NORTH CAROLINA REPORTS
VOL. 238

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1953

FALL TERM, 1953

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1954

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

1 and 2 Martin, Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C.
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4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
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				Phillips Law	"	61	"
				" Eq.	"	62	"

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

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1953—FALL TERM, 1953.

CHIEF JUSTICE:

W. A. DEVIN.

ASSOCIATE JUSTICES:

M. V. BARNHILL,
J. WALLACE WINBORNE,
EMERY B. DENNY,
S. J. ERVIN, JR.,
JEFF. D. JOHNSON, JR.,
R. HUNT PARKER.

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

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RALPH MOODY,
CLAUDE L. LOVE,
I. BEVERLY LAKE,
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HARRY W. McGALLIARD.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE AND SUPREME COURT REPORTER

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

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

SPECIAL JUDGES

GEORGE M. FOUNTAIN	Tarboro.
C. W. HALL	Durham.
HOWARD H. HUBBARD	Clinton.
GROVER A. MARTIN	Smithfield.
MALCOLM C. PAUL	Washington.

WESTERN DIVISION

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

SPECIAL JUDGES

GEORGE B. PATTON	Franklin.
SUSIE SHARP	Reidsville.
FRANCIS O. CLARKSON	Charlotte.
PEYTON MCSWAIN	Shelby.
R. LEE WHITMIRE	Hendersonville.

EMERGENCY JUDGES

W. H. S. BURGWYN	Woodland.
HENRY A. GRADY	New Bern.
FELIX E. ALLEY, SR.	Waynesville.

[1]Resigned 31 December, 1953. Succeeded by Clifton L. Moore, Burgaw.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. COHOON	First	Elizabeth City.
GEORGE M. FOUNTAIN[1]	Second	Tarboro.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Kenly.
W. J. BUNDY	Fifth	Greenville.
WALTER T. BRITT	Sixth	Clinton.
WILLIAM Y. BICKETT	Seventh	Raleigh.
CLIFTON L. MOORE[2]	Eighth	Burgaw.
MALCOLM B. SEAWELL	Ninth	Lumberton.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

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

[1]Appointed Special Judge 10 October, 1953. Succeeded as solicitor by Elbert S. Peel, Williamston.

[2]Appointed Resident Judge, Eighth Judicial District. Succeeded by John J. Burney, Jr., Wilmington.

SUPERIOR COURTS, FALL TERM, 1953

Revised through 5 October, 1953.

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Judge Morris

Beaufort—Sept. 21* (A); Sept. 28†; Oct. 12†; Nov. 9* (A); Dec. 7†.
Camden—Aug. 31.
Chowan—Sept. 14; Nov. 30.
Currituck—Sept. 7.
Dare—Oct. 26.
Gates—Nov. 23.
Hyde—Oct. 19.
Pasquotank—Sept. 21†; Oct. 19† (A); Nov. 9†; Nov. 16.*
Perquimans—Nov. 2.
Tyrrell—Oct. 5.

SECOND JUDICIAL DISTRICT

Judge Bone

Edgecombe—Sept. 14; Oct. 5* (S) (2); Oct. 19; Nov. 16† (2).
Martin—Sept. 21 (2); Nov. 23† (A) (2); Dec. 14.
Nash—Aug. 31; Sept. 21† (A) (2); Oct. 12†; Nov. 2* (S) (2); Nov. 30*; Dec. 7†.
Washington—July 13; Oct. 26†.
Wilson—Aug. 31† (A); Sept. 7; Sept. 28* (A); Oct. 5†; Oct. 26* (A); Nov. 2† (2); Dec. 7 (A).

THIRD JUDICIAL DISTRICT

Judge Parker

Bertie—Aug. 31 (2); Nov. 16 (2).
Halifax—Aug. 17 (2); Oct. 5† (A) (2); Oct. 26† (S); Nov. 9; Nov. 30 (2).
Hertford—Aug. 3; Oct. 19 (2).
Northampton—Aug. 10; Nov. 2 (2).
Vance—Sept. 28*; Oct. 12†.
Warren—Sept. 14*; Oct. 5†.

FOURTH JUDICIAL DISTRICT

Judge Williams

Chatham—Aug. 3† (2); Oct. 26.
Harnett—Sept. 7* (A); Sept. 21†; Oct. 5† (A) (2); Nov. 16* (2).
Johnston—Aug. 17*; Sept. 28† (2); Oct. 19 (A); Nov. 9†; Nov. 16† (A); Dec. 14 (2).
Lee—July 20*; July 27†; Sept. 14†; Sept. 21† (A); Nov. 7*; Dec. 14† (A).
Wayne—Aug. 24; Aug. 31† (2); Oct. 12† (2); Nov. 30 (2).

FIFTH JUDICIAL DISTRICT

Judge Frizzelle

Carteret—Oct. 19; Dec. 7†.
Craven—Sept. 7; Sept. 14 (A); Oct. 5† (2); Nov. 16 (A); Nov. 23† (2).
Greene—Dec. 7 (A); Dec. 14; Dec. 21.
Jones—Aug. 17†; Sept. 21; Dec. 14 (A).
Pamlico—Nov. 9 (2).
Pitt—Aug. 24†; Aug. 31; Sept. 14†; Sept. 28†; Oct. 5 (A); Oct. 12 (A); Oct. 26†; Nov. 2; Nov. 23† (A).

SIXTH JUDICIAL DISTRICT

Judge Stevens

Duplin—Aug. 31; Sept. 7; Oct. 12; Oct. 19†; Dec. 7† (2).
Lenoir—Aug. 24*; Sept. 14 (A); Sept. 28†; Nov. 2 (A); Nov. 9†; Nov. 16†; Nov. 30 (A).
Onslow—July 20‡; Oct. 5; Nov. 23† (2).
Sampson—Aug. 10 (2); Sept. 14† (2); Oct. 26; Nov. 2†.

SEVENTH JUDICIAL DISTRICT

Judge Harris

Franklin—Sept. 21† (2); Oct. 12*; Nov. 30† (2).
Wake—July 13*; Aug. 17†; Sept. 7* (2); Sept. 21† (A) (2); Oct. 5† (A) (2); Oct. 5*; Oct. 19† (3); Nov. 9*; Nov. 16† (2); Nov. 30† (A); Dec. 7† (A) (2); Dec. 7* (A); Dec. 14*; Dec. 21†.

EIGHTH JUDICIAL DISTRICT

Judge Burney

Brunswick—Sept. 21; Nov. 30† (S) (A).
Columbus—Sept. 7* (2); Sept. 28† (2); Nov. 2† (A) (2); Nov. 23* (2).
New Hanover—July 20* (S); July 27*; Aug. 17*; Aug. 24† (2); Oct. 5* (A); Oct. 12† (2); Nov. 9* (2); Dec. 7† (2).
Pender—Sept. 28 (A); Oct. 26† (2).

NINTH JUDICIAL DISTRICT

Judge Nimocks

Bladen—Sept. 21*; Nov. 9* (S); Nov. 16† (S).
Cumberland—Aug. 31*; Sept. 28† (2); Oct. 12* (A); Oct. 19* (S); Oct. 26† (2); Nov. 23* (2); Dec. 14† (S).
Hoke—Aug. 24; Nov. 16.
Robeson—July 13† (2); Aug. 17*; Aug. 31† (A); Sept. 7* (2); Sept. 28* (A); Oct. 12† (2); Oct. 26* (A); Nov. 9*; Nov. 16† (A); Nov. 23 (S); Dec. 7† (2); Dec. 21*

TENTH JUDICIAL DISTRICT

Judge Carr

Alamance—Aug. 3† (A); Aug. 17*; Sept. 14†; Sept. 21† (A); Oct. 12† (A); Oct. 19* (A); Oct. 26* (A); Nov. 16† (A); Nov. 23† (A); Dec. 7* (A).
Durham—July 20*; Aug. 17† (S); Aug. 31* (A); Sept. 7*; Sept. 14* (A); Sept. 21† (2); Oct. 5 (A); Oct. 12*; Oct. 19† (A) (2); Nov. 2†; Nov. 9; Nov. 30*; Dec. 7*; Dec. 14* (A).
Granville—July 27; Oct. 26†; Nov. 16 (2).
Orange—Dec. 14.
Person—Aug. 31 (A); Oct. 19.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Judge Bobbitt

Ashe—July 20† (S); Oct. 26*; Nov. 2*.
Alleghany—Aug. 17; Oct. 5.
Forsyth—July 13 (2); Sept. 7 (2); Sept. 21† (2); Oct. 12 (S); Oct. 12 (2); Oct. 26† (A); Nov. 2†; Nov. 9 (2); Nov. 23† (2); Dec. 7 (2); Dec. 21†.

TWELFTH JUDICIAL DISTRICT

Judge Armstrong

Davidson—Aug. 24; Sept. 14† (2); Oct. 5† (A) (2); Nov. 23 (A) (2).
Guilford, Greensboro Division—July 13† (A) (2); July 13*; July 27* (2); Aug. 31*; Sept. 14† (A) (2); Sept. 14* (A) (2); Sept. 28† (2); Oct. 12† (2); Oct. 12* (A) (2); Oct. 26† (A) (2); Oct. 26* (S) (2); Nov. 9* (2); Nov. 23† (2); Nov. 30* (S); Dec. 7* (A); Dec. 21*.
Guilford, High Point Division—July 20*; Aug. 3† (A); Sept. 28* (A); Oct. 5† (S); Nov. 9† (A) (2); Dec. 7†; Dec. 14*.

THIRTEENTH JUDICIAL DISTRICT

Judge Rudisill

Anson—Sept. 14†; Sept. 28*; Nov. 16†.
Moore—Aug. 17*; Sept. 21†; Sept. 28† (A); Nov. 9† (A).
Richmond—July 20†; July 27*; Sept. 7†; Oct. 5*; Nov. 9†.
Scotland—Aug. 10; Nov. 2†; Nov. 30 (2).
Stanly—July 13; Sept. 7† (A) (2); Oct. 12†; Nov. 23.
Union—Aug. 24 (2); Oct. 19.

FOURTEENTH JUDICIAL DISTRICT

Judge Rousseau

Gaston—July 27*; Aug. 3† (2); Sept. 14* (A); Sept. 21† (2); Oct. 26*; Nov. 2† (A); Nov. 9* (S); Nov. 30* (A); Dec. 7† (2).
Mecklenburg—July 13* (2); Aug. 3* (A); Aug. 10* (A); Aug. 17* (2); Aug. 31*; Sept. 7† (2); Sept. 7† (A) (2); Sept. 21† (A) (2); Sept. 21* (A) (2); Oct. 5† (A) (2); Oct. 5*; Oct. 12† (2); Oct. 19† (A) (2); Nov. 2† (A) (2); Nov. 2† (2); Nov. 16† (A) (2); Nov. 16*; Nov. 23† (2); Nov. 30† (A) (2); Dec. 7* (A) (2); Dec. 14† (A); Dec. 21†.

FIFTEENTH JUDICIAL DISTRICT

Judge Pless

Alexander—Sept. 28.
Cabarrus—Aug. 24*; Aug. 31†; Oct. 19 (2); Nov. 16† (A); Dec. 7† (A).
Iredell—Aug. 3 (2); Nov. 9 (2).
Montgomery—July 13; Oct. 5 (A); Nov. 2†.
Randolph—July 20†; July 27; Sept. 7*; Oct. 26† (A) (2); Dec. 7 (2).
Rowan—Sept. 14 (2); Oct. 12†; Nov. 23 (2).

SIXTEENTH JUDICIAL DISTRICT

Judge Nettles

Burke—Aug. 10 (2); Sept. 28† (2); Dec. 14 (2).
Caldwell—Aug. 24 (2); Sept. 7† (A) (2); Nov. 2† (S) (2); Nov. 30 (2).
Catawba—July 6 (2); Aug. 10† (s); Sept. 7† (2); Nov. 16 (2); Dec. 7† (A).
Cleveland—July 27 (2); Sept. 14† (A); Sept. 21† (A); Nov. 2 (2).
Lincoln—Oct. 19; Oct. 26†.
Watauga—Sept. 21*; Nov. 16† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT

Judge Moore

Avery—July 6 (2); Oct. 19 (2).
Davie—Aug. 31; Dec. 7†.
Mitchell—July 27† (2); Sept. 21 (2).
Wilkes—July 20†; Aug. 10 (3); Sept. 14†; Oct. 5† (2); Nov. 2†; Nov. 9† (S); Dec. 14 (2).
Yadkin—Sept. 7*; Nov. 16† (2); Nov. 30.

EIGHTEENTH JUDICIAL DISTRICT

Judge Clement

Henderson—Oct. 12 (2); Nov. 23† (2).
McDowell—July 13† (2); Sept. 7 (2).
Polk—Aug. 24 (2).
Rutherford—Sept. 28† (2); Nov. 9 (2).
Transylvania—July 27 (2); Dec. 7 (2).
Yancey—Aug. 10 (2); Oct. 26† (2).

NINETEENTH JUDICIAL DISTRICT

Judge Sink

Buncombe—July 13†* (2); July 27*†; Aug. 3; Aug. 10†* (2); Aug. 24 (A) (2); Aug. 24*†; Sept. 7†* (2); Sept. 21 (A); Sept. 21*†; Sept. 28; Oct. 5†* (2); Oct. 19 (A); Oct. 19*†; Oct. 26; Nov. 2; Nov. 9†* (2); Nov. 23 (A) (2); Nov. 23*†; Dec. 7†* (2); Dec. 21*†; Dec. 21 (A); Dec. 28.
Madison—Aug. 31; Oct. 5 (A) (2); Nov. 30.

TWENTIETH JUDICIAL DISTRICT

Judge Phillips

Cherokee—Aug. 10 (2); Nov. 9 (2).
Clay—Oct. 5.
Graham—Sept. 7 (2).
Haywood—July 13 (2); Sept. 21† (2); Nov. 23 (2).
Jackson—Oct. 12 (2).
Macon—Aug. 24 (2); Dec. 7 (2).
Swain—July 27 (2); Oct. 26 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Judge Gwyn

Caswell—Oct. 5† (A); Nov. 16*.
Rockingham—Aug. 10* (2); Sept. 7† (2); Oct. 26†; Nov. 2* (2); Nov. 30† (2); Dec. 14*.
Stokes—Oct. 12*; Oct. 19†.
Surry—July 13 (2); Sept. 21; Sept. 28 (2); Nov. 23; Dec. 21.

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

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

JULIAN T. GASKILL, U. S. Attorney, Raleigh, N. C.
SAMUEL A. HOWARD, Assistant U. S. Attorney, Raleigh, N. C.
IRVIN B. TUCKER, JR., Assistant U. S. Attorney, Raleigh, N. C.
THOMAS F. ELLIS, Assistant U. S. Attorney, Raleigh, N. C.
MISS JANE PARKER, Assistant U. S. Attorney, Raleigh, N. C.
F. S. WORTHY, United States Marshal, Raleigh.
A. HAND JAMES, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

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

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

Greensboro, first Monday in June and December. HENRY REYNOLDS, Clerk; MYRTLE D. COBB, Chief Deputy; LILLIAN HARKRADER, Deputy Clerk; MRS. BETTY H. GERRINGER, 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; M. LOUISE MORRISON, Deputy Clerk.

Charlotte, first Monday in April and October. ELVA MCKNIGHT, 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.

LICENSED ATTORNEYS

FALL TERM, 1953.

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed examinations of the Board of Law Examiners as of the 8th day of August, 1953:

ADAMS, HOYLE BRANNOCK, JR. ..... Hendersonville.
ALLEN, ROBERT EUGENE ..... Canton.
ANDERSON, JAMES WILLIAM, JR. ..... Greensboro.

BAER, ERVIN ISADORE ..... Dunn.
BERRY, DORAN JOYCE ..... Chapel Hill.
BROOKS, VALLIE CARLTON ..... Wilson.
BROWN, WILLIS DONALD ..... Magnolia.

CAUDLE, THERON LAMAR, JR. ..... Wadesboro.
CLARK, CHARLIE DAVIS, JR. ..... Roanoke Rapids.
CLINE, MARSHALL EUGENE, JR. ..... Conover.
COLE, ROY MORGAN ..... Chapel Hill.
CONRAD, THEODORE CHARLES ..... Charlotte.
CROWELL, OSCAR BERNARD, JR. ..... Hendersonville.

DANIEL, CHARLES WILLIAM ..... Fuquay Springs.
DAVIS, FERD LEARY ..... Zebulon.
DAVIS, MARION JOHNSON ..... Winston-Salem.
DETTOR, DOUGLAS PAGE ..... Guilford College.
DICKENS, WADE HAMPTON, JR. ..... Scotland Neck.
DOWNS, KENNETH RAY ..... Pineville.

EAST, THOMAS FERNS, JR. ..... Franklinton.
EDWARDS, WILLIAM HAROLD ..... Chapel Hill.
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FORSYTH, ALYCE STUART ..... Greensboro.

GADSDEN, EUGENE HINSON ..... Durham.
GOLDING, JOHN GARDNER ..... Tryon.
GRAY, WALLACE ROOSEVELT ..... Buxton.
GWYN, JULIUS JOHNSTON ..... Durham.

HANNAH, WALTER LEWIS ..... Raleigh.
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HENDRIX, ROGER BELTON ..... Winston-Salem.
HERBIN, LEONIDAS, JR. ..... Greensboro.
HICKS, JOHN DARWIN ..... Charlotte.
HIGH, MAJOR STONINGTON ..... Zebulon.
HINSHAW, ARNED LEE ..... Burlington.
HODSON, CHARLES BERNARD ..... Chapel Hill.

HOLLOWELL, JAMES MCNIDER.....Hertford.
HUBBARD, ROBERT CARL.....Durham.
HUDSPETH, GEORGE LEE.....Yadkinville.
HUNT, CLIFTON TREDWAY, JR. .....Charlotte.

ISLEY, HUGH GALLOWAY, JR. .....Raleigh.
ISRAEL, JAMES OTHO, JR. .....Candler.

JOHNSON, SAMUEL HENRY.....Magnolia.
JONES, DANIEL STEPHEN.....Clinton.
JONES, LAMAR.....Newport.

KEENER, HURSHELL HALTON.....Lenoir.

LAMSON, HUBERT, JR. .....Raleigh.
LAWRENCE, JAMES FUGATE.....Candler.
LINDLEY, JESSE OWEN, JR. .....Guilford College.
LINN, STAHLE, JR. .....Salisbury.
LLOYD, LEONARD WALTER.....Robbinsville.
LOCK, ROBERT EARL.....Jacksonville.
LONG, WILLIAM FIFE.....Thomasville.

MCDONALD, ARTHUR ALLEN, JR. .....Durham.
MCKNIGHT, ROY BOWMAN, JR. .....Charlotte.
MCMILLAN, ARCHIBALD ALEXANDER.....Raleigh.

MARSH, WILLIAM ANDREW, JR. .....Durham.
MARTIN, HUGH MILLARD.....Jamesville.
MAY, CECIL DALTON.....New Bern.
MAYO, WILLIAM PATRICK.....Washington.
MILLER, ESLIE LEROY, JR. .....Hickory.
MILLER, GEORGE JOHN.....Charlotte.
MONTGOMERY, JOHN ROBERT, JR. .....Raleigh.
MONTAGUE, BERT MCGEE.....Raleigh.
MORTON, ERNEST HARRISON, JR. .....Albemarle.
MUILENBURG, PAUL LUTHER.....Charlotte.

NICHOLS, CHARLES EDWARD.....Greensboro.
NIVENS, WALTER BREWER.....Monroe.

OLIVE, HUBERT ETHERIDGE, JR. .....Lexington.
OWEN, ROBERT ALLEN.....Greensboro.

PARKER, THOMAS DILWORTH.....Raleigh.
PARRISH, ELIAS JACKSON.....Winston-Salem.
PLUMIDES, JOHN GEORGE.....Charlotte.
POTTS, JACK HUFFMAN.....Highlands.
PRIDGEN, OTTO KILGORE II.....Wilmington.
PUETT, WILLIAM NELSON.....Dallas.

QUINLIVAN, VIRGINIA DOUGLAS.....Wilmington.

RAPER, ELMER WORTH.....Elizabeth City.
RECTOR, LLOYD KENYON.....Drexel.
RENFROW, ROBERT PERRY.....Raleigh.

SAVAGE, ROBERT LEE, JR. .....Wake Forest.
SENTER, JACK EVERETT.....Kipling.
SHUFORD, WILLIAM ALBERT.....Thomasville.
SHUPING, JERRY MONROE.....Asheboro.
SIMPSON, JAMES ABERNATHY.....Glen Alpine.
SLEDGE, EDWARD LAMAR.....New Bern.

SMITH, LEE CREECY.....Raleigh.
SMITH, WILLIAM WHITFIELD.....Raleigh.
SOLOMON, EUGENE ANTHONY, JR. .....Raleigh.
SPAINHOUR, HAROLD INGRAM.....Winston-Salem.
SPENCE, JAMES ROBERT.....Lillington.
STANTON, ROBERT ROWLAND.....Asheville.
STRAUS, KARL HERMAN.....Asheville.
SUMMEY, ROBERT GRAHAM.....Franklinton.

TATE, SAMUEL MCDOWELL.....Morganton.
TAYLOR, WILLIAM ALEXANDER.....Buies Creek.
TEAGUE, FRANKLIN LEGRAND.....Charlotte.
TROTTER, JAMES ROBERT, JR. .....Salisbury.
TURNER, KENNETH WARD.....Rosehill.

UNION, MORTON LEE.....Fayetteville.

VADEN, WILLIAM ARTHUR.....Greensboro.
VAN ANDA, JACK NICHOLAS.....Durham.

WALKER, JAMES ROBERT, JR. .....Statesville.
WEAVER, LUCIUS STACY, JR. .....Durham.
WILDER, WILLARD ALLEN.....Franklinton.
WILLIAMS, LONNIE BOYD.....Wilmington.
WILLIAMSON, EDWARD LORENZA.....Evergreen.
WILSON, ROBERT BRUCE III.....Winston-Salem.
WINFREE, HERMAN.....Guilford College.
WOOD, BILLY FRANCIS.....Chapel Hill.
WORTH, WALKER YEATMAN, JR. .....Raleigh.

YOUNG, WILBERT PAUL.....Swannanoa.

ZIMMERMAN, JAMES LAWRENCE.....Durham.

As to the following, license not issued or to issue until compliance with rules of the Board:

GUY, CHARLES LEE, JR. .....Dunn.
LUMPKIN, BRYANT PERRY.....Wake Forest.

BY COMITY.

CLIFFORD, J. C., JR. .....Greenville from New York.
WHITLOCK, J. COIT.....Maxton from South Carolina.
ZACKS, IRVING K. .....New Bern from New York.
MCCLAIN, J. A. .....Durham from Missouri.
NARRON, WILEY.....Smithfield from District of Columbia.
GERAGHTY, JOHN JAMES.....Raleigh from New York.

Given over my hand and the seal of the Board of Law Examiners this 30th day of November, 1953.

(OFFICIAL SEAL)

EDWARD L. CANNON, *Secretary,*
Board of Law Examiners,
State of North Carolina.

CASES REPORTED

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES.

S. v. Daniels, 231 N.C. 17; 231 N.C. 509. Petition for *certiorari* denied 21 October, 1953.

S. v. McGee, 237 N.C. 633. Appeal dismissed 12 October, 1953.

S. v. Tickle, 238 N.C. 206. Petition for *certiorari* denied 18 January, 1954.

S. v. Lovedahl. Petition for *certiorari* denied 1 February, 1954.

APPEAL PENDING.

S. v. Towery, 239 N.C. 274.

CASES CITED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1953

W. M. NANCE, JR., BY HIS NEXT FRIEND, W. M. NANCE, v. DR. J. M. HITCH.

(Filed 12 June, 1953.)

1. **Trial § 22b—**

Defendant's evidence which is not in conflict with that of plaintiff and which explains or makes clear the evidence offered by plaintiff may be considered on motion to nonsuit.

2. **Trial § 22a—**

On motion to nonsuit, plaintiff's evidence and so much of defendant's evidence as is favorable to plaintiff or tends to explain or make clear that which has been offered by plaintiff, will be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable intendment and inference to be drawn therefrom. G.S. 1-183.

3. **Physicians and Surgeons § 14—**

The rule that a physician or surgeon may not be held liable to a patient if he possesses the knowledge and skill ordinarily possessed by others of his profession and uses reasonable care, diligence and skill in the practice of his art, *is held* applicable to a physician practicing in the special field of dermatology in the use and manipulation of an X-ray machine.

4. **Physicians and Surgeons § 19—**

The burden is upon plaintiff in an action for malpractice to show that defendant physician was negligent as alleged in the complaint and also that such negligence was the proximate cause or one of the proximate causes of plaintiff's injury.

5. Physicians and Surgeons § 20—

Evidence tending to show that plaintiff suffered a third degree burn to his heel following X-ray treatment administered by defendant physician to plaintiff's heel in removing a wart, *is held* insufficient to overrule nonsuit on the theory that such injury would not have resulted in the ordinary course of such treatment if proper care and skill had been used, when plaintiff's own expert testimony, together with expert testimony for defendant, is to the effect that such burns do occur at times notwithstanding the best care and skill and caution in the use of X-ray therapy. Such evidence negatives the applicability of *res ipsa loquitur.*

6. Same—

The contention that defendant physician was negligent in permitting his nurse to administer X-ray therapy contrary to the accepted practice of the profession is not raised when there is positive testimony that the physician and not the nurse administered the treatment and the only evidence to the contrary is plaintiff's statement modified by his averment that he was not positive who gave him the X-ray treatment.

APPEAL by plaintiff from *Godwin, Special Judge,* at September Civil Term, 1952, of WAKE.

Civil action to recover for personal injury allegedly resulting from actionable negligence in the X-ray therapy treatment administered by defendant to wart or tumor of skin on plaintiff's heel.

Plaintiff alleges in his complaint substantially these facts: That defendant is a registered and duly licensed physician to practice medicine in the State of North Carolina, and holds himself out as one qualified to diagnose and treat diseases and other maladies of the skin; that during the month of January, 1948, defendant took plaintiff, eleven years of age, as a patient, and agreed to treat, and did treat him for the removal of a wart or tumor on his heel by means of X-ray therapy; that defendant administered said X-ray therapy or treatment in such manner and applied same in such amounts that the treated area of plaintiff's heel assumed a pink and unnatural color and became tender; that subsequently there developed in said area a boil-like lesion, and the skin and tissues of the heel began to deteriorate; that, though defendant was treating plaintiff, this condition continued to become worse, for more than a year; and that plaintiff has become partially crippled.

And plaintiff alleges, upon information and belief, that defendant carelessly and negligently administered said X-ray therapy, thereby causing irradiation injury to the skin, tissues and bone of the heel, in that he caused plaintiff to be exposed to excessive amounts or dosages of X-ray . . . for excessive periods of time, when "defendant knew or in the exercise of ordinary care should have known that such exposure . . . would cause irradiation injury to the exposed areas," proximately causing the injury of which complaint is made.

Defendant, answering, admits that he is a duly licensed physician to practice medicine in the State of North Carolina, holding himself out as one qualified to diagnose and treat diseases and maladies of the skin; that on 31 December, 1947, plaintiff became a patient of defendant for treatment and removal of a wart or tumor on the heel of his left foot; and that in the treatment of plaintiff by defendant X-ray therapy was administered. And defendant avers that he possesses the requisite degree of learning, skill and ability necessary to the practice of his profession, and which others similarly situated ordinarily possess; that the treatment of plaintiff was done in a skillful manner and according to approved methods, and was the usual and customary treatment in cases of the character from which plaintiff was suffering, and that he, the defendant, exercised reasonable and ordinary care and diligence in the use of his skill, and in application of his knowledge, and that treatment was in accordance with his best judgment, and the judgment of practitioners possessing the same knowledge and skill. On the other hand, defendant denies all allegations of negligence.

Upon trial in Superior Court plaintiff W. M. Nance, Jr., and his mother and his father testified as witnesses in his behalf. Their testimony tends to show that on 31 December, 1947, William M. Nance, Jr., then nine years of age, having a wart about the size of a nickel on his heel, was taken by his parents to defendant Dr. J. M. Hitch for examination,—having in view the removal of the wart. Dr. Hitch suggested X-ray treatment, and on that day gave the first X-ray treatment. Other X-ray treatments were given on 7 January, and 14 January, 1948. Plaintiff testified in early part of his direct examination that the second treatment was given by the nurse, but later, on such examination, stated: "I believe I said that on the second and third visits the nurse administered the X-ray treatments. I am not positive who gave the X-ray treatments the second and third times."

The father of plaintiff gave this description of the first treatment: "After Dr. Hitch examined the wart I think he took a knife and trimmed the wart. My wife and I were standing right by him. Then he cut a shield and then put him on a table on his stomach . . . and he instructed the nurse what to give him or how much to give him . . . He took the machine and put it right there almost on his foot, put it so it wouldn't have been more than half an inch away from his foot and then he instructed the nurse as to how much to give him and during the time he was there he took a little pad, was cutting it out and showing us how to put a pad on his heel so he could wear his shoe,—a pad for his heel . . ."

Then on cross-examination, the father continued: ". . . I went into the room the X-ray machine was in. Dr. Hitch prepared the shield to be used in connection with the treatment. The X-ray machine was a

cone-shaped thing, had a cone-shaped thing right at its end that fitted down to the area to be treated, the heel or whatever that area was. This cone-shaped thing was fitted down at his heel or I might say it wasn't more than half an inch from his heel. He pulled it right down over it. I stayed there during that treatment. Dr. Hitch advised that he wanted to give him another treatment in about a week and told me what day to send him back to him, and Billy was sent back to him as directed."

Then plaintiff further testified: ". . . I went back on the 7th and 14th of January for further treatment . . . In about ten days . . . I did go back to see him . . . Dr. Hitch examined my heel and I told him the wart had fallen off about two days before that. The place where the wart came out . . . it left something like a scab . . . I went back to Dr. Hitch's office in a few days after that . . . at which time the place where the wart had been had healed up a little. I don't remember Dr. Hitch at that time requesting me to come back a few days later, but I did go back on the 1st day of March, 1948, or around that date. My heel was doing nicely but it was still red. On the 15th of March, 1948, I went back to Dr. Hitch and he examined my heel, at that time my heel was healing, I mean the raw place was not there, but it was red and . . . touchy . . . Dr. Hitch told me he thought it was going to be all right but that if it gave me any trouble to come back and see him . . . I . . . did go on the 1st day of June, 1950; at that time the place on my heel was sore and had been . . . all the time, in fact ever since the wart had come off it had been touchy and sort of tender so that I couldn't stand for anything to hit it . . . I was wearing shoes all of that time and had been going to school . . . walked to school . . ."

And testimony of plaintiff further tends to show that a day or two after the first X-ray treatment, the area around the wart became red and inflamed and it was tender; that the heel continued to be red and sore and "it had a sort of tingling feeling."

The mother testified: "After the X-ray treatment, Bill's heel was tender and it turned a pinkish color, I'd say in less than 48 hours after that and then that condition continued. It didn't regain its natural color, and we went back to him . . . Until the wart came off and even before within an area as large as a half-dollar it stayed pink or light red, I'd say pink-red. Following the series of treatments with X-ray and after the wart came off the heel stayed a light red; it never regained its natural color . . . It was January of 1950 that he (Billy) went back to Dr. Hitch. I went with my son on that occasion. I took him back . . . because . . . I noticed an ulcer where the wart had come off . . . and in discussing the situation with Dr. Hitch I told him that the area there had never regained its natural color and he told me that he had had to use an unusually large amount of X-ray to remove that wart because it

was large . . . He (Billy) had never had any X-ray treatment to his heel before I took him to Dr. Hitch. When I took him to Dr. Hitch for the removal of the wart, the skin around the wart was normal, was just the wart itself there. After the X-ray treatment, the skin on his heel turned pink."

And plaintiff further testified: "Prior to the time I had the first X-ray treatment, the wart was kind of sore . . . It gave me no trouble. There was no inflammation or redness around the wart before I had the first X-ray treatment. Between the time I had the X-ray treatment and the time the ulcer developed on my heel, I had not injured my heel in any way whatever. During that time I did not have any X-ray treatments from anybody, or any other doctors . . ."

And in respect to going back to Dr. Hitch in January, 1950, plaintiff testified: "I do not know the exact date I next saw Dr. Hitch, but when I went back to him he lanced my heel and gave me a shot of penicillin . . . My heel was inflamed and it was touchy . . . Following that I saw other doctors. I went to Dr. Hunt, and he operated on my heel. The operation never healed and then I went to Dr. Walter Neal. He gave me plastic surgery—a skin graft. . . . It was in 1950 when I went to Dr. Neal and he discharged me in 1952 . . ."

Then Dr. T. C. Worth, a specialist in radiology, that is, the use of X-ray in the diagnosis and treatment of disease, as witness for plaintiff, testified in pertinent part: ". . . On the 31st day of January, 1951, I had the occasion to make an X-ray picture of Billy Nance's heel . . . the left heel, which shows that there is a very definite defect in the tissue overlying the heel and area which I would say measures about half an inch . . . adjacent to this area of defect in the bone that we thought very questionable and which might be due to some disturbance in the blood supply of the bone in that area; we did not think there was any evidence of any inflammation of . . . the bone; but we did think there might be some disturbance in the blood supply of the bone. There are many things that can cause a disturbance in the blood supply, but I knew the history of this boy, which helped me some. Knowing the history of the boy, and from my examination of the X-ray negative, I believe it was due to irradiation injury . . . X-ray . . . a form of irradiation . . ."

Then on cross-examination Dr. Worth continued: "I am familiar with and have knowledge of the history of this case, and I had knowledge that a wart had been removed from the heel of Billy Nance by X-ray. I will say that X-ray, or the use of X-ray in removing warts and in the treatment of warts in that area, is an approved method. I will say, though, that in spite of skillful treatment by the use of X-ray for the removal of warts and in exercising the very best of care that burns do sometimes occur.

"In treatment of this sort a cone is attached to the machine and the important thing is the distance between the skin and the target of the X-ray tube. Therefore the length of the cone is the important thing to consider, and not how close the end of the cone is to the patient's skin, at all. If you use a long cone you will therefore have a long target skin distance, and if you use a short cone, it will therefore be short. The length of the cone is important in determining how much X-ray would be delivered to a skin lesion. The distance of the cone controls the distance that the X-ray itself is from the point of contact, it limits it; you cannot get any closer than the end of the cone. The cone is placed there for that protection, for that purpose, plus the fact that it keeps the X-ray in one place without letting it scatter around . . . From the history of this patient that I had that was given to me of the wart on Billy Nance's heel, I would as a radiologist have given to him X-ray treatment for the removal of that wart."

Then on re-direct examination Dr. Worth continued: "The X-ray machine if improperly used is a very dangerous instrument. It is customary for the radiologist to at all times give his own treatments . . . they don't generally turn them over to a nurse, to give them."

Then the doctor was asked these questions, to which he gave answers as shown: "Q. Following the X-ray treatment state whether or not it is usual for the area to become pink or red? A. Depending on the dosage, . . . used it is customary for it to become pink. If it is an ordinary dose or a safe dose, the condition will clear up within two or three days. Q. State whether or not if it doesn't clear up that that is an indication that a larger dosage than was safe was given? A. I wouldn't say that at all because there might be some other cause of irritation that might be superimposed on a lesion, but if there are no other causes superimposed, you would assume that there is a possibility that too much had been used."

The doctor concluded by saying that when he received the history of the case he was not advised "as to the amount of irradiation that was used."

Dr. J. Walter Neal, an expert in medicine and surgery, testified in pertinent part: ". . . I first saw Billy Nance on June 22, 1950. At that time he had an ulcerated lesion on his heel . . . After examining his heel and knowing the history of the lesion on his heel, I believe the injury was caused from X-ray therapy . . . X-ray treatment . . . the skin and the underlying tissues down to the bone were destroyed. They had eaten away an area of about half an inch in diameter. That type of burn is known as a third degree burn. A first degree burn is a reddening of the skin which requires no treatment, like getting a sunburn, doesn't even blister . . . A second degree burn is one that involves the skin and causes blistering of the skin and causes some pain and soreness. When it

involves the entire thickness of the skin and gets to the underlying tissues then that is called a third degree burn. I don't know whether or not a third degree burn of the type I have described is the usual and ordinary result of X-ray therapy. You see them caused from X-ray therapy occasionally, but it is not often . . ."

Then on cross-examination Dr. Neal continued: "I wouldn't say such burns often occur, but they do occur; they do occur in spite of skill and caution in using it." And in answer to this question, "And that is by virtue of the fact that some people can take more than others and some can take so much less, isn't that right?", the doctor answered: "Well, I don't know the cause, but I presume that is one way to explain it. I think some people are more sensitive to it than others, just like some people are more sensitive to the sun's rays than others. There is no way to determine how sensitive a person is to that kind of irradiation, I believe, before you administer the X-ray, I don't know of any way, but some of the radiologists may be able to tell you about that . . ."

And the doctor concludes by saying, "I don't know X-ray therapy."

Motion of defendant to dismiss the action on ground that plaintiff has failed to make out a *prima facie* case.

Defendant offered evidence: He, himself, testified in detail (1) As to his professional education, training and experience, and recognition as a physician, duly licensed—more particularly in the field of dermatology, the treatment of diseases of the skin, in which X-ray is commonly used. And (2) as to: (a) his treatment of plaintiff, W. M. Nance, Jr., for the removal of a wart on his heel by means of X-ray therapy, (b) the mechanism and proper operation of an X-ray machine, (c) the make and operation of his X-ray machine—one that is approved and in general use in his profession in the treatment of skin diseases, (d) the approved method of, and formula for X-ray treatment for removal of warts,—which he followed and used in treatment for the removal of the wart on plaintiff's heel, on 31 December, 1947, 7 January, 1948, and 14 January, 1948; and (e) the condition of the plaintiff's heel subsequently.

As to this last subject: Defendant said: "I saw him on January 26, 1948 . . . The wart had disappeared . . . two days prior . . . leaving a clean but tender base where it had disappeared. I saw him again on February 2, 1948. At that time my notations say his heel was clean and healing slowly, and I had him continue on the same treatment . . . simply the use of an ointment . . . I saw him again on February 16. My notation on the condition of his heel then says 'about healed.' I saw him again on March 1, 1948, and the condition of his heel 'still healing.' I saw him again on March 15, 1948, and my notation shows that it was healed and that the skin was slightly scaly . . . My notation shows that I suggested that any type of cream could be used to soften the scaliness

. . . and no further appointment was made. I saw him again on January 6, 1950, but I had not heard anything from him during the time between March 15, 1948, and January 6, 1950. Mrs. Nance came with him to my office on January 6, 1950 . . . My examination of his heel disclosed the heel to be moderately red with a small ulceration present and a slight tenderness in the central portion of it. I treated his heel at that time. He was given an antibiotic ointment to use and . . . penicillin muscularly and a rubber pad was prescribed for use over the heel to prevent the shoe from rubbing it too much, and his mother was instructed to cut down on his exercise and to obtain for his use a larger pair of shoes . . . I saw him again on the 7th. At that time I made a notation that the area was somewhat more tender than on the previous day, but that the central area of the ulceration had been largely freed of pus and debris, leaving a healthy appearing granulating mass of small, shallow ulcers. I cleaned the remaining debris and the ulcers out and the area was redressed and, as previously, ointment was given him and he was given another injection of penicillin. I saw him again on the 8th. I examined his heel at that time and it disclosed that it was improving; it was cleaner and less tender. I saw him again on the 12th of January, and made an examination of his heel, and it was improved over its previous condition. I did not see him any more after January 12 . . ."

The defendant continued: "When I first saw this boy on December 31, 1947, the area around the wart was of a red color; when he returned to me on the 7th of January, 1948, I would say there was no more discoloration of the area around the place than previously present and no more than one would expect with a raised lesion being confined and rubbed by shoes. When I saw him January 7, 1948, there was no condition about his heel that indicated to me that he had received any burn from X-ray . . . There wasn't anything about its condition, its color or otherwise, that indicated to me on January 14, 1948, that he had received any burn from X-ray treatment. With the use of the lead shield and the cone that was used on X-ray machine, no area of his heel could have been burned except that immediately over the wart. It would take at least two weeks to show any redness at all from the X-ray . . . The aluminum filter we used would tend to lengthen the time rather than shorten it."

And defendant, continuing, said: "There is no test that a practitioner can give a patient in order to determine the susceptibility of the patient to the X-ray. You would have to give a series of X-ray dosage to an area of the patient's skin and keep increasing the dosage until you burned it to find out how much that was, whether a smaller dose than the average, or not. But when we discovered how much he could take, the patient would already be burned under that kind of test; but there is no practical test that can be given. I do at times have unsatisfactory conditions or

results in the treatment of skin lesions, warts such as Billy Nance had, regardless of the care and skill that is used. I guess that these unsatisfactory conditions or results are attributed to the variability of human beings. Some individuals can take or stand more X-ray than others, as far as local reaction is concerned . . . The treatment that I administered to Billy Nance beginning on the 31st of December, 1947, and through March 15, 1948, is the usual treatment that is used by practitioners in treating a condition such as Billy Nance had."

Then on cross-examination defendant testified, in part: "When I saw him on January 6, 7, 8 and 12, it was my impression, it was my diagnosis . . . that he had cellulitis, which is an infection of the tissue . . . in a skin that had been previously irradiated and therefore was, perhaps, not quite as resistant to such infection as normal skin . . . The immediate cause of the ulcer was an infection . . . of his heel, which I think was probably due to trauma, to too short shoes . . . It was not the result of X-ray therapy . . . I would say he did not have too much X-ray. I am going on the basis that he had 750 R's each treatment. It would not produce a third degree reaction except in a rare individual who is hypersensitive to X-ray. There is never anything to indicate that anyone is one of those rare individuals . . ."

Further on cross-examination defendant said: ". . . I did not delegate the authority to the nurse . . . I gave the treatment . . ." In this connection, Mrs. Pauline Batten Singleton, a registered nurse, as witness for defendant, testified that she was working for Dr. Hitch at the time he gave plaintiff the X-ray treatments; that Dr. Hitch adjusted the machine, and prepared the patient; that all she did was under the doctor's supervision, and "telling me what to do"; and that "the X-ray machine automatically turned itself off after the time expired that it was set for."

Defendant also offered expert testimony of Dr. J. L. Calloway, professor of dermatology at Duke University School of Medicine, teacher and practitioner, Dr. T. C. Worth, who had been on the stand as witness for plaintiff, Dr. Michael Bolus, licensed and practicing dermatologist at Raleigh, N. C., and Dr. Robert P. Noble, roentgenologist, practicing medicine and specializing in X-ray at Raleigh, N. C.

These testified in the main in answer to hypothetical questions based upon testimony of defendant. Briefly stated, their expert opinions, variously expressed, are:

(1) That the formula used by defendant in giving X-ray treatment to the wart on the heel of plaintiff is usually accepted by the profession as being proper treatment in such cases.

(2) That the X-ray machine used by defendant in treating plaintiff is one that is approved and in general use by the profession.

(3) That rays so administered do not produce redness, except in rare occasions, within ten days to twenty-one days, as variously estimated. Dr. Calloway said: "This particular quality of X-ray that we are speaking of, with the 3 mm of aluminum filter in this dosage, redness will never occur under two weeks. It is my opinion that with that formula used that any redness which appeared within a week could not have been the result of that X-ray therapy." Dr. Worth said: "Under treatment of that kind with filtered irradiation, in my opinion, it would be ten days or two weeks before there would be any redness, if at all." Dr. Bolus said: ". . . at least 10 days and usually 21 days . . . with filtering I don't think that it should become pink . . . It could have turned pink from some other cause . . ." And Dr. Noble said: "It is my opinion it would require the skin around the lesion of that kind to become red or pink from X-ray burns, if there were X-ray burns, to start in about ten days or two weeks . . ."

(4) That there is no method by which to determine the amount of X-ray a person can take without burning. Dr. Calloway testified: "It appears that some people are able to take more X-ray than others, in the same way that one person may be able to take more sunshine than another without burning, without reacting. Using filtered irradiation there is no way of anticipating what is going to happen . . . Burns occur at time when X-ray such as was used in this case is applied by a person who is learned and skilled in dermatology, even though skillfully applied, using every care and caution . . . I would not say it happens commonly but it does happen and it cannot, as far as I know, be predicted or prevented by any physical test before the use of the X-ray irradiation. There are many people who differ in their ability to react to an X-ray irradiation . . ." Dr. Worth expressed his opinion in this way: "By the administration of approved doses of X-ray therapy I have never had a third degree reaction treating a wart or skin trouble . . . But it happens to the most careful practitioner at times. It may happen to you no matter how much knowledge you have or how much skill you may use or how much care you may exercise it sometimes, maybe today, happens . . . It would not necessarily indicate that more than you intended to give had been given."

And Dr. Noble, in expressing his opinion, said: ". . . We find that they get more reaction in some people than in others, and there is no telling how that will be . . ."

Dr. Calloway also testified that "In the removal of a wart the size that has been described was on the heel of Billy Nance, following X-ray therapy, there is a natural weakening of the skin and tissue. X-ray in this dosage produces scarring, produces atrophy of the skin, and any scar, by and large, is a weaker piece of tissue than a normal piece of skin

because it does not have the blood supply that the normal skin has." And, again, that "such a scarred area reacts much more poorly after being traumatized,—has less ability to respond normally."

And Dr. Noble, in answer to this question, "After the removal of a wart there is naturally a deterioration, a breakdown of the tissues in that particular area, isn't there?", answered "Yes. You have got to do that to destroy it."

Dr. Walter S. Hunt, orthopedic surgeon, testified that he had occasion to see and treat William M. Nance, Jr., plaintiff in this case; that he was called to perform an operation on his left heel, and did so; and he said: "I found no damage to the bone."

Motion of defendant for judgment as of nonsuit made at close of evidence was allowed, and judgment was signed.

Plaintiff appeals therefrom to Supreme Court and assigns error.

Bickett & Banks and W. H. Yarborough for plaintiff, appellant.
Brassfield & Maupin and Robert L. Savage, Jr., for defendant, appellee.

WINBORNE, J. Did the court below err in granting defendant's motion for a judgment as of nonsuit at the conclusion of all the evidence? This is the question presented on this appeal.

In considering such motion, "the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff," *Stacy, C. J.*, in *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598, citing *S. v. Fulcher*, 184 N.C. 663, 113 S.E. 769. See *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543, where other cases in which this rule was applied are cited. See also *Williams v. Robertson*, 235 N.C. 478, 70 S.E. 2d 692; *Ward v. Cruse*, 236 N.C. 400, 72 S.E. 2d 835; *Express, Inc., v. Jones*, 236 N.C. 542, 73 S.E. 2d 301.

Therefore, taking the evidence offered by plaintiff, and so much of defendant's evidence as is favorable to the plaintiff, or tends to explain and make clear that which has been offered by the plaintiff, as shown in the case on appeal, in the light most favorable to plaintiff, and giving to plaintiff the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, as the law directs in considering a motion for judgment as of nonsuit, G.S. 1-183, this Court is of opinion and holds that the evidence is insufficient to carry the case to the jury on the issue of negligence of defendant as alleged in the complaint, and that the question posed merits a negative answer.

Text writers, interpreting the law as declared in courts of the land, say that "the rules governing the duty and liability of physicians and

surgeons in the performance of professional services generally . . . are applicable to them in the use and manipulation of an X-ray machine"; that "the degree of care, skill, and diligence required of an X-ray operator is fixed by that ordinarily possessed and exercised by others in the same line of practice and work in similar localities"; and that "such operator impliedly represents to his patient that he possesses the ordinary skill and learning of members of his profession, and that he will exercise reasonable skill, care and diligence in his treatment." 41 Am. Jur. 207, Physicians and Surgeons, Section 89. See also 70 C.J.S. 946, Physicians and Surgeons, Section 41.

And it is said that "this rule involves dual standards of skill and care, one having reference to the mechanical operation of the apparatus, and the other to the possession and exercise of the professional skill and care of the physician in his diagnosis and treatment of the patient's ailment in other respects than the mere operation of the machine"; and that "a physician who possesses the requisite skill and knowledge, and exercises ordinary and reasonable care and skill in the operation of an X-ray machine is not liable for damages for burns resulting from X-ray treatment in a proper case where no negligence is shown." 41 Am. Jur., pp. 207-8, Physicians and Surgeons, Section 89. See annotations on subject "Liability for injury by X-ray." 13 A.L.R. 1414, 26 A.L.R. 732, 57 A.L.R. 268, and 60 A.L.R. 259.

While this Court has not treated of this particular phase of duty and liability of physicians, the principles are consonant with the rules enunciated by this Court, and prevailing in North Carolina in respect to the duty and liability of physicians in the performance of professional services generally. See *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356; *Grier v. Phillips,* 230 N.C. 672, 55 S.E. 2d 485; *Jackson v. Sanitarium,* 234 N.C. 222, 67 S.E. 2d 57; *Jackson v. Joyner,* 236 N.C. 259, 72 S.E. 2d 589.

In *Nash v. Royster, supra,* it is stated that the law holds a physician or surgeon "answerable for any injury to his patient proximately resulting from a want of that degree of knowledge and skill ordinarily possessed by others of his profession, or for the omission to use reasonable care and diligence in the practice of his art, or for the failure to exercise his best judgment in the treatment of the case."

Moreover, in the case of *McCracken v. Smathers,* 122 N.C. 799, 29 S.E. 354, this Court held that the degree of care and skill required of a dentist to his patient is that possessed and exercised by the ordinary members of his profession. And in *Smith v. McClung,* 201 N.C. 648, 161 S.E. 91, citing the *McCracken case,* the Court said that "dentists, in their particular fields, are subject to the same rules of liability as physicians and surgeons.

Accordant with the reasoning of these decisions, the rules governing the duty and liability of physicians and surgeons in the performance of professional services generally, may properly be applied to a physician practicing in the special field of dermatology, in the use and manipulation of an X-ray machine,—and this Court now so holds.

The burden is on plaintiff to show by evidence not only that defendant was negligent as alleged in the complaint, but that his negligence was the proximate cause, or one of the proximate causes of plaintiff's injury. The acts of negligence alleged are that defendant caused plaintiff to be exposed to excessive amounts or dosages of X-ray for excessive periods of time. Therefore this question arises: Is there sufficient evidence to support the allegations? The proof should have been of such character as reasonably to warrant the inference required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact. *Smith v. Wharton,* 199 N.C. 246, 154 S.E. 12; *Grier v. Phillips, supra.*

Plaintiff contends that where it is shown that defendant was in exclusive control of a dangerous instrumentality, an X-ray machine, and following treatment by defendant, plaintiff sustained third degree burn, the case should be submitted to the jury. He invokes the rule stated by *Barnhill, J.,* in *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477, that "When a thing which causes an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care."

In this connection, it is not disputed that the X-ray machine used by defendant was under his control and operation. And conceding that there is evidence tending to show that there was third degree burn to the heel of plaintiff following the X-ray treatment administered by defendant, the evidence is insufficient to show that the burn is one which, in the ordinary course of things will not happen if defendant used proper care. The evidence is to the contrary.

Dr. Worth testifying as witness for plaintiff stated: "I will say . . . that in spite of skillful treatment by the use of X-ray for the removal of warts and in exercising the very best care that burns do sometimes occur." And plaintiff's witness Dr. Neal said: "I wouldn't say such burns often occur, but . . . they do occur in spite of skill and caution in using it." Moreover, the testimony of defendant and of the doctors introduced by him, including Dr. Worth, is to the same effect. Hence the principle declared in the *Etheridge case* is inapplicable to the factual situation in hand.

Indeed, all the evidence offered, as shown in the record and case on appeal, negatives the applicability of the doctrine of *res ipsa loquitur*—that is, that the thing speaks for itself.

Plaintiff contends also that there is evidence that the X-ray therapy was administered by Dr. Hitch's nurse who admittedly is not trained in radiology. In this connection attention is directed to plaintiff's statement: "I believe I said that on the second and third visits the nurse administered the X-ray treatments. I am not positive who gave the X-ray treatment the second and third times." This statement is too uncertain to have probative value. Hence it will not be considered as evidence that the nurse gave the treatment,—a fact which both she and defendant say did not occur.

Moreover, a reading of the entire evidence leads to the conclusion that the plaintiff's case is one of those unfortunate results which in medical science and learning could not have been foreseen or predicted. The evidence fails to show that it is the result of any neglect or lack of care on the part of defendant. Therefore he may not be held liable for it.

The judgment from which this appeal is taken is

Affirmed.

FRED E. WILSON, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE CITY OF HIGH POINT AND COUNTY OF GUILFORD, v. CITY OF HIGH POINT AND COUNTY OF GUILFORD.

(Filed 12 June, 1953.)

1. Taxation § 38a—

A taxpayer of a municipality has the right to maintain an action to test the authority of the municipality to issue proposed bonds.

2. Taxation § ½—

The issuance of bonds by a municipality is but an incipient step in the exercise of its power of taxation, and necessarily involves its power to levy a tax to pay the principal and interest thereon.

3. Taxation § 4—

What is a necessary municipal expense within the meaning of Art. VII, sec. 7, of the Constitution of N. C., is a question of law to be determined by the courts, and although legislative construction of this provision is entitled to great weight, it is not binding.

4. Municipal Corporations § 41—

A municipality cannot expend tax revenue without the explicit or implicit authority of a constitutional statute. G.S. 160-1.

5. Taxation § 1—

A contract under which property of a municipality within the county would be taxed for the purpose of raising revenue to pay the total initial cost of erecting a building to be used jointly by the city and county for their respective governmental functions, and then subsequently included in a county-wide tax to defray the county's obligation, would result in taxing the property in the city twice for the same purpose, and would violate the rule of uniformity.

6. Taxation § 3—

The provisions of Art. V, sec. 4, authorizing the issuance of bonds by a municipality not to exceed two-thirds of the amount of bonds retired by it during the preceding fiscal year does not authorize a municipality to issue bonds, without a vote of the people, even within the limitation, if such bonds are not for a necessary municipal expense.

7. Constitutional Law § 10b—

While the Supreme Court will not hold an act of the General Assembly unconstitutional unless it clearly transgresses the fundamental law, it is its duty to declare an act unconstitutional if, after indulging every presumption in favor of constitutionality, the statute clearly contravenes the Constitution.

8. Taxation §§ 4, 9—

A municipality may not issue its bonds, without a vote of its people, for the purpose of providing revenue to pay the entire initial costs of a building to be used by the county and the municipality jointly in the discharge of their respective governmental functions, even though the county has entered into a contract with the city eventually to purchase the building from the city, since the discharge of the governmental functions of the county touches no phase of the municipal government, and therefore is not a necessary expense of the municipality within the meaning of Art. VII, sec. 7, and further would amount to taxing one governmental unit for the benefit of another.

9. Appeal and Error § 40d—

The Supreme Court will not discuss or decide questions not presented by the facts agreed, since to do so would be to render an advisory opinion.

APPEAL by plaintiff from *Sink, J.*, in Chambers in Greensboro, 9 April, 1953. GUILFORD.

This is a civil action instituted by Fred E. Wilson, on behalf of himself and all other taxpayers of the City of High Point and the County of Guilford, in which he seeks a permanent injunction to restrain both defendants from erecting a building for their joint use in the City of High Point, and to restrain the City of High Point from issuing bonds to pay the total initial cost of said building.

The City of High Point and the County of Guilford will be hereafter referred to as the City and the County. The City and County filed a joint answer.

It is admitted in the pleadings that Fred E. Wilson, then and now, is a citizen, resident and taxpayer of the City and County, and brings this action on behalf of himself and all other taxpayers of the City and County; that the City is a municipal corporation of the State of North Carolina, and the County one of the counties of North Carolina.

Counsel for the plaintiff and the defendant stipulated and agreed in writing that this action should be heard and decided by Sink, J., Resident Judge of the 12th Judicial District, in chambers in the courthouse at Greensboro, without a jury, upon the following statements of facts, which were declared to be the pertinent facts.

1. The 1953 General Assembly of North Carolina enacted a Public-Local Statute—See EXHIBIT A.

2. That defendants of the City of High Point and Guilford County have executed an agreement with each other—See EXHIBIT B.

3. That unless defendants are legally restrained, they will proceed as soon as practicable to perform the above contract and to cause the erection of the building provided for in said contract, and to pay for, use and dispose of the building and its site as provided in said contract.

4. That it will be necessary for defendant City of High Point to issue bonds to enable it to perform its part of the contract.

5. That defendants are of opinion that the building proposed to be erected is necessary for the efficient operation of the government of the City of High Point and of Guilford County and is a necessary expense and for a public purpose.

6. That two-thirds of the amount of bonded debt of the defendant City of High Point, retired during the fiscal year 1952-1953, was $308,000; and for any necessary purpose the defendant City of High Point may issue bonds not in excess of $308,000 during the next fiscal year, without a vote of the people of the City of High Point.

EXHIBIT B is an agreement duly approved by the Council of the City and the Board of Commissioners of the County. The material parts are as follows:

(1) The City and County shall erect upon the Guilford County Building Grounds in High Point a new building to be used by the City for the housing of its Police Department, Jail, and for holding City Municipal Court; and to be used by the County for the Sheriff's Department, Jail, and the holding of terms of the Superior Court, High Point Division; and to be used for other purposes of the City and County to be hereafter mutually agreed upon.

(2) The selection of an architect; plans and specifications; and cost of the proposed building shall be approved by the City Council of the City and County Commissioners of the County.

(3) The location of the site of the building shall be agreed upon by the City Council and the County Commissioners, and the value of the site appraised by the Appraisal Committee of the High Point Real Estate Board before construction of the building begins.

(4) The County shall convey to the City the site as determined and valued in paragraph 3.

(5) The entire expense of designing, erecting and completing said building shall be immediately borne by the City.

(6) A one-half undivided interest in the building and grounds, upon completion of said building, shall be conveyed to the County by the City.

(7) The purchase price of the County's one-half undivided interest in the new building and grounds shall be ascertained as follows: To the appraised value of the grounds shall be added the exact cost of the completed building, and this sum divided by two, which shall be deemed the value of each undivided interest. From this sum the value of the grounds shall be subtracted and the County shall owe to the City the sum remaining.

(8) The County shall pay the purchase price of its one-half undivided interest as follows: $50,000 on 1 August of the next fiscal year after the building is completed, and $50,000 on 1 August of each fiscal year thereafter until the entire debt is paid. The County can pay more than $50,000 in any fiscal year if it so desires. The payments so provided shall bear no interest if paid at maturity; past-due payments shall bear 4% interest per annum until paid.

(9) During the 25 years succeeding the completion of the building the County shall have the option to purchase the other one-half undivided interest of the City in the building at a value determined by the value of the grounds at time of conveyance to the City, and the cost of the completed building, that is to say, one-half of said value. In any event, on the expiration of 25 years the County shall purchase the other one-half interest of the City on the basis above provided for.

(10) So long as the building is jointly owned, it shall be jointly occupied by the City and the County as hereafter agreed upon; and for a period of ten years after the purchase of the interest of the City by the County the building shall be jointly occupied as at the time of purchase.

(11) No rent shall be paid if each shall occupy an equal amount of space; if one occupies more space than the other, rent shall be paid for the extra space. After the County becomes the sole owner, the City shall pay an equitable rent to the County.

After this agreement was duly approved by the Council of the City and by the Board of Commissioners of the County, it is admitted in the pleadings that the defendants secured the passage of H.B. 497 by the 1953 Session of the General Assembly of North Carolina purporting to author-

ize the proposed action on the part of the City and the County as set out in their agreement in the erection of said building for their joint use in the City.

EXHIBIT A is H.B. 497, Ch. 353 of the 1953 Session of the General Assembly of North Carolina and is entitled "An Act to Authorize Guilford County and the City of High Point to Erect a Governmental Building for Their Joint Use." It was ratified 18 March, 1953. The material parts are in substance these.

Section One authorizes and empowers the County Commissioners of the County and the Council of the City to erect on a portion of the lands now owned by the County in the City, corner of South Main and Green Streets, a building for the purposes and uses as set forth in the agreement which is EXHIBIT B.

Section Two. The County Commissioners of the County and the Council of the City are vested with the power to determine in their discretion all matters relating to the erection, use and disposition of the building, including such matters as whether the initial cost of the erection of the building shall be borne by one governmental unit; and which one; and whether such cost shall be borne by both governmental units and in what proportion; in whose name the title to said land or building shall vest either temporarily or permanently; the extent of the use of the building by each governmental unit; the rent, if any, to be paid by each governmental unit; and the final disposition of the property. The County and the City are empowered at any time to purchase the interest of the other on credit, and to pay the purchase price in installments at such times and upon such terms as may be mutually agreed upon. The express mention of the above matters shall not exclude the power of the County and the City to determine any other matter necessary, proper and relating to the erection, the use and the final disposition of said land and building.

Section Three. The erection of the building is necessary for the proper operation of the governmental functions of the County and the City, and will be beneficial to both; and the City, when authorized by its City Council, may issue bonds to provide for the erection of said building in accordance with the Municipal Finance Act of the State of North Carolina.

Section Four. The determination of any matter relating to the erection, the use and disposition of the building shall be at a joint meeting of the Board of County Commissioners and City Council; or the said determination may be in separate meetings, if both governing bodies shall elect to do so. Each governing body shall vote as a unit, and the majority of both bodies shall be necessary to make any agreement concerning the erection, the use and disposition of the building and the land upon which it shall be built.

Section Five. So long as the County and the City own the property jointly and for a period of ten years after either shall last acquire the entire interest, neither the County nor the City shall sell the property, or any interest therein, without the consent of the other.

Section Six. The powers granted by this Act are granted in addition to and not in substitution for existing powers of the County and City.

Section Seven. If any provision of this Act shall be held invalid, the remainder of the Act shall not be affected thereby.

It is admitted in the pleadings that the cost of this building will be approximately $300,000.

Sink, J., entered judgment stating that the cause was heard upon the pleadings and the statement of facts agreed to by the parties, found that the Public-Local Act of the 1953 General Assembly of North Carolina and the agreement between the City and the County are valid and constitutional, "and ordered that the action be dismissed, and that the defendants recover their costs."

From the judgment signed, the plaintiff appealed, assigning error.

Schoch & Schoch, Haworth, Haworth & Walker, and W. B. Byerly, Jr., for plaintiff, appellant.

Horace Haworth, G. H. Jones, and T. C. Hoyle, Sr., for defendant, appellees.

PARKER, J. The plaintiff as a taxpayer of the City has the right to bring this action to test the authority of the City to issue the proposed bonds. *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90; *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209.

This question is presented for our decision. Is the issuance of bonds by the City to pay the total cost of the erection of a building in the City for the joint use of the City and the County—the City to use said building for its Municipal Court, its Police Department and other governmental functions, and the County to use said building for holding terms of the Superior Court, High Point Division, and other governmental functions necessary or proper to be performed in the City—a necessary expense of the City within the meaning of Art. VII, sec. 7, of our Constitution, when the County shall be required eventually to purchase the building from the City, according to a contract between them? The answer is No.

Art. VII, sec. 7, of our Constitution reads: "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 approved by a majority of those who shall vote thereon in any election held for such purpose."

The City proposes to issue bonds to pay for the total initial cost of the building as a necessary expense of the City without a vote of the people thereon. The exercise by a municipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation, and authority given to a municipality to issue bonds necessarily involves the power to levy taxes for the payment of interest on said bonds and the payment of said bonds at maturity. *Bennett v. Comrs.*, 173 N.C. 625, 92 S.E. 603; *Comrs. v. Lacy*, 174 N.C. 141, 93 S.E. 482; *Brown v. Comrs.*, 223 N.C. 744, 28 S.E. 2d 104.

Section 3 of H.B. 497, Ch. 353, Session Laws of the 1953 General Assembly states that the erection of the building provided for in the Act is necessary for the proper operation of the governmental functions of the County and the City, and will be beneficial to both. The legislative construction of the Constitution is entitled to great weight, but it is not binding upon the Court. Our decisions uniformly hold that what are necessary expenses for a municipal corporation for which it may contract a debt, pledge its faith, or loan its credit and levy a tax without an approving vote of a majority of those who shall vote thereon in an election held for such purpose, is a question for the Court. *Person v. Watts*, 184 N.C. 499, 115 S.E. 336; *Palmer v. Haywood County*, 212 N.C. 284, 193 S.E. 668; *Sing v. Charlotte*, 213 N.C. 60, 195 S.E. 271; *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E. 2d 702; *Green v. Kitchin*, 229 N.C. 450, 50 S.E. 2d 545.

What is such "a necessary expense" has been tersely and lucidly stated for the Court by *Ervin, J.*, in *Green v. Kitchin, supra*, at p. 457. "This Court has uniformly held that where the purpose for which a proposed expense is to be incurred by a municipality is the maintenance of public peace or administration of justice, or partakes of a governmental nature, or purports to be an exercise by the municipality of a portion of the State's delegated sovereignty, the expense is a necessary expense within the Constitution, and may be incurred without a vote of the people. *Sing v. Charlotte*, 213 N.C. 60, 195 S.E. 271; *Palmer v. Haywood County*, 212 N.C. 284, 193 S.E. 668; 113 A.L.R. 1195; *Martin v. Raleigh*, 208 N.C. 369, 180 S.E. 786."

In *Henderson v. Wilmington*, 191 N.C. 269, 132 S.E. 25, the question for decision was whether the purchase of wharf and terminal facilities was a necessary expense of the City of Wilmington. At p. 278 the Court said: "The cases declaring certain expenses to have been 'necessary' refer to some phase of municipal government. This Court, so far as we are advised, has given no decision to the contrary." At p. 277 the Court further said: "In defining 'necessary expense' we derive practically no

aid from the cases decided in other States. We have examined a large number of such cases apparently related to the subject and in each one we have found some fact or feature or constitutional or statutory provision antagonistic to or at variance with the section under consideration. We must rely upon our own decisions."

While this Court has said in *Henderson v. Wilmington, supra,* in defining necessary expenses "we must rely on our own decisions," it may not be inappropriate to quote what is said in 51 Am. Jur., Taxation, Sec. 402: "It is clear that one taxing district, whether State, County, Municipality, or District established for the particular purpose, cannot be taxed for the benefit of another district. . . . A municipal corporation cannot be compelled to turn over a portion of its funds to the county in which it is situated in order to pay the expense of a county function."

Nor what is said in 61 C.J., Taxation, Sec. 66: "The purpose to be accomplished by a tax must pertain to the district taxed, as the constitutional requirement of uniformity in taxation forbids the imposition of a tax on one municipality or part of the State for the purpose of benefiting or raising money for another." In support of this statement C.J. quotes the following North Carolina cases: *Comrs. v. Lacy,* 174 N.C. 141, 93 S.E. 482; 2 A.L.R. 726; *Keith v. Lockhart,* 171 N.C. 451, 88 S.E. 640; *Faison v. Board of Comrs.,* 171 N.C. 411, 88 S.E. 761.

In *Campbell County v. City of Newport,* 174 Ky. 712, 193 S.W. 1, L.R.A. 1917D, 791, the decision is correctly summarized in the L.R.A. headnote: "The attempt by the legislature to require a municipal corporation to turn over a portion of its taxes to the county in which it is situated to assist in the support of a juvenile court, for which the county has already levied a tax on all the property within its limits, including that within the municipality, is invalid as violating the principle that taxation and representation must go together, that one municipal subdivision cannot levy a tax upon property located in another municipal subdivision, and also the constitutional provision that taxes must be uniform."

A municipality, a creature of the State, has the "powers prescribed by statute, and those necessarily implied by law, and no other." G.S. 160-1. Therefore, a municipality cannot expend tax revenue without the explicit or implicit authority of a constitutional statute. *Horner v. Chamber of Commerce,* 231 N.C. 440, 57 S.E. 2d 789.

The defendant appellees contend in their brief that the case of *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803, supports their position that the City can issue bonds to pay the total initial cost of this building, because the expenditure will be primarily for the benefit of the City. The facts are entirely different. In that case it was held that Guilford County and the Cities of Greensboro and High Point could lawfully join in the construction, maintenance and operation of an airport if each of

them is benefited. But it was stipulated in the agreed facts that the appropriations made by the municipalities were out of funds in their hands not derived from *ad valorem* taxes, but mainly from the sale of property. In this case at p. 8 this Court said: "No question of credit or taxation in violation of Article VII, section 7" (of our Constitution) "is involved, and the prohibition constituting the *ratio decidendi* in *Sing v. Charlotte, supra,* does not apply."

The defendant appellees argue in their brief that *Callam v. City of Saginaw,* 50 Mich. 7, 14 N.W. 677, is in point in support of their position. The Michigan Legislature enacted a statute authorizing the City of Saginaw to take upon itself alone the entire expense of building a courthouse in the City for Saginaw County. A taxpayer filed his bill to restrain the issue of bonds to pay for said building. In that case the Michigan Court said: ". . . the Constitution, which in some cases requires a vote from the electors of the counties on financial questions, contains no such requirements as to cities, which usually act by their local legislatures . . . Under the statute, while the approval of the taxpayers is a condition precedent, it is nothing more. The council can do as they please about making an arrangement with the county. The legislature might have given the council power to act without the approval of any other persons." According to the language of the Court, the Michigan Constitution had no provision similar to Art. VII, sec. 7, of our Constitution.

The issuance of bonds by the City to pay for the erection of a building for the operation of its Municipal Court for the housing of its Police Department, providing space for its City Jail and for the performance of other governmental functions is undoubtedly "a necessary expense" of the City within the meaning of Art. VII, sec. 7, of our Constitution. But the City proposes to go further and issue its bonds, the interest and principal of which must be paid by *ad valorem* taxation of property within the City, to erect a building for the City and the County to use for their governmental functions respectively.

G.S. 153-77, subsec. (b), provides that counties may issue bonds and levy taxes for "the erection and purchase of courthouse and jails." That is "a necessary expense" for the County. *Jackson v. Comrs.,* 171 N.C. 379, 88 S.E. 521; *Castevens v. Stanly County,* 209 N.C. 75, 183 S.E. 3. For the City to issue bonds, thereby contracting a debt, pledging its faith and lending its credit, and as a necessary consequence being required to levy taxes, to pay the entire cost for the erection of a building, part of which shall be used by the County as a courthouse for the Superior Court of the County, High Point Division, for providing space for the Office of the Clerk of the Superior Court of the County, for the housing of the Sheriff's Department, the Tax Supervisor's Department of the County,

for the safekeeping of county prisoners and for other governmental functions of the County proper to be performed in the City touches no phase of municipal government. All those matters are governmental functions of the County, not of the City, and the taxpayers of the City with all the other taxpayers of the County are taxed for the performance by the County of such governmental functions of its own. To tax the citizens of High Point again to pay for the performance of governmental functions of the County would mean that taxation in the County would not be uniform. Taxation that is not uniform is necessarily unequal. It would mean taxing property in the City twice for the same purpose. Lack of uniformity in taxation is unjust, and opposed to the principles of equality and fairness upon which a righteous scheme of taxation depends. It is not "a necessary expense" for the City to provide such a building for the County.

It is with us well settled law that for other than necessary expenses a municipality cannot levy a tax either within or in excess of the constitutional limitations except by a vote of the people under appropriate legislative authority. *Sing v. Charlotte, supra,* and cases cited; *Airport Authority v. Johnson, supra.*

The defendant appellees state in their brief the "Constitution Art. V, sec. 4 authorizes a city to issue bonds for necessary expenses without a vote of the people, if the amount issued does not exceed two-thirds of the amount of bonds retired during the preceding fiscal year." As we have stated above, the proposed issue of bonds is not a necessary expense of the City.

It is an elementary principle of law that an Act of the General Assembly will not be held unconstitutional, unless it is clearly proven so. *Nash v. Tarboro, supra,* and the numerous cases therein cited. We are mindful of the fact that every presumption is in favor of the constitutionality of a statute, and all doubts must be resolved in support of it. However, when it is clear a statute transgresses the authority vested in the legislature by the Constitution, it is a duty of the Court to declare the act unconstitutional. *Glenn v. Board of Education,* 210 N.C. 525, 187 S.E. 781; *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749.

The plaintiff contends that H.B. 497, Ch. 353, enacted at the 1953 Session of the General Assembly is unconstitutional. We have carefully studied the question before us in the light of the decisions and other authorities herein cited, and we are of the opinion that this part of Section 3 of the Act which reads "and the City of High Point when authorized by its city council may issue bonds to provide for the erection of said building in accordance with the Municipal Finance Act of the State of North Carolina" is in clear violation of Art. VII, sec. 7, of our Constitution, as it would permit the City not for the necessary expenses

thereof to contract a debt, pledge its faith, loan its credit and levy a tax, without the approval of a majority of the voters of the City in an election held for such purpose. And this is true, even though the County has entered into a contract with the City to pay the City eventually in full for said building.

The agreed facts do not present for our consideration a case where a city has funds already on hand, and the proposed expenditure for a public purpose will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. *Adams v. Durham,* 189 N.C. 232, 126 S.E. 611; *Nash v. Monroe,* 198 N.C. 306, 151 S.E. 634; *Goswick v. Durham,* 211 N.C. 687, 191 S.E. 728; *Airport Authority v. Johnson, supra.*

Nor do the agreed facts present for decision a case where the Legislature has enacted a statute that the City may issue bonds for the construction of a building to be jointly used by the City and the County, provided it was approved by a majority of those who voted thereon in an election held for such purpose, and the action of the Legislature has been sanctioned by a majority vote of the people of the City, who would be primarily liable for the bonds, and necessarily affected by the tax. See *Briggs v. Raleigh,* 195 N.C. 223, 141 S.E. 597; and *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211, where the people of Reidsville voted to issue bonds and levy a tax for a municipal airport.

We have decided this case upon the agreed facts presented to us. To discuss other questions argued in the defendant appellees' brief would be to render an advisory opinion, which we do not do.

However beneficial it may be to have a joint building for the use of the City and the County in High Point in the performance of their respective governmental functions there, the cost of the building, if constructed, must be paid in accordance with the provisions of our Constitution and laws.

The judgment of the Court below is reversed, and it is ordered that a permanent injunction issue to restrain the City from issuing the proposed bonds.

Reversed.

LYON & SONS, INC., v. N. C. STATE BOARD OF EDUCATION AND/OR SAMPSON COUNTY BOARD OF EDUCATION.

(Filed 12 June, 1953.)

1. State § 3a—

The State Tort Claims Act will be construed to effectuate its purpose to waive the sovereign immunity of the State in those instances in which injury is inflicted through the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured

party the same right to sue as any other litigant, and the Act will not be given a strict or narrow construction which would defeat this purpose. G.S. 143-291 *et seq.*

2. Subrogation § 1—

The equitable principal of subrogation will be broadly applied to compel a party primarily liable for an obligation to reimburse the person who has been compelled to pay the debt and who is, therefore, not a mere volunteer or intruder.

3. Insurance § 51: Parties § 1—

An insured who has been paid a part of the damage to his car by insurer can maintain an action in his own name against the tort-feasor for the entire damage, but insurer is a proper party and may be joined in the discretion of the court.

4. State § 8a—

In this proceeding under the State Tort Claims Act, the Industrial Commission found that plaintiff's car was damaged as a result of the negligence of the driver of a State school bus, that plaintiff was not guilty of contributory negligence, and that plaintiff had been paid a part of the damage under the provisions of a fifty dollar deductible collision policy. *Held:* Plaintiff is entitled to recover the total damage to his car for the benefit of himself and his insurer, and the State is not entitled to a deduction from the recovery of the amount paid by insurer.

APPEAL by plaintiff from *Morris, J.*, March Civil Term, 1953, of DURHAM.

This was a proceeding instituted by the plaintiff before the North Carolina Industrial Commission under Ch. 1059, Session Laws of North Carolina, 1951, codified as G.S. 143-291 *et seq.*—captioned An Act to Authorize the North Carolina Industrial Commission to Hear and Determine Tort Claims Against State Departments and Agencies—for an award of $121.55 for damage to its automobile allegedly caused by the actionable negligence of the defendants, without contributory negligence on the part of the claimant.

The plaintiff, pursuant to Sec. 9 of the Act, filed an affidavit with the Industrial Commission setting forth the information required.

By consent the proceeding was heard in Durham before Commissioner J. W. Bean. There was no controversy about the facts. Upon competent evidence the Commission found facts, which are summarized as follows: (1) Bobby Porter, an employee of the State Board of Education, an agency of the State, was operating a State owned school bus in Sampson County on a public road; (2) while acting within the scope of his employment he negligently backed the bus into plaintiff's automobile, and such negligence was the proximate cause of $121.55 damage to the automobile; (3) there was no contributory negligence on plaintiff's part; (4) the Southern Fire Ins. Co. of Durham had issued a liability insurance policy

to the plaintiff covering its automobile, with a $50.00 deductible provision, and pursuant to the policy paid the plaintiff $71.55, leaving a net loss to the plaintiff of $50.00. The Hearing Commissioner awarded the plaintiff $50.00 as damages. There was an appeal by the plaintiff to the full Commission. The full Commission stated "that plaintiff's appeal is grounded upon the contention that it is entitled to recover the full sum of $121.55—$71.55 of which belongs to Southern Fire Insurance Co. in satisfaction of its subrogated rights." In the hearing before the full Commission it was stipulated that the plaintiff should introduce in evidence, to be made a part of the record, (1) Southern Fire Ins. Co. Policy #A42107, (2) Subrogation receipt executed by plaintiff to the carrier and proof of loss. The full Commission affirmed the order of the Hearing Commissioner. Upon appeal to the Superior Court by the plaintiff the order of the full Commission was affirmed.

From the judgment signed, the plaintiff appeals, assigning error.

Henry Bane for plaintiff, appellant.

Attorney-General McMullan, Assistant Attorney-General Love, and Gerald F. White, Member of Staff, for the defendants, appellees.

PARKER, J. This question is presented for our decision: Does the right of subrogation exist under the provisions of Ch. 1059, Session Laws N. C., 1951, codified as G.S. 143-291 *et seq.*, and known as Tort Claims against State Departments and Agencies? The exact question presented is of first impression in our State.

The pertinent parts of Ch. 1059, N. C. Session Laws, 1951, are as follows: Sec. 1: The State Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the State Highway & Public Works Commission, and all other departments, institutions, and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose 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. If the Commission finds that there was such negligence on the part of a State employee while acting within the scope of his employment proximately causing the injury and no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages the claimant is entitled to be paid, including medical and other expenses, and direct the payment of such damages by the department, institution or agency concerned but the damages awarded shall not exceed $8,000.00. Sec. 3 provides for an appeal from the full Commission to the Superior

Court, and from the Superior Court to the Supreme Court: such appeal shall be for errors of law only, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them. Sec. 11 reads as follows: "All claims against any and all State departments, institutions, and agencies, except the claims enumerated in Section 13 of this Act, shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident giving rise to the injury and damage, and if death results from the accident, the claim for wrongful death shall be forever barred unless a claim be filed by the personal representative with the Industrial Commission within two years after such death." Sec. 13 reads as follows: "The following claims against the various departments, institutions, and agencies of the State indicated below shall be heard and determined by the Industrial Commission as provided in this Act, and each claimant upon request shall furnish the Industrial Commission the information provided for in Section 9 of this Act, as follows." Then follows a list of 276 claims. The 194th claim listed is plaintiff's claim, and is as follows:

CLAIMANT	UNIT	COUNTY	AMOUNT
Lyon & Sons, Inc.	Sampson Co. Bd. of Ed.	Sampson	$121.55

Some 33 of these claims are for less than $25.00. The claims range in amounts from $3.00, $11.06, $14.03, $69.86 to $25,000.00.

It is frequently stated that while the decisions are not uniform, most courts hold that statutes waiving the Government's immunity from suit should be strictly construed. 49 Am. Jur., p. 314; 81 C.J.S., Statutes, p. 1306. However, the current trend of legislative policy and of judicial thought is toward the abandonment of the monarchistic doctrine of governmental immunity, as exemplified, for instance, in Tort Claims Acts enacted by the Congress and the Legislatures of the various States. We think that the legislative attitude in passing a Tort Claims Act, or waiving a State's immunity from suit, is more accurately reflected by *Cardozo, J.*, in *Anderson v. John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28 (quoted with approval in *U. S. v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 94 L. Ed. 171): "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." The Washington & Lee Law Review, Vol. VI, p. 116, says: "The opinion of *Justice Cardozo* in *Anderson v. John L. Hayes Construction Co.* properly states the general rule to be applied to those cases involving the construction of a waiver of immunity statute" and goes on to quote the language of *Cardozo, J.*, quoted above.

When a State consents to be sued or waives its governmental immunity, it occupies the same position as any other litigant, and a plaintiff has the

same right that he would have to sue an ordinary person. The State in such circumstances is not entitled to special privileges. 81 C.J.S., States, p. 1310, and cases cited; *State v. Stanolind Oil & Gas Co.*, Tex. Civ. App., 190 S.W. 2d 510; *Com. v. Bowman*, 267 Ky. 50, 100 S.W. 2d 801; *Murrain v. Wilson Line*, 59 N.Y.S. 750, 270 App. Div. 372, affirmed 296 N.Y. 845, 72 N.E. 2d 29, re-argument denied 296 N.Y. 995, 73 N.E. 2d 572.

The Federal Tort Claims Act—formerly 28 U.S.C., sec. 931, which is now divided and, with immaterial changes, appears in 28 U.S.C., secs. 1346 (b) and 2674—provides in pertinent part that ". . . the United States District Court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred . . . sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only . . . on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the plaintiff for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this chapter, the United States shall be liable in respect of such claims to the same claimants, in the same manner and to the same extent as a private individual under like circumstances."

Courts of Appeals in seven circuits have upheld the right of subrogees to sue under the Tort Claims Act. *State Farm Mut. Liability Ins. Co. v. United States* (1st Cir.), 172 F. 2d 737 (1949); *Aetna Casualty & Surety Co. v. United States* (2d Cir.), 170 F. 2d 469 (1948); *Yorkshire Ins. Co. v. United States* (3rd Cir.), 171 F. 2d 374 (1948); *United States v. South Carolina State Highway Dept.* (4th Cir.), 171 F. 2d 893 (1948); *Old Colony Ins. Co. v. United States* (6th Cir.), 168 F. 2d 931 (1948); *National American Fire Ins. Co. v. United States* (9th Cir.), 171 F. 2d 206 (1948); *United States v. Chicago, R. I. & P. R. Co.* (C.A. 10th Okla.), 171 F. 2d 377 (1949). The Court of Appeals for the Fifth Circuit reached a contrary conclusion, *United States v. Hill*, 171 F. 2d 404, *Hutcheson, J.*, dissenting. Re-argument was ordered before the full bench and, upon reconsideration, the original opinion was modified, 174 F. 2d 61, *Hutcheson, J.*, concurring in the result "as in substantial accordance with the views the dissent expressed."

In discussing the word "claimant" under the Federal Tort Claims Act the Court said in *Old Colony Ins. Co. v. United States, supra:* "The Act does not limit the meaning of the word 'claimant' to one who has sustained damage to his property and we are not justified in reading such limitation into it . . . to do so would be tantamount to amendment by us of

the statute, a function which of course is not ours. . . If Congress had intended to exclude subrogees from the benefits of the Act it would readily have excluded them in the list of the twelve specified exemptions." In *Spelar v. United States,* 171 F. 2d 208, in speaking of the Federal Tort Claims Act the Court said: "When after many years of discussion and debate Congress has at length established a general policy of Governmental generosity toward tort claimants, it would seem that that policy should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself." In *Aetna Casualty & Surety Co. v. United States, supra,* the Court stated: "Defendant's arguments, in effect, rest on the following basis: (1) The United States enjoys immunity from suit without its consent . . . (2) This doctrine . . . is so important and stubborn that any consent given by the United States (as a sort of monarch) must be construed in as niggardly fashion as possible." The Court further said: "We cannot accept this narrow interpretation of the Act." In *State Farm Mut. Liability Ins. Co. v. United States, supra,* the Court said: "Extended discussion would be superfluous in view of the numerous recent decisions in other circuits adverse to contentions of the Government for a narrow interpretation of the Federal Tort Claims Act." Citing numerous Federal cases.

"Transfers by subrogation of claims against the United States are upheld by most courts. Subrogation to tort claims against the United States which can now be asserted under the Federal Tort Claims Act are generally considered to be transfers by operation of law and so not within the prohibition of the Federal Anti-Assignment Statute." 12 A.L.R. 2d Anno. 480, where cases are cited.

In *United States v. Aetna Casualty & Surety Co.,* 338 U.S. 366, 94 L. Ed. 171 (1949), the Supreme Court of the United States has laid at rest the diversity of opinion among some of the lower courts as to the application of the Federal Tort Claims Act. The Supreme Court said this important question was presented under the Federal Tort Claims Act: "May an insurance company bring suit in its own name against the United States upon a claim to which it has become subrogated by payment to an insured who would have been able to bring such an action?" The Court answered the question Yes, notwithstanding the anti-assignments statute (31 U.S.C., sec. 203), which invalidates all transfers and assignments of any claim upon the United States, because assignments by operation of law are not within the prohibition of the anti-assignment statutes, as the anti-assignment statutes prohibit voluntary assignments of claims. It was also held that although either the insurer or the insured may sue the United States where the insurer has paid to the insured only part of a claim upon which the latter is able to bring action under the

Federal Tort Claims Act, the United States, upon timely motion, may compel their joinder; both are necessary parties, though not indispensable parties. It was also held that the doctrine that statutes waiving sovereign immunity must be strictly construed is not applicable to the Federal Tort Claims Act.

The South Carolina Court in *United States Casualty Co. v. State Highway Dept.*, 155 S.C. 77, 151 S.E. 887 (1930), arrived at a different conclusion. A South Carolina statute, 35 St. at Large, p. 2055, enacted 10 March, 1928, provided: "Any person, firm or corporation who may suffer injury to his or her person or damage to his, her or its property by reason of a defect in any state highway or by reason of the negligent repair of any state highway, or by reason of the negligent operation of any vehicle or motor vehicle in charge of the State Highway Department while said vehicle or motor vehicle is actually engaged in the construction or repair of any of the said highways, may bring suit against the State Highway Department." So far as the question we have under consideration is concerned the South Carolina Court in this case decided two things in sustaining a demurrer to the complaint. First, that the complaint did not show that the claim for injuries from defects in the highway was filed before the commencement of the suit, as required by the South Carolina statute. Second, that a surety company settling with insured for damages occasioned by defects in the state highway cannot sue the State Highway Department under the theory of subrogation under the statute quoted above. The Court cited no authority to sustain its opinion that the right of subrogation did not exist under the statute. *Cothran, J.*, wrote an opinion concurring in the result that the demurrer should have been sustained as the claim was not filed before the commencement of suit, but stated that it should "be declared as the law that an insurance company which pays damages for an injury to a car, caused by the neglect of the State Highway Department, is subrogated to the rights of the owner against the department." *Cothran, J.*, further used this language: "But it is insisted that, because the act does not give the assignee of a claim by the owner against the department the right to sue, under the rule of strict construction, he does not come within its protection. I think that this is an exceedingly narrow and unjustified contraction of the purpose of the act, which evidently was that the department should be held responsible for the consequences of its delicts. But, aside from this, when the State invests one of its citizens with a fixed right and a fixed remedy, it follows necessarily that it intended to invest him with every incident of those rights, one of which is the right to assignment. If there had been no insurance upon the car at all, and the owner, after the destruction of his car, by reason of the negligence of the department, would assign his claim against the department to a bank as

collateral to a loan with which to buy another car . . . could it be successfully contended that the assignee had no cause of action against the department because he was not mentioned in the act? As there *was* insurance upon the car in the present instance, can it rightfully be held that the owner's acceptance of the insurance canceled the statutory responsibility of the department? That conclusion would lead to the illogical result that the department, admittedly liable for the loss of the car to the owner, is relieved entirely from liability by reason of the collection of insurance by the owner; in other words, it would receive the full benefit of insurance without having to pay a cent for it. Would it be contended that the claim of the owner against the department would not descend to his executor or administrator because such representative was not named in the act?"

In 1950 *Jeff Hunt Mach. Co. v. South Carolina State Highway Dept.*, 217 S.C. 423, 60 S.E. 859, was heard on the pleadings. The Court stated the first question involved was: "May a person whose property has been damaged by reason of a defect in a state highway but who has been fully reimbursed for such loss under a policy of insurance, maintain an action against the State Highway Department for the amount of such damage under Section 5887 of the 1942 Code of Laws for South Carolina?" The pertinent part of the statute is as follows: "Any person, firm or corporation who may suffer injury to his or her person or damage to his, her or its property by reason of a defect in any state highway, or by reason of the negligent repair of any state highway . . . may bring suit against the State Highway Department for the actual amount of said injury or damage . . ." It was contended that the question was not an open one in South Carolina, but had been concluded by the decision in *United States Casualty Co. v. State Highway Dept.*, 155 S.C. 77, 151 S.E. 887. The Court said: "The *United States Casualty Case* has been quoted with approval and followed by the Supreme Court of Kansas, *American Mutual Liability Ins. Co. v. State Highway Commission*, 146 Kan. 239, 69 P. 2d 1091" (1937), "and by the Supreme Court of Alabama. *Turner et al. v. Lumbermens Mutual Ins. Co.*, 235 Ala. 632, 180 So. 300" (1938). "But in *Dickerson et al. v. State*, 169 S.W. 2d 1005" (1943), "the Court of Civil Appeals of Texas indicated some doubt as to the correctness of our decision and quoted with approval from the dissenting opinion of *Justice Cothran.*" The Court went on to say that on this subject there had been considerable diversity of opinion in the lower Federal Courts as to whether an insurance company could bring suit under the Federal Tort Claims Act in its own name against the United States upon a claim to which it had become subrogated by payment to an insured who would have been able to bring such an action but that the matter was finally set at rest by the decision of the United States Supreme Court in *United*

States v. Aetna Casualty & Surety Co., 338 U.S. 366, 94 L. Ed. 171, 12 A.L.R. 2d 444, where it was held that such an action could be brought by the subrogated insurer. The South Carolina Court said: "We do not think the *U. S. Casualty Case* controls the precise question here. It is only authority for the position that an action of this kind cannot be brought in the name of a subrogee because the immunity waived by the statute is not extended to such a party . . . that is to say, the proper plaintiff in suits under the statute is a person who has been damaged by the defect in the highway, and therefore the suit can properly be filed only by that person." In the *Jeff Hunt Mach. Co. Case* the Court decided that the owner, whose property was damaged by reason of a defect in state highway was entitled to maintain suit in its own name against the department though the owner had been reimbursed for its loss by its insurer, and was bringing action for benefit of insurer.

The Kansas Court followed the South Carolina Court in the *U. S. Casualty Case;* the Alabama Court followed the Kansas Court in the *Turner et al. Case,* and the South Carolina Court in the *United States Casualty Co. Case,* and in 1950 the *United States Casualty Co. Case* was repudiated in the home of its origin by the South Carolina Court in the *Jeff Hunt Mach. Co. Case.* The reasoning of the Kansas Court and the Alabama Court is that the Tort Claims Acts of their states are to be strictly construed, and as these Acts do not provide for subrogation, none exists under these Acts.

After investigation we have been unable to find any other cases directly in point, and counsel for the appellant and the Attorney-General have cited in their briefs no other cases on all fours.

The equitable principle of subrogation is universally recognized. *State Farm Mut. Liability Ins. Co. v. United States, supra.* The doctrine of subrogation "is a remedy which is highly favored, and is not so restricted in its application as formerly. The courts are inclined rather to extend than to restrict the principle, so that although formerly the right was limited to transactions between principals and sureties, now it is broad and expansive and has a very liberal application." *Boney, Ins. Comr., v. Ins. Co.*, 213 N.C. 563, 568, 197 S.E. 122.

"Legal subrogation, as distinguished from conventional subrogation, is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it. It arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable." *Beam v. Wright*, 224 N.C. 677, 683, 32 S.E. 2d 213.

Our Tort Claims Act is not a verbatim copy of the Federal Tort Claims Act, nor of that of the State of South Carolina. However, we think that the logic and reasoning of the Federal Courts above cited, of *Cothran, J.*,

in the *United States Casualty Co. Case* and of the South Carolina Court in the *Jeff Hunt Mach. Co. Case* that the right of subrogation in those cases does exist is correct, and applies to our Tort Claims Act. Our Legislature by enacting our Tort Claims Act has established a policy which opens the door to tort claims based on negligence. By enacting this law it has relieved itself of passing on these claims. The Legislature has directed the Industrial Commission to hear and determine the plaintiff's claim. If the State had desired to exclude the right of subrogation, it would have written such exemption into the Act.

If the plaintiff had had no insurance upon his automobile, the Commission would have awarded him $121.55 for damages to his automobile. Because the plaintiff had collision insurance with a $50.00 deductible provision, and was paid $71.55 by the insurance company, the defendants contend that their liability is limited to $50.00, and that the Tort Claims Act should not be construed to permit an award of $121.55 to the plaintiff, $71.55 of which would be for the benefit of the insurance company by way of subrogation.

If the defendants were private persons, can it be doubted that the right of subrogation would exist? The State has waived its immunity as to plaintiff's claim, and in doing so occupies the same position as any other litigant, and is entitled to no special privileges.

It is not apparent why the prudent foresight of the plaintiff in protecting its property by insurance should result in a benefit to the State, or a detriment to the insurance carrier. In this respect the carriage of insurance would seem to be, so far as the State is concerned, merely a transaction between the plaintiff and the insurance company, in which the State was no wise interested. It was, therefore, *res inter alios acta.*

We cannot accept the narrow interpretation of our Tort Claims Act as contended for by the defendants. That interpretation would lead, to paraphrase the words of *Cothran, J.,* in *U. S. Cas. Co. v. State Highway Dept., supra,* to the illogical result that the defendants admittedly liable for the entire damage to plaintiff's automobile, if he had had no insurance, are relieved of partial liability by reason of the collection of insurance by the plaintiff for part of the loss; in other words, the defendants would receive the benefit of the insurance without having to pay a cent for it.

The plaintiff can maintain this proceeding in its own name for the benefit of itself and the insurance company, though the insurance company is a proper party, and can be made a party by the Industrial Commission or the Court in its discretion. *Jackson v. Baggett,* 237 N.C. 554, 75 S.E. 2d 532; *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231.

When we consider that the principle of subrogation, a creature of equity, universally recognized and highly favored by the courts, is broad

enough to include every instance in which one person not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter, we decide in this case that the insurance company, which by virtue of its contract of insurance has paid the plaintiff part of its damage to its automobile caused by the actionable negligence of the defendants without any contributory negligence on plaintiff's part, is subrogated to the rights of the plaintiff against the defendants, in the amount it has paid.

The plaintiff's assignment of error to the judgment is sustained. It is ordered that this proceeding be remanded to the Superior Court that judgment may be entered awarding the plaintiff $121.55 as damages, $71.55 of which award shall be held by the plaintiff for the benefit and use of the Southern Fire Ins. Co. of Durham.

Error and remanded.

STATE v. WESLEY STROUPE, L. C. CHANDLER, RAY EDWARD McMAHAN AND JAMES V. (PETE) WALKER.

(Filed 12 June, 1953.)

1. **Gambling § 1—**

Whether a game is a game of chance within the purview of G.S. 14-292, or a game of skill, depends upon whether the element of chance or the element of skill predominates in determining the results of the game.

2. **Gambling § 9—**

The evidence as to the rules and method of playing "Negro Pool" *is held* sufficient to be submitted to the jury on the question of whether the game is a game of chance within the purview of G.S. 14-292.

3. **Same—**

Evidence that all defendants wagered money on the results of a game of chance played by some of them *is held* sufficient to overrule their motions to nonsuit in a prosecution under G.S. 14-292.

4. **Criminal Law § 53d—**

The trial judge must charge the jury on every substantial and essential feature of the case embraced within the issues and arising on the evidence, and this without any prayer for special instructions. G.S. 1-180.

5. **Gambling § 10—**

An instruction that "the object of the gambling statute (G.S. 14-292) is to prevent people from getting something for nothing" without defining the term "game of chance" constituting an essential element of the offense charged, *is held* reversible error.

6. Criminal Law § 81c (2)—

Where the trial court gives a correct instruction on a material feature of the case in one part of the charge and an incorrect instruction on the same point in another part of the charge, a new trial must be awarded, since the jury may have acted upon the incorrect instruction.

DEVIN, C. J., dissenting.

JOHNSON, J., concurs in dissent.

APPEAL by defendants from *Pless, J.*, and a jury, January Criminal Term, 1953. GASTON.

Criminal prosecution on an indictment charging Wesley Stroupe, L. C. Chandler, Ray Edward McMahan and James V. (Pete) Walker on 13 October, 1952, with unlawfully and willfully playing at a game of chance at which money and other things of value were bet, and further charging Wesley Stroupe, L. C. Chandler, Ray Edward McMahan and James V. (Pete) Walker did then and there bet on said game of chance.

The State had one witness, Ralph Warren, whose testimony is summarized as follows: About 2:00 p.m. on 13 October, 1952, he was sworn in as a police officer of the Town of Lowell, North Carolina, but there had been no announcement of his appointment, and he was not in uniform. About 6:50 p.m. of that day he went to "the combination grocery-gas station-poolroom" operated by Wesley Stroupe in Lowell. When he arrived, James V. (Pete) Walker and Ray Edward McMahan were playing "Negro Pool" and betting $5 and $8 a game.

"Negro Pool" is a game played on a pool table. At one end of the table is a flat board with holes in it. A picture of two Negroes is at one hole, and a picture of one Negro is at another hole. The other holes are numbered, each hole bearing a different number. Each player draws a pill bearing a number from a leather bottle. To win, the player must select a ball from the table bearing a number, and shoot that ball into a hole bearing a number, the total of which numbers must equal the number on the pill drawn from the bottle. Also a player wins if he shoots his ball into the hole with the picture of one Negro: he wins double if he shoots his ball into the hole with the picture of two Negroes. The players take turns, and the game continues until one wins.

Walker and McMahan played until about 7:40 p.m. Then Jim Chandler and Wesley Stroupe played about five games betting $5 and $8 a game. Then Pete Walker and one Ramsey played, and Stroupe and Chandler bet on the games played by Walker and Ramsey. Warren saw money change hands, but he didn't know who won.

Sometimes a game would continue 5 or 10 minutes; sometimes it would take each man 5 shots before one won; sometimes one would win on the first shot. Warren saw there Levan Beard, Eldon Roberts and Horace Bradford, witnesses for the defendants.

The defendants did not testify for themselves, but offered 5 witnesses. Levan Beard testified for them in substance. He was in this poolroom from about 5:00 p.m. to 8:30 p.m. on the day charged in the indictment, and saw all the defendants playing "Negro Pool," but did not see any bets or any money change hands. "You shoot a numbered ball up on the board containing numbers, and if you make your pill, you have won the game." The numbers on the pills and balls are from 1 to 16. The winner displays his numbered pill to support his claim of victory. Eldon Roberts and Horace Bradford testified that they were in the poolroom from about 6:00 p.m. until about 9:00 p.m., when Stroupe closed up on the day in question, and saw the defendants, or some of them, playing "Negro Pool," but saw no betting or gambling or money changing hands. The other two witnesses testified Stroupe's reputation for character was good, and one character witness said he went to Stroupe's place nearly every day, but never saw any gambling there.

The jury found each defendant guilty, and the trial judge passed sentences against all of them. All the defendants excepted and appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and Robert L. Emanuel, Member of Staff, for the State.

Thomas J. Wilson for defendants, appellants.

PARKER, J. The defendants assign as Error No. One the refusal of the trial court to grant their motion for judgment of nonsuit made at the close of the State's evidence, and assign as Error No. Two the refusal of the trial court to grant their motion for judgment of nonsuit renewed at the close of all the evidence.

The defendants contend that they were playing "Negro Pool"; that "Negro Pool" is a game of skill and not of chance, and that G.S. 14-292 has no application to games of skill. In their brief they state the question involved as to whether their motion for nonsuit should have been allowed "hinges on whether the game as played by the defendants was one of chance or one of skill."

G.S. 14-292. "Gambling.—If any person play at any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor."

In *S. v. Gupton*, 30 N.C. 271, this Court said: "The universal acceptation of 'a game of chance' is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." This was one of the first cases to discuss in detail the meaning of the phrase "game

of chance." 135 A.L.R. Anno. 109. This definition of the illustrious *Chief Justice Ruffin* has become classic for almost its exact words have been used to define "game of chance" in 24 Am. Jur., Gaming and Prize Contests, Sec. 18; in 38 C.J.S., Gaming, p. 35, and 60 A.L.R. Anno. 343. In the *Gupton case* the Court gives as illustrations of games of chance, the game of dice in which the throw of the dice regulates the play or the hand at cards depending upon a dealing with the face down; and as illustrations of games of skill, chess, draughts or chequers, billiards, bowls and quoits. The Court in this case held that the game of tenpins is not a game of chance.

In *S. v. Bishop,* 30 N.C. 266, the jury found "shuffleboard" was not a game of chance. In *S. v. King,* 113 N.C. 631, 18 S.E. 169, tenpins again was held not a game of chance. In *S. v. DeBoy,* 117 N.C. 702, 23 S.E. 167, the Court said this decision has "no application to the long prevailing custom of 'shooting for beef,' shooting at turkeys and other similar trials of skill." These decisions rest upon the rationale that superior knowledge and attention, or superior strength, agility and practice gain the victory, and little or nothing is left to chance. It is true an unseen gravel in the way may deflect a ball in tenpins or bowls or a sudden gust of wind a bullet, but if these incidents are sufficient to make tenpins and bowls or shooting at beef a game of chance, there would be no other games but those of chance. *S. v. Gupton, supra.* See also *S. v. Abbott,* 218 N.C. 470, at pp. 479-480, 11 S.E. 2d 539.

In *S. v. Taylor,* 111 N.C. 680, 16 S.E. 168, it was held that a game of cards was a game of chance. In *S. v. DeBoy, supra,* the Court said "if several parties each put up a piece of money and then decide by throwing dice who shall have the aggregate sum, or 'pool,' this is unquestionably a game of chance." Cases like these rest upon the basis that these games are decided not by judgment, practice, skill or adroitness, but by a turn of a card or the cast of the dice.

In many courts questions have arisen as to the amount of chance that must be involved in the result of a game before it becomes one of chance, or the amount of skill before the game becomes one of skill, or the ratio between chance and skill in a mixed game of chance and skill. "In the absence of statutes and other *indicia* to the contrary, most courts have reasoned that there are few games, if any, which consist purely of chance or skill, and that therefore a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance." 135 A.L.R. Anno. 113. In this annotation many definitions of "games of chance" by many courts are given.

In 135 A.L.R. Anno. 121 it is said: "There is considerable authority that the game of billiards is a game of skill and not a game of chance as

the latter term is used in the popular sense to mean a game in which the result depends upon chance as distinguished from skill or certainty." Cases from various states are cited, and among them is the *obiter dictum* in *S. v. Gupton, supra.* In the same Anno., p. 123, it is said: "The game of pool, of which there are various kinds, has been held to be a game of skill as distinguished from a game of chance, as those terms are used in the popular sense of referring to the elements of skill and chance in the game"; and several cases are cited to support the statement. In *Scott v. Jackson* (1911), 30 N.Z.L.R. 1025, p. 1043, *Williams, J.,* said, as quoted in 135 A.L.R. Anno. 123: "In ordinary language billiards and pool are not games of chance. If any one thinks they are, let him go and play them for a stake, and he will promptly discover his error."

"In *U. S. v. Concepcion* (1917), 37 Philippine 48 (quoted in 135 A.L.R. Anno., p. 124), the game of *'nones y pares,'* played on a billiard table, at which money was bet, was held to be a game of chance . . . The game was described by one witness as follows: The player places himself on the left-hand side of the head of the billiard table. Two balls are placed at a certain distance from the cushion of the left side. The player impels one of these balls against the other and the latter is driven against the upper opposite cushion and, on returning toward the center of the table, touches little pegs. If an even number of these fall down the 'even' win; and if an odd number, the 'odds' win. The player always bets on the 'even,' and others bet on the 'odds.'"

There are many kinds of pool, 135 A.L.R. Anno. 123. It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment. *S. v. Gupton, supra,* and 24 Am. Jur., Gaming and Prize Contests, Sec. 18. "It is the character of the game, and not the skill or want of skill of the player, which determines whether the game is one of chance or skill. A game of chance does not cease to be such because it calls for the exercise of skill, nor does a game of skill cease to be such because at times its result is determined by some unforeseen accident." 38 C.J.S., Gaming, p. 37.

This case is the kind of pool designated as "Negro Pool." A flat board with holes in it is placed at one end of the table. A picture of two Negroes is at one hole; a picture of one Negro at another hole. The holes are numbered. Each player draws a pill bearing a number from a bottle—that is mere chance. To win, the player must select a numbered ball on the table, and shoot that ball into a hole bearing a number, the

total of which numbers must equal the number on the pill; or the player may win, if he shoots his ball into the hole of one Negro, and may win double if he shoots his ball into the hole of the two Negroes. The number of the pill drawn by chance from the bottle determines the number of combinations the player can make to win, and it would seem, for example, that No. 16 would make available more combinations than No. 3. The cue ball strikes his numbered ball, and shoots it *up on the board* containing the numbers. It is a fact of common and general knowledge that a skilled and experienced player of billiards or pool by striking his cue ball on the top or bottom, or by putting "English" on it, can make the cue ball follow the struck ball, stop when it strikes it, or move back in reverse after striking it, so as to make his next shot easier—that manipulation of the cue ball is what in large measure makes straight billiards and straight pool games of skill. It is well known that billiard and pool tables are flat, and any unevenness on the surface of the table will deflect the course of the cue ball or shot ball. It would seem that when in "Negro Pool" the cue ball shoots the numbered ball *up on the board* with numbers and pictures on it that the hole the ball goes into *up on the board*—whether the hole with the picture of one Negro, or the hole with the picture of two Negroes so as to win double, or the hole with a number—is determined by mere luck or chance or fortuitous accident, and is not dependent on the skill, experience or judgment of the player.

The evidence for the State discloses that Walker and McMahan were playing "Negro Pool" and betting $5 and $8 a game; that beginning about 7:40 p.m. Chandler and Stroupe played about five games of "Negro Pool" betting the same amount on each game, and that Stroupe and Chandler bet on the games played by Walker and Ramsey. Chandler was indicted as L. C. Chandler. The evidence refers to him as Jim. No point has been made that Jim Chandler is not L. C. Chandler, and manifestly, there is no uncertainty that Jim Chandler is L. C. Chandler.

Considering the evidence in the light most favorable to the State, and giving to it the benefit of every reasonable inference to be drawn therefrom, there was sufficient evidence to carry the case to the jury that "Negro Pool" is a game of chance. *S. v. Smith,* 237 N.C. 1, 73 S.E. 2d 901; *S. v. Shipman,* 202 N.C. 518, 163 S.E. 657. The lower court was correct in denying the defendants' motions for nonsuit made at the close of the State's evidence, and in denying the renewal of their motions for judgment of nonsuit made at the close of all the evidence.

The defendants assign as Error No. 3 the court's charge: "Our Supreme Court of North Carolina has never definitely said whether a game of pool or billiards was a game of chance or not. In its final analysis, however, the object of the gambling statute is to prevent people from getting something for nothing; that is, Gentlemen of the Jury, it is in-

tended by our law that people shall not take the property of another person without rendering some service to the other person." That is their sole assignment of error to the charge.

The essential elements for the State to prove in this case were that the defendants, or some of them, played at a game of chance at which money was bet, and that the defendants, or some of them, bet thereon, for both those who played and those who bet thereon, if any did, are guilty. G.S. 14-292.

"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." *S. v. Merrick,* 171 N.C. 788, at p. 795, 88 S.E. 501. See also *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53; *S. v. Brady,* 236 N.C. 295, 72 S.E. 2d 675. To so charge is not only a requirement incident to the great office a trial judge holds to see justice impartially administered, but it is mandatory in our courts by statute law. G.S. 1-180.

Nowhere in the charge did the lower court define for the jury "a game of chance," which was an essential element for the State to prove in this case. Instead of doing so, the trial court attempted to charge the essential elements of G.S. 14-292 by giving what it conceived to be the object of this statute. This part of the charge would lead the jury to believe that the essential element of the offense charged in the indictment was to prevent people from getting something for nothing, rather than whether the game played was "a game of chance" or "a game of skill," and whether or not money or other thing of value was bet thereon. This is prejudicial error for it is an erroneous definition of the essential elements of the offense charged, and would divert the jury into a different field of inquiry.

Perhaps, as contended by the State, if the court had omitted to define "gambling," and omitted the words he used in his charge "and received no benefit or service therefrom" and "having rendered no service or furnished nothing to the person who gave him the money," the charge might not contain prejudicial error under authority of *S. v. Morgan,* 133 N.C. 743, 45 S.E. 1033; and *S. v. Webster,* 218 N.C. 692, 12 S.E. 2d 272.

However that may be, the court undertook to charge the essential elements of the offense contained in the bill of indictment, and the court charged incorrectly. When a judge undertakes to define the law he must state it correctly, and if he does not, it is prejudicial error sufficient to warrant a new trial. *S. v. Wolf,* 122 N.C. 1079, 29 S.E. 841; *Jarrett v. Trunk Co.,* 144 N.C. 299, 56 S.E. 937; *Roberson v. Stokes,* 181 N.C. 59, 106 S.E. 151; *Jones v. Bland,* 182 N.C. 70, 108 S.E. 344.

Whatever the court said later in this case did not cure this error. This Court has uniformly held that where the court charges correctly in one

part of the charge, and incorrectly in another part, it will cause a new trial, since the jury may have acted upon the incorrect part of the charge. *S. v. Morgan,* 136 N.C. 628, 48 S.E. 670; *S. v. Isley,* 221 N.C. 213, 19 S.E. 2d 875; *S. v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685; *S. v. McDay,* 232 N.C. 388, 61 S.E. 2d 86.

We might say in passing that the word "bet" is so universally understood and used that for a court to attempt to define it would be:

"To gild refined gold, to paint the lily,
To throw a perfume on the violet."

Shakespeare, King John, Act IV, Sc. II, Lines 11 and 12.

Not infrequently in attempting to define a simple word that has become current coin of expression a thing in itself very plain is obscured. A classic illustration is Dr. Samuel Johnson's oft quoted definition in his Dictionary of "Network" as "Anything reticulated or decussated, at equal distances, with interstices between the intersections."

The exception to the charge is well taken, and a new trial is ordered.

New trial.

DEVIN, C. J., dissenting: In the trial just two questions were presented for determination: (1) Was the game of pool described in the majority opinion a game of chance? (2) If so, did the defendants wager money on the result of this game of chance?

The State's evidence on both points was unequivocal. It was sufficient to make out a case of gambling under the statute. The jury so found.

The only exception was that the able judge who tried this case in the course of his charge to the jury referred to the object of the statute against gambling as being one to prevent people from getting something for nothing. It is thought by the majority that this was too broad an expression, and that it was prejudicial to these particular defendants, necessitating a new trial. There is some justification for saying that one of the basic impulses that induces adventurers to wager on a game of chance is the hope of gain, of obtaining something of value without the expenditure of services or property. However, if the language objected to be regarded as inappropriate, it will be noted it was used in a preliminary general observation, and the jury was presently instructed pointedly on the evidence in this particular case as to the elements of the offense charged against these defendants.

After stating the evidence and the contentions of the State and the defendants, the court charged the jury as follows:

"The court instructs you if you find, and find beyond a reasonable doubt, that the defendants engaged in a game of chance betting upon the outcome, money passing upon the result, in which some persons lost

money and received no benefit or service therefrom, and that others gained money having rendered no service or furnished nothing to the person who gave him the money, I say if you find, and find beyond a reasonable doubt that the defendants did that, it would be your duty to render a verdict of guilty."

In this instruction Judge Pless put the matter clearly and correctly to the jury on the determinative questions at issue. There could be no misunderstanding as to what was necessary to constitute gambling under the statute as applied to these defendants under the evidence in this case. The evidence that the defendants had bet money on a game of chance was positive and credible. It would hardly seem probable that an intelligent jury would have been influenced by a general observation, such as that here complained of, rather than by the direct and positive instruction of the Judge on the evidence in this case as to what was necessary to be found before the defendants could be convicted.

Verdicts and judgments are not to be lightly set aside. The rule is that it must be made to appear not only that the matter complained of was erroneous but also that it was material and prejudicial, amounting to a denial of some substantial right. *Wilson v. Lumber Co.*, 186 N.C. 56; *Rogers v. Freeman*, 211 N.C. 468; *Collins v. Lamb*, 215 N.C. 719; *S. v. Bovender*, 233 N.C. 683 (690). An error cannot be regarded as prejudicial unless there is a reasonable probability that the result would have been different. *Call v. Stroud*, 232 N.C. 478.

In my opinion the verdict and judgment should have been upheld.

I am authorized to say that JUSTICE JOHNSON joins in this opinion.

DOROTHY HUNT, BY HER NEXT FRIEND, MRS. AUGUSTA H. HUNT, v. JOHN F. WOOTEN, JR., JOHN F. WOOTEN, SR., AND E. W. PRICE, GUARDIAN AD LITEM OF JOHN F. WOOTEN, JR.

(Filed 12 June, 1953.)

1. **Appeal and Error § 39e—**

In order to be entitled to a new trial for the admission of evidence, appellant must show, ordinarily, that he objected to its admission, that the evidence was inadmissible because incompetent or irrelevant, and that the evidence was prejudicial to his cause of action or defense.

2. **Evidence § 51—**

The finding of the trial judge that a witness is an expert is conclusive on appeal when sustained by the evidence.

3. Evidence § 47f—

A medical expert may testify from his examination of plaintiff as to the character, extent and probable effect of plaintiff's disfigurement.

4. Evidence § 47e—

It is competent for a nonexpert to point out to the jury the places where implanted skin had been grafted upon plaintiff's face to minimize the disfigurement resulting from plaintiff's injuries, since such testimony is merely describing the physical appearance of the plaintiff as observed by a nonexpert.

5. Damages § 11—

Where there is evidence that the injuries suffered by plaintiff are permanent in character, the mortuary tables are competent as evidence on the question of plaintiff's life expectancy. G.S. 8-46.

6. Evidence § 30d—

A fire hydrant struck by defendant's car may be introduced in evidence when there is testimony that it had not been altered in any way since the accident.

7. Evidence § 30a—

Where there is testimony that photographs taken of plaintiff before and after the injury were accurate likenesses at the times they were taken, the photographs are competent for the purpose of explaining the testimony of the witnesses.

8. Same—

Even though the hydrant struck by defendant's car was removed subsequent to the accident, a photograph of the scene is competent when the witness testifies that at the time the picture was taken the hydrant had been replaced in the identical position it had occupied immediately after the accident.

9. Damages § 11—

The annuity tables are incompetent in evidence in an action to recover for permanent injury negligently inflicted. G.S. 8-47.

10. Appeal and Error § 39e—

In an action to recover for permanent injuries, the admission in evidence of the annuity tables will not be held prejudicial when it is apparent from the record that plaintiff intended to offer in evidence only the mortuary tables and that the reference to G.S. 8-47 was a mere inadvertence, and that the jury was not advised at any time as to the contents of the annuity tables and did not consider them in any way in reaching their verdict.

11. Same—

The admission of testimony over objection cannot be held prejudicial when the record discloses that testimony of the same import was admitted during the trial without objection.

12. Negligence § 16—

Where defendant relies upon contributory negligence, he is required specifically to plead in his answer the acts or omissions of plaintiff relied

upon as constituting contributory negligence, and prove them at the trial. G.S. 1-139.

13. Pleadings § 24—

Allegation without proof and proof without allegation are equally unavailing.

14. Automobiles §§ 18a, 20a—

Defendant driver, sued by a guest in his car for negligent injury sustained by her when the car hit a fire hydrant, is not entitled to have the issue of contributory negligence submitted to the jury upon the theory that he hit the hydrant because plaintiff was voluntarily kissing him at the time, in the absence of allegation in the answer setting forth this circumstance.

15. Damages § 13a—

Where there is evidence that plaintiff suffered a permanent facial disfigurement impairing her earning capacity after majority, the court is warranted in instructing the jury that it should consider whether such impairment existed in passing upon the question of damages, limiting any award to the present net worth of any impairment of earning capacity after plaintiff's majority.

WINBORNE, J., concurring in part and dissenting in part.

APPEAL by defendants from *Burney, J.*, and a jury, at November Term, 1952, of LENOIR.

Civil action by guest to recover damages from automobile operator and automobile owner for personal injuries suffered by guest when automobile left roadway and struck nearby hydrant.

John F. Wooten, Sr., a resident of Kinston, maintained an Oldsmobile car for the general convenience, pleasure, and use of members of his family, including his son, John F. Wooten, Jr., a 17-year-old schoolboy. About one o'clock on the morning of 6 June, 1951, John F. Wooten, Jr., was driving the Oldsmobile by permission of his father for his own individual pleasure along a public road in the vicinity of the Kinston Airport. He was accompanied by a guest, Dorothy Hunt, an 18-year-old schoolgirl, who rode beside him on the front seat. The Oldsmobile car suddenly left the roadway and struck a nearby hydrant, casting Dorothy Hunt headlong against the windshield. The impact inflicted upon her somewhat disfiguring injuries.

Dorothy Hunt brought this action against her host, John F. Wooten, Jr., and his father, John F. Wooten, Sr., for the recovery of damages allegedly resulting from her personal injuries. The complaint charged that the injuries were caused by the actionable negligence of John F. Wooten, Jr., in the operation of a family purpose automobile furnished by John F. Wooten, Sr. The answer admitted the applicability of the

family purpose doctrine to the case. Dorothy Hunt sued by her next friend, and John F. Wooten, Jr., defended by his guardian *ad litem*.

Both sides offered testimony at the trial. Issues were submitted to and answered by the jury as follows:

1. Was the plaintiff Dorothy Hunt injured by the negligence of the defendants as alleged?

Answer: Yes.

2. What amount in damages, if any, is the plaintiff entitled to recover?

Answer: $30,000.00.

The court entered judgment on the verdict, and the defendants appealed, assigning errors.

Thos. J. White for plaintiff, appellee.
Sutton & Greene for defendants, appellants.

ERVIN, J. The defendants concede with commendable candor the sufficiency of the plaintiff's evidence to make out a case of actionable negligence on their part. They lay claim to a new trial, however, on the ground that the presiding judge committed reversible error in admitting testimony, in failing to submit an issue of contributory negligence, and in charging the jury.

As a general rule, an appellant must establish these three propositions by the case on appeal to obtain a new trial for error of the trial judge in admitting evidence:

1. That he objected to the admission of the evidence in the trial court. *Carpenter, Solicitor, v. Boyles,* 213 N.C. 432, 196 S.E. 850; *Ferebee v. Berry,* 168 N.C. 281, 84 S.E. 262; *Sykes v. Everett,* 167 N.C. 600, 83 S.E. 585; *Peyton v. Shoe Co.,* 167 N.C. 280, 83 S.E. 487; *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933.

2. That the evidence was inadmissible in law because it was incompetent (*Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316; *Robbins v. Alexander,* 219 N.C. 475, 14 S.E. 2d 425), or immaterial (*Sprout v. Ward,* 181 N.C. 372, 107 S.E. 214; *Heileg v. Dumas,* 69 N.C. 206; *Devries v. Phillips,* 63 N.C. 207; *Madden v. Porterfield,* 53 N.C. 166; *Adams v. Clark,* 53 N.C. 56), or irrelevant, *Freeman v. Ponder,* 234 N.C. 294, 67 S.E. 2d 292.

3. That the evidence was prejudicial to his cause of action or defense. *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863; *Williams v. Stores Co., Inc.,* 209 N.C. 591, 184 S.E. 496; *Rierson v. Iron Co.,* 184 N.C. 363, 114 S.E. 467; *Jenkins v. Long,* 170 N.C. 269, 87 S.E. 47; *Morgan v. Fraternal Association,* 170 N.C. 75, 86 S.E. 975; *In re Rawlings' Will,* 170 N.C. 58, 86 S.E. 794; *Lupton v. Express Co.,* 169 N.C. 671, 86 S.E. 614; *Fruit Distributors v. Foster,* 169 N.C. 39, 85 S.E. 130; *Hodges v.*

Wilson, 165 N.C. 323, 81 S.E. 340; *In re Will of Parker,* 165 N.C. 130, 80 S.E. 1057.

This general rule is subject to an exception not germane to the instant case. *Presnell v. Garrison,* 122 N.C. 595, 29 S.E. 839; *Hooper v. Hooper, supra.*

The defendants have no legal ground for their present complaint that the presiding judge erred in admitting the opinion evidence of the plaintiff's witness J. C. Grady in relation to the effect of the depletion of the battery upon the headlights of an Oldsmobile car similar to the one involved in the accident. This is true because they did not object at the trial to the admission of this evidence. When the case on appeal is read aright, it appears that the defendants took only two objections during the examination of Grady. One of them was addressed to the preliminary finding of fact of the presiding judge that Grady was competent to testify as an expert in respect to automobile batteries. The other was directed to an unanswered question put to Grady by counsel for plaintiff. The finding of the presiding judge as to the competency of Grady to testify as an expert was sustained by evidence at the trial, and in consequence is not subject to attack on this appeal. *S. v. Cofer,* 205 N.C. 653, 172 S.E. 176; *Nance v. Fertilizer Co.,* 200 N.C. 702, 158 S.E. 486; *Rangely v. Harris,* 165 N.C. 358, 81 S.E. 346; *Horne v. Power Co.,* 144 N.C. 375, 57 S.E. 19; *Allen v. Traction Co.,* 144 N.C. 288, 56 S.E. 942; *Geer v. Water Co.,* 127 N.C. 349, 37 S.E. 474.

The defendants also assign as error rulings of the presiding judge allowing one of the plaintiff's attending physicians, Dr. Oscar W. Crantz, to express his opinion as to what percentage of the plaintiff's face was disfigured by her injuries; letting the plaintiff's aunt, Mrs. M. H. Clayton, point out to the jury places where implanted skin had been grafted upon the plaintiff's face to minimize the disfigurement resulting from her injuries; permitting the plaintiff to exhibit in court as demonstrative or real evidence the hydrant struck by the Oldsmobile; and receiving in evidence the mortuary tables embodied in G.S. 8-46, the annuity tables incorporated in G.S. 8-47, photographs of the plaintiff taken before and after the injury, and a photograph of the hydrant.

The testimony of Dr. Crantz and Mrs. Clayton was rightly received under the rule that in an action to recover damages for a personal injury tortiously inflicted, evidence as to the physical condition of the injured plaintiff both before and after the injury is admissible to show the character, extent, and probable effect of the injury. *Solomon v. Koontz,* 189 N.C. 837, 127 S.E. 516; *Jordan v. Motor Lines,* 182 N.C. 559, 109 S.E. 566; *Brown v. Railroad,* 147 N.C. 136, 60 S.E. 898; 25 C.J.S., Damages, section 147. Dr. Crantz was a medical expert testifying to matters within his personal knowledge. *Spivey v. Newman,* 232 N.C. 281, 59 S.E. 2d

844; *Williams v. Stores Co., Inc., supra.* Mrs. Clayton was merely describing the physical appearance of the injured plaintiff as observed by a nonexpert or lay witness. *Brown v. Railroad, supra;* 32 C.J.S., Evidence, sections 467, 513.

The testimony tended to show that the plaintiff's injuries are permanent in character. This being true, it was proper for the presiding judge to permit the plaintiff to introduce and the jury to consider the mortuary tables embodied in G.S. 8-46. *Bullock v. Williams,* 212 N.C. 113, 193 S.E. 170; *Hubbard v. R. R.,* 203 N.C. 675, 166 S.E. 802; *Odom v. Lumber Co.,* 173 N.C. 134, 91 S.E. 716; *Sledge v. Lumber Co.,* 140 N.C. 459, 53 S.E. 295; *Georgia Automatic Gas Co. v. Fowler,* 77 Ga. App. 675, 49 S.E. 2d 550; *Advance v. Thompson,* 387 Ill. 77, 55 N.E. 2d 57; *Louisville, N. A. & C. R. Co. v. Miller,* 141 Ind. 533, 37 N.E. 343; *Fournier v. Zinn,* 257 Mass. 575, 154 N.E. 268; *Banks v. Braman,* 195 Mass. 97, 80 N.E. 799; *Daniels v. Boston & M. R. Co.,* 184 Mass. 337, 68 N.E. 337. The presiding judge instructed the jury in conformity with approved precedents that the mortuary tables are merely evidentiary on the question of expectancy. *Bullock v. Williams, supra; Odom v. Lumber Co., supra.*

The plaintiff's witness Frank Crary identified the hydrant offered in evidence as the hydrant struck by the Oldsmobile, and testified with positiveness that the hydrant had not been altered in any way since the accident. This being so, the presiding judge did not err in permitting the jury to inspect the hydrant. The inspection of this object was calculated to enable the jury to understand the evidence, and to realize more completely its cogency and force. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *S. v. Speller,* 230 N.C. 345, 53 S.E. 2d 294.

The photographs of the plaintiff antedating and following the injury were rightly received in evidence under the rule that whenever it is relevant to describe a person, photographs of such person are admissible for the purpose of explaining the evidence of the witnesses relating to his appearance and aiding the jury in understanding such evidence. *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Davis v. Railroad,* 136 N.C. 115, 48 S.E. 591. The photographers and other witnesses testified that the photographs were accurate likenesses of the plaintiff at the times they were taken. *White v. Hines,* 182 N.C. 275, 109 S.E. 31; *Bane v. R. R.,* 171 N.C. 328, 88 S.E. 477. The presiding judge gave the jury the customary instruction that the photographs were not admitted as original or substantive evidence, but were received solely for the purpose of enabling the witnesses to explain, and the jury to understand, the testimony. *S. v. Rogers, supra; Coach Co. v. Motor Lines,* 229 N.C. 650, 50 S.E. 2d 909; *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; *Pearson v. Luther,* 212 N.C. 412, 193 S.E. 739; *Kelly v. Granite Co.,* 200 N.C. 326, 156 S.E. 517; *Honeycutt v. Brick Co.,* 196 N.C. 556, 146 S.E. 227; *Elliott v.*

Power Co., 190 N.C. 62, 128 S.E. 730; *S. v. Jones*, 175 N.C. 709, 95 S.E. 576; *Hoyle v. Hickory*, 167 N.C. 619, 83 S.E. 738; *Pickett v. R. R.*, 153 N.C. 148, 69 S.E. 8.

The photograph of the hydrant was taken at the scene of the accident six months after that event occurred. The evidence disclosed that the plaintiff's witness Frank Crary removed the hydrant shortly after the accident and replaced it just before it was photographed. Notwithstanding this evidence, the trial judge did not err in admitting the photograph of the hydrant, which was verified by its maker, for the limited purpose sanctioned by the decisions cited above. This is true because Crary testified that when he replaced the hydrant, it was in the identical position occupied by it immediately after the accident. Posed photographs of the reconstructed scene of an accident are admissible where such photographs are properly identified by a witness as being accurate representations of the conditions at the scene as he saw them at the time in issue. *Jewel Tea Co. v. McCrary*, 197 Ark. 294, 122 S.E. 2d 534; *Reed v. Davidson Drug Co.*, 97 Colo. 462, 50 P. 2d 532; *State v. Ebelsheiser*, 242 Iowa 49, 43 N.W. 2d 706, 19 A.L.R. 2d 865; *Lewis v. Chicago Great Western R. Co.*, 155 Minn. 381, 193 N.W. 695; *Favre v. Louisville & N. R. Co.*, 180 Miss. 843, 178 So. 327; *Fulton v. Chouteau County Farmers' Co.*, 98 Mont. 48, 37 P. 2d 1025; *Bailey v. Greeley General Warehouse Co.* (Ohio App.), 83 N.E. 2d 244; *Dofner v. Branard* (Tex. Civ. App.), 236 S.W. 2d 544; *Thayer v. Glynn*, 93 Vt. 257, 106 A. 834; *Farmer v. School Dist. No. 214, King County*, 171 Wash. 278, 17 P. 2d 899, 115 A.L.R. 1171.

This brings us to the assignment of error based on the admission in evidence of the annuity tables incorporated in G.S. 8-47. These tables have no place in an action to recover damages for personal injuries tortiously inflicted for the very simple reason that the action does not involve the establishment of the present worth of an annuity to any person. *Brown v. Lipe*, 210 N.C. 199, 185 S.E. 681; *Poe v. Railroad*, 141 N.C. 525, 54 S.E. 406. The only mention of the annuity tables in the entire case on appeal is that appearing by implication only in this rather ambiguous recitation: "The plaintiff offered in evidence the mortuary or life tables, G.S. 8-46 and *8-47*." It is obvious that counsel for the plaintiff merely intended to offer in evidence the mortuary tables embodied in G.S. 8-46, and that his reference to G.S. 8-47 was a mere inadvertence. It is likewise obvious that the presiding judge understood that counsel for the plaintiff was merely offering in evidence the mortuary tables embodied in G.S. 8-47. He made no mention of the annuity tables in his charge to the jury. When it is read aright in its entirety, the case on appeal compels the conclusion that the jurors were not advised at any time as to the contents of the annuity tables, and that they did not consider the annuity tables in any way in reaching their verdict. This being so, the defend-

ants have failed to establish by the case on appeal that the offering and receiving of the annuity tables was prejudicial to their defense. *Freeman v. Ponder, supra; Dellinger v. Building Co.,* 187 N.C. 845, 123 S.E. 78.

The defendants duly objected at the trial to the admission of the testimony of the plaintiff's mother, Mrs. Augusta H. Hunt, concerning her instructions to the plaintiff as to the time for returning home at night, and the testimony of the plaintiff's aunt, Mrs. M. H. Clayton, respecting the plaintiff's difficulties as a student during the scholastic year next succeeding the accident. They waived these objections, however, by allowing these witnesses to testify to virtually the same facts without objection in other portions of their examinations. The like observation applies to the objection to the admission of the testimony of the defendant John F. Wooten, Sr., which was drawn out by counsel for plaintiff on cross-examination, that he replaced the damaged Oldsmobile with a Cadillac. The defendants lost the benefit of this objection by permitting counsel for plaintiff to elicit the same evidence from John F. Wooten, Sr., a second time without objection. *Spivey v. Newman, supra; White v. Disher,* 232 N.C. 260, 59 S.E. 2d 798; *Landis v. Gittlin,* 229 N.C. 521, 50 S.E. 2d 298; *Lambert v. Caronna,* 206 N.C. 616, 175 S.E. 303; *Bateman v. Brooks,* 204 N.C. 176, 167 S.E. 627; *Colvard v. Light Co.,* 204 N.C. 97, 167 S.E. 472; *Gray v. High Point,* 203 N.C. 756, 166 S.E. 911; *Bank v. Florida-Carolina Estates, Inc.,* 200 N.C. 480, 157 S.E. 424; *Thompson v. Buchanan,* 198 N.C. 278, 151 S.E. 861; *Tilghman v. Hancock,* 196 N.C. 780, 147 S.E. 300.

The defendants excepted to the refusal of the presiding judge to submit to the jury an issue of contributory negligence tendered by them.

The statute now codified as G.S. 1-139 specifies that "in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial." The defendant must meet the two requirements of this statute to obtain the benefit of the affirmative defense of contributory negligence. The first requirement is that the defendant must specially plead in his answer an act or omission of the plaintiff constituting contributory negligence in law; and the second requirement is that the defendant must prove on the trial the act or omission of the plaintiff so pleaded. Allegation without proof and proof without allegation are equally unavailing to the defendant. *Bruce v. O'Neal Flying Service,* 234 N.C. 79, 66 S.E. 2d 312; *Rollison v. Hicks,* 233 N.C. 99, 63 S.E. 2d 190; *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538; *Dalrymple v. Sinkoe,* 230 N.C. 453, 53 S.E. 2d 437; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Bevan v. Carter,* 210 N.C. 291, 186 S.E. 321; *Ramsey v. Furniture Co.,* 209 N.C. 165, 183 S.E. 536; *Farrell v. Thomas & Howard Co.,* 204 N.C. 631, 169 S.E. 224; *Murphy v. Power Co.,* 196

N.C. 484, 146 S.E. 204; *Moore v. Iron Works,* 183 N.C. 438, 111 S.E. 776; *Kearney v. R. R.,* 177 N.C. 251, 98 S.E. 710; *Fleming v. R. R.,* 160 N.C. 196, 76 S.E. 212; *Jeffress v. R. R.,* 158 N.C. 215, 73 S.E. 1013; *Wright v. R. R.,* 155 N.C. 325, 71 S.E. 306; *Watson v. Farmer,* 141 N.C. 452, 54 S.E. 419; *Smith v. Railroad,* 129 N.C. 374, 40 S.E. 86; *Cox v. Railroad,* 123 N.C. 604, 31 S.E. 848; *Hudson v. Railroad,* 104 N.C. 491, 10 S.E. 669; *Wallace v. Railroad,* 104 N.C. 442, 10 S.E. 552.

When the instant case is reviewed in the light of the statutory requirements, it is manifest that the presiding judge did not commit legal error in refusing to submit an issue of contributory negligence to the jury. The defendants alleged with particularity in their answer that the plaintiff was contributorily negligent in specified ways. There was, however, no evidence at the trial tending to sustain these allegations. The youthful defendant gave this testimony: "I ran off the road because she and I were kissing each other . . . That is the only reason that I was not looking where I was going." There was, however, no mention of this incident in the answer. In the absence of appropriate allegations on the subject, the presiding judge was neither required nor permitted to leave to the jury the question whether the plaintiff distracted the attention of her host from the operation of the automobile by sharing a kiss with him and thus proximately contributed to the accident and her resultant injuries.

It was intimated on the oral argument that the defendants did not specially plead the kissing episode as contributory negligence on the part of the plaintiff because the youthful defendant did not reveal the incident to their counsel until the trial of this action was under way. His reluctance to kiss and tell is understandable. But it does not nullify the positive legislative declaration that a defendant cannot rely on an act or omission of contributory negligence unless it is pleaded as well as proved. The transcript of the record does not show any invocation of the discretionary power of the presiding judge to permit an amendment.

The assignments of error based on exceptions to the charge are untenable. The evidence was sufficient to support a finding that the injured minor plaintiff suffered a permanent physical disability, impairing her earning capacity after majority, so as to warrant the instruction that the jury should consider whether such impairment existed in passing on the question of damages. *Cross v. Sharaffa,* 281 Mass. 329, 183 N.E. 838. The presiding judge made it plain to the jurors that they should limit any award of damages for any impairment of the plaintiff's earning power after reaching her majority to their present worth. *Shipp v. Stage Lines,* 192 N.C. 475, 135 S.E. 339.

The errors apparent on the present record are human errors. We are empowered by law to correct legal errors only. In consequence, the trial and judgment must be upheld.

No error.

WINBORNE, J., concurring in part and dissenting in part: In the refusal of the trial court to submit an issue as to alleged contributory negligence of plaintiff, there is, in my opinion, error, for which a new trial should be awarded.

I agree that the statute G.S. 1-139 provides that "in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial." I also agree that it is elementary in the law of pleading and practice that here must be both allegation and proof as the statute provides. And I agree, as stated in the majority opinion, that defendants have pleaded contributory negligence. But I do not agree that there was no evidence at the trial tending to sustain these allegations.

I hold that defendants have offered evidence of sufficient probative value to support the plea, and that the allegation is sufficient to embrace the kissing incident and to render evidence thereof pertinent on the issue of contributory negligence. It is provided by statute G.S. 1-135 that the answer of defendant must contain "a statement of any new matter constituting a defense . . . in ordinary and concise language, without repetition." And McIntosh in his North Carolina Practice and Procedure, p. 487, speaking of contributory negligence, says that defendant "must plead it specially, stating the circumstances which constitute the contributory negligence." In other words, it is the ultimate facts, and not evidentiary matters that have a place in the answer.

The averments on which defendants base their plea of contributory negligence are these: "6. That . . . as the automobile left the said gravel covered area and entered the said paved roadway, the plaintiff turned her body sidewise and to the left so that she was facing directly toward the said John F. Wooten, Jr., and so that her weight rested upon and along the front portion of the seat in which they were riding and engaged in animated conversation with said minor defendant in a manner which was calculated to divert and which did . . . divert his mind from the physical and mental processes of driving . . . and while the said defendant was so driving and the plaintiff was so sitting and directing her conversation to him, he suddenly discovered . . . a fire plug directly in his path and a few feet only away . . . and although the automobile was moving at a comparatively slow rate of speed . . . it was impossible to stop the said automobile before it struck the said fire plug . . ."

The ultimate fact averred is that plaintiff engaged minor defendant "in animated conversation . . . in a manner which was calculated to divert and which did . . . divert his mind from the physical and mental processes of driving . . ."

Now what is the evidence? Plaintiff testified: "I probably did state after this happened that I didn't think he (John, Jr.) was any more to

blame than I was. On this particular night, just before the collision took place, I was sitting facing him, and he and I were taking very much interest in each other." (R. p. 46.) Plaintiff also testified: "I was talking to him and sitting there facing him at the time of the wreck." (R. p. 48.) And again, plaintiff testified: "I was conversing with him." (R. p. 117.) Certainly these statements of plaintiff are some evidence that she and John, Jr., were in conversation.

Then was it an animated conversation? Defendant John, Jr., when upon the stand as a witness, testified: "Right after we got around this corner, she leaned over towards me and I leaned over slightly toward her, and we kissed. We were on the pavement at that time." (R. p. 145.)

Again, on cross-examination, defendant John, Jr., was asked: "Why do you say you ran off the road?" A. "Well, er, I was occupied in other ways at the time. I wouldn't say I was kissing Dot at the time; she was kissing me. No, I wouldn't want to say that either; by mutual agreement, you might say, and it just happened . . ." (R. p. 152.)

And on re-direct examination defendant John, Jr., concluded: "I thought I was headed straight down the road. And Miss Dorothy leaned over to me, and I leaned towards her, too, and we kissed together; each one kissed the other. And I looked back again and the hydrant was right in front of me; that is about it. I hollered out 'Look out,' and tried to apply my brakes but I didn't have time." (R. pp. 158-9.)

Surely this matter of kissing is evidence from which the jury could infer that it was a mutual affair and an incident to the conversation.

And clearly the evidence is sufficient to support a finding that the conversation was animated. Repeating, I say the kissing is evidence of the ultimate fact alleged, but is not the ultimate fact to be alleged. Hence, failure to allege it is not fatal to defendant's plea.

Moreover, in the course of his testimony, defendant John, Jr., testified: "Nothing was said in that answer about my kissing the girl or her kissing me. Nobody knew about it until yesterday. Nobody that I had told."

The factual background and setting of the occurrence here under consideration as shown by the evidence offered on trial sheds light on the situation. It is as follows:

Plaintiff was 18 years of age, and a senior in high school. Defendant, John, Jr., was 17 years of age and a junior in high school. He and she had been going together two or three months. But being a junior he could not take part in entertainments at commencement time unless invited by a senior. So plaintiff invited him to be her escort. And on the night of 5 June, 1951, he took her in his father's car to various places where entertainment was had. Then he heard that there was to be an open-air dance out at the airport. So he and she drove out there, but did not stop. They drove on further to a paved place behind or beside the

gym, or recreation building. No one else was there. And plaintiff testified: "John and I parked right there at the recreation building and sat there and talked to be quiet." But they did alight, and in the language of plaintiff: "We played the radio there and danced there. Nobody there but John and me. I was not in a hurry to get home. Not until 12:30 I wasn't." And defendant John, Jr., testified: "When I finally did start, I came out back of the gym and headed down the drive which runs beside the gym, towards the road on which I had the wreck . . ."

For reasons stated, I vote for a new trial.

STATE v. JOHN L. CRUSE.

(Filed 12 June, 1953.)

1. **Criminal Law § 87—**

The Post-Conviction Hearing Act provides a remedy by which a person convicted of crime may present for adjudication whether in the trial resulting in his conviction he was deprived of substantial constitutional rights which were not asserted during the trial because of factors beyond his control, but the Act is not a substitute for appeal, and a party is not entitled to assert as grounds for relief under the Act alleged errors in the admission or exclusion of evidence, rulings on motions, or other matters relating to procedure. G.S. 15-218.

2. **Criminal Law § 90—**

Upon petition under the Post-Conviction Hearing Act, the findings of fact of the trial court, when supported by competent evidence, are binding upon the Supreme Court upon review by *certiorari.*

3. **Criminal Law § 89—**

The failure to report the charge of the court cannot be made the basis for relief under the Post-Conviction Hearing Act, since in such instance the presumption is that the trial court charged the jury properly as to the law applicable to all phases of the evidence.

4. **Constitutional Law § 31b—**

In a prosecution for a felony less than capital, it is not incumbent upon the court to assign defendant counsel in the absence of a request unless there are exceptional circumstances which make it apparent that representation by counsel is necessary to insure defendant a fair trial. Constitution of N. C., Art. I, Sec. 11.

5. **Same: Criminal Law § 89—**

Where it appears that defendant was a man thirty-nine years old at the time of his trial for a felony less than capital, that he had completed six grades in school, and had had repeated experience as a defendant in criminal prosecutions, the trial court is not under duty to assign him counsel,

in the absence of a request by him, and the failure of the court to do so does not deprive him of due process of law, and is not ground for relief under the Post-Conviction Hearing Act as a deprivation of his constitutional rights.

PETITION by defendant Cruse for *certiorari* to review judgment of *Harris, J.*, January Term, 1953, of LENOIR. Affirmed.

The judgment complained of dismissed defendant's petition for new trial under the provisions of the North Carolina Post-Conviction Statute, Chapter 1083, Session Laws 1951, G.S. 15-217. We granted *certiorari*.

The petitioner John L. Cruse and another were indicted and convicted at March Term, 1952, of the Superior Court of Lenoir County upon a bill of indictment charging (1) conspiracy to assault and rob, (2) assault with deadly weapon with intent to kill inflicting serious injury not resulting in death, and (3) robbery from the person. On verdict of guilty as to each count prison sentences not in excess of the maximum fixed by statute were imposed on the petitioner as to each count in the bill, the sentences to be served consecutively. The petitioner did not appeal.

On 1 November, 1952, defendant Cruse filed in the Superior Court of Lenoir County his petition for relief under G.S. 15-217. The court assigned counsel for petitioner. The solicitor for the State answered. In due course the matter came on to be heard at January Term, 1953, before Judge Harris.

The amended petition prepared by petitioner's counsel, after setting out the facts of his conviction and sentence, stated the grounds for relief under the statute as follows:

"4. That at the time your petitioner was arraigned and tried, as hereinbefore alleged, your petitioner was without funds with which to employ counsel and was not represented by counsel at said trial, but that the State was represented in the prosecution of said criminal action by the Solicitor for the Judicial District and by Mr. Frank Owens, an attorney of Kinston, N. C., who was representing the private prosecution.

"5. That although your petitioner was without counsel and was without funds with which to employ counsel, the court did not tender him the appointment of counsel although your petitioner was being tried upon a bill of indictment charging him with the commission of three serious felonies. That your petitioner has completed less than seven years of formal school education, has not studied law, and is not qualified to adequately represent and defend himself in the criminal courts; that your petitioner is unlearned in the rules of criminal procedure and of the rules of evidence and that your petitioner was without knowledge as to what constituted the crime of conspiracy with which he was charged.

"6. That on the date your petitioner was arraigned and tried he was carried from the county jail to the Court House at about of 11:00 a.m.;

that he had no knowledge until that time that he was to be arraigned and tried on said date, that he requested subpoenas to be issued for certain witnesses, among one of whom was the doctor who had examined the prosecuting witness. That he did not know the name of the doctor and that no one made any attempt to furnish him with the name of said doctor, although the name of the doctor could have been readily determined from the prosecuting witness who was then in Court. That your petitioner is informed and believes and upon information and belief alleges that subpoenas were not actually issued for his witnesses until a few minutes before his case was called for trial and one of his witnesses who was material to a proper defense of said case did not appear during the trial of said cause.

"7. That your petitioner is informed and believes and upon information and belief alleges that during the course of the trial the State offered in evidence certain photographs taken of the prosecuting witness and that said photographs were offered and were received in evidence as substantive evidence. Your petitioner is further informed and believes and upon information and belief alleges that such photographs are not competent as substantive evidence and that had your petitioner been represented by counsel, counsel would have objected to receiving such photographs as substantive evidence.

"8. That your petitioner is informed and believes and upon information and belief alleges that the court stenographer failed to take down the Judge's charge to the jury and that there now exists no record of His Honor's charge to the jury. Your petitioner is further informed and believes and upon information and belief alleges that if he had been represented by counsel, counsel would have requested the court stenographer to take down the court's charge to the jury and that counsel would have had opportunity to review said charge to determine whether errors were committed therein.

"9. Your petitioner is informed and believes and upon information and belief alleges that due to the matters and things hereinbefore alleged that the sentence he is now serving involved a denial of his rights under the Fourteenth Amendment of the Constitution of the United States and that he has been denied the rights and privileges which are guaranteed to him thereunder.

"10. That the constitutional questions raised in this proceeding have not heretofore been raised or passed upon by any court of competent jurisdiction."

The court heard all the evidence offered, including not only the evidence offered at the hearing but also examined the record of the evidence offered in the trial at March Term, 1952, and found facts and rendered judgment thereon as follows (omitting recitation of preliminary proceedings):

"2. That the petitioner, from the time of his arrest to the time of his trial at the March, 1952, Criminal Term, Lenoir County Superior Court, did not have sufficient funds to employ an attorney, was not represented by counsel at said trial, and the court did not assign or appoint counsel for the defense; and that in said case the State was represented by the Solicitor for the Sixth Judicial District and Mr. Frank Owens, Attorney of Kinston, represented the private prosecution.

"3. That at the time of said trial the petitioner was thirty-nine years of age, had completed the 6th grade and had had previous experience in Courts as defendant in numerous trials, having been represented in most of them by counsel.

"4. That the petitioner was not represented by counsel in said trial did not prejudice the petitioner's rights, and that in the opinion of the Court no evidence or testimony prejudicial to the petitioner was admitted.

"5. That the petitioner was not represented by counsel did not prevent the petitioner from having all witnesses necessary to his defense subpoenaed and present in Court at said trial.

"6. That the petitioner was not represented by counsel did not prevent the petitioner from determining the name of the doctor who examined the prosecuting witness, and that upon the petitioner's request to the Court to issue a subpoena for said doctor, it was not the duty of the court or Solicitor to assist the petitioner in determining the name of said doctor and to have a subpoena issued for him, although the prosecuting witness was in court at the time said request was made.

"7. That there was sufficient competent evidence offered and received in the trial of petitioner to submit each of the three counts in the Bill of Indictment to the jury, and, if counsel had been assigned to represent petitioner, a motion to dismiss as to anyone or all of said counts would have been denied.

"8. That the admission in evidence of the photographs of the prosecuting witness without instructions from the Court, at the time such photographs were offered in evidence, that they were limited to illustrating or explaining the witness' testimony and were not substantive evidence, were not prejudicial error and that such instructions would not have been given to the jury upon request of counsel.

"9. That when the petitioner attempted to cross-examine the prosecuting witness with reference to said witness' past criminal record, the witness' answer to the question—'Have you ever had a warrant taken out for you for robbery'—and the witness' answer of 'No, sir'—to which the State objected, and the Court's statement: 'He says No, and that ends it,' the Court's statement was not prejudicial error, and that the petitioner's constitutional rights were not prejudiced by not having counsel to assist him in properly cross-examining the witnesses.

"10. That the failure of the Court to instruct and assist the petitioner as to the cross-examination of the State's witnesses was not prejudicial to the petitioner's receiving a fair trial.

"11. That the failure of the Court to instruct the court reporter, and the failure of the court reporter, to take a full transcript of the evidence, including the charge of the court to the jury, was not prejudicial to the petitioner and did not deprive the petitioner of any constitutional rights.

"12. That the failure of the Court to instruct the jury that the statement made by the prosecuting witness—'But Bill Brady went back there later and got my hat and a full Coca-Cola. But I didn't see any hat or the Coca-Cola'—was admitted only for the purpose of corroborating the testimony of other witnesses if it did corroborate the testimony of subsequent witnesses, was not error and was not prejudicial and the petitioner's constitutional rights to a fair trial were not prejudiced thereby.

"NOW, THEREFORE, upon motion of the Solicitor of the Sixth Judicial District, and upon the foregoing findings of fact and conclusions of law, it is considered, ordered, adjudged and decreed that the petitioner's Petition be dismissed and application for a new trial be, and the same is hereby denied."

Petitioner excepted to this judgment and assigned error in the court's findings of fact numbered 4 to 10 inclusive.

Defendant's petition for *certiorari* was granted and the case brought to the Supreme Court for review.

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

Charles B. Aycock for petitioner, appellant.

DEVIN, C. J. The North Carolina Post-Conviction Statute, G.S. 15-217, under which the petition in the case before us was filed, provides that any person imprisoned in State's Prison or jail "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 had been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this article."

The statute provides that the proceeding be commenced by filing petition in the Superior Court of Wake County or the county in which the conviction took place, setting forth the respects in which petitioner's constitutional rights were violated, and that the constitutional questions raised have not heretofore been raised or passed upon by any court of competent jurisdiction. G.S. 15-218 to 15-222. The procedure prescribed by the statute was followed in this case, and the presiding judge after

hearing all the evidence, made findings of fact and entered judgment thereon adverse to the petitioner.

The statute which authorizes the procedure by which the defendant has sought relief in the instant case was not intended to operate as a substitute for an appeal. It was not designed merely to afford to a person heretofore convicted of crime the right to present to this Court assignments of error in the trial in which he was convicted and from which he did not appeal. The statute was enacted for the purpose of providing an adequate, simple and effective post-conviction remedy for persons who have suffered substantial and unadjudicated deprivation of constitutional rights in the original action which resulted in their conviction, because they were prevented from claiming such constitutional rights by factors beyond their control. *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513. The statute provides a procedure by which a person convicted of crime may thereafter obtain a hearing upon the question whether he was denied due process of law. It affords an opportunity to inquire into the constitutional integrity of his conviction. *People v. Dale,* 406 Ill. 238.

In the interpretation of the Illinois Post-Conviction Statute, which is similar to the North Carolina statute, the Supreme Court of Illinois in *People v. Hartman,* 408 Ill. 133, had this to say: "It certainly was not the intent of the General Assembly, by the new act in question, to enable a person convicted of a crime to have a review of ordinary questions of procedure, for which the law already provides a remedy, by charging that they constitute a denial of constitutional rights." And in *People v. Farley,* 408 Ill. 288, the Court again pointed out that "objections to evidence, or ordinary errors occurring during the course of the trial do not constitute denials of rights guaranteed by the constitution." See also *People v. Reeves,* 412 Ill. 555.

It was not the intention of the Legislature to afford under this statute a general review of every error a prisoner who is dissatisfied with his conviction and sentence may assert, but only in those instances in which a substantial denial of a constitutional right has been made to appear.

Furthermore, the statute under which the defendant's petition was filed requires that petitioner shall "clearly set forth the respects with which petitioner's constitutional rights were violated." G.S. 15-218. In compliance with this provision petitioner has set out in his amended petition the several respects in which he claims he suffered deprivation of his constitutional rights in the trial which resulted in his conviction. Each of these was considered by the court below and findings of fact with respect thereto entered of record. These findings are supported by evidence and are binding on the defendant on this review. *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513. The defendant's claim that he was unable to subpoena witnesses is not borne out. Several witnesses were present

and testified at his instance. The fact that on the trial photographs competent for some purpose were admitted and that evidence in corroboration of witnesses examined was received is insufficient to show error or unfairness. A motion for judgment as of nonsuit if made would have been unavailing as there was evidence both of assault and robbery, and of conspiracy to commit these crimes, and a motion to quash the second count if allowable would have presented only a question of procedure by way of amendment or additional bill. The failure of the record to show the court's charge to the jury is inconsequential. Error may not be predicated on the possibility of error in a charge which was not reported and as to which no error is now assigned. The presumption is that the court charged the jury properly as to the law applicable to all phases of the evidence. *State v. Russell,* 233 N.C. 487, 64 S.E. 2d 579. But these are matters of procedure. The proceeding authorized by the statute does not contemplate a review of errors in the trial subsequently assigned after a conviction from which defendant did not appeal. The right to an appeal is unqualifiedly given in North Carolina to every person convicted of a criminal offense in any court. G.S. 15-180. No constitutional question is presented by assignments of error relating only to matters of procedure. The Constitution does not guarantee to a defendant charged with crime a trial free from all error. He may not be held to have suffered deprivation of constitutional rights merely from adverse rulings of the trial court on matters of procedure.

The defendant, however, relies upon the fact that in the trial court no counsel was assigned to aid him. He avers that he was unacquainted with legal procedure, was of limited education, and unable adequately to defend himself. He contends that legal counsel would have enabled him to make motions and raise questions material to his defense, and that there was absence of that due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States and Article I, sec. 17, of the Constitution of North Carolina.

It is not contended that request was made to the court that counsel be assigned him or that the court was advised he was unable to secure counsel. The bill of indictment did not charge a capital felony. The Constitution of North Carolina, in Art. I, sec. 11, declares the right of every man charged with crime "to have counsel for his defense." This provision of the Constitution, however, as interpreted by this Court, does not make it incumbent upon the trial judge in all cases of criminal prosecution for noncapital offenses to assign counsel, but only when the circumstances are such as would seem to require it as essential to a fair trial. *Betts v. Brady,* 316 U.S. 455. The settled rule in North Carolina was stated in *S. v. Hedgebeth,* 228 N.C. 259, 45 S.E. 2d 563: "In capital felonies these provisions (of the Constitution) relative to counsel are

regarded as not merely permissive but mandatory . . . But in cases of misdemeanors and felonies less than capital it has been the uniform practice in this jurisdiction to regard these provisions as guaranteeing the right of persons accused to have counsel for their defense, to be represented by counsel, and the right to have counsel assigned if requested and the circumstances are such, for financial or other reasons, as to show the apparent necessity of counsel for the protection of the defendant's rights.

"But we cannot hold that in all cases, in the absence of any present statute to that effect, the burden is imposed upon the State to provide counsel for defendants. In cases less than capital the propriety of providing counsel for the accused must depend upon the circumstances of the individual case, within the sound discretion of the trial judge." *S. v. Wagstaff,* 235 N.C. 69, 68 S.E. 2d 858; *In re Taylor (S. v. Taylor),* 230 N.C. 566, 53 S.E. 2d 857; *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520; *S. v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322.

The *Hedgebeth case* was affirmed by the Supreme Court of the United States, *Hedgebeth v. North Carolina,* 334 U.S. 806.

The rule in force in North Carolina is in accord with that stated by the Supreme Court of the United States in recent decisions. In *Palmer v. Ashe,* 342 U.S. 134, it was said: "This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and fair defense." There the Court was speaking of an eighteen-year-old boy with record of mental abnormality. And in *Gallegos v. Nebraska,* 342 U.S. 55: "The Federal Constitution does not command a state to furnish defendants counsel as a matter of course, as is required by the Sixth Amendment in federal prosecutions. Lack of counsel at state noncapital trials denies federal constitutional protection only when the absence results in a denial to accused of the essentials of justice." The defendant in that case was a Mexican, unable to speak or read English, against whom an alleged forced confession was used. To the same effect was the ruling in *Wade v. Mayo,* 334 U.S. 672, where the defendant was an inexperienced youth incapable of adequately representing himself and whose request for counsel had been denied. *Powell v. Alabama,* 287 U.S. 45; *Williams v. Kaiser,* 323 U.S. 471; *Bute v. Illinois,* 333 U.S. 640; *Uveges v. Pennsylvania,* 335 U.S. 437; *Quicksall v. Michigan,* 339 U.S. 660.

The ruling in *Townsend v. Burke,* 334 U.S. 736, was based on the showing that conviction was predicated on misinformation submitted by the prosecutor or misreading of the record by the Court. Likewise the facts underlying the decisions in *Gibbs v. Burke,* 337 U.S. 773, are distinguishable.

In the case at bar, however, the facts in evidence do not reveal a situation which would indicate that the failure to assign counsel, in the absence of request or notice of special circumstances requiring it, constituted denial of due process of law.

The defendant Cruse was 39 years old. He had completed six grades in school. He admitted he had served a substantial portion of the last twenty [years] in prison in North Carolina, in Michigan, and in Atlanta (Federal). He had been tried in court many times and convicted in twelve or more criminal cases such as forgery, breaking and entering, larceny of automobile, felonious assault (four times), highway robbery, violation liquor and motor vehicle statutes. In most of these he had been represented by counsel. Certainly he was not without experience in the trial of criminal cases in court. In the trial in which he was last convicted he made no request for counsel, conducted his case himself, cross-examined the State's witnesses, testified in his own behalf, offered three other witnesses. He was given opportunity to address the jury but declined, and no argument to the jury was made by the prosecution.

After a careful consideration of all the facts and circumstances surrounding the trial in which petitioner was convicted, and the facts brought out in the hearing on his petition under the statute, we reach the conclusion that the failure of the trial court to assign counsel, and the fact that he was not represented by counsel did not constitute a deprivation of due process of law or violate any constitutional right of the petitioner.

The judgment of Judge Harris dismissing the petition and denying relief thereunder is

Affirmed.

ARCHIE ELLEDGE, ADMINISTRATOR OF THE ESTATE OF LUTHER JEFFERSON WELCH, v. ZELLA CATHERINE FISHEL WELCH; WINFRED A. FISHEL, GUARDIAN FOR ZELLA C. WELCH; R. GLENDORA CLINARD; CREED CARLOUS WELCH AND WIFE, MRS. CREED CARLOUS WELCH; ELBERT LEE WELCH AND WIFE, MRS. ELBERT LEE WELCH; CLARA ALDINE SNYDER (MINOR); MARTHA FRANCES SNYDER (MINOR); NELLIE JEAN GARDNER (MINOR); PATSY ANN GARDNER (MINOR).

(Filed 12 June, 1953.)

1. Partition § 8: Descent and Distribution § 2: Husband and Wife § 14—

Where heirs at law exchange deeds for the purpose of partitioning land held by them as tenants in common, such deeds create no new title, even though in the regular form of deeds of bargain and sale, but merely sever the unity of possession so that each takes his share by descent from the ancestor, and therefore the deed to one heir and his wife under such partition does not create an estate by the entirety.

2. Appeal and Error § 39e—

The admission of testimony over objection is not ground for a new trial when the objecting party thereafter affirmatively elicits on cross-examination substantially the same testimony.

3. Same—

The admission of testimony not pertinent to the determinative issues in the cause *is held* harmless in this case.

4. Descent and Distribution § 4—

Upon the death of an heir without lineal descendants, title to land inherited by him passes to his collateral heirs of the blood of the ancestor. G.S. 29-1 (Rule 4).

5. Insane Persons § 16—

Where a person adjudged incompetent is a party defendant, her rights are committed to the care of the court and she will be deemed to have pleaded all pertinent defenses notwithstanding that she is represented by a guardian. G.S. 1-16.

6. Appeal and Error § 6c (1), (9)—

Where a person adjudged incompetent is a party to the action, the Supreme Court on appeal, in the exercise of its supervisory power, will assume jurisdiction on her behalf and treat errors committed against her as being before the court and duly presented for review notwithstanding that she has not appealed.

7. Dower § 7—

Where land of intestate is sold to make assets to pay debts of the estate, the dower claim of intestate's widow has priority in the proceeds of sale both as against the husband's debts and the cost and charges of administration.

8. Homestead § 4a—

When a husband dies childless and in debt, his widow is entitled to a homestead in his lands. Constitution of N. C., Art. X, sec. 5.

APPEAL by defendants Creed Carlous Welch and Elbert Lee Welch from *Godwin, Special Judge,* and a jury, at 12 January Term, 1953, of FORSYTH.

Special proceeding brought by Archie Elledge, Administrator of the estate of Luther Jefferson Welch, deceased, to sell land to create assets with which to pay debts of the decedent.

The land involved in this appeal is a lot located on Arcadia Avenue in the City of Winston-Salem. It was a part of the landed estate of J. J. Williard, who died intestate prior to 1927, being survived by his widow, Martha A. Williard, and the following named persons, his only heirs at law: R. Glendora Clinard, a daughter, and Luther Jefferson Welch, a grandson (the son of a deceased daughter). Therefore upon the death of J. J. Williard all his lands descended to R. Glendora Clinard and

Luther J. Welch, share and share alike, subject to the right of dower of his widow, Martha A. Williard.

In 1927 R. Glendora Clinard and husband, J. H. Clinard, with the joinder of Martha A. Williard, widow, made a deed to Luther J. Welch and wife, Zella C. Welch, embracing the lot involved in this appeal. The deed is recorded in the Public Registry of Forsyth County in Deed Book 288, p. 222.

The decedent, Luther J. Welch, died intestate in Forsyth County 23 July, 1948, without having disposed of the lot. He left no children or lineal descendants. He was survived by his widow, the defendant Zella C. Welch, and by his aunt, R. Glendora Clinard, the latter being the next collateral relation of Luther J. Welch who was of the blood of J. J. Williard, the first purchaser of the lot. Luther J. Welch was survived by these collateral kin who were not of the blood of J. J. Williard: two half-brothers, Creed Carlous Welch and Elbert Lee Welch; and four nieces (children of two deceased half-sisters), Clara Aldine Snyder, Martha Frances Snyder, Nellie Jean Gardner, and Patsy Ann Gardner.

The questions at issue in the trial below revolved around the legal effect of the foregoing deed. The allegations of the parties in respect thereto are in substance as follows:

1. The plaintiff, administrator, in his original petition alleges that the deed conveyed to the intestate, Luther J. Welch, a one-half interest in the lot in controversy.

2. The widow Zella C. Welch, incompetent, being represented by her guardian, filed answer alleging that the deed made in 1927 by Martha A. Williard and R. Glendora Clinard and husband to Luther J. Welch and wife, Zella C. Welch, created in the grantees an estate by the entirety in the lot in question, and that upon the death of Luther J. Welch she, the widow, by survivorship became the sole owner of the lot, and that no part thereof is subject to sale by the administrator.

3. The defendants Creed Carlous Welch and Elbert Lee Welch, half-brothers of the decedent Welch, by answer allege that the lot in question was originally owned by J. J. Williard; that in 1927 following his death, his only heirs at law, R. Glendora Clinard and Luther J. Welch, "entered into an agreement as to the division of" the lands of J. J. Williard; "and under that agreement each one accepted certain of the real properties as their division and went into possession of the same under the agreement," and that the deed made by Martha A. Williard, widow, and R. Glendora Clinard and husband to Luther J. Welch and wife, Zella C. Welch, was made pursuant to this partition agreement.

However, these defendants further allege that the deed in question, being a regular form deed of bargain and sale reciting a valuable consideration, had the legal effect of placing title in Luther J. Welch by pur-

chase. These defendants also specially plead the deed, with its covenants of seizin and warranty, as an estoppel against R. Glendora Clinard's claim of title by inheritance from Luther J. Welch through the blood line of J. J. Williard.

4. The infant nieces of the decedent by the half-blood (whose legal status is necessarily analogous to that of the half-brothers), represented by their guardian *ad litem,* filed a general denial and submitted their interests to the protection of the court.

5. Upon call of the case for trial, the administrator, under leave of court, filed a reply and thereby recast the theory of his cause of action by alleging that Luther J. Welch was the sole owner of the lot, rather than the owner of a half-interest therein as originally alleged. The pertinent allegations of the reply follow:

"That upon the death of J. J. Williard he owned four tracts of land which are described in the following deeds recorded in the office of the Register of Deeds of Forsyth County, N. C.: Book 288, pages 219, 220, 221 and 222; that . . ., Martha A. Williard, widow of J. J. Williard, and R. Glendora Clinard and husband, J. H. Clinard, executed deeds to two of these tracts to Luther J. Welch and wife, Zella C. Welch, and that Luther J. Welch and wife, Zella C. Welch, and the widow, Martha A. Williard, deeded the other two tracts to R. Glendora Clinard and these deeds were all dated the same date and all acknowledged on the same date before the same Notary Public and recorded at the same time in the office of the Register of Deeds of Forsyth County, . . . and the execution of these deeds was a partition of the real estate inherited by R. Glendora Clinard and Luther J. Welch, . . . joined in by the widow, Martha A. Williard; that these were the sole heirs of J. J. Williard, deceased, and that the real estate described in Deed Book 288 at page 222 was one of the partition deeds and was not a deed to Luther J. Welch by purchase. . . . that Luther J. Welch became the sole owner of said real estate and that his estate was inherited from his grandfather, J. J. Williard, and that the half brothers and sisters of Luther J. Welch are not of the blood of J. J. Williard, and that the sole blood heir of J. J. Williard is R. Glendora Clinard; that after the real estate described in Deed Book 288, page 222, is sold to create assets to pay debts, the amount remaining, if any, ascends to R. Glendora Clinard, . . . subject to the dower interest of Zella C. Welch."

6. The defendant R. Glendora Clinard filed no answer or other pleading. She seems to have been content to permit the administrator to stake out her claim, both originally as stated in the petition, and later as alleged in the reply filed immediately before the commencement of the trial.

The case was tried upon the theory of the plaintiff's cause of action as recast by the reply.

It was stipulated by the parties in substance as follows: (1) that J. J. Williard owned the lot in question at the time of his death; (2) that R. Glendora Clinard "is now the only blood heir of J. J. Williard"; and (3) that the appealing defendants "are half-brothers and sisters of Luther J. Welch, but no blood relation to J. J. Williard."

The plaintiff offered in evidence from the Public Registry of Forsyth County two deeds dated the same day in 1927: one executed by Martha A. Williard and Luther J. Welch and wife, Zella C. Welch, to R. Glendora Clinard; the other, executed by Martha A. Williard and R. Glendora Clinard and husband to Luther J. Welch and wife, Zella C. Welch, embracing the lot in controversy. The latter deed is a regular form deed of bargain and sale; it contains the usual covenants of warranty and seizen and recites a consideration of "One Hundred Dollars and other valuable consideration(s)." (Other deeds not pertinent to decision were also offered in evidence.)

Over objection and exception of the appellants, the defendant R. Glendora Clinard was permitted to testify as a witness for the plaintiff, administrator, in substance that when the foregoing two deeds were executed between her and Luther J. Welch, no money was paid over by either party to the other. However, on cross-examination by counsel for the appealing defendants, the witness R. Glendora Clinard, in relevant response to questions propounded, testified in substance that after the death of her father, J. J. Williard, she and her nephew, Luther J. Welch, "got together and agreed on a division of the property" and "we each took possession of what was deeded over to us"; that she and her nephew agreed on what the estate was worth, and each took the share agreed upon. And when recalled later in the trial, she further testified under cross-examination by counsel for appellants: "Q. This morning you stated that—speaking about the piece of property in question in Book 288 at page 222, I believe you stated this morning you received no money or anything of value from Mrs. Welch in connection with that transaction? A. No, I didn't receive any."

No evidence was offered by any of the defendants.

Issues were submitted to the jury and answered under peremptory instructions as follows:

"1. Was J. J. Williard the owner of the real estate described in Deed Book 288, page 222, as recorded in the office of the Register of Deeds of Forsyth County, North Carolina, at the time of his death? Answer: YES.

"2. Was the deed executed by Martha A. Williard, R. Glendora Clinard and husband, J. H. Clinard, to Luther J. Welch and wife, Zella C. Welch, as recorded in Deed Book 288 at page 222, a partition deed executed between the heirs of J. J. Williard? Answer: YES.

"3. What estate in the land described in the deed recorded in Deed Book 288 at page 222, if any, was conveyed to Zella C. Welch by said deed? Answer: NONE.

"4. Is R. Glendora Clinard the sole surviving heir to said real estate, subject to the dower rights of Zella C. Welch, widow of Luther Jefferson Welch, as alleged by the petitioners? Answer: YES.

"5. Is it necessary for the administrator of the estate of Luther Jefferson Welch to sell the real estate described in paragraph 8 of the petition to create assets to pay debts of the estate? Answer: YES."

Judgment was entered on the verdict directing that the lot be sold in accordance with statutory procedure, with direction that the proceeds be treated as assets in the hands of the administrator for the payment of the debts of the decedent Welch and the costs and charges of administration. It was further directed that "from the balance on hand" the administrator pay over to or for Zella C. Welch the cash value of her dower interest in the lot and that any balance remaining be paid "to R. Glendora Clinard, sole heir and next of kin of J. J. Williard."

From the judgment so entered the defendants Creed Carlous Welch and Elbert Lee Welch appealed to this Court, assigning errors.

George W. Braddy for defendants Creed Carlous Welch and Elbert Lee Welch, appellants.

Parker & Lucas for petitioner, appellee.

JOHNSON, J. Deeds between tenants in common, when the purpose is partition, operate only to sever the unity of possession and convey no title. Each party holds precisely the same title which he had before the partition, and neither cotenant derives any title or interest from his cotenants, the theory being that the undivided interest held by each in the whole tract is severed by the partition from the interests of the others and concentrated in the parcel set apart to each, with the interests of the others being excluded therefrom. *Wood v. Wilder,* 222 N.C. 622, 24 S.E. 2d 474; *Valentine v. Granite Corporation,* 193 N.C. 578, 137 S.E. 668; *Garris v. Tripp,* 192 N.C. 211, 134 S.E. 461; *Virginia-Carolina Power Co. v. Taylor,* 191 N.C. 329, 131 S.E. 646. See also 68 C.J.S., Partition, Sec. 17, p. 23.

Accordingly, a deed made by one tenant in common to a cotenant and the latter's spouse in partitioning inherited land or land held as a tenancy in common, does not create an estate by the entirety or enlarge the marital rights of the spouse as previously fixed by law. *Duckett v. Lyda,* 223 N.C 356, 26 S.E. 2d 918; *Wood v. Wilder, supra; Harrison v. Ray,* 108 N.C. 215, 12 S.E. 993; 68 C.J.S., Partition, Sec. 17, p. 24; Annotations: 132 A.L.R. 630, p. 637; 172 A.L.R. 1216, p. 1218.

And the fact that deeds exchanged between tenants in common in effecting partition may be regular form deeds of bargain and sale, with the usual covenants of title, seizen, and warranty, ordinarily does not affect the operation of the rule that a partition deed creates no new, different, or additional title. *Wood v. Wilder, supra; Duckett v. Lyda, supra; Harrison v. Ray, supra.* See also 47 C.J., p. 281; 68 C.J.S., Partition, Sec. 17, pp. 22 and 23. *Cf. Sutton v. Sutton,* 236 N.C. 495, 73 S.E. 2d 157, which is factually distinguishable and governed by a different rule.

In the light of the foregoing principles of law, it is apparent that the record does not sustain the appellants' allegation that Luther J. Welch took title by purchase under the Clinard deed, rather than by inheritance from his grandfather, J. J. Williard. *Wood v. Wilder, supra; Duckett v. Lyda, supra.* And equally untenable is appellants' plea of estoppel against R. Glendora Clinard. *Harrison v. Ray, supra.*

The testimony of the defendant R. Glendora Clinard to the effect that no consideration was paid in connection with the exchange of partition deeds between her and Luther J. Welch was violative of the dead man statute, G.S. 8-51, and should have been excluded. Even so, appellants lost the benefit of their exceptions by affirmatively eliciting on cross-examination substantially the same testimony. *Willis v. New Bern,* 191 N.C. 507, p. 514, 132 S.E. 286. *Cf. Shelton v. Southern R. Co.,* 193 N.C. 670, 139 S.E. 232. Besides, under the theory of the trial as shaped by the pleadings, the facts developed by the challenged testimony were not pertinent to the determinative issues. Therefore, in any aspect of the case, the reception of this evidence may be treated as harmless. *Wilson v. Lumber Co.,* 186 N.C. 56, 118 S.E. 797; *S. v. Rainey,* 236 N.C. 738, p. 741, 74 S.E. 2d 39. See also *Muse v. Muse,* 236 N.C. 182, 72 S.E. 2d 431.

From the admissions in the pleadings and the uncontroverted evidence in the case it is manifest, as the only reasonable inference deducible, that Luther J. Welch derived title to the land in controversy by inheritance from his grandfather, J. J. Williard, and that the Clinard deed to the decedent Welch, under which the appellants claim, was a partition deed which created no new or additional title. And if this be so, it follows that upon the death of Luther J. Welch, intestate and without lineal descendants, title to the lot passed by inheritance to his aunt, R. Glendora Clinard, who was the next and only collateral relation of Luther J. Welch of the blood of the purchasing ancestor, J. J. Williard, capable of inheriting under our fourth canon of descent, G.S. 29-1 (Rule 4). *Poisson v. Pettaway,* 159 N.C. 650, 75 S.E. 930.

Therefore the appellants may not predicate error upon the peremptory instructions given the jury by the presiding judge. Nor have the appel-

lants shown error prejudicial to them in any other phase of the case. All their assignments of error must be overruled, and it is so ordered.

However, error as against the defendant Zella C. Welch appears on the face of the record. She has not appealed. Nevertheless, the record discloses she is an adjudged incompetent person. As such, her rights were committed to the care of the court. She is deemed to have pleaded specially all pertinent defenses. G.S. 1-16. In the exercise of our supervisory power, we will assume jurisdiction on her behalf and treat errors committed against her as being before the Court and duly presented for review. Constitution of North Carolina, Article IV, Section 8; *Ange v. Ange,* 235 N.C. 506, 71 S.E. 2d 19; *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663; *Wescott v. Bank,* 227 N.C. 644, 43 S.E. 2d 844.

First, it is noted that the judgment in making provision for the disbursement of the proceeds of sale gives the unsecured debts of the decedent and the costs and charges of administration priority over the dower claim of the widow. This is error. The dower claim is entitled to priority, both as against the husband's creditors (G.S. 30-3; *Holt v. Lynch,* 201 N.C. 404, 160 S.E. 469; *Curry v. Curry,* 183 N.C. 83, 110 S.E. 579), and also the costs and charges of administration. 28 C.J.S., Dower, Sec. 40, p. 107.

Next, we note this is a case in which the widow is entitled to a homestead. The State Constitution, Article X, Sec. 5, provides that when a husband dies childless and in debt, the widow is entitled to a homestead in his lands. *McAfee v. Bettis,* 72 N.C. 28; *Smith v. McDonald,* 95 N.C. 163.

Here both prerequisites of this provision of the Constitution have been met. Also, the record discloses that the intestate, Luther J. Welch, owned other lands. One parcel, not involved in the appeal as perfected, appears to have been sold under order of the court and part of the proceeds have been impounded to await decision herein. Ordinarily, under the procedure prescribed by statute, where a special proceeding, like this one, is brought by an administrator to sell land to make assets, the facts in respect to the widow's homestead rights are brought to the attention of the court for determination in the pending cause. G.S. 1-389.

It nowhere appears in the pleadings or record that the homestead rights of this widow have been asserted by the guardian or investigated by the court. It may be that such investigation has been made and that the widow's homestead rights have been determined and adequately fixed by appropriate action of the court apart from this proceeding. However, against the other eventuality, the case will be remanded with direction that the court ascertain whether these homestead rights have been properly determined and fixed; and if not, the court under proper procedure will conduct such further hearings and enter such decrees as the ends of

justice require for the protection of the interests of this litigant, to the extent, if need be, of setting aside, or treating as surplusage, portions of the verdict rendered by the jury. See *McAfee v. Bettis, supra; Spence v. Goodwin,* 128 N.C. 273, 38 S.E. 859; *Oakley v. Van Noppen,* 96 N.C. 247, 2 S.E. 663; *Campbell v. White,* 95 N.C. 491. See also 29 N.C.L. Rev. 143; McIntosh, N. C. Practice and Procedure, p. 881 *et seq.;* Mordecai's Law Lectures, Second Edition, pp. 380, 381, 520, 1328, and 1333; *Williams v. Johnson,* 230 N.C. 338, 53 S.E. 2d 277.

The judgment below will be set aside and the cause remanded to the Superior Court of Forsyth County for further proceedings and entry of decrees in accordance with this opinion. Let the plaintiff, administrator, pay the costs of the appeal.

Remanded.

BRANCH BANKING & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF GEORGE FRANKLIN WHITFIELD, DECEASED, AND BRANCH BANKING & TRUST COMPANY, GUARDIAN OF THE PROPERTY OF KATHERINE ROSE WHITFIELD AND GEORGE FRANKLIN WHITFIELD, JR., MINORS, v. KATHERINE ROSE WHITFIELD AND GEORGE FRANKLIN WHITFIELD, JR., MINORS, AND HATTIE C. HILL AND CATHERINE C. BELL, TESTAMENTARY GUARDIANS OF THE CUSTODY AND TUITION OF SAID MINORS; AND F. E. WALLACE, JR., GUARDIAN AD LITEM OF KATHERINE ROSE WHITFIELD AND GEORGE FRANKLIN WHITFIELD, JR., ABOVE-NAMED MINORS.

(Filed 12 June, 1953.)

1. Declaratory Judgement Act § 2c—

An action for a declaratory judgment will lie only when there is an existing controversy between the parties. The remedy is unavailable for the purpose of submitting a theoretical problem or obtaining an advisory opinion.

2. Same: Wills § 39—

Where it is alleged that the beneficiaries of a testamentary trust are contemplating marriage, but there is no allegation that they are engaged or a wedding date set, the courts will not give a declaratory judgment as to the duties of the executor and trustee under provisions of the will giving certain directions if the beneficiaries should marry prior to their majority.

3. Wills § 31—

Where the intent of testator is expressed in clear and unambiguous language there is no room for construction, and the intent of testator will be effectuated unless contrary to some rule of law or at variance with public policy.

4. Wills § 84a—

Ordinarily a devise or bequest to a minor must be paid to his properly qualified guardian.

5. Same—Where will so directs, bequests to minors must be paid directly to them.

Testator bequeathed certain jewelry to each of his children with direction to the trustee to retain possession for safekeeping until each reached the age of eighteen years, and then to deliver to each his respective share to hold absolutely, with further discretionary power to the executor to deliver the bequests at an earlier date if it would promote the happiness and best interests of the beneficiaries. *Held:* The gift of the jewelry was absolute and did not involve a passive trust, and it was the duty of the executor to deliver to each beneficiary his respective share upon his becoming eighteen years of age, since the provision for delivery merely postponed the enjoyment and not the gift, the mandate of the will is not contrary to law or public policy and may not be defeated by the contention that the minors could not execute a valid receipt.

APPEAL from *Grady, Emergency Judge,* April Term, 1953. LENOIR.

This is a civil action brought by the plaintiff as executor and trustee under the last will and testament of Dr. George F. Whitfield and as guardian of Katherine Rose Whitfield and George F. Whitefield, Jr., under the provisions of the Uniform Declaratory Judgment Act, G.S. 1-253 *et seq.* for advice and instruction by the Court as to the delivery of jewelry under Items II and III of the will, and as to its duties and responsibility as trustee in the administration of the trust estate under Item VI, sections 3 and 5 of the will.

George F. Whitfield, a resident of Kinston, died testate about 23 September, 1948. His will was duly probated, and recorded. His sole heirs and the principal legatees and devisees named in his will were his daughter Katherine Rose, who became 18 years of age on 1 February, 1953, and his son George F., who will be 17 years old on 21 August, 1953. The plaintiff was appointed executor and trustee by the will, and duly qualified as executor. The plaintiff has completed the administration of the estate, and has turned over to itself as trustee the assets belonging to the trust estate created in the will. The executor has not been discharged.

The will states that at the time of its execution the daughter was eleven years of age, and the son nine. It further states that the will is contained in twelve pages of legal cap paper, and that at the bottom of each page the testator has signed his name. The will disposed of a valuable estate—over one hundred thousand dollars of listed securities. It is apparent from reading the will that it was most carefully thought out and drawn, giving to the trustee very wide discretion in the handling of the trust estate so as to provide financial security for the testator's two children during their lives, so far as human wisdom could reasonably foresee.

The pertinent part of Item II of the will reads: "I give and bequeath to my beloved daughter, Katherine Rose Whitfield, the following personal property, to be hers absolutely: 1 diamond and sapphire bracelet; 1 diamond engagement ring; 1 diamond and ruby pin; and 1 diamond and pearl watch. In connection with this bequest I desire and direct my Executor and Trustee hereinafter named, to keep, retain and hold for safekeeping the said jewelry and watch until my daughter reaches the age of eighteen years, and to then deliver same to her, to have and to hold absolutely. I authorize and direct my said Executor and Trustee solely in its best judgment and discretion to deliver the said watch and jewelry or any part of same to my said daughter at any earlier age, if in its best judgment and discretion it deems that it will promote the happiness and best interest of my said daughter." This jewelry was appraised at $4,150.00, and had been worn by Katherine Rose's mother.

Item III of the will in almost identical language bequeaths to his son George F., Jr., the watch and ring his father wore, and all other jewelry not bequeathed in Item II of the will. This jewelry was appraised at $1,194.00.

Item VI of the will gives, devises and bequeaths all the residue and remainder of the testator's estate to the plaintiff, in trust, to be held, managed and disposed of for the uses and purposes set forth in 8 sections of said item for the benefit of his two children. The pertinent part of Section 3 of this item is as follows: "I desire and direct that said distribution of the trust estate of my said daughter as provided in the preceding subsection 2 shall be subject to the following exceptions and positive directions, to wit: That my said Trustee shall pay over and deliver to my said daughter on the day of her marriage, or as soon as practical thereafter, from either the principal or accumulated income of her said trust estate, the sum of FIVE THOUSAND DOLLARS ($5,000.00) cash, free and discharged of all trust, and to be used and enjoyed by my said daughter in such manner as she may desire, the same to be considered by her as a wedding present from me." Item V of said section contains a similar provision in respect to his son.

On or about 1 December, 1948, the plaintiff qualified as guardian of the two minors to collect the proceeds of certain U. S. Government life insurance policies on the life of the testator payable to his two children.

On her 18th birthday Katherine Rose requested the plaintiff to deliver to her the jewelry bequeathed to her in her father's will, and the plaintiff refused to deliver it. She also informed the plaintiff she was contemplating marriage prior to her 21st birthday, and would demand upon her marriage the $5,000.00 bequeathed to her by her father as a wedding present.

George F., Jr., informed the plaintiff that he would demand the jewelry bequeathed to him on his 18th birthday, and that he also was considering marriage before his 21st birthday, and would make a similar demand for the payment of $5,000.00 as a wedding present when married.

Hence, the plaintiff instituted this action. The two minors, who are defendants, appear by their guardian *ad litem* F. E. Wallace, Jr. The action came on to be heard by consent of all parties upon the pleadings filed, the evidence presented and arguments of counsel. No issue of fact is raised by the pleadings.

The court signed judgment that Katherine Rose Whitfield having become 18 years old on 1 February, 1953, is entitled to the immediate possession of the jewelry bequeathed to her in her father's will, and it is the legal duty of the trustee to deliver the jewelry to her, and upon delivery to take from her a receipt which is adjudged to be a valid receipt discharging the trustee of any further duties, liability and responsibility with respect to the jewelry. A similar adjudication was made as to the jewelry bequeathed to George F. Whitfield upon his reaching 18 years of age. The court further decreed that under the provisions of the will Katherine Rose Whitfield and George F. Whitfield will be entitled to be paid $5,000 each by the plaintiff trustee upon her or his marriage, whether either have attained the age of 21 years, and the trustee is directed to make such payment, and a receipt taken for such payment will be a valid and binding receipt, even though Katherine Rose and George F. are under 21 years of age. The court further adjudicated that the plaintiff as guardian had no legal right to receive possession of the jewelry, and no legal right to be paid by the trustee $5,000.00 for the benefit of a ward marrying while a minor. The plaintiff as trustee was directed to distribute the jewelry held by it as a passive trustee for safekeeping as directed by the will, and to distribute the wedding presents in accordance with the will.

The plaintiff appellant states in its brief that no exceptions have been taken to any of the court's findings of fact, but merely to the conclusions of law adjudicated.

From the judgment signed the plaintiff appealed, assigning error.

Whitaker & Jeffress for the plaintiff, appellant.
Wallace & Wallace for defendants, appellees.

PARKER, J. Actions for a declaratory judgment under the provisions of G.S. 1-253 *et seq.* will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404; *Etheridge v. Leary,* 227 N.C. 636, 43 S.E. 2d 847; *Tryon v. Power Co.,* 222

N.C. 200, 22 S.E. 2d 450. "It does not extend to the submission of a theoretical problem or a 'mere abstraction' . . . It is no part of the function of the courts . . . to give advisory opinions or to answer moot questions . . ." *Poore v. Poore,* 201 N.C. 791, 161 S.E. 532. "The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Lide v. Mears, supra.*

The plaintiff alleges in its complaint that Katherine Rose Whitfield, who was 18 years of age on 1 February, 1953, told it that she was considering and contemplating marriage prior to her 21st birthday, and upon such marriage prior to her 21st birthday she would demand that the plaintiff pay her $5,000.00 as a wedding present from her father in accord with the provisions of Section 3, Item VI of the will. George F. Whitfield, who will be 17 years of age on 21 August, 1953, made a similar statement to the bank, and said he would make a similar demand upon his marriage under Section 5, Item VI of the will.

The lower court signed a judgment directing that the plaintiff as trustee pay to Katherine Rose Whitfield $5,000.00 upon her marriage, regardless of whether she was 21 years old at the time, and directed a similar payment to George F. Whitfield upon his marriage, though he married while a minor.

These two minors may marry before they are 21 years of age; they may not. There is no allegation in the complaint that either, or both, are engaged, and the date of the proposed wedding set. The complaint merely alleges that the minors are considering marriage before their 21st birthdays. The best-laid plans "gang aft agley."

It seems to us that the question as to whether the plaintiff as trustee shall pay to these two minors $5,000.00 as a wedding present under the will, if they, or either of them, marry before reaching the age of 21 years presents merely an academic problem, which may or may not arise. That part of the action which requests advice in the administration of the trust estate under Sec. 3 and Sec. 5 of Item VI of the will is ordered dismissed as there is no real existing controversy between the parties on that point, and will not be, unless one or both marry before reaching 21 years of age.

This question is presented: was it the duty of the plaintiff to turn over to Katherine Rose Whitfield the jewelry bequeathed to her in Item II of her father's will when she reached the age of 18 years, and is it its duty to turn over to George Franklin Whitfield the jewelry bequeathed to him in Item III of his father's will, when he reaches the age of 18 years, or to deliver to him the jewelry at an earlier age, if the plaintiff in its best judgment and discretion deems that it will promote the happiness and best interest of George Franklin Whitfield to do so?

To answer this question we must ascertain the intent of the testator as expressed in his will. When that intent is ascertained, the command of the law is "thy will be done," unless contrary to some rule of law or at variance with public policy. *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777; *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888.

When the intention of the testator is clearly and consistently expressed, there is no need for interpretation. *McCallum v. McCallum,* 167 N.C. 310, 83 S.E. 250. A writing is not doubtful if it has the same meaning to everyone. *Krites v. Plott,* 222 N.C. 679, 24 S.E. 2d 531. Construction belongs to the field of ambiguity, or where different impressions are reasonably made on different minds. *Walton v. Melton,* 184 Va. 111, 34 S.E. 2d 129; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17. A will is to be given effect according to its obvious intent. *Brock v. Porter,* 220 N.C. 28, 16 S.E. 2d 410.

Considering Dr. Whitfield's will from its four corners it is perfectly obvious that he has expressed his intent in language that is clear, definite, explicit and plain of meaning that his daughter Katherine Rose should be given by the plaintiff the jewelry bequeathed to her in Item II of his will when she reached the age of 18 years, if not earlier, and a similar intent in respect to his son as to the jewelry bequeathed to him in Item III of his will. There is no room for construction, and the courts must give effect to his will, as he has seen proper to express it, unless contrary to law or public policy. *McCallum v. McCallum, supra; Coppedge v. Coppedge, supra.*

Where a will does not specifically provide when a legacy shall be delivered or paid, it seems to be the general rule that a bequest to, or the distributive share of a minor, can be legally paid only to his properly qualified guardian in his fiduciary capacity. 34 C.J.S., Executors and Administrators, p. 400 *et seq.;* Schouler on Wills, Executors and Administrators (6th Ed.), sec. 3094; *Walker v. Walker,* 7 N.C. 265; *Trust Co. v. Walton,* 198 N.C. 790, 153 S.E. 401.

A different question arises when the testator fixes in his will the time for the payment or delivery of legacies.

In 69 C.J., Wills, sec. 2633, it is written: "It is perfectly competent for the testator to fix by will the time for payment or delivery of legacies therein provided for, so long as his restrictions violate no rule of law, and the period is not so uncertain as to be unreasonable, and a court has no power to alter the time of payment so prescribed. Thus, the testator may fix the time of payment within sixty days after his death, on the arrival of the legatee at majority, or some earlier or later age. . . ." This appears to be the general rule though in *Re Robertson,* 17 Ont. L. 568, 13 Ont. W. R. 208; *Re Noyes,* 17 Ont. W. N. 302, it has been held that direc-

tions to pay to minor have been held not final in the absence of a provision in the will that the infant's receipt shall be a sufficient discharge.

4 Page on Wills (Lifetime Ed.), sec. 1589, states the law thus: "If testator provides specifically in his will at what time a legacy is to be paid, this direction will be enforced, provided that it is not in violation of the rule against perpetuities, and provided it does not violate the rights of testator's creditors. . . . Where testator provides that a certain legacy shall be paid to the beneficiary upon his arrival at majority, or some other specified age, it is payable only at the time fixed. It may, however, be made payable to the legatees personally even though they are not of age." Citing many authorities from various states.

"Wills often contain special provisions as to time of payment which must be followed." Schouler, *supra,* sec. 3153.

That the respective legacies of jewelry are vested and absolute is undeniable. *Shelton v. King,* 229 U.S. 90, 57 L. Ed. 1086, 33 S. Ct. Rep. 686. The provisions in the will as to when the jewelry should be delivered did not postpone the gift, but only its enjoyment. *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420.

Our decisions are in accord with the rule stated in C.J.S., *supra;* Page on Wills, *supra;* Schouler, *supra.* The general rule in respect of interest on legacies, when immediately payable, and not promptly paid, is that they bear interest from the end of one year after the testator's death. *Shepard v. Bryan,* 195 N.C. 822, 143 S.E. 835. In *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356, the legacy was payable when the legatee "becomes 30 years old." The Court said: "The amount bequeathed, thirty thousand dollars, will be due and payable at that time, and it bears no interest in the interim." To the same effect *Croom v. Whitfield,* 45 N.C. 143; *Holt v. Hogan,* 58 N.C. 82.

In *Cannon v. Cannon, supra,* it was held as correctly summarized in the first headnote: "Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, *unless it is otherwise provided in the will.*"

These are cases where the will specifically provides when the legacy or devise is to be paid or to take effect. *Gibbons v. Dunn,* 7 N.C. 548; *Southerland v. Cox,* 14 N.C. 394; *Varner v. Johnston,* 112 N.C. 570, 17 S.E. 483; *Hill v. Jones,* 123 N.C. 200, 31 S.E. 474; *Halliburton v. Phifer,* 185 N.C. 366, 117 S.E. 296. See also *Jackson v. Langley,* 234 N.C. 243, 66 S.E. 2d 899, where the will fixed the time when the legal and equitable title should vest, discharged of the trust.

Dr. Whitfield died in September, 1948, leaving a large estate. No rights of creditors are involved. The provisions of his will do not violate the rule against perpetuities. It is very apparent from his will that Dr.

Whitfield was devoted to his two children. He bequeathed to the plaintiff as trustee a large estate to secure the objects of his affection, as far as property can do it, from the vicissitudes of fortune. We can perceive of no reason, no public policy, no rule of law why his jewelry should not be delivered to his daughter and son on their 18th birthdays for such was obviously his intent as set forth in his carefully thought out and drawn will. To hold, as contended for by the plaintiff, that these two minors cannot receive this jewelry on their 18th birthdays, because they cannot give to the plaintiff a binding receipt releasing and discharging it of liability by reason of their infancy would be for the court to alter their father's will as to the time of delivery of the jewelry. This the court has no power to do. When the intent of the testator as written in his will is ascertained, the mandate of the law is to enforce the will, unless contrary to law or public policy. *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *House v. House, supra; Seawell v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369; *Coppedge v. Coppedge, supra; Woodard v. Clark, supra.*

The judgment of the experienced and learned trial judge as to the delivery of the jewelry as provided for in Items II and III of the will was correct.

Katherine Rose Whitfield and George F. Whitfield are donees of a gift made to them by their father in his will. The cases cited by the appellant in its brief dealing with the disaffirmance by an infant of a contract, other than for necessaries, are entirely different.

The lower court adjudicated that the plaintiff held the jewelry as a passive trust for safekeeping. It is not a passive trust for legal title to the jewelry was not placed in the plaintiff by the will. *Bank v. Sternberger,* 207 N.C. 811, 178 S.E. 595.

All the assignments of error of the plaintiff appellant as to that part of the action for instructions as to Items II and III of the will are not tenable.

For the reasons hereinbefore stated, plaintiff's assignments of error in the ruling of the court below as to Item VI, secs. 3 and 5, of the will are sustained.

The cause is remanded for judgment in accordance with this opinion.

Modified and affirmed.

G. G. GREEN AND WIFE, ELNA S. GREEN, v. W. M. BARBEE AND WIFE, NANCY E. BARBEE.

(Filed 12 June, 1953.)

1. Easements § ½—

As a general rule, an easement may be acquired by grant, dedication or prescription.

2. Easements § 2—

Dedication of an easement may be made by express language, reservation, or by conduct showing an intention to dedicate.

3. Same—

In order for the division and sale of a tract of land by lot to create an easement by implication, it must appear that at the time of sale the easement had been so long continued and was so obvious as to show it was meant to be permanent, and that at that time the easement was necessary to the beneficial enjoyment of the land granted or retained.

4. Same—Descriptions in deeds conveying land by lots held insufficient to create easement by implication.

The owner of a tract of land facing upon a street divided same into three lots, two on the street and one lot in the rear, and sold, successively, the two lots facing the street, reserving a ten-foot alleyway between the two front lots to the rear lot. The deed to the western front lot called for the alleyway as its eastern boundary, and the deed to the eastern front lot called for the alleyway as its western boundary. The description in the deed to the back lot, later executed, stated that it fronted on the ten-foot alley. The owner later quitclaimed the alleyway to the owners of the front lots. *Held:* The alleyway could not be a way of necessity to the lots fronting on the street, and in the absence of allegation that it was a way of necessity to the back lot at the time of the conveyance of the backlot, the mere reference in the deeds to the alleyway is insufficient to create an easement by implication appurtenant to any one of the three lots.

APPEAL by plaintiffs from *Morris, J.*, February Term, 1953, of DURHAM.

This is an action to determine whether the plaintiffs have an easement in the alley hereinafter described.

The cause was heard by the trial judge upon the pleadings and stipulations, the parties having waived trial by jury.

It was stipulated that the pleadings raise this single issue: "Do the several deeds as set forth in the complaint by which O. K. Proctor conveyed out of himself title to the lands now owned by the plaintiffs and defendants create by dedication, express or implied, an easement in the 10-foot strip of land designated as a 10-foot alleyway, to the benefit of the plaintiffs in this cause as alleged?"

Prior to 1895, O. K. Proctor was the owner of a tract of land lying north of what was known as Angier Avenue (now Ashe Street and here-

inafter so called), in the City of Durham. By deed dated 19 February, 1895, he conveyed a parcel of this land which bordered on Ashe Street to D. R. Bynum. This deed includes in its description mention of a 10-foot alley as a part of its metes and bounds. In fact, the alleyway constituted the eastern boundary of the lot conveyed and this lot through *mesne* conveyances is now owned by the plaintiffs, and will be referred to hereinafter as the Bynum lot.

Rebecca Graham Shepherd became the owner of the lot lying east of the alley referred to in the above deed, which lot is now owned by the defendants. Her deed set out in the record was executed 27 October, 1917, to correct the description in the original deed executed 19 February, 1895, but what the description was in the original deed does not appear and there is no indication it was ever recorded. The 1917 deed merely calls for the alley as the western boundary of the lot conveyed for a distance of 210 feet, which was the depth of the two lots conveyed, fronting on Ashe Street. This lot will be referred to hereinafter as the Shepherd lot.

On 7 January, 1907, O. K. Proctor executed a deed conveying to one Hob Norwood, from or through whom plaintiffs derived title to the northern tract of their property which lies to the rear of the above lots, the southern line of which runs parallel with Ashe Street, but 210 feet to the north of said street. This deed, in its description by metes and bounds, includes the following language: ". . . fronting a 10-foot alley running from Angier Avenue and between Bynum and Graham lots. . . ." This lot will be hereinafter identified as the Norwood lot.

It was further stipulated that, "for the purpose of this action, it is agreed that as of the date of the execution of the deeds from O. K. Proctor to his several grantees the said O. K. Proctor owned the fee to the 10-foot strip of land referred to as the 10-foot alleyway."

According to the record, Jesse H. Proctor, Rosa B. Proctor, S. LeRoy Proctor, and Thelma F. Proctor, on 18 October, 1947, executed a deed quitclaiming and conveying to the defendants W. M. Barbee and wife, all their right, title, and interest in and to the 10-foot alley in question, and these defendants have closed the alley.

When the matter was heard, it appearing to the court that the plaintiffs do not allege an easement by prescription, but that the alley was dedicated by the grantor, O. K. Proctor, by his several deeds as set out in the complaint, and that said dedication arises by implication; the court found as a fact "that the conveyances from O. K. Proctor were not pursuant to any general plan of development, nor based upon any map of the property as of the date of said respective deeds." Whereupon the court held that the language contained in the deeds is not such as to constitute a dedication and that the issue submitted should be answered in the negative

as a matter of law. Judgment was accordingly entered, and the plaintiffs appeal and assign error.

Jas. B. Patton and C. Horton Poe, Jr., for plaintiffs, appellants.
Edwards & Sanders for defendants, appellees.

DENNY, J. The plaintiffs challenge the correctness of the judgment of the court below on two grounds: (1) They except and assign as error the failure of the court to hold that the alleyway reserved by O. K. Proctor was dedicated by implication upon the conveyance of all the land contiguous to the alley, as shown by the deeds referred to in the record; (2) they except and assign as error the refusal of the court to hold that O. K. Proctor reserved an easement in the 10 by 210 foot alley upon the conveyance of one lot to D. R. Bynum and another to Rebecca Graham Shepherd, in 1895, and that the reserved easement passed to Hob Norwood by deed executed to him by O. K. Proctor dated 7 January, 1907, conveying the rear or north lot.

There is no exception to the finding of the court below to the effect that O. K. Proctor, the original grantor, did not convey the three lots described in the deeds referred to in the complaint, pursuant to any general plan of development nor as described or shown on any map of the property as of the date of his respective deeds.

Therefore, it becomes our duty to determine whether the court below, upon a consideration of the pleadings, stipulations, and the findings of fact, reached the correct legal conclusions.

It is the general rule that an easement may be acquired by grant, dedication, or prescription. The plaintiffs do not claim an easement by prescription, but by dedication or implication. It is well settled that a dedication may be by express language, reservation, or by conduct showing an intention to dedicate; such conduct may operate as an express dedication, as where a plat is made showing streets, alleys, or parks, and the land is sold, either by express reference to such plat or by showing that the plat was used and referred to in the negotiations. *Milliken v. Denny,* 141 N.C. 224, 53 S.E. 867; *Moose v. Carson,* 104 N.C. 431, 10 S.E. 689; *Conrad v. Land Co.,* 126 N.C. 776, 36 S.E. 282; *Hughes v. Clark,* 134 N.C. 457, 46 S.E. 956; *Green v. Miller,* 161 N.C. 24, 76 S.E. 505; *Haggard v. Mitchell,* 180 N.C. 255, 104 S.E. 561; *Draper v. Conner,* 187 N.C. 18, 121 S.E. 29.

We think it is clear, under our decisions, that O. K. Proctor, in retaining title to the 10-foot alley, in 1895, when he executed deeds to D. R. Bynum and Rebecca Graham Shepherd, did not give these grantees an easement by dedication or otherwise in this unconveyed strip of land. *Milliken v. Denny, supra; Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224.

In the last cited case it is said: "Three things are essential to the creation of an easement upon the severance of an estate, upon the ground that the owner before the severance made or used an improvement in one part of the estate for the benefit of another. First, there must be a separation of the title; second, it must appear that before the separation took place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was meant to be permanent; and, third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. An easement which is apparent and continuous, such as a drain or other artificial watercourse, a thing which is continuous in its service, and which does not require any active intervention of the owner for its continuance, and can always be seen or known on careful inspection, will pass on the severance of two tenements as appurtenant, without the use of the word 'appurtenances'; but an easement which is not apparent and noncontinuous, such as a right of way, which is enjoyed at intervals, leaving no visible sign, in the interim, of its existence, will not pass unless the grantor uses language sufficient to create the easement *de novo*."

In the case of *Milliken v. Denny, supra*, the precise question raised by the plaintiffs' first assignment of error, was presented. George A. Dick, trustee, and Mrs. Mary E. Dick, the beneficial owner, executed a deed to Mrs. Julia P. Dick for certain lands. The deed called for, "a 'stone,' thence north 84 degrees 22 minutes west 340 feet along the south side of the ten-foot alley." There, as here, it was contended that the 10-foot alley was dedicated by being left unconveyed when the lot was conveyed to Mrs. Julia P. Dick and another tract of land owned by the grantors lying on the opposite side of the alley was conveyed to a third party, a part of which was afterwards conveyed to plaintiffs. The Court held that the language of Mrs. Dick's deed did not estop her from closing the alley and that whatever right she had in it passed to her grantee, the defendant. Moreover, the Court pointed out that an easement by implication will not arise unless it rests on necessity, not convenience, citing 14 Cyc., 1173. In sustaining the nonsuit entered in the court below, *Connor, J.*, in speaking for the Court, said: "If Mrs. Dick did not, at the time she executed the deed of August, 1890, either expressly or by implication, dedicate the strip of land referred to as an alley to the use of the lot conveyed to Mrs. Julia Dick, thereby creating an easement appurtenant thereto, which passed with the title to the plaintiff, nothing said or done by the persons thereafter could impose the burden thereon. The description in the deeds made by her do not cover the land, therefore the title remained in her, and passed to defendant in the same plight and condition as she held it."

Certainly, the unconveyed 10-foot strip of land lying between the Bynum and Shepherd lots was not a way of necessity for Bynum and Shepherd since the lots conveyed to them fronted on Ashe Street. And since the alley was not a way of necessity at the time the lots were originally conveyed in 1895, the language in the respective deeds was insufficient to create an easement therein in favor of the grantees by implication or otherwise. *Milliken v. Denny, supra.* This assignment of error will not be upheld.

Under their second assignment of error, the plaintiffs take the position that regardless of whether they acquired an easement in the 10-foot alley in question, under their chain of title to the Bynum lot, that when O. K. Proctor conveyed the lot which lies to the rear of the Bynum and Shepherd lots to Hob Norwood in 1907, that an easement in the alley passed to Norwood and from Norwood through *mesne* conveyances to them.

The contention of the plaintiffs in this respect cannot be sustained. There is no allegation or stipulation to the effect that at the time Proctor conveyed to Norwood, in 1907, the use of the alley had been so long continued and so obvious or manifest as to show that it was meant to be permanent; or that the easement was necessary to the beneficial enjoyment of the lot conveyed, as pointed out in *Carmon v. Dick, supra,* as being essential to the creation of an easement upon the severance of an estate. 28 C.J.S., Easements, section 33 (a), page 691, *et seq.* Furthermore, it is the general rule that where a private right of way is claimed and there is no language in the deed "indicating that an easement was created over lands of the grantor not included in the description, constituting a perpetual burden upon them, the evidence should be clear and unmistakable." *Milliken v. Denny, supra.* In the instant case, we have no evidence from which an intent on the part of the grantor to establish the easement claimed, except the bare references to the alley for descriptive purposes. This alone is insufficient.

It does appear, however, from the record that the plaintiffs became the owners of the Bynum lot which fronts 105.04 feet on Ashe Street, in the City of Durham, on 27 September, 1939, and of the Norwood lot, which adjoins the Bynum lot on the north, by deed dated 12 March, 1942. Thereafter, on 12 September, 1947, the plaintiffs isolated the northern end of the Bynum lot and the Norwood lot from Ashe Street by conveying the southern portion of the Bynum lot, being all their frontage on Ashe Street, to Hillman D. Ray. Therefore, they allege that said alleyway is the only means of ingress and egress to a public street from that portion of the Bynum lot that was retained and now owned by them.

The conduct of the plaintiffs in isolating themselves from Ashe Street by conveying to Hillman D. Ray all their street frontage, does not change the status of the retained portion of this lot with respect to an easement

in the adjoining alley from that which existed when it was originally conveyed in 1895.

The plaintiffs also allege that the alley between the Bynum and Shepherd lots, now owned by the plaintiffs and defendants respectively, is the only means of ingress and egress to a public street from their Norwood lot, which adjoins the portion of the Bynum lot retained and owned by them. But as we have heretofore pointed out, there is no allegation in the complaint to the effect that the alleyway in question was the only means of ingress and egress to this lot when it was conveyed to Norwood in 1907, or that an easement therein was necessary to the beneficial enjoyment thereof. Certainly the alley was not a way of necessity to and from the Norwood lot so long as the plaintiffs owned both the Norwood and Bynum lots.

We concur in the view of the court below to the effect that O. K. Proctor did not convey to Hob Norwood an easement over the 10-foot strip of land lying between the Bynum and Shepherd lots when he conveyed the land to Hob Norwood described in the deed dated 14 January, 1907. *Milliken v. Denny, supra.*

We concede, however, that there are authorities which hold that where a conveyance merely describes the land conveyed, as bounded by a road, street, or alley, the fee of which is vested in the grantor, there is an implied grant of easement in such road, street, or alley. See 28 C.J.S., Easements, section 40, page 704, and cited cases.

The cases of *Harris v. Carter,* 189 N.C. 295, 127 S.E. 1; *Ferrell v. Trust Co.,* 221 N.C. 432, 20 S.E. 2d 329; and *Packard v. Smart,* 224 N.C. 480, 31 S.E. 2d 517, cited and relied upon by the plaintiffs, are distinguishable and not controlling on the present record.

The judgment of the court below is

Affirmed.

STATE v. FRANCIS DUVAL SMITH.

(Filed 12 June, 1953.)

1. Automobiles § 28e—

The evidence tended to show that defendant was driving at a speed of some 75 to 85 miles per hour in a 35 mile per hour speed zone, and hit a boy riding a bicycle traveling in the opposite direction on defendant's right side of the street, resulting in fatal injury to the boy. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's culpable negligence constituting the proximate cause of the boy's death.

2. Same—

Where the State's evidence tends to show that defendant was traveling at a speed of some 75 to 85 miles per hour in a 35 mile per hour speed zone

and struck a boy riding a bicycle traveling in the opposite direction on defendant's right side of the street, nonsuit may not be granted on the contention that the boy was riding the bicycle on his left side of the street in violation of G.S. 20-38 (ff), since contributory negligence as such has no place in the law of crimes.

3. Same—

Where the evidence tends to show that defendant driver could have seen the boy riding the bicycle for some 360 feet before his car collided with the bicycle, and that skid marks made by defendant's car did not commence until he was within 41 feet of the point of impact, the court is warranted in submitting to the jury the question of defendant's culpable negligence in failing to keep a proper lookout.

4. Criminal Law § 53f—

Where defendant offers no evidence but merely cross-examines each of the numerous witnesses for the State, the fact that the court necessarily consumes more time in stating the contentions of the State than it does those of defendant is not ground for exception.

5. Criminal Law § 62a—

Where the sentence imposed is within the discretionary limits fixed by statute, it cannot constitute a cruel or unusual punishment in the constitutional sense, and will not be disturbed in the absence of a showing of abuse of discretion. Constitution of N. C., Art. I, sec. 14.

6. Criminal Law § 62d—

A judgment which provides that the sentence imposed should commence at the expiration of sentences imposed in an unrelated former case, and further provides that in the event the former case, then on appeal, should result in a reversal or new trial, the sentence imposed should begin as provided by law, will not be held void as contingent.

7. Criminal Law § 79—

Exceptions not brought forward in the brief are deemed abandoned. Rule of Practice in the Supreme Court 28.

APPEAL by defendant from *Armstrong, J.*, and a jury, at 6 October Criminal Term, 1952, of GUILFORD (Greensboro Division).

Criminal prosecution tried upon two bills of indictment, consolidated for trial by consent, charging the defendant with (1) the felonious and willful killing of one George Rainey, tried below on the charge of involuntary manslaughter, and (2) "hit and run" driving in violation of G.S. 20-166.

On the afternoon of 16 July, 1952, at about 12:45 o'clock, George Rainey, a 13-year-old boy, was riding a bicycle along Boren Street in the Pomona suburb, just outside the corporate limits of Greensboro, when he was struck by a Ford automobile and killed instantly. It is alleged that the automobile was being driven by the defendant. Boren Street runs in an east-west direction and is paved to a width of about 18 feet

with black asphalt. The two vehicles were meeting. The automobile was being driven eastwardly along the south side of the street. The boy was riding the bicycle westwardly along the south side, "but . . . was turning to his left off the street."

The collision occurred just after the automobile had passed inside a 35-mile per hour speed zone, marked by a sign on the south side of the street. The point of impact was 220 feet east of the sign. On the north, diagonally across Boren Street from the speed zone sign, is a service station known as Rainey's Service Station. About 50 feet east of the service station, Boren Street is intersected by a dirt street known as Rucker Street. Beyond Rucker Street and on the right looking east is a row of houses facing the south side of Boren Street. The collision occurred in front of the fourth house. On the north, across the street from the houses, is an open grove. Boren Street extends on beyond the point of impact some four blocks east and dead-ends at the Western Electric plant.

The Rainey Service Station "is right at a little rise or crest in the road," over which the automobile had crossed and beyond which it had traveled some 175 or 200 feet when the boy was struck. The high point of the hillcrest "is just a . . . bit west . . . of the service station." As bearing on the question whether it was a blind hillcrest over which the automobile had just passed before striking the boy, engineer Luke A. Parsley, testifying from notes based on a survey of the premises, said in part: "I verified the elevation and profile of the road and I know where the road goes up and where it goes down. I graphed out a straight line on the profile which was 2½ feet above the surface of the pavement at a point 220 feet east of the speed sign (the point of collision) and saw where that line by clearing the crest of the hill would then be 4 feet 3 inches above the surface of the pavement to the west of the crest there at Rainey's Service Station. . . . If I took a measurement 10 feet to the east of that point—in other words, 230 from the east of the speed sign, (10 feet east of the point of impact) and drew a line 2½ feet high, clearing the crest there in front of Rainey's Service Station, the line would go a distance of approximately 360 feet before it was 4 feet 3 inches off the ground."

The driver of the automobile fled the scene without stopping. It is admitted in the defendant's brief "that there was sufficient circumstantial evidence from which the jury might draw the inference that the defendant was the operator of the Ford automobile at the time of the accident." Hence we omit reference to the evidence bearing on the question of identity of the driver.

There were a number of eyewitnesses to the collision. G. T. Rainey, uncle of the boy, testified he was sitting on the icebox in front of the

Rainey Service Station, with his back to the west, looking east, and saw the boy when he was struck. He estimated the speed of the car at 85 miles per hour. He said he first saw the car when it was east of the station and about 50 or 60 feet from him, and that it traveled on and hit the boy at a point about 300 feet diagonally east of the station from where he was sitting; that the boy was on the same side of the street as the car, but was turning toward the sidewalk when hit by the car—". . . he was turning in east off the street."

Betty Mullinax, a 15-year-old girl, said she saw the collision from a window in her home, which faces Boren Street and is the next house east of the Young house, in front of which the boy was hit. Her attention was attracted by the "squealing of the car brakes." The car and the bicycle were together at the time she first saw them. She said: "At the time I looked up they were together and the boy went off the bicycle into the air." She estimated the speed of the car at "between 75 and 85 miles per hour."

Mrs. Villard Dunn, who lives in the house two doors west of the Young house, said she "heard the brakes first and then the crash. . . . I saw George Rainey. He was hurtling through the air. . . . Then I went out to the street and saw some skid marks there. . . . These skid marks were a portion of the marks I saw the car making. . . . they extended a short distance from this side of my house on the west side beyond the Young house on the east side."

Mrs. S. R. Young, in front of whose house the boy was struck, was sitting near the front door. She said: ". . . on hearing the noise, I ran to the front door where I saw a car directly in front of my house. . . . I don't know what the speed of the car was, but it was going at a terrific rate of speed. . . . I turned to see what it had hit, and I saw a little boy lying in my driveway . . ."

W. S. McKinney, State Highway Patrolman, arrived at the scene a few minutes after the collision. He described the speed sign located on the south side of the street as being the conventional type used in designating a 35-mile-per-hour speed zone, and stated that the sign was visible for a quarter of a mile west of its location. In describing the skid marks, he stated that they began 179 feet east of the sign; that there were straight skid marks covering a distance of 191 feet, and then curved skid marks for an additional distance of 42 feet; that these marks were continuous, growing darker as they got in "this area" to the point they started to curve; that there were some bits and pieces of headlight glass in an area beginning about 41 feet to the east of where the straight skid marks started, and a gouged out place in the surface of the street indicating the approximate point of impact.

There was other evidence indicating that the bicycle was dragged along the surface of the street about 98 feet and thrown some 10 feet to the south, off the pavement. The right head lamp of the automobile identified as the death car was damaged; the right front fender was bent, and what appeared to be blood was found on the front bumper.

F. B. Wilson testified he was sitting in his car on Boren Street in front of the Baptist Church, about two blocks east of the scene of the collision; that he heard the car skidding and heard the crash; that he "looked back and could see the car swerving to the left and then back to the right"; that the car traveled on eastwardly and passed him, traveling at that time about 40 miles per hour, "and seemed to be accelerating."

R. W. Barrow said he was sitting in his car, parked about two blocks east of the scene of the collision. As he put it, "I saw the car approaching the boy as it came over the crest of the hill. . . . the boy on the bicycle was on the south side of the street. He was going off the road. . . . At the time the car struck the boy on the bicycle, the front wheels of the bicycle were off the highway and the back wheel was on the edge of the tar and gravel. I heard the squealing of the tires about that time. I was not able to judge the speed of the car as it approached me. It was some two blocks away. I noticed skidding—he slid straight a little ways and then it began to swerve after he had hit the child."

There was evidence tending to show that the weather was clear, the street was dry, and no other traffic was in the vicinity at the time.

The defendant offered no evidence.

The jury returned a verdict of guilty as charged in each case, and judgments were entered in substance as follows: (1) In the case in which the defendant was found guilty of "hit and run" driving in violation of G.S. 20-166, he was sentenced to the State's Prison for a term of not less than four nor more than five years, with direction that the sentence should commence after the expiration of sentences imposed in a former case against the defendant, tried at the February Term, 1952, of Guilford Superior Court and then on appeal to the Supreme Court of North Carolina (*S. v. Smith,* 237 N.C. 1, 74 S.E. 2d 291). (2) In the case in which the defendant was found guilty of involuntary manslaughter, he was sentenced to the State's Prison for a term of not less than twelve nor more than twenty years, with direction that this sentence should commence after the expiration of the sentences in the former case tried at the February Term, 1952, then on appeal to the Supreme Court, and also after expiration of the sentence imposed in the companion hit and run driving case.

The court expressly directed that in the event the former case then on appeal to the Supreme Court should result in a reversal or new trial, the sentences imposed in the instant cases should "begin as provided by

law," but it was specifically stipulated that in any event the sentences should run consecutively and not concurrently.

The defendant appealed, assigning errors.

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

Hines & Boren and Jordan & Wright for defendant, appellant.

JOHNSON, J. The defendant, pointing to the fact that the collision occurred on his right side of the street, contends that the court erred in refusing to allow his motion for judgment as of nonsuit. Here the defendant emphasizes the provisions of G.S. 20-38 (ff), under which a bicycle is deemed a vehicle and a rider of a bicycle is made subject to the applicable provisions of the statutes relating to motor vehicles. (*Tarrant v. Pepsi-Cola Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565.)

The defendant's contention is untenable. It is well established that "contributory negligence as such has no place in the law of crimes." *S. v. Cope*, 204 N.C. 28, 167 S.E. 456, and cases there cited. The evidence adduced below was sufficient to sustain the inference of culpable negligence of the defendant as the proximate cause of the boy's death. The court below properly overruled the motion for judgment as of nonsuit. *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, supra; 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 *S. v. Triplett*, 237 N.C. 604, 75 S.E. 2d 517.

Next, the defendant insists that the court erred in submitting to the jury with the issues of excessive speed and reckless driving, the issue of culpable negligence based on failure of the defendant to keep a proper lookout. Here the defendant contends there was not sufficient evidence to justify a finding of culpable negligence based on this theory. A study of the record, however, impels the other view. The evidence discloses that in approaching and cresting the hill, the defendant had a sight distance of approximately 360 feet, yet it appears that the skid marks did not commence until he was within about 41 feet of the point of impact. Also, crucial as bearing on this phase of the case is the evidence that the front wheel of the bicycle was off the main traveled portion of the road when hit. The exception may not be sustained. *S. v. Hough*, 227 N.C. 596, 42 S.E. 2d 659; *S. v. Rountree, supra; S. v. Gash*, 177 N.C. 595, 99 S.E. 337. Judge Armstrong clearly and correctly delineated the difference between actionable negligence and culpable negligence. *S. v. Rountree, supra.*

The defendant also excepts to the entire charge upon the theory that the court violated the provisions of G.S. 1-180 by failing to give equal stress to the contentions of the State and the defendant. In the development of the State's case, 21 witnesses were called and examined. The narrative reduction of this evidence covers approximately 76 pages of the record. While the defendant cross-examined each of the witnesses, he neither offered evidence nor took the stand in his own behalf. A study of the record leaves the impression that this exception is unfounded. *S. v. Roman,* 235 N.C. 627, 70 S.E. 2d 857.

Further, the defendant insists that the judgment imposed in the manslaughter case was excessive and violated his constitutional rights, entitling him to a remand for proper sentence. The contention is untenable. The punishment imposed was within the discretionary limits fixed by statute. G.S. 14-18; *S. v. Richardson,* 221 N.C. 209, 19 S.E. 2d 863; *S. v. Dunn,* 208 N.C. 333, 180 S.E. 708. While the punishment inflicted is substantial, abuse of discretion has not been shown, nor has it been made to appear that the judgment pronounced comes within the constitutional inhibition against "cruel or unusual punishments." Constitution of N. C., Art. I, Sec. 14; *S. v. Swindell,* 189 N.C. 151, 126 S.E. 417; *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Daniels,* 197 N.C. 285, 148 S.E. 244, and cases cited.

Finally, the defendant contends that the judgment in the manslaughter case is void as being contingent upon the outcome of a previous unrelated case (*S. v. Smith,* 237 N.C. 1). As to this, it is enough to say that authoritative decisions of this Court support the judgment as pronounced. *S. v. Sellers,* 234 N.C. 648, 68 S.E. 2d 308; *S. v. Satterwhite,* 182 N.C. 892, 109 S.E. 862; *S. v. Cathey,* 170 N.C. 794, 87 S.E. 532.

The defendant concedes in brief that the sentence imposed in the "hit and run" driving case, standing alone, is within the limits permitted by G.S. 20-182. It also appears that none of the assignments of error relating to this case was brought forward in the brief, except in so far as the punishment imposed in that case bears upon the reasonableness of the punishment imposed in the involuntary manslaughter case. Therefore the assignments of error in the "hit and run" driving case will be treated as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, p. 563; *Dillingham v. Kligerman,* 235 N.C. 298, 69 S.E. 2d 500.

In the trial below we find no error of law; therefore the judgments will be upheld.

No error.

EARLE B. EDWARDS AND A. B. WEST, SR., TRADING AS HIGHLAND SUPPLY COMPANY v. A. D. VAUGHN, GUARDIAN AD LITEM OF WELDON VAUGHN,

and

CARL C. MIMS v. A. D. VAUGHN, GUARDIAN AD LITEM OF WELDON VAUGHN.

(Filed 12 June, 1953.)

1. Trial § 22a—

On motion to nonsuit, plaintiffs are entitled to have their evidence considered in the light most favorable to them and to the benefit of every reasonable inference to be drawn therefrom.

2. Negligence § 19c—

When plaintiffs' own evidence establishes contributory negligence so clearly that no other conclusion may reasonably be drawn therefrom, nonsuit is proper.

3. Automobiles § 18h (3)—Evidence held to show contributory negligence in entering intersection with dominant highway without yielding right of way.

Plaintiffs' evidence tended to show that plaintiff driver stopped at a stop sign on a servient highway some 37 feet from the intersection with a dominant highway, that at this point he could see 150 feet to his left, and that he proceeded across the intersection at a speed of 12 miles an hour without again stopping, notwithstanding that before reaching the intersection he saw the car driven by defendant approaching along the dominant highway from his left. Plaintiffs' evidence further tended to show that at one point before entering the intersection plaintiff driver could have seen a distance of three-tenths of a mile to his left. *Held:* Plaintiffs' own evidence discloses contributory negligence as a matter of law on the part of plaintiff driver.

4. Automobiles § 8i—

Stop signs along a servient highway at an intersection with a dominant highway are placed for the purpose of giving drivers along the servient highway timely notice of the duty to stop before entering the intersection, but do not indicate that a motorist should stop at the sign, it being the duty of a motorist to stop at a place before entering the intersection from which his act of looking can be effective. G.S. 20-158.

APPEAL by plaintiffs Earle B. Edwards and A. B. West, Sr., trading as Highland Supply Company, and by defendant (in both cases), from *Burgwyn, Special Judge,* December Term, 1952, of CUMBERLAND.

These were civil actions instituted in Cumberland County, North Carolina, for damages sustained to person and property as a result of a motor vehicle collision which occurred on 10 January, 1952, about 3:00 p.m. at a point in Harnett County known as Bailey's Crossroads. The actions were consolidated for the purpose of trial.

The evidence reveals this factual situation with respect to the intersection involved. Two asphalt highways intersect at approximately right angles. The plaintiff Mims was operating a pickup truck owned by the plaintiffs Edwards and West, trading as Highland Supply Company, eastwardly over the highway leading from Coats to Benson. The defendant Vaughn was operating his Chevrolet automobile in a southerly direction on the highway leading from Hardy's Crossroads to Dunn. The road on which plaintiff Mims was operating the truck was a servient highway and on which there was a stop sign located 37 feet west of the western edge of the intersecting dominant highway.

The plaintiff Mims testified, "The weather was fair. As I approached the intersection, I observed on my right, along the highway, a stop sign and on my left a cotton gin. I stopped about 15 feet from the intersection. I looked to my left and then to my right and pushed the car into second gear and pulled out slowly, cautiously, and as I traveled on going from 12 to 15 miles an hour and as the front of my truck crossed the intersection, I saw a Chevrolet approaching from my left. I had not seen that vehicle until actually the front of my truck was started into the intersection. . . . I could not tell how fast it was coming. In my opinion, the speed of the approaching automobile was in excess of 80 miles an hour. I did not hear any noise the approaching car was making until its brakes were applied. I first observed this car when it was about 50 yards away from me and I heard the brakes when it was about 30 yards away. . . . The car hit me behind the cab in the bed of the truck, the portion directly behind the cab. . . . I had crossed the middle of the intersection when I was struck."

On cross-examination, this witness testified, "I was a stranger to this intersection prior to this occurrence. I saw the stop sign and I stopped at it with the front of my truck parallel to the stop sign. It is my opinion that the stop sign was about 15 feet from the edge of the intersecting highway. At the stop sign I could see by the gin down the intersecting highway to my left about 150 feet. After I stopped at the stop sign, I did not stop again before entering the highway, but went straight on in the (intersecting) highway at the rate of about 12 miles an hour. . . . I saw this man (Vaughn) and I thought I could get on through the intersection. . . . The first time I saw Vaughn's automobile, I could see well on down the road at that point. I (had not entered) the intersection when I first saw it, but I still continued into it. . . . I looked at Vaughn's automobile when I saw it. I turned my head, looked back in front, and looked again; the gap was closer between us, considerably. That is the only basis on which I could say he was going 80 miles an hour. . . . I was leaving the intersection when he hit me, that is the cab of the truck had passed over the center of the highway. . . . The front end of the

truck had not gone completely out of the intersection. The truck is about 16 feet, . . . I know that I myself in the cab was over the center of the highway, but part of the truck was back over on Vaughn's right side of the highway. I knew prior to the time that I was actually in the intersection that Vaughn's car was coming from my left down the highway toward the intersection."

The plaintiffs offered other witnesses who testified that when a car was stopped at the stop sign referred to by the plaintiff Mims, the driver could see the intersecting highway to the left for a distance of more than 250 feet and that the distance increased the nearer the car approached the intersection; that before you got to the intersection you could see in the direction from which the Vaughn car was coming, a distance of three-tenths of a mile. The plaintiffs also offered evidence to the effect that the stop sign referred to by the witnesses has never been moved and that an actual measurement made by one of the plaintiffs' witnesses while the trial was in progress, revealed that it is located 37 feet from the intersecting highway; that Vaughn's car skidded approximately 60 feet before the impact and that at the point of impact, skid marks showed that his car veered slightly to the left. The truck was virtually demolished, and the plaintiff Mims seriously injured.

There is but little conflict between the evidence of the plaintiffs and that of the defendant except as to speed. The defendant testified that he was driving only 45 to 50 miles an hour at the time Mims pulled the truck into the intersection, too late for him to stop or slow down and avoid the collision.

In the case of Edwards and West, trading as Highland Supply Company, against the defendant, the issues of negligence and contributory negligence were answered in favor of the plaintiffs and the issue of damages was answered in the sum of $50.00. In the case of *Mims v. Vaughn,* the issues of negligence and contributory negligence were answered in favor of the plaintiff, and the jury awarded him the sum of $9,000 for his injuries. The defendant appealed in both cases, and plaintiffs Edwards and West also appealed, assigning error.

Nance & Barrington for plaintiffs, appellants, Edwards and West.

Oates, Quillin & Russ for defendant, appellant.

Robert H. Dye and Nance & Barrington for plaintiff Mims, appellee.

DENNY, J. The defendant assigns as error the refusal of the court below to sustain his motion for judgment as of nonsuit interposed, in both cases, at the close of the evidence for plaintiffs and renewed at the close of all the evidence.

We will consider this assignment of error first since, if it is sustained, it will not be necessary to consider the defendant's other assignments of error, or those relied upon by Edwards and West on their appeal.

The plaintiffs here, as in all cases where a motion for judgment as of nonsuit is interposed, are entitled to have their evidence considered in the light most favorable to them and to the benefit of every reasonable inference to be drawn therefrom. *Morrisette v. Boone Co.*, 235 N.C. 162, 69 S.E. 2d 239; *Ervin v. Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431; *Chambers v. Allen*, 233 N.C. 195, 63 S.E. 2d 212; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307. However, when the defendant, as in this case, pleads contributory negligence, and the plaintiffs' evidence establishes such negligence so clearly that no other conclusion may be reasonably drawn therefrom, the defendant is entitled to have his motion for judgment as of nonsuit sustained. *Morrisette v. Boone Co., supra; Donlop v. Snyder*, 234 N.C. 627, 68 S.E. 2d 316; *Matheny v. Motor Lines*, 233 N.C. 673, 65 S.E. 2d 361; *Carruthers v. R. R.*, 232 N.C. 183, 59 S.E. 2d 782; *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; *Beck v. Hooks*, 218 N.C. 105, 10 S.E. 2d 608.

The plaintiff Mims, driver of the truck owned by plaintiffs Edwards and West, while operating the truck on the servient highway, stopped at a stop sign 37 feet from the intersecting highway. From the stop sign he had an unobscured vision, according to his own evidence, to his left of only 150 feet. Even so, his testimony is to the effect that he put the truck in second gear and proceeded into the intersection without stopping at a speed of about 12 miles an hour; that before entering the intersection he saw the defendant's car approaching on the dominant highway at a point only 150 feet from the intersection, traveling at a speed of 80 miles an hour. Moreover, according to plaintiffs' evidence, the plaintiff Mims could have seen the highway in the direction from which the defendant's car came, if he had looked, for a distance of three-tenths of a mile after he left the stop sign and before entering the intersection. In fact, the plaintiff Mims testified, "The first time I saw Vaughn's automobile, I could see well down the road at that point."

It is clear that the plaintiff Mims, in view of the conditions and circumstances related by him and corroborated by his witnesses, entered the intersection without exercising reasonable care for his own safety or the safety of others; and his negligence in so doing was a proximate cause, if not the proximate cause, of the injuries and damages resulting from the collision. *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598. If it be conceded that the defendant was negligent in driving his automobile at

an excessive rate of speed, we hold that the plaintiffs' evidence establishes contributory negligence on the part of the plaintiff Mims as a matter of law. He had ample time to see the approaching car in time to stop and avoid the collision. The conclusion we have reached is supported by our decisions. *Morrisette v. Boone Co., supra; Matheny v. Motor Lines, supra; S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532; *Parker v. R. R.,* 232 N.C. 472, 61 S.E. 2d 370; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137.

In *Morrisette v. Boone Co., supra, Devin, C. J.,* said: "It is not sufficient for the driver of a motor vehicle on approaching an intersection of highways to content himself with looking once from a point whence he cannot see oncoming traffic, if from a nearer point before entering the intersection another look would reveal the danger of collision. His looking must be timely so that his precaution may be effective."

Likewise, *Barnhill, J.,* said in *Parker v. R. R., supra:* "It does not suffice to say that the plaintiff stopped, looked, and listened. His looking and listening must be timely . . . so that his precaution will be effective."

The purpose of a stop sign at the intersection of highways is to warn the driver of a motor vehicle that he is approaching a zone of danger and to require him to observe the traffic conditions on the highways and to determine when, in the exercise of due care, he may enter the intersecting highway with reasonable safety to himself and others. G.S. 20-158; *Matheny v. Motor Lines, supra; S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155. The purpose to be served by placing a stop sign some distance from the intersection of a servient and dominant highway, is to give the motorist ample time to slow down and stop before entering the zone of danger. And when the driver of a motor vehicle stops at a stop sign on a servient highway and then proceeds into the intersection without keeping a lookout and ascertaining whether he can enter or cross the intersecting highway with reasonable safety, he ignores the intent and purpose of the statute, G.S. 20-158. It is the duty of the driver of a motor vehicle on such servient highway to stop at such time and place as the physical conditions may require in order for him to observe traffic conditions on the highways and to determine when, in the exercise of due care, he may enter or cross the intersecting highway with reasonable safety. In many places, stop signs due to the surrounding physical conditions are located at points from which the driver of a motor vehicle cannot get an unobscured vision of the intersecting highway for a sufficient distance to ascertain whether it can be entered or crossed with reasonable safety. Even so, as pointed out above, this does not relieve a driver on a servient highway from the duty to look and observe traffic conditions on the dominant highway, and to make such observation, before entering or crossing the same,

as may be necessary to determine whether or not it would be reasonably safe to enter or cross such highway.

It is the duty of the driver of a motor vehicle not merely to look, but to keep a lookout in the direction of traffic, and he is held to the duty of seeing what he ought to have seen and could have seen if he had looked. *Wall v. Bain, supra.*

The court below committed error in refusing to sustain defendant's motion for judgment as of nonsuit.

Reversed.

STATE v. IRENE HAM, MAUDE HAM PHIPPS, VIOLA CHURCH, JEAN TEASTER, AND LEONARD TEASTER.

(Filed 12 June, 1953.)

1. **Criminal Law § 8b—**

An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime.

2. **Same—**

All who are present and either aid, abet, assist or advise in the commission of a crime or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty.

3. **Same—**

Mere presence at the scene of the crime without any actual participation in its commission is insufficient to constitute a person an aider and abettor in the absence of any evidence tending to show that such person by word or deed gave active encouragement to the perpetrator or by his conduct made it known that he was standing by to lend assistance to the perpetrator when and if such assistance should become necessary.

4. **Same: Homicide § 2—Mere fact that bystander was husband of one of perpetrators of crime is insufficient to constitute him aider and abettor.**

Evidence tending to show that the driver of a car was the husband of one of its occupants and a friend or acquaintance of the other women occupants, that the occupants of his car and the women occupants of another car alighted from their respective cars and became embroiled in a "free-for-all" fight, that he took no part therein but merely watched the fight from the rear of his car, without any evidence that he either said anything to the participants or did anything, *is held* insufficient to withstand his motion to nonsuit, since whether he would have intervened to aid his wife if necessary, although a probability, rests in surmise based upon human nature and not an inference of fact supported by evidence.

5. **Criminal Law § 52a (2)—**

Conviction of a criminal offense may not rest upon surmise or conjecture or upon facts consistent with guilt but likewise consistent with innocence.

6. Homicide § 27h—

Where defendants plead not guilty and contend throughout the trial that they fought only in their necessary self-defense, an instruction to the effect that defendants contended that upon a finding by the jury of certain facts beyond a reasonable doubt, they would be guilty of murder in the second degree, must be held for error.

7. Criminal Law § 81c (2)—

Where it is apparent from the record that an erroneous instruction probably influenced the verdict of the jury, such error cannot be held harmless.

8. Criminal Law § 77d—

The Supreme Court is bound by the record and must assume that it is a correct transcript of the proceedings in the court below.

APPEAL by defendants from *Rudisill, J.,* October Term, 1952, ASHE.

Criminal prosecution under a bill of indictment in which it is charged that the defendants did kill and murder one Lola Church.

The homicide grew out of an affray between two groups of women. One was composed of *feme* defendants and the other of the deceased and the State's witnesses Evelyn Lemly, Lavonne Church, Delcie Testerman, and a Mrs. Stike. For convenience the defendants will hereafter be referred to as the Teaster group, and the other, as the Church group.

On 16 September, 1951, Lavonne Church and Evelyn Lemly and a Mrs. Stike went to the prison camp at Smethport in Ashe County to visit Garney Church, a convict confined in the prison camp. He is the brother of Lavonne Church and Evelyn Lemly, the son of the deceased, and the husband of the defendant Viola Church. Mrs. Stike is his grandmother. While they were at the camp the defendants came up on the automobile of defendant Leonard Teaster, husband of defendant Jean Teaster, to visit the same prisoner. Viola got out and went to the fence where Evelyn Lemley and Mrs. Stike were talking to Garney Church. Evelyn and Mrs. Stike left and went by the Teaster car. Evelyn said, "You g—— d—— whores." She and Mrs. Stike got on their car and left. They returned in about fifteen or twenty minutes, and Evelyn went back to the fence where Viola and Garney were talking. Evelyn and Viola "stood there and quarreled a while" and Evelyn then went back to her car. As her party passed the Teaster car, Evelyn said, "We will waylay you down the road." Epithets were passed between the two groups of women, and there was evidence that one of the Teaster group threw a bottle at the Lemly automobile. The Teaster group remained at the camp until about 4:30 and then left to go to the home of the father of *feme* defendants.

When the Church group left the camp the second time, they went to the home of the deceased. Later in the afternoon they, including the

deceased and Delcie Testerman, drove their automobile on a narrow road leading from the camp by the home of the father of *feme* defendants, turned around, and stopped in a sharp curve of the road. They testified they stopped because the automobile struck some rocks and to let Lola Church and Delcie Testerman get out and walk back home. There was evidence this is not the road they would travel on their way home. The defendants, on their way to the home of the father of the *feme* defendants, where one of them lived and where the Teasters had left a child, came up to the Church group car and stopped. They testified they were forced to stop because the Church group had put large rocks in the road, and Evelyn Lemly was standing in the road in a position where they would have to run over her if they proceeded.

From this point on the testimony is in sharp conflict. The substance of the State's evidence is to the effect the *feme* defendants got out of their car and assaulted the Church group with rocks, a bottle, and a car battery cable. The evidence for defendants tends to show that their way was blocked, that all of the Church group except Mrs. Stike were out of their car, or got out, and Lavonne Church said to them: "Roll out, you damn whores, we are going to kill you." "Stop, damn you." "Crawl out of there if you want to fight." Defendants got out and "she started throwing rocks, and so I (Jean Teaster) started towards her and she throwed one and hit me above the eye . . . Mrs. Church threw rocks. I had my hands on no one but Lavonne." As Lola Church got out of her car, Maude Phipps hit her with something that looked like a battery cable. In short, a general affray in which rocks and other weapons were used ensued. During the course of the affray, Lola Church was hit on the head with a rock, and in the face with a bottle, receiving an injury from which she died shortly thereafter.

The State's evidence as it relates to defendant Leonard Teaster tends to show that when his passengers got out of the automobile at the scene of the affray, he also alighted, went to the back of his car, placed one hand on his hip and the other on his automobile, and watched the fight. After Mrs. Church was hit, he said, " 'Girls, you all get in the car and let's go,' and so he got all in the car except Irene, and Irene said, 'I want to get that grey-headed bitch.' He said, 'You done killed one and you had better get in here.' "

Other State's witnesses testified that if Leonard Teaster did anything, they did not see it; that he stood with one hand on the car and one on his hip and watched it well done. There was testimony coming from witnesses for the defendants to the effect he never got out of the car until after the affray was over.

The jury for its verdict found the defendants Irene Ham, Maude Ham Phipps, and Viola Church guilty of murder in the second degree, and the

defendants Jean Teaster and Leonard Teaster, guilty of manslaughter. The court pronounced judgments on the verdicts and defendants appealed.

Attorney-General McMullan, Assistant Attorney-General Love, and Robert L. Emanuel, Member of Staff, for the State.

Bowie & Bowie and Higgins & McMichael for defendant appellants.

BARNHILL, J. The defendants assign as error the refusal of the court below to sustain their demurrer to the evidence under G.S. 15-173. However, the assignment is abandoned as to all the defendants other than Leonard Teaster. They, no doubt, upon reflection, perceived that the evidence, considered in the light most favorable to the State, tends to show that they, acting in concert, made an assault with deadly weapons upon the deceased and her companions, and that in the course of the assault the deceased was killed. Their own testimony tends to show there was a "free-for-all" affray during which Mrs. Church received the blow or blows upon her head which caused her death.

But the defendant Leonard Teaster insists that his demurrer to the evidence was well advised and should have been sustained. We are constrained to agree.

The testimony relied on by him tends to show that he remained in his automobile until the affray terminated. The State's eyewitnesses, without exception, testified that he neither did nor said anything. He merely took his stand at the rear of his automobile and watched the fight.

All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. *S. v. Hoffman,* 199 N.C. 328, 154 S.E. 314; *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272.

An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Williams,* 225 N.C. 182, 33 S.E. 2d 880; *S. v. Holland, supra.*

To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. *S. v. Holland, supra.*

If the defendant Leonard Teaster is guilty at all, he is guilty under these principles of law enunciated in our decisions.

We are aware that some textbooks state that "when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may

be regarded as an encouragement" and that in contemplation of law this is aiding and abetting. Wharton's Crim. Law, 12th Ed., ch. 9, sec. 246; and that this statement has been quoted in some of our decisions. *S. v. Williams, supra; S. v. Holland, supra.* Yet we find no decision of this Court in which it is held that evidence tending to show that a bystander was a friend of the perpetrator and the perpetrator was aware of his presence, and nothing more, is sufficient to support a conviction.

The defendant Jean Teaster was aware of the presence of her husband, and we may assume that in all probability this defendant would have intervened had it appeared to him that his wife was getting the worst of the encounter. But this is a pure surmise based on our knowledge of human nature and not an inference of fact supported by evidence.

While the facts and circumstances in respect to this defendant appearing from the testimony are consistent with his guilt, they are likewise consistent with his innocence. And the guilt of a person charged with the commission of a crime is not to be inferred merely from facts consistent with his guilt. Nor may the enforcement of the criminal law be made to rest upon surmise or conjecture.

The cases cited and relied on by the State are factually distinguishable. In those and like cases there was evidence of some fact or circumstance tending to establish the defendant's actual participation in the commission of the crime charged.

The court in the course of its charge instructed the jury in part as follows:

"On the other hand, gentlemen of the jury, the prisoners and each of them say and contend that if you are so satisfied beyond a reasonable doubt that they, or either of them, inflicted a rock wound on the deceased and the deceased died as the proximate result thereof, then under the law he or she would be guilty of murder in the second degree . . ."

Thus the court in effect stated to the jury that defendants conceded that if the jury found from the evidence that one or more of them struck the deceased with a rock and the deceased died as a proximate result thereof, then under the law she or they would be guilty of murder in the second degree.

There was no such formal admission entered of record. If counsel in their arguments to the jury so admitted—and it does not so appear—then the defendants are not bound thereby. *S. v. Redman,* 217 N.C. 483, 8 S.E. 2d 623. The defendants had entered a plea of not guilty. They strenuously insisted throughout the trial that they fought only in their necessary self-defense and were guilty of no crime. At the same time, there was evidence tending to show that three of them struck the deceased; that two of them struck her with rocks; and that one of the three also struck her in the face with a bottle and another with something that

looked like a battery cable. Hence the charge to which defendants except must be held for error on authority of *S. v. Redman, supra,* and *S. v. Simmons,* 236 N.C. 340, 72 S.E. 2d 743.

Was this charge prejudicial? All the defendants were engaged in an affray in which deadly weapons were used. The homicide resulted in the death of the deceased, so that the defendants, if guilty of an unlawful homicide, are all guilty in equal degree. *S. v. Beal,* 199 N.C. 278, 154 S.E. 604, and cases cited. Three defendants struck deceased with rocks or some other weapon. Jean Teaster and Leonard Teaster did not. The jury convicted the three of murder in the second degree. At the same time it returned a verdict of guilty of manslaughter only as against the two Teasters. It would seem, therefore, that the jury gave heed to the instruction. In any event, the probability that it influenced the verdict is too strong for us to brush it aside as harmless error.

But the Attorney-General stressfully insists that when the charge is read contextually it becomes apparent that this particular excerpt is not a correct transcript of what the judge said; that slight rephrasing thereof would make it harmonize with statements contained in the preceding and succeeding paragraphs and at the same time constitute a correct statement of the law.

If this be true, then the time to correct the record and make it speak the truth was when the case on appeal was settled. The cause comes before us on a case agreed. We are bound thereby and must assume that it is a correct transcript of the proceedings in the court below. *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921; *Mason v. Commissioners of Moore,* 229 N.C. 626, 51 S.E. 2d 6; *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740; *S. v. Wolfe,* 227 N.C. 461, 42 S.E. 2d 515.

The demurrer to the evidence entered by the defendant Leonard Teaster should have been sustained. As to him, the judgment entered must be reversed. As to the *feme* defendants, for the reasons stated, there must be a new trial.

As to defendant Leonard Teaster,

Reversed.

As to *feme* defendants,

New trial.

C. B. FULGHUM v. TOWN OF SELMA,

and

E. M. GRIFFIS, MRS. JOHN ELLIS, LUTHER CREECH, WOODROW STEVENS, HARRY HILL, MRS. OSCAR MORRIS, HIRAM EASON, AND ALL OTHERS WHO SIGN THIS COMPLAINT AND ALL OTHERS SIMILARLY SITUATED, v. TOWN OF SELMA.

(Filed June 12, 1953.)

1. Contracts § 11½a—

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

2. Municipal Corporations § 8b (2)—

A municipality executed a contract with a citizen under which the municipality was to furnish water to such citizen for distribution through his pipes to consumers in an adjacent village, and charge such citizen therefor the rate charged consumers within its corporate limits. The agreement fixed no time for the duration of the contract. *Held:* Either party could terminate the contract at will by giving reasonable notice to the other party.

3. Same—

A municipality which operates its own water works is under no duty to furnish water to persons outside its limits but has the discretionary power to do so. G.S. 160-255.

4. Same—

A municipality which undertakes to furnish water to persons outside its corporate limits does not assume the obligations of a public service corporation toward such nonresidents, but retains the authority to specify the terms under which they may obtain water and to fix rates different from those charged consumers within its limits. G.S. 62-30 (3), G.S. 160-256.

5. Same—

An amendment to an ordinance which substantially increases the rates charged for water supplied by a municipality for consumption outside its corporate limits cannot be held discriminatory in a legal sense when it applies alike to all nonresidents, and it is immaterial that a nonresident consumer deems such rates exorbitant or unreasonable.

6. Municipal Corporations § 8b (1)—

Defendant municipality sold water to an individual at a meter just inside its limits, and such individual resold the water through his own pipes to consumers outside the city limits. By amendment to its ordinances, the municipality greatly increased the rates charged such individual. *Held:* Such individual, even though a resident of the municipality, may not maintain that the city is under duty to furnish him water at the same rate furnished consumers within the corporate limits, since the municipality owes no duty to supply water to a resident for resale to others either within or without its limits.

7. Evidence § 2—

Courts will not take judicial notice of municipal ordinances.

APPEAL by plaintiffs from *Burgwyn, Special Judge,* at January Term, 1953, of JOHNSTON.

Consolidated civil actions to enjoin a municipality from cutting off a plaintiff's water supply, or charging him a water rate alleged to be discriminatory, exorbitant, and unreasonable.

The facts are stated in ultimate terms in the numbered paragraphs set forth below.

1. The defendant Town of Selma is a municipality in Johnston County.

2. A settled community known as Selma Mill Village abuts the outside boundaries of the defendant to the westward.

3. The defendant has owned and operated a waterworks system for many years.

4. The defendant furnishes water to its own residents for domestic and manufacturing purposes.

5. The defendant likewise supplies water through its own water mains for similar uses to nearby nonresidents other than the inhabitants of Selma Mill Village.

6. The defendant charges consumers of water residing within its corporate limits these monthly water rates: 5,000 gallons or less, $1.50; 5,000 to 55,000 gallons, 20 cents per 1,000 gallons; and over 55,000 gallons, 15 cents per 1,000 gallons.

7. The defendant charged its nonresident water customers the same rates as its resident consumers until 20 May, 1952.

8. The defendant sank a deep well near Selma Mill Village during 1948 to augment its town water supply. This operation substantially lowered the water level in the community, making it impossible for inhabitants of Selma Mill Village to obtain water by means of shallow wells.

9. The proposal to dig the deep well mentioned in the preceding paragraph was first broached during 1946. At that time inhabitants of Selma Mill Village requested the defendant to extend its water mains to Selma Mill Village and furnish them water.

10. The defendant declined to comply with this request. But the defendant made a contemporary contract with the plaintiff C. B. Fulghum, who resides in the Town of Selma and operates a grocery store in Selma Mill Village, whereby it agreed to supply water to Fulghum at a meter inside its corporate limits at the rates specified in paragraph six, and to permit Fulghum to convey the water through pipes of his own to Selma Mill Village for resale to its inhabitants for his own benefit. The contract did not fix the time of its duration.

11. Fulghum forthwith installed pipe lines at his own expense connecting the places of business and residences of inhabitants of Selma Mill Village desiring water service with the defendant's water mains at a meter just inside the corporate limits.

12. Fulghum completed his installations in 1946. Since that time the defendant has supplied water to Fulghum at the meter just inside the corporate limits, and Fulghum has distributed the water through his own pipe lines to the buildings of inhabitants of Selma Mill Village desiring water service. At the time of the commencement of these actions, Fulghum was distributing a total of 80,000 gallons of water each month to 42 buildings in Selma Mill Village, and was charging $2.00 for each building per month for so doing. Fulghum paid defendant the rates specified in paragraph six for all water supplied to him before 20 May, 1952.

13. On 2 May, 1952, the defendant adopted an ordinance establishing these rates for water supplied by it for consumption outside its corporate limits "on and after the 20th day of May, 1952": 5,000 gallons or less, $1.50; and over 5,000 gallons, $1.00 per 1,000 gallons. On 7 July, 1952, the defendant amended this ordinance by making the flat rate for the first 5,000 gallons or less $2.00 instead of $1.50. The defendant gave immediate notice of the enactments to Fulghum, the only person who buys water from the defendant for resale to others.

14. Fulghum has consistently denied the validity of the ordinance and the amendment, and has constantly offered to pay the defendant for the water supplied him since 19 May, 1952, at the rates specified in paragraph six. The defendant has consistently refused to accept the payments tendered by Fulghum, and has repeatedly threatened to cut off Fulghum's water supply because of his refusal to pay for the water supplied him since 19 May, 1952, at the higher rates fixed by the ordinance and the amendment.

15. These two actions arose out of the controversy set out in the preceding paragraph. The first action was brought against the defendant by Fulghum himself, and the second action was brought against the defendant by Luther Creech, Hiram Eason, Mrs. John Ellis, Mrs. John T. Evans, Mrs. Lela Evans, E. M. Griffis, Dina Hall, Minnie Hall, Harry Hill, Mrs. Harry Hill, M. H. Howell, Add Mitchell, Jr., Mrs. Add Mitchell, Jr., Mrs. Oscar Morris, T. R. Philyan, Mrs. Ted Poole, W. G. Radford, Charlie Starling, Woodrow Stevens, Mrs. Ed. Taylor, and Mrs. W. H. Thompson, inhabitants of Selma Mill Village who receive water through Fulghum's pipes. Judicial orders were entered in the actions restraining the defendant from cutting off Fulghum's water supply pending trials on the merits.

16. The complaints alleged in detail that the defendant enacted the ordinance of 2 May, 1952, and the amendment of 7 July, 1952, to coerce Fulghum to abandon his water service to the inhabitants of Selma Mill Village, and to transfer his pipe lines to the defendant at a sacrifice; and that the ordinance and the amendment were void because they violated the contract made between Fulghum and the defendant in 1946 and because the water rates fixed by them were discriminatory, exorbitant, and unreasonable. The complaints prayed, in substance, that the ordinance and the amendment be adjudged void; that the defendant be enjoined from charging Fulghum the rates fixed by them; and that the defendant be restrained from cutting off Fulghum's water supply. The answers denied the validity of the claims asserted in the complaints.

When the actions were called at the January Term, 1953, of the Superior Court of Johnston County, they were consolidated by consent for trial and judgment. The plaintiffs offered testimony sufficient to establish the matters stated in paragraphs one to fourteen, both inclusive. When the plaintiffs had produced their evidence and rested their case, the defendant moved that the consolidated actions be dismissed upon a compulsory nonsuit. The presiding judge allowed the motion, and entered judgment accordingly. The plaintiffs excepted and appealed.

Lyon & Lyon for plaintiffs, appellants.
W. I. Godwin and Wellons, Martin & Wellons for defendant, appellee.

ERVIN, J. There may be more than a modicum of truth in the assertion of the plaintiffs that the defendant enacted the ordinance and its amendment for the coercive purpose of inducing Fulghum to abandon his water service to the inhabitants of Selma Mill Village and transfer his pipe lines to the defendant at less than their value. Be this as it may, we must remember that hard cases are the quicksands of the law and confine ourselves to our appointed task of declaring the legal rights of the parties.

The crucial question raised by the appeal is this: Does the evidence of the plaintiffs suffice to show that Fulghum has the legal right to compel the Town of Selma to supply water to him at the rates charged consumers within its corporate limits for resale beyond its boundaries?

The plaintiffs insist initially that this question must be answered in the affirmative on the ground that the contract made by Fulghum with the Town of Selma in 1946 gives Fulghum this legal right.

This contention does not take certain controlling factors into account. The evidence discloses that Fulghum and the Town of Selma did not fix the time for the duration of the contract; that there was nothing in the inherent nature of the contract or the surrounding circumstances to indi-

cate that Fulghum and the Town of Selma intended the contract to be perpetual or to continue for any ascertainable period of time; that the Town of Selma manifested its intention to put an end to the contract by adopting the ordinance and the amendment in controversy; and that the Town of Selma gave Fulghum due notice of its intention to terminate the contract. This being true, the evidence of the plaintiffs affirmatively reveals that the contract invoked by them has been lawfully terminated under this rule: Where the parties to a contract calling for a continuing performance fix no time for its duration and none can be implied from the nature of the contract or from the surrounding circumstances, the contract is terminable at will by either party on reasonable notice to the other. *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N.E. 263; *Scott v. Dedham Water Co.*, 224 Mass. 398, 113 N.E. 282; *Barish v. Chrysler Corp.*, 141 Neb. 157, 3 N.W. 2d 91; Williston on Contracts (Rev. Ed.), section 38; 12 Am. Jur., Contracts, section 305; 17 C.J.S., Contracts, section 398; 67 C.J., Waters, section 747.

The precise question now before us was presented to the South Carolina Supreme Court upon virtually identical facts in *Childs v. Columbia*, 87 S.C. 566, 70 S.E. 296, 34 L.R.A. (N.S.) 542. In rejecting a contention similar to that now advanced by the plaintiffs, the South Carolina Supreme Court used these incisive words: "But . . . there is no allegation whatever that the plaintiff was bound to take, or the city was bound to furnish, water for any specified time. When the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other."

The plaintiffs maintain secondarily that their evidence is sufficient to establish a legal right in Fulghum to the relief sought irrespective of the matter of contract right. They argue in this connection that when the Town of Selma established its water works and undertook to distribute water for compensation, it became the legal duty of the Town of Selma to supply Fulghum water for any purpose at the same rates as those charged consumers residing within its corporate limits.

This position is clearly insupportable if Fulghum is assigned the status of a nonresident because of his business activities in Selma Mill Village.

A municipality which operates its own water works is under no duty in the first instance to furnish water to persons outside its limits. It has the discretionary power, however, to engage in this undertaking. G.S. 160-255. When a municipality exercises this discretionary power, it does

not assume the obligations of a public service corporation toward nonresident consumers. G.S. 62-30 (3); 67 C.J., Waters, section 739. It retains the authority to specify the terms upon which nonresidents may obtain its water. *Construction Co. v. Raleigh,* 230 N.C. 365, 53 S.E. 2d 165. In exerting this authority, it "may fix a different rate from that charged within the corporate limits." G.S. 160-256.

The rates fixed by the ordinance and the amendment for water supplied by the Town of Selma for consumption outside its corporate limits are not discriminatory in a legal sense. They apply alike to all nonresidents who purchase town water. The Town of Selma was empowered by law to make these rates different from those charged within its corporate limits. Since a nonresident must pay the uniform rates fixed by the Town of Selma for other nonresidents in order to obtain town water, it is immaterial that he deems such rates to be exorbitant or unreasonable. *Construction Co. v. Raleigh, supra; Childs v. Columbia, supra.*

The legal position of Fulghum is not bettered a single whit on the present record if he is assigned the status of a resident of the Town of Selma because his home is within its boundaries.

When a municipality engages in supplying water to its inhabitants, it owes the duty of equal service in furnishing water only to consumers within its corporate limits. It is under no legal obligation to supply water to a resident for resale to others either within or without its municipal limits. *Brand v. Board of Water Commissioners of Town of Billerica,* 242 Mass. 223, 136 N.E. 389.

Fulghum does not seek to have the water in controversy furnished to him as a consumer residing within the boundaries of the Town of Selma. His sole purpose is to resell the water to persons living outside its corporate limits. This being true, he cannot complain of the refusal of the Town of Selma to furnish him the water in controversy at the same rate charged resident consumers of the same quantity of water.

We cannot take judicial notice of municipal ordinances. 31 C.J.S., Evidence, section 27. In consequence, we have ignored the ordinance allegedly adopted by the defendant on 7 November, 1952.

Our decision on the compulsory nonsuit precludes a discussion of the other questions debated by the parties.

For the reasons given, the compulsory nonsuit is

Affirmed.

PAULINE HICKS DAVIS, ADMINISTRATRIX OF THE ESTATE OF CRAWFORD WHEELER DAVIS, DECEASED, v. CAROLINA POWER & LIGHT COMPANY.

(Filed 12 June, 1953.)

1. **Death § 3—**

In an action for wrongful death, plaintiff must produce evidence sufficient to establish that defendant was guilty of a negligent act or omission, and that such act or omission was the proximate cause of the death of decedent.

2. **Negligence § 9—**

Foreseeability of injury is a requisite of proximate cause.

3. **Electricity § 7—Held: Injury was not foreseeable under the evidence, and therefore nonsuit was properly entered.**

The evidence tended to show that defendant maintained at a height of 17 or 18 feet above the surface of a highway an uninsulated high voltage transmission line, and that plaintiff's intestate was electrocuted when he threw a house mover's measuring tape over the transmission line with a view to determining whether there was sufficient clearance to move a building under the line. *Held:* Even conceding negligence on the part of defendant in the maintenance of the transmission line, in the absence of any evidence that defendant had notice that plaintiff's intestate was moving the house under its line, the tragedy was not within the reasonable prevision of defendant, and therefore its motion to nonsuit should have been allowed.

DENNY, J., dissenting.

APPEAL by plaintiff from *Bone, J.*, at November Term, 1952, of DURHAM.

Civil action to recover damages for the death of the plaintiff's intestate who suffered electrocution when he threw a house-mover's measuring tape over a transmission line carrying a powerful current of electricity.

The plaintiff's evidence made out this case:

1. The plaintiff's intestate Crawford Wheeler Davis, an alert and industrious young man of the age of 25 years, was experienced in the moving of buildings from place to place by means of rollers and screw supports.

2. The defendant Carolina Power & Light Company, which was engaged in furnishing electricity to the public, distributed electricity through a settled community immediately west of the corporate limits of the City of Raleigh in Wake County by a transmission line, which crossed a public highway known as Western Boulevard at a height of 17 or 18 feet above the surface of the highway. The transmission line consisted of bare copper wires, which carried approximately 7,200 volts.

3. Prior to 23 April, 1951, the plaintiff's intestate entered into a contract with the State Highway and Public Works Commission whereby he obligated himself to move a one-story building along Western Boulevard from its original site east of the defendant's transmission line to a new location west of the line.

4. On the date mentioned, the plaintiff's intestate threw a housemover's measuring tape over the defendant's transmission line with a view to determining whether there was sufficient space beneath the transmission line for the clearance of the building. When the tape came in contact with the bare wires, a deadly current of electricity escaped from the wires, coursed through the tape, and struck the plaintiff's intestate, killing him instantly.

The evidence did not indicate that the defendant had any notice that the plaintiff's intestate intended to move the building along the highway or to throw the tape over the transmission line.

When the plaintiff had introduced her evidence and rested her case, the defendant moved to dismiss the action upon a compusory nonsuit. Judge Bone allowed the motion, and entered judgment accordingly. The plaintiff excepted and appealed.

Egbert L. Haywood and Emery B. Denny, Jr., for plaintiff, appellant.

Fuller, Reade & Fuller, E. S. DeLaney, Jr., and A. Y. Arledge for defendant, appellee.

ERVIN, J. This case is founded on negligence. In an action for death by wrongful act based on negligence, the burden rests on the plaintiff to produce evidence sufficient to establish the two essential elements of actionable negligence, namely: (1) That the defendant was guilty of a negligent act or omission; and (2) that such act or omission was the proximate cause of the death of the decedent. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670.

It is well settled in this jurisdiction that foreseeability of injury is a requisite of proximate cause. *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25; *Wood v. Telephone Co.,* 228 N.C. 605, 46 S.E. 2d 717; *Watkins v. Furnishing Co.,* 224 N.C. 674, 31 S.E. 2d 917; *Montgomery v. Blades,* 222 N.C. 463, 23 S.E. 2d 844; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808; *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446; *Osborne v. Coal Co.,* 207 N.C. 545, 177 S.E. 796. This being true, we would be compelled to affirm the compulsory nonsuit even if we should accept as valid the contention of plaintiff that the defendant was negligent in conveying a dangerous current of electricity across a public highway in a settled community on uninsulated wires suspended only 17 or 18 feet above the surface of the highway. The evidence at the trial did not disclose any

facts sufficient to charge the defendant with notice that someone might throw a house-mover's measuring tape over its transmission line. In consequence, the tragedy was not within the reasonable foresight of the defendant. *Pugh v. Power Co.*, 237 N.C. 693, 75 S.E. 2d 766; *Mintz v. Murphy*, 235 N.C. 304, 69 S.E. 2d 849; *Deese v. Light Co.*, 234 N.C. 558, 67 S.E. 2d 751; *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. 895; *Calloway 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; *Watrals' Adm'r v. Appalachian Power Co.*, 273 Ky. 25, 115 S.W. 2d 372; *Kelley v. Texas Utilities Co.* (Tex. Civ. App), 115 S.W. 2d 1233; *Kedziora v. Washington Water Power Co.*, 193 Wash. 51, 74 P. 2d 898; 18 Am. Jur., Electricity, section 53; 29 C.J.S., Electricity, section 42.

The ruling on the motion to nonsuit would have been the same had the plaintiff's witness J. C. Winters been permitted to testify that he had never observed uninsulated wires crossing highways.

Affirmed.

DENNY, J., dissenting: It is with reluctance that I dissent in this case. However, I think the plaintiff offered more than a scintilla of evidence in support of her allegations of negligence against the defendant. *Tippite v. R. R.*, 234 N.C. 641, 68 S.E. 2d 285. Be that as it may, the majority opinion holds that the compulsory nonsuit must be affirmed for the reason "the evidence at the trial did not disclose any facts sufficient to charge the defendant with notice that someone might throw a house-mover's measuring tape over its transmission line."

This Court in *Helms v. Power Co.*, 192 N.C. 784, 136 S.E. 9, speaking through *Stacy, C. J.*, said: "Electric companies are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business, to avoid injury to those likely to come in contact with its wires." *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543; *Mintz v. Murphy*, 235 N.C. 304, 69 S.E. 2d 849.

The question presented here, as I understand it, is whether the defendant in the construction of an electric transmission line, designed to carry

a strong and powerful current of electricity, could or should have foreseen when such line was constructed only 17 or 18 feet above and across a heavily traveled highway that some injury was likely to occur as a result of its construction and maintenance in such manner. Ordinarily a plaintiff is not required to prove that the defendant could or should have foreseen that the exact injury that did occur was likely to occur. The rule was stated in *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63, by *Johnson, J.,* in speaking for the Court, in which he said: "It is not necessary that the tort-feasor should have been able to foresee the injury in the precise form in which it occurred, nor to have been able to anticipate the particular consequences ultimately resulting from the negligent act or omission . . . Ordinarily, under our decisions it suffices to show (1) that 'by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act of omission, or that consequences of a generally injurious nature might have been expected.' . . . and, (2) that the injuries sustained were the natural and probable, although not the necessary and inevitable, result of the negligent fault of the defendants, *i.e.,* such injuries as were likely, in ordinary circumstances, to have ensued from the act or omission in question," citing numerous authorities.

According to plaintiff's evidence it is the procedure generally followed by house movers where a house is to be moved under a wire, "if the wire appears to be too low for the building to go under it, to take a tape and throw over it and let it drop to the ground. . . . If the wires are too low, you call back to the company and, of course, they raise it for you, for a fee." This witness, an experienced house mover, further testified that he had thrown a tape line identically like that used by plaintiff's decedent over power lines and did not get hurt.

Upon the evidence adduced in the trial below, was plaintiff's decedent charged with the duty to foresee that the defendant would construct and maintain a power line, carrying 7,200 volts of electricity, only 17 or 18 feet above and across a heavily traveled highway and neither insulate it by insulation nor by more adequate isolation? I do not think so.

STATE v. DOCK CRANFIELD (CRANFILL).

(Filed 12 June, 1953.)

1. **Forgeries § 2—Where blank checks bearing forged signature are filled out at defendant's direction, they are indirectly uttered by defendant.**

Evidence tending to show that defendant delivered to a merchant signed blank checks and requested the merchant to fill them in for specified amounts and received therefor merchandise and cash, and that the signatures were forgeries, *is held* sufficient to be submitted to the jury in a prosecution under G.S. 14-120, since even though the checks were incapable of passing or obtaining anything of value as delivered, the checks were filled in at the direction of defendant, and therefore the evidence is sufficient on the question whether defendant directly or indirectly uttered the forged checks.

2. **Criminal Law § 42b—**

The trial court has the discretionary power to permit leading questions, and upon defendant's failure to show prejudice such discretionary action of the trial court will not be disturbed.

3. **Criminal Law § 78d—**

The denial of a motion to strike out the testimony of a main witness for the State will not be held for error, since it would seem that the motion is too late and, in failing to point out any particular portion of the testimony, is too vague and general.

APPEAL by defendant from *Armstrong, J.*, at 9 March, 1953, Term, of FORSYTH.

Criminal prosecutions upon two bills of indictment, Nos. 8453 and 8454, each containing two counts charging (1) forgery of a check, and (2) uttering of a forged check. No. 8453 relates to a check signed in the name of Claude Hicks, dated 18 February, 1952, drawn upon the Bank of Davie, payable to the order of Cash for the sum of $62.90. And No. 8454 relates to a check signed in the name of Frank Hendrix, dated 25 April, 1952, drawn upon the Bank of Davie, payable to the order of Piedmont Bargain House for the sum of $50.00.

Defendant pleaded not guilty.

Upon trial in Superior Court the State offered testimony substantially as follows:

(1) Claude Hicks testified that he knew nothing about the check, dated 18 February, 1952, drawn on the Bank of Davie, Mocksville, N. C., for $62.90, payable to order of Cash, purporting to be signed in his name, until it showed up in his bank statement that was returned in March, 1952; that he did not sign the check, nor did he authorize anybody to sign his name to it; and that the writing in the body of the check is different from that of the signature.

(2) J. Frank Hendrix testified that he knew nothing about the check dated 25 April, 1952, drawn on the Bank of Davie, Mocksville, N. C., for $50, payable to the order of Piedmont Bargain House, purporting to be signed in his name, until around the first of May when it came to him through his bank statement; that he did not sign the check, nor did he authorize anybody to sign his name to it; and that the handwriting in the body of the check is not the same as the signature.

(3) And Nathan Sosnik testified substantially and in pertinent part that in the year 1952 he was operating the Piedmont Bargain House, at 606½ N. Trade Street, right across the street from the Western Auto, in Winston-Salem, North Carolina; that on 18 February defendant came into his store with a check just signed at the bottom in the name of "Claude Hicks" stating that he, the landlord on whose land he farmed, told him to buy lespedeza seed, and that he (defendant) wanted to do some trading in his (Sosnik's) store; that it would take $50 to buy the lespedeza seed, besides the $12.90 for merchandise; that defendant told him to fill in the check, and he did so,—everything except the signature; and that after the check was filled in, he, Sosnik, cashed it for defendant,— taking out $12.90 for merchandise and gave him, defendant, $50 in "cash money."

And Nathan Sosnik continued, saying: That on 25 April the defendant came back to his store and said that he needed $50; that defendant had a check on which there was nothing but Mr. Hendrix' signature; and requested him, Sosnik, to fill in the check, and that he, Sosnik, did so in defendant's presence, and then cashed it for him and gave him $50 "cash money."

Defendant, as witness for himself, denied the transactions related by the witness Sosnik,—testifying that he was in the town of Mocksville on both of those days.

The above is the framework on which the case was presented to the jury.

Verdict: Guilty of uttering as charged in the second count of the bill of indictment in each of the above cases.

Judgment: A prison sentence in No. 8453, followed by a like sentence in No. 8454, to run consecutively—the latter suspended on conditions stated.

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.

Frank Freeman and J. J. Harris for defendant, appellant.

WINBORNE, J. Appellant, the defendant, brings forward several assignments of error,—but, after careful consideration of them, prejudicial

error is not made to appear. However, this Court will treat such of the assignments of error so presented as it is deemed to be required.

Assignments of error numbered 7 and 9 are based upon exceptions numbered 7 and 15, to denial of motions aptly made for judgment as of nonsuit, pursuant to G.S. 15-173.

In this connection it is appropriate to note that the two counts in the bills of indictment on which these prosecutions are founded are in conformity with the provisions of two kindred statutes pertaining to forgery, (1) G.S. 14-119, relating to "Forgery of bank-notes, checks and other securities," and (2) G.S. 14-120, relating to "Uttering forged paper." These statutes have as their origin an act of the General Assembly of North Carolina, "begun and held at Raleigh" on 20 November, 1819, Chapter 994 (2 Potter 1819) entitled "An Act more effectually to punish the making, passing or attempting to pass, counterfeit bank-notes."

And this Court, considering this Act of 1819, in the case of *S. v. Harris,* 27 N.C. 287, at December Term, 1844, in opinion by *Ruffin, C. J.,* had this to say: "Under the first section of the act of 1819 the crime consists in passing as true 'a note which the party knew to be forged.' But by the second section the passing or attempting to pass by one person 'to any other person' a forged note, knowing it to be forged, constitutes the offense. It is putting spurious paper in circulation, and not defrauding the individual who takes it, that the statute has in view."

Defendant stands convicted of the charge predicated upon the provision of G.S. 14-120 relating to "uttering forged paper." This statute declares that: "If any person, directly or indirectly, whether for the sake of gain, or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check or security as is mentioned in the preceding section; or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeited), the person so offending shall be punished by imprisonment . . ."

The preceding section, G.S. 14-119, so referred to, relating to "Forgery of bank-notes, checks and other securities" declares that "If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this State, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or on the cashier thereof; or any of the securities purporting to be issued by or on behalf of the State, or by or in behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the State, the person so offending shall be guilty of a felony and shall be punished by imprisonment . . .," etc.

Defendant takes the position that "one of the essential elements of a forged check is that it be capable of passing or obtaining a thing of value," and that, hence, when the checks in question physically passed from the hands of defendant into the hands of Nathan Sosnik, neither of them was capable of "passing or obtaining a thing of value." In support of this position the case of *Barnes v. Crawford,* 115 N.C. 76, 20 S.E. 386, is cited. In that case the Court stated that "to constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false, it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud." There is nothing wrong with this principle, but the difficulty confronting defendant, as reflected by the record, is that the premises he assumes is only an inference the jury might find from the evidence offered on the trial.

The motion for judgment as of nonsuit raises the question as to whether the evidence offered upon the trial, and shown in the case on appeal, taken in the light most favorable to the State, is sufficient to take the case to the jury on the question as to whether defendant passed to Nathan Sosnik a forged check, knowing it to be forged. The evidence tends to show that the name appearing on, and as the drawer of the checks, respectively, was not signed by such person, nor did he authorize any other person to sign it for him. The evidence tends to show that the purported drawer of each check knew nothing of it until it came to him through the bank on which it was drawn. Manifestly this evidence is of sufficient import to support a finding by the jury that the name appearing as the drawer of the check was forged. The evidence further tends to show that defendant had these blank checks so purporting to be signed. And as to the check of 18 February, the evidence tends to show that defendant represented to Nathan Sosnik that his landlord "gave him the check to do his trading, to buy lespedeza seed, which took $50.00 besides the $12.90 worth of merchandise" for which defendant was trading, and that at defendant's request, and in his presence, he, Sosnik, filled in the check payable to Cash for $62.90, and that after the check was filled in, he, Sosnik, cashed it for defendant, taking out $12.90 for the merchandise, and gave defendant $50.00 in cash.

From this evidence, we fail to follow through on defendant's contention that the filling in of the check was the handiwork of Sosnik, for which he, the defendant, is not responsible. The statute G.S. 14-120 expressly covers any person who "directly or indirectly" utters a forged check. What defendant did through Sosnik, he did himself.

Assignments of error numbered 1, 2, 3, 4 and 5, based upon exceptions of like numbers, relate to leading questions asked by the Solicitor for the State of the witness Sosnik on direct examination with respect to his

filling in the blank spaces in the checks, and as to his doing so at the request and direction of defendant. In this connection, it has been uniformly held by this Court that "the allowance of leading questions is a matter entirely within the discretion of the trial judge, and his ruling will not be reviewed on appeal, at least in the absence of a showing of abuse of discretion." Stansbury's N. C. Evidence, Section 31, citing *S. v. Buck,* 191 N.C. 528, 132 S.E. 151. See also among other cases *S. v. Hargrove,* 216 N.C. 570, 5 S.E. 2d 852; *S. v. Harris,* 222 N.C. 157, 22 S.E. 2d 229.

Applying this principle to case in hand, prejudice is not discernible,—hence there is no showing of abuse of discretion. *S. v. Harris, supra.*

Assignment of Error 6, based on exception 6, is directed to ruling of the court in denial of defendant's motion "that the evidence of the witness Nathan Sosnik be stricken out." The motion was made at the conclusion of the testimony of the witness. It would seem that the motion came too late. Indeed, it is vague and too general, and fails to point out any particular portion of the testimony of the witness. And for these, if for no other reasons, the exception is without merit.

As to other assignments of error, express consideration is not deemed necessary.

In the judgment from which appeal is taken, we find

No error.

JANE GRAY SAPP FINLEY v. GEORGE M. SAPP.

(Filed 12 June, 1953.)

1. Divorce § 17—

The procedure for determining the right to custody of a child as between its parents who have been divorced by a decree of another state is governed by G.S. 50-13.

2. Divorce § 19—

Findings of the trial court, upon supporting evidence, that both the father and mother are of good character and fit and suitable persons to have the custody of their child, and further that the best interests of the child would be served by granting its custody to the mother, support judgment awarding the custody to the mother. The natural right of a father to the custody of his child does not limit the discretionary power of the court under the statute which makes the paramount consideration the best interests and the general welfare of the child. G.S. 50-13.

3. Same—

The fact that at the time of separation the wife agrees that the husband should have custody of their child is not binding upon the court in a subse-

quent contest between them for the custody of the child after divorce and the remarriage of each of them.

APPEAL by respondent Sapp from *Clement, J.*, at Chambers, 7 May, 1953, FORSYTH. Affirmed.

This was a special proceeding under G.S. 50-13 to determine the custody of Jean Elizabeth Sapp, child of the marriage between petitioner and respondent.

Petitioner and respondent were married in 1940. The child was born in 1942. The parents separated in 1949, and in 1950 petitioner obtained an absolute divorce from respondent in the State of Arkansas. Petitioner has since married Floyd L. Finley, and she and her present husband are now residents of Forsyth County. The respondent has also married again and is living in Guilford County. At the time of the separation between petitioner and her husband, it was agreed between them that the child should remain in the custody of her father, and since then she has been living with her paternal grandparents.

There was evidence of the good character of petitioner and of respondent.

The court found facts and rendered judgment as follows:

"That on October 5, 1940, the plaintiff, Jane Gray, married the defendant, George Sapp, and on the 12th day of January 1950, the said Jane Gray Sapp obtained an absolute divorce from the defendant in the State of Arkansas, and that since said time both the plaintiff and the defendant have remarried, the plaintiff now living in or near Winston-Salem, N. C., with her second husband, and the defendant with his second wife living in Guilford County, N. C.; that the said plaintiff and defendant had one child, to-wit; Jean Elizabeth Sapp, now approximately ten years of age; that since the remarriage of the defendant the said child has been living with its paternal grandparents in Guilford County, and that since the said remarriage of the defendant said child has been in the custody and under the control of its paternal grandparents, with the defendant dropping in to see the said child frequently.

"The court further finds as a fact that the plaintiff is a woman of good character and is a fit and suitable person to have the custody and control of her said child, and that her home is a fit and suitable home in which to rear the said child; the court further finds as a fact that on account of the age and sex of the said child it would be for the child's best interests, health and general welfare to be with her own mother, and that at this particular time in the child's life she especially needs the care, love, watchfulness and concern of her own mother; and the court further finds as a fact that as between the child's own mother and paternal grandparents, that the mother is entitled to the custody of the said child. The court

also finds that the father is also a fit and suitable person to have the custody of said child.

"It is, therefore, ordered, adjudged and decreed that Jane Gray Sapp Finley be, and she is hereby, awarded the custody of her minor daughter, Jean Elizabeth Sapp, with the right of the defendant to see and have the said child at reasonable times and for reasonable periods of time so as not to interfere with the child's school work, and that the said defendant may have the said child on weekends, and may have her for eight weeks during vacation in the summer when the child is not in school."

The respondent appealed.

Deal, Hutchins & Minor for petitioner, appellee.

F. L. Paschal, Robert H. McNeely, and James M. Hayes, Jr., for respondent, appellant.

DEVIN, C. J. The parents of the child whose custody is now being contested were divorced by decree of an appropriate court in the State of Arkansas where petitioner was then residing. All the parties are now residents of North Carolina. Hence the procedure for determining the custody of the child is governed by the statute G.S. 50-13. *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884.

The able and experienced judge who heard all the evidence found the facts and thereupon adjudged that the custody of the little girl be awarded the mother who was found to be a woman of good character and fit and suitable to have the custody of her child. The court further found it would be for the child's best interest and general welfare to be with her mother. Provisions were made for the child to be with her father during school vacation. There was evidence to support these findings and the judgment based thereon.

The statute (G.S. 50-13) specifically provides that the court "may commit their custody and tuition to the father or mother, as may be thought best." And in *Walker v. Walker,* 224 N.C. 751, 32 S.E. 2d 318, *Justice Winborne,* speaking for the Court, used this language: "Applying this statute, the decisions of this Court hold that the question of granting the custody and tuition of the child to the father or mother is discretionary with the court (citing authorities). The welfare of the child is the paramount consideration, or, as stated *In re Lewis,* 88 N.C. 31, 'the polar star by which the discretion of the Courts is to be guided.'" *In re Alderman,* 157 N.C. 507, 73 S.E. 126; *Brake v. Brake,* 228 N.C. 609, 46 S.E. 2d 643; *Hardee v. Mitchell, supra; Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313.

The appellant assigns error in the judgment on the ground that the court having found that the father was also a fit and suitable person to

have custody of the child, the paramount right to the custody of his child was in him, citing *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144, and *Patrick v. Bryan,* 202 N.C. 62, 162 S.E. 207.

The *Patrick case* was a suit to recover damages for injury to a child, and the matter to which the decision related was the validity of a settlement agreed to by the father. In that connection it was said in the opinion of the Court that the father "is the guardian by nature of his child."

In *Tyner v. Tyner, supra,* the trial judge had found that the father was the proper person to have custody of his children, and that it was to the best interests of the children that he have such custody. This Court affirmed, and in the opinion was quoted the following from *Newsome v. Bunch,* 144 N.C. 15, 56 S.E. 509: "The father is, in the first instance, entitled to the custody of his child. But this rule of the common law has more recently been relaxed, and it has been said that where the custody of children is the subject of dispute between different claimants, the legal rights of parents and guardians will be respected by the courts as being founded in nature and wisdom. . . .; still, the welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion, and therefore, they may, within certain limits, exercise a sound discretion for the benefit of the child."

Neither of these cases supports the view that the natural right of a father to the custody of his child should override the finding of the judge that the best interests of a little girl would be served by awarding her custody to her mother.

It also appears that in the case at bar the father does not propose to take the child into his own home but thinks her best interests would be served by permitting her to continue to reside with her grandparents. It cannot be said that the facts were found by the judge below under a misapprehension of the law. *Perkins v. Sykes,* 233 N.C. 147, 63 S.E. 2d 133.

The fact that petitioner agreed when the separation took place between her and her husband in 1949 that the custody of the child should remain with the father is not binding on the Court. *In re Alderman,* 157 N.C. 507, 73 S.E. 126; *S. v. Duncan,* 222 N.C. 11, 21 S.E. 2d 822; *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313. Doubtless there were other considerations than lack of maternal love which brought about this agreement on her part at that time.

We conclude that the findings below are supported by the evidence, and that the judgment thereon must be in all respects

Affirmed.

ERNEST H. VINCENT v. J. K. WOODY AND T. H. HERNDON.

(Filed 12 June, 1953.)

1. Bailment § 7—

Evidence tending to show that plaintiff delivered his car to defendant under an agreement that defendant was to have it repaired and sell it for plaintiff, that defendant refused to surrender the car voluntarily, and that when plaintiff obtained possession of the car by claim and delivery it was in a damaged condition, *is held* sufficient to make out a *prima facie* case and repel defendant's motion to dismiss as in case of nonsuit.

2. Bailment § 4—

It is the duty of bailee to exercise ordinary care to protect the property bailed against damage and to return the property in as good condition as when he received it.

3. Same—

A bailee is liable for damage to the property bailed proximately resulting from his negligence or the negligence of his agent while the property is in his possession.

4. Bailment § 7—

In bailor's action to recover for damage to the property while in possession of bailee, a single excerpt from the charge to the effect that the bailee was liable as an insurer for any damage to the property while in his possession or the possession of his agent, will not be held for prejudicial error when the charge construed contextually unambiguously limits the bailee's liability to damage proximately resulting in the failure of the bailee or his agent to exercise due care.

5. Appeal and Error § 39f—

The charge of the trial court will be read contextually, and an excerpt from the charge will not be held prejudicial, even though it be erroneous when considered out of context, if the charge when considered as a whole presents the law of the case to the jury in such manner as to leave no reasonable cause to believe that the jury was misled or misinformed.

6. Trial § 19—

The weight and credibility of the testimony is for the jury and not the court.

APPEAL by defendant Woody from *Morris, J.*, March Term, 1953, DURHAM. No error.

Civil action to recover possession of an automobile and compensation for damages thereto.

On 29 October, 1951, plaintiff, a resident of Person County, delivered his automobile and certificate of title to defendant Woody, a resident of Durham. He alleges and offered evidence tending to show that he did so under an agreement that Woody would find a purchaser and sell the vehicle for him.

Defendant admits that the automobile was delivered to him but alleges and offered evidence tending to show that it was delivered to him as security for money advanced to plaintiff and amounts expended and to be expended in repairing the vehicle and putting it in condition for sale. He admits he agreed to find a purchaser after the automobile was repaired. In addition, the defendant pleads a counterclaim in the sum of $284.57 and prays that said sum be adjudged a lien upon said automobile and that the automobile be sold to satisfy said lien.

While the vehicle was in the possession of Woody, it was delivered to defendant Herndon, a mechanic, so that he might make certain repairs and replacements. Plaintiff offered evidence tending to show that while the vehicle was in Herndon's possession, Herndon used it as his own and caused considerable damage thereto, and parts were removed therefrom, as detailed in his testimony.

On 11 March, 1952, plaintiff instituted this action and sued out an ancillary writ of claim and delivery under which the vehicle was seized and delivered to plaintiff.

In the trial below, at the conclusion of the testimony, the court entered judgment of nonsuit as to the defendant Herndon, and the jury for its verdict found that (1) said automobile was wrongfully detained by defendant Woody, (2) plaintiff is not indebted to Woody in any amount, (3) plaintiff is entitled to recover $150 for the wrongful detention of the automobile, and (4) plaintiff is entitled to recover of Woody compensation for damages to said automobile in the sum of $495 while it was in the possession of defendants.

The court set aside the verdict on the third issue and entered judgment on the verdict as thus amended. Defendant Woody excepted and appealed.

C. Horton Poe, Jr., for plaintiff appellee.

Edwards & Sanders for defendant appellant.

BARNHILL, J. The appellant's exception to the denial of his motion to dismiss the action as in case of involuntary nonsuit is untenable. He admits in his answer that plaintiff holds the legal title to the vehicle in controversy and that he received possession thereof from plaintiff, which possession he has not voluntarily surrendered. Even now he claims the right of possession under an agreement that he should retain the same as security for the debt alleged to be due him by plaintiff. And plaintiff offered evidence tending to show that while the vehicle was in Woody's possession or in the possession of Herndon as his agent, parts were removed therefrom and it was otherwise materially damaged. This evidence suffices to make out a case for the jury.

On this record the defendant was a bailee. As such, it was his duty to exercise ordinary care to protect the property bailed against damage and to return it in as good condition as it was when he received it. Hence he is liable for any damages to the vehicle in question while in his possession which was proximately caused by his negligence or the negligence of his agent. *Falls v. Goforth,* 216 N.C. 501, 5 S.E. 2d 554; *Trustees v. Banking Co.,* 182 N.C. 298, 109 S.E. 6; *Insurance Asso. v. Parker,* 234 N.C. 20, 65 S.E. 2d 341.

While the burden rested upon plaintiff to establish his cause of action, it is an established rule in this jurisdiction that evidence tending to show that the bailee failed to return the chattel held in bailment free from damage is *prima facie* evidence that the loss or damage was due to the negligence of the bailee and is sufficient to repel a motion to dismiss as in case of nonsuit. *Perry v. R. R.,* 171 N.C. 158, 88 S.E. 156; *Trustees v. Banking Co., supra; Beck v. Wilkins,* 179 N.C. 231, 102 S.E. 313; *Falls v. Goforth, supra; Wellington-Sears Co. v. Finishing Works,* 231 N.C. 96, 56 S.E. 2d 24.

The plaintiff contended that the vehicle was delivered to Herndon without his knowledge or consent. Woody contended it was delivered by him and plaintiff jointly and plaintiff gave instructions as to the repairs and replacements to be made by the mechanic. The excerpt from the charge of the court directed to the evidence on this phase of the case, to which defendant excepts, lifted out of context, would seem to make defendant an insurer of the safe return of the property bailed in an undamaged condition. In the event "the automobile was placed in possession of Herndon without the knowledge, consent, or permission of the plaintiff; and as a result of the automobile having been placed in his possession, Herndon's, without the knowledge, consent, or permission of the plaintiff, and it was then damaged by Herndon; then Woody would be liable for the damage done to said automobile while in the possession of Herndon . . ."

But it is axiomatic that the charge must be read and construed contextually. Immediately preceding the instruction to which exception is entered the court had correctly instructed the jury as to defendants' liability. Immediately following, the court emphasized the fact that defendants' liability in any event depended upon the presence or absence of negligence. It then applied the law specifically to the case on trial in the following language:

"So that in this case, if you find that the relationship of bailor and bailee existed between the plaintiff and defendant, the defendant had imposed upon him the responsibility of exercising due care to return the property in the same condition as it was when delivered to him, or to keep the same in good order and condition until bail was made. And if by his

failure to exercise due care, the property was damaged in any amount, the plaintiff would have carried the burden of the fourth issue, entitling him to nominal damages at least. And this fact is so prominent (*sic*), that if the defendant placed the car in the hands of some other person; that is to say, if Woody placed the car in the hands of Herndon, and Herndon failed to use due care and subjected it to abuse; then Woody is answerable to any conduct on the part of Herndon that caused a decrease in value of the automobile; and he, Woody, delivering the car to Herndon, would and did make Herndon his agent."

Ordinarily the presiding judge must instruct the jury extemporaneously from such notes as he may have been able to prepare during the trial. To require him to state every clause and sentence so precisely that even when lifted out of context it expresses the law applicable to the facts in the cause on trial with such exactitude and nicety that it may be held, in and of itself, a correct application of the law of the case would exact of the *nisi prius* judges a task impossible of performance. The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that it was misled or misinformed in respect thereto.

Such is the case here. The charge, when read as a composite whole, leaves us with the impression the jury must have understood that defendant was liable only for those damages to the automobile which proximately resulted from his negligence or the negligence of his agent.

In the final analysis, the case is one of fact. The evidence in many respects was in sharp conflict. The jury, having heard both sides, has decided the issues in favor of plaintiff. The testimony was such that it might well have answered them in favor of the defendant. The weight and credibility of the testimony was for it, and not for the court, to decide. Defendant must now abide the result.

No error.

FOSTER RICE (EMPLOYEE) v. THOMASVILLE CHAIR COMPANY, SELF-INSURER (EMPLOYER-CARRIER).

(Filed 12 June, 1953.)

1. Master and Servant § 40g—

Evidence tending to show that plaintiff employee felt a sharp pain in his groin while exerting himself in the course of his employment on a Friday afternoon, that painful swelling shortly followed, and that on Wednesday of the following week the doctor found an impulse which he diagnosed as hernia, but waited several days for the development of the hernia to be

absolutely sure, *is held* sufficient to sustain the finding of the Industrial Commission that the injury was compensable under G.S. 97-2 (r).

2. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence even though the evidence might support contrary findings. G.S. 97-86.

APPEAL by defendant from *Rudisill, J.*, at February Civil Term, 1953, of DAVIDSON.

Proceeding under Workmen's Compensation Act to determine liability of defendant, self-insurer, to plaintiff, employee.

The pertinent phases of the evidence may be summarized as follows: On 15 June, 1951, the plaintiff was helping push a truck of gum lumber, weighing about five tons, on a track leading into the dry kiln at defendant's plant. Ordinarily eight men did the pushing; this time only five were doing it. The men were pushing with their backs against the lumber. They were having difficulty moving the truck. It had stalled momentarily. Whereupon, as the plaintiff testified: "We backed up there, trying to get a good start, and said 'let's go, boys, and give it all we got,' and when I did that, my left foot slipped and I went down . . . I felt a sharp pain there in my left groin after I slipped. . . . like somebody cut me with a knife, . . . After it happened, I got kind of dizzy and sick on the stomach." The plaintiff told his fellow employees at the time that he was hurt.

The incident occurred on Friday afternoon around 4:20 or 4:30 o'clock. Plaintiff continued to work that day, but that night at home observed his left side was swollen. He returned to work Monday of the following week, but, thinking "it was something that would clear up," he made no report to his employer until Wednesday, 20 June, 1951. He was sent that day to Dr. R. L. McDonald, who made an examination of his inguinal ring. Dr. McDonald found the plaintiff tender in the left inguinal region and discovered an impulse on coughing. He examined the plaintiff again on 3 August, 1951, at which time he found a definite hernia mass. The plaintiff was operated on by Dr. McDonald on 8 August, 1951, and was pronounced able to return to work six weeks thereafter.

Dr. McDonald testified in part: "I examined him (on 20 June, 1951) and he was acutely tender in his groin; had a small impulse on coughing. Due to the smallness of it and tenderness, I told him to return to work and let me check him again in a week. Approximately two weeks later I saw him, and at that time a definite hernia had developed. He was less tender, and I advised surgery, . . . My records show that I diagnosed it (as hernia) the first time I saw him, . . ." Dr. McDonald further stated that in his opinion it was of recent origin. He testified: "When I first

saw the plaintiff, there was tenderness and swelling in the region. It is a fact that when a hernia develops it may take several days for the intestine to protrude there through. I stated a moment ago that my first observation of him I had a definite opinion that there was a hernia and I merely waited for it to develop to be absolutely sure."

The plaintiff testified in part: "I have never had a pain in that particular region before (referring to the pain which struck him the day of the incident). . . . Never had a pain, never had a doctor until Dr. McDonald dressed my wounds. Never had a swelling in that place before. . . . I did not injure myself from that time until the day I was operated on. Just gradually got worse and worse. The swelling never did go down."

The Industrial Commission found and concluded "that the plaintiff's claim for hernia meets the requirements set forth in G.S. 97-2 (r)," and awarded compensation.

The pertinent findings of fact of the hearing Deputy Commissioner, as affirmed and adopted on review by the Full Commission, may be summarized as follows: That the incident described constituted an injury by accident arising out of and in the course of the plaintiff's employment, which resulted in a hernia or rupture; that a hernia or rupture appeared suddenly; that it was accompanied by pain; that the hernia or rupture immediately followed an accident; and that the hernia or rupture did not exist prior to the accident for which compensation is claimed.

On appeal to the Superior Court the award was affirmed. From this latter ruling, the defendant appeals, assigning errors.

W. H. Steed for plaintiff, appellee.
Don A. Walser for defendant, appellant.

JOHNSON, J. The statute, G.S. 97-2 (r), provides:

"In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

"First. That there was an injury resulting in hernia or rupture.

"Second. That the hernia or rupture appeared suddenly.

"Third. That it was accompanied by pain.

"Fourth. That the hernia or rupture immediately followed an accident.

"Fifth. That the hernia or rupture did not exist prior to the accident for which compensation is claimed."

The defendant challenges the sufficiency of the evidence to support the determinative findings and conclusions of the Commission. In particular, the defendant urges that the evidence does not support the finding that

the hernia was the result of an accident; but, if so, and in any event, that the evidence does not sustain the finding that the hernia appeared suddenly or immediately following the accident.

A study of the record leaves the impression that the findings and conclusions are supported by the evidence. The crucial evidence is the plaintiff's testimony that the incident was accompanied by a sharp pain in his groin followed shortly by a swelling, and the opinion given by Dr. McDonald that the impulse which he found upon his first examination was in fact a hernia. *Moore v. Sales Co.*, 214 N.C. 424, 199 S.E. 605; *Ussery v. Cotton Mills*, 201 N.C. 688, 161 S.E. 307.

Under the Workmen's Compensation Act the Industrial Commission is made the fact-finding body, and the rule is, as fixed by statute and the uniform decisions of this Court, that the findings of fact made by the Commission are conclusive on appeal, both in the Superior Court and in this Court, when supported by competent evidence. G.S. 97-86; *Fox v. Mills*, 225 N.C. 580, 35 S.E. 2d 869; *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294; *Nissen v. Winston-Salem*, 206 N.C. 888, 893, 175 S.E. 310. This is so, even though the record may support a contrary finding of fact. *Riddick v. Cedar Works*, 227 N.C. 647, 43 S.E. 2d 850; *Hegler v. Mills Co.*, 224 N.C. 669, 31 S.E. 2d 918.

The judgment below is

Affirmed.

WILLIAM A. TILLIS, SR., v. CALVINE COTTON MILLS, INC., A CORPORATION, AND LEON SALKIND.

(Filed 12 June, 1953.)

1. Appeal and Error § 2: Bill of Discovery § 1c—

When motion for examination of the adverse party as a matter of right after the pleadings have been filed on both sides is supported by affidavit which meets statutory requirements, G.S. 1-568.9 (c), G.S. 1-568.11, an appeal from order allowing the motion is premature and will be dismissed.

2. Bill of Discovery § 1c: Pleadings § 26: Election of Remedies § 5½—

A bill of particulars and a bill of discovery are not inconsistent remedies, and therefore the denial of an application for a bill of particulars does not preclude the same party from thereafter moving for leave to examine the adverse party in regard to the same matters. G.S. 1-150, G.S. 1-568.1 *et seq.*

APPEAL by plaintiff from *Sharp, Special Judge*, at 5 January, 1953, Regular Civil Term of MECKLENBURG.

Civil action to recover for alleged breach of contract, heard below on motion of the defendants for an order to examine the plaintiff adversely for the purpose of obtaining evidence to be used at the trial.

In September, 1950, after the pleadings were filed on both sides, the plaintiff was examined adversely by the defendants. From this examination, the narrative of which covers nearly 19 pages of the record, it appears that the plaintiff was examined in detail as to both the terms of the alleged contract and the particulars respecting breach and the question of damages.

The case came on for trial in November, 1951. After the plaintiff had been examined somewhat in detail, a question arose respecting the competency of certain proffered testimony relative to loss of profits caused by the defendants' alleged breach of the contract. Thereupon Judge Patton, then presiding, being of the opinion that in order to render such evidence admissible it was necessary that the complaint be amended, ordered a mistrial and a new trial, and granted the plaintiff leave to amplify his complaint by stating more minutely his claim for special damages. And this was done by amendment filed 5 March, 1952.

In April, 1952, the defendants moved the court for a bill of particulars to require the plaintiff to amplify further his allegations of damages. The motion was denied by Judge Moore. From this discretionary ruling, the defendants appealed. The appeal was dismissed by *per curiam* opinion of this Court filed 19 November, 1952 (236 N.C. 533, 73 S.E. 2d 296).

Thereafter the defendants answered, denying the material allegations of the complaint as amended.

On 2 January, 1953, the defendants, on *ex parte* application, obtained leave of the clerk to examine the plaintiff adversely on interrogatories which were submitted with the motion. The plaintiff immediately moved the clerk to vacate the order of examination. A hearing ensued in which both sides participated. It was made to appear that practically all the interrogatories submitted by the defendants are couched in the precise language of the defendants' previous application for bill of particulars, and that the interrogatories are calculated to elicit substantially the same information denied the defendants on application for bill of particulars. The clerk found that the amendment to the complaint and the previous examinations of the plaintiff afforded the defendants adequate information to defend the action, and thereupon entered an order setting aside the former order and denying the defendants' motion for further examination of the plaintiff.

From this order the defendants appealed to the Superior Court. There Judge Sharp, being of the opinion that the defendants were entitled to examine the plaintiff as a matter of right, entered an order reversing the

latter ruling of the clerk and allowing the examination as originally ordered.

From the order so entered the plaintiff appealed to this Court, assigning errors.

G. T. Carswell, B. Irvin Boyle, and James F. Justice for plaintiff, appellant.

Clayton & Sanders for defendants, appellees.

JOHNSON, J. This proceeding to examine the plaintiff before trial was under the procedure prescribed by Chapter 760, Session Laws of 1951, now codified as G.S. 1-568.1 through 1-568.27. This Act repealed the former statutes dealing with examination of parties before trial (G.S. 1-568 through 1-576).

The statute directs that a party may be examined adversely for the purpose of obtaining evidence to be used at the trial, G.S. 1-568.3 (2); and where the pleadings have been filed on both sides, an examination may be had as "a matter of right." G.S. 1-568.9 (c).

Here the pleadings are in on both sides. The defendant's preliminary affidavit on which the order below is based meets statutory requirements. G.S. 1-568.11. See also *Douglas v. Buchanan,* 211 N.C. 664, 191 S.E. 736.

Therefore under our usual procedure the appeal will be dismissed as premature. *Abbitt v. Gregory,* 196 N.C. 9, 144 S.E. 297. See also *Brown v. Clement Co.,* 203 N.C. 508, 166 S.E. 515; *Whitehurst v. Hinton,* 184 N.C. 11, 113 S.E. 500; *Monroe v. Holder,* 182 N.C. 79, 108 S.E. 359; *Pender v. Mallett,* 122 N.C. 163, 30 S.E. 324; *Holt v. Warehouse,* 116 N.C. 480, 21 S.E. 919; *Vann v. Lawrence,* 111 N.C. 32, 15 S.E. 1031; *Shelby v. Lackey,* 235 N.C. 343, 69 S.E. 2d 607; *City of Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669.

A consideration of the appeal on its merits as in *Knight v. Little,* 217 N.C. 681, 9 S.E. 2d 377, would avail the plaintiff no substantial relief. A bill of particulars and discovery under our statutes are not inconsistent remedies; rather, they are concurrent and cumulative remedies. G.S. 1-150 and G.S. 1-568.1 *et seq.;* 71 C.J.S., Pleading, Sections 376, 388 (p. 816), and 393 (p. 825). Therefore the defendants were not put to an election in applying for a bill of particulars. *Randle v. Grady,* 228 N.C. 159, 45 S.E. 2d 35; 18 Am. Jur., Election of Remedies, Sections 9 through 13. Moreover, it is noted that some, at least, of the interrogatories submitted by the defendants as the basis for their motion for leave to examine the plaintiff would seem to be unobjectionable. See *Grandy v. Walker,* 234 N.C. 734, 68 S.E. 2d 807; 27 C.J.S., Discovery, Section 61, note 65.

Besides, the provisions of G.S. 1-568.17 and 1-568.18 and related statutes furnish the plaintiff adequate protection against harassment or the hazard of untoward consequences on refusal to answer such of the interrogatories as appear to be unduly repetitious or beyond the proper scope of examination. See also G.S. 1-568.23 (d).

Appeal dismissed.

EMMA L. HANELINE v. TURNER WHITE CASKET COMPANY, INC., AND WASHINGTON NATIONAL INSURANCE COMPANY.

(Filed 12 June, 1953.)

1. Insurance § 8—

The employer in a group insurance policy is not ordinarily the agent of the insurance company.

2. Insurance § 13a—

A contract of life insurance, like any other contract, is to be interpreted and enforced according to the terms of the policy.

3. Insurance § 32c—

Where the group policy and the individual certificate provide that upon notification to the insurer the certificate should terminate at the end of the policy month in which the employee's active employment should end, such provision must be given effect, notwithstanding that during the month the employee was discharged the employer deducted from his wages his part of the premium for a quarter in advance, and upon the death of the employee after termination of the certificate but prior to the expiration of the quarter for which his premium had been deducted, insurer may be held liable only for the return of the unearned premium.

APPEAL by plaintiff from *Patton, Special Judge,* October Term, 1952, of FORSYTH. Modified and affirmed.

This was a suit by plaintiff beneficiary to recover on a certificate of life insurance issued to Charles R. Haneline by the defendant Insurance Company under a group insurance policy for employees of defendant Casket Company.

From judgment on an agreed statement of facts that plaintiff recover nothing, the plaintiff appealed.

C. B. Poindexter and J. J. Harris for plaintiff, appellant.

Womble, Carlyle, Martin & Sandridge for defendants, appellees.

DEVIN, C. J. The certificate of life insurance issued to Charles R. Haneline, employee, under the group insurance policy issued by defendant Insurance Company covering the employees of defendant Casket Com-

pany, employer, contains this provision: "This insurance shall teminate whenever the employee shall leave the service of said employer." The group insurance policy issued to the Casket Company provided: "The insurance of any employee covered hereunder shall terminate at the end of the policy month in which his active employment with the employer shall end."

According to the statement of facts the defendant Insurance Company had issued to Charles R. Haneline, employee of defendant Casket Company, 10 December, 1950, certificate of insurance under the master policy to his employer, and under agreement between employer and employee the Casket Company deducted from the wages of Haneline each quarter his share of the premiums on his certificate of insurance in the sum of $3.75, and remitted it to the Insurance Company. Under this arrangement the Casket Company on 21 March, 1951, deducted from his wages $3.75. On 27 March Charles R. Haneline was discharged by the Casket Company and his employment terminated on that date, and on 31 March the Insurance Company was notified of this action and the certificate issued to the employee was canceled as of that date.

After the termination of his employment Charles R. Haneline made no application or request for conversion or for any other benefit under the policy. Charles R. Haneline died 16 May, 1951.

According to the terms of the policy the insurance of Haneline, upon his discharge by the Casket Company, terminated at the end of the policy month in which his active employment terminated. As the policy month began 10 March the insurance thereunder terminated on his discharge at the end of that month, 10 April. However, the amount of premium deducted from his wages had been computed for the entire quarter ending 10 June. Hence it would seem there was an unearned portion of the premium, amounting to $2.50, which the defendant Insurance Company in its answer offers to return to the plaintiff.

The plaintiff's position is that since the Casket Company, the employer, deducted from the wages of the decedent an amount sufficient to pay the premium to 10 June, 1951, and as no refund was made at the time of his discharge, his beneficiary is now entitled to recover the full amount of the policy. The plaintiff relies on what was said by this Court in *Hicks v. Insurance Co.*, 226 N.C. 614, 39 S.E. 2d 914. But we do not think the principle stated in that case is applicable to the facts in the case at bar. In the *Hicks case* the Insurance Company resisted payment on the ground that it was provided in the policy that the policy should be void if there was in force another policy on the life of insured issued by the same company unless the number of the prior policy was endorsed on the policy with a waiver signed by the company. It was thought that as the insurance company had knowledge of the policies it

had issued on the life of the insured it would be inequitable to permit the Insurance Company to take advantage of that limitation.

It was said in *Dewease v. Insurance Co.*, 208 N.C. 732, 182 S.E. 447, "The employer in a group insurance policy is not ordinarily the agent of the insurance company." *Burchfield v. Ins. Co.*, 210 N.C. 828, 185 S.E. 926. And in *Boseman v. Connecticut Gen. L. Ins. Co.*, 301 U.S. 196 (204), the Court characterized the functions of the employer in group insurance as follows: "Employers regard group insurance not only as protection at low cost for their employees but also as advantageous to themselves in that it makes for loyalty, lessens turn-over and the like. When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as agents of the insurer but for their employees or for themselves."

We are unable to agree with plaintiff's position on the facts of this case. Here the decedent after his discharge made no request for any benefit under the policy, left the employment of the Casket Company and secured employment with another employer and was so engaged at the time of his death. The measure of liability of the insurance company is to be determined by the terms, provisions and limitations of the contract of insurance.

It was specifically set out in both the master group policy and in the certificate issued to the decedent that insurance thereunder should terminate at the end of the policy month in which his active employment with the employer should end. It was provided that the employer should give written notification to the insurance company of termination of employment, and that "such written notification shall be satisfactory evidence that such insurance has terminated and shall release the company from all claim on account of the insurance so terminated."

The group insurance policy and the individual certificate were issued in compliance with the statute G.S. 58-211. It is provided in this statute that "the standard provisions required for individual life insurance policies shall not apply to group life insurance policies."

A contract of life insurance, like any other contract between the parties, is to be interpreted and enforced according to the terms of the policy. *Bailey v. Ins. Co.*, 222 N.C. 716, 24 S.E. 2d 614; *Stanback v. Ins. Co.*, 220 N.C. 494, 17 S.E. 2d 666; *Taft v. Casualty Co.*, 211 N.C. 507, 191 S.E. 10.

According to the terms of the policy the decedent's insurance terminated 10 April, 1951. However, we think the judgment should have provided for the payment of the sum of $2.50 to the plaintiff as offered by the defendant Insurance Company.

Accordingly the judgment as thus modified will be Affirmed.

STATE v. J. L. ALBARTY.

(Filed 12 June, 1953.)

1. Constitutional Law § 32—

There can be no valid trial, conviction, or punishment for a crime without a formal and sufficient accusation.

2. Indictment and Warrant § 9—

An accusation of crime must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed.

3. Sales § 1—

"Barter" and "sale" are not synonymous, barter being the exchange of one commodity for another, and a sale being the transfer of goods for a specified price payable in money.

4. Gambling § 4—

G.S. 14-291.1 proscribes four separate offenses: (1) the sale of lottery tickets, (2) the barter of lottery tickets, (3) causing another to sell lottery tickets, (4) causing another to barter lottery tickets.

5. Indictment and Warrant § 9—

Where a statute specifies in the alternative several means or ways in which an offense may be committed, an indictment under the statute should not charge such means or ways in the alternative.

6. Gambling § 7—

A warrant charging in the alternative that defendant sold or bartered or caused another to sell or barter lottery tickets, is fatally defective in failing to specify the crime with which defendant is charged. The warrant should also describe the character of the lottery with definiteness. G.S. 14-291.1.

7. Criminal Law § 54b—

A verdict which finds defendant guilty as charged must be interpreted in the light of the criminal complaint.

8. Same: Gambling § 11—

Where the warrant charges an offense disjunctively or alternatively, and the verdict finds the defendant guilty as charged, the verdict is invalid for uncertainty, since it fails to identify the crime of which the defendant is convicted.

9. Criminal Law § 78c—

Where the jury returns a verdict of guilty as charged in the warrant, and the warrant charges the offense in the alternative, the verdict does not support the judgment, and therefore the verdict and judgment will be set

aside upon defendant's exception to denial of his motion to set aside the verdict and exception to the judgment, notwithstanding the absence of a motion to quash the warrant or a motion in arrest of judgment.

10. Criminal Law § 81i—

The courts do not pass on constitutional questions until the necessity for doing so has arisen.

APPEAL by defendant from *Armstrong, J.*, and a jury, at January Term, 1953, of FORSYTH.

Criminal prosecution upon a warrant charging the defendant with several violations of a lottery statute in the alternative or the disjunctive.

This criminal action originated in the Municipal Court of the City of Winston-Salem, and was carried thence to the Superior Court of Forsyth County by the appeal of the defendant.

Trial was had *de novo* in the Superior Court upon the original warrant, which was based on a criminal complaint alleging "that J. L. Albarty, on or about the 28 day of October, 1952, at and in the County aforesaid or within the corporate limits of the City of Winston-Salem, did unlawfully and willfully sell, barter, or caused to be sold or bartered, any ticket, token, certificate for any number or shares in any lottery commonly known as the numbers or butter and eggs lottery, or lotteries of similar character to be drawn or paid within or without the State against the statute in such cases made and provided and against the peace and dignity of the State."

The only evidence at the trial was that adduced by the State. The petit jury found "the defendant guilty of lottery as charged in the warrant." The presiding judge sentenced the defendant to pay a fine and suffer imprisonment as a misdemeanant, and the defendant excepted and appealed, assigning errors.

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

Buford T. Henderson for defendant, appellant.

ERVIN, J. There can be no valid trial, conviction, or punishment for a crime without a formal and sufficient accusation. 42 C.J.S., Indictments and Informations, section 1. As a consequence, it is impossible to overmagnify the necessity of observing the rules of pleading in criminal cases.

The first rule of good pleading in criminal cases is that the indictment or other accusation must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed. *S. v. Cole*, 202 N.C. 592, 163 S.E. 594; *S. v. Carlson*, 171 N.C. 818, 89 S.E. 30;

S. v. Green, 151 N.C. 729, 66 S.E. 564; *S. v. Lunsford,* 150 N.C. 862, 64 S.E. 765; *S. v. Hill,* 79 N.C. 656.

The language of the criminal complaint underlying the original warrant discloses that it was intended to be drawn under G.S. 14-291.1, which makes it a misdemeanor for any person to "sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or butter and egg lottery, or lotteries of similar character, to be drawn or paid within or without the State."

The words "barter" and "sell" are not used in this statute as synonyms. Barter is a contract by which parties exchange one commodity for another. It differs from a sale, in that the latter is a transfer of goods for a specified price, payable in money. *Speigle v. Meredith,* 22 Fed. Cas. 910; *Hatfield v. State,* 9 Ind. App. 296. See, also, in this connection: *Duke v. State,* 146 Ala. 138, 41 So. 170; *Coker v. State,* 91 Ala. 92, 8 So. 874; *Gunter v. Leckey,* 30 Ala. 591; *Forkner v. State,* 95 Ind. 406; *Westfall v. Ellis,* 141 Minn. 377, 170 N.W. 339; *Stone v. Rogers,* 186 Miss. 53, 189 So. 810; *J. I. Case Threshing Mach. v. Loomis,* 31 N.D. 27, 153 N.W. 479; *Jenkins v. Mapes,* 53 Ohio St. 110, 41 N.E. 137; *Sturgill v. Lovill Lumber Co.,* 132 W. Va. 172, 51 S.E. 2d 126. This being so, an accused may violate G.S. 14-291.1 in four distinct ways. He may sell the illegal articles, or he may barter them, or he may cause another to sell them, or he may cause another to barter them.

The criminal complaint involved in this action is drawn in the alternative or the disjunctive rather than the conjunctive, and charges the defendant with violating the statute by selling the illegal articles, *or* by bartering them, *or* by causing another to sell them, *or* by causing another to barter them, leaving the exact accusation against him shrouded in uncertainty. In so doing, the criminal complaint offends the first rule of good pleading in criminal cases. It is well settled "that an indictment or information must not charge a party disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him. Two offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count. As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative." 42 C.J.S., Indictments and Informations, section 101. See, also, in this connection: *S. v. Williams,* 210 N.C. 159, 185 S.E. 661; *S. v. Harper,* 64 N.C. 129; *United States v. Buckner,* 118 F. 2d 468; *Price v. United States,* 11 F. 2d 283; *United States v. Dedof,* 42 F. Supp. 57; *Isom v. State,* 71 Ga. App. 803, 32 S.E. 2d 437; *Powell v. State,* 196 Miss. 331, 17 So. 2d 524; *State v. Jefferson,* 19 N. J. Misc. 678, 23 A. 2d 406; *Brown v. State,* 139 Tex. Cr. R. 332, 140 S.W. 2d 449;

State v. Kitzerow, 221 Wis. 436, 267 N.W. 71. We deem it advisable to observe that the criminal complaint falls short of the rules of pleading in another aspect. It does not describe the character of the lottery with definiteness. *President v. State*, 83 Ga. App. 731, 64 S.E. 2d 596.

The verdict must be interpreted in the light of the criminal complaint because the jury found "the defendant guilty of lottery as charged in the warrant." When this is done, it appears that the jury made this anomalous finding: That the defendant is guilty of selling lottery tickets, *or* that the defendant is guilty of bartering lottery tickets, *or* that the defendant is guilty of causing another to sell lottery tickets, *or* that the defendant is guilty of causing another to barter lottery tickets. This being true, the verdict is invalid for uncertainty. It is not sufficiently definite and specific to identify the crime of which the defendant is convicted. *S. v. Williams, supra.* In consequence, it will not support a judgment. *S. v. Lassiter*, 208 N.C. 251, 179 S.E. 891; *S. v. Snipes*, 185 N.C. 743, 117 S.E. 500. While the defendant did not question the validity of the criminal complaint by a motion to quash the warrant or a motion in arrest of judgment, he did challenge the sufficiency of the verdict to support the judgment by an exception to the denial of his motion to set aside the verdict and an exception to the judgment itself. *S. v. Snipes, supra.*

Since the judgment is not supported by the verdict, the judgment and the verdict are set aside, and the cause is remanded to the Superior Court of Forsyth County for further proceedings conforming to law.

We refrain from expressing any opinion upon the question of the constitutionality of the statutes extending the territorial jurisdiction of the Municipal Court of the City of Winston-Salem. This course is in keeping with the settled practice that courts do not pass on constitutional questions until the necessity for so doing has arisen. *S. v. Wilkes*, 233 N.C. 645, 65 S.E. 2d 129; *Horner v. Chamber of Commerce*, 231 N.C. 440, 57 S.E. 2d 789.

New trial.

CAROLINA CASUALTY INSURANCE COMPANY v. ARCHIE CLINE AND WILLIAM FREEMAN.

(Filed 12 June, 1953.)

1. Negligence § 19c—

On motion to nonsuit on the ground of contributory negligence, plaintiff's evidence must be considered in the light most favorable to it.

2. Automobiles §§ 8i, 14, 18h (3)—Evidence held not to compel conclusion that driver attempted to pass preceding vehicle at intersection.

Plaintiff's evidence tending to show that its driver overtook and attempted to pass defendant's vehicle, after giving audible signal by horn, at least 300 feet before reaching an intersection when the highway ahead was free of oncoming traffic for a distance of 1,000 feet, and that, as the vehicles were running side by side, defendant's driver turned sharply to the left without any signal or warning, and collided with plaintiff's vehicle, *is held* not to compel the conclusion that plaintiff's driver attempted to pass defendant's vehicle at an intersection in violation of G.S. 20-150 (c), and therefore defendant's motion to nonsuit on the ground of contributory negligence was properly denied notwithstanding defendant's evidence that plaintiff's driver attempted to traverse the intersection while defendant's driver was endeavoring to make a left turn into the connecting highway.

3. Trial § 22b—

In passing upon defendant's motion to nonsuit, the court correctly ignores defendant's evidence which merely contradicts that offered by plaintiff.

APPEAL by defendants from *Bone, J.*, and a jury, at September Term, 1952, of ALAMANCE.

Civil action arising out of a collision between two motor vehicles proceeding along the highway in the same direction.

The accident happened on United States Highway 29 near Landis in Rowan County on 17 November, 1950, when an automobile, which belonged to the plaintiff Carolina Casualty Insurance Company, overtook and attempted to pass a truck, which was owned by the defendant Archie Cline. The automobile was driven by J. J. Hinton, an employee of the plaintiff; and the truck was operated by the defendant William Freeman, an employee of Cline. Each driver was performing a business mission for his employer. The plaintiff sought damages from the defendants Cline and Freeman for injury to its automobile upon a complaint charging that such injury was caused by the actionable negligence of Freeman in the management of Cline's truck. The defendants denied this charge, and pleaded contributory negligence on the part of plaintiff's driver Hinton as an affirmative defense. Both sides offered evidence at the trial.

These issues were submitted to the jury:

1. Was the plaintiff's automobile damaged through the negligence of the defendants, as alleged in the complaint?

2. If so, did the plaintiff, through the negligence of its agent, contribute to its own damage, as alleged in the answer?

3. What damages, if any, is plaintiff entitled to recover of the defendants?

The jury answered the first issue "Yes," the second issue "No," and the third issue "$1,350.00." The trial judge entered judgment for the

plaintiff in accordance with the verdict, and the defendants excepted and appealed.

H. Clay Hemric for plaintiff, appellee.
Long & Long and Paul H. Ridge for defendants, appellants.

ERVIN, J. The assignments of error raise this solitary question: Did the trial judge err in refusing to dismiss the action upon a compulsory nonsuit?

The defendants admit the sufficiency of the plaintiff's evidence to establish actionable negligence on their part. They contend, however, that the action ought to have been involuntarily nonsuited in the court below upon the authority of *Cole v. Lumber Co.*, 230 N.C. 616, 55 S.E. 2d 86, on the ground that the plaintiff's driver Hinton was contributorily negligent as a matter of law. They advance this argument to sustain this position: The plaintiff's evidence compels the single conclusion that Hinton overtook and attempted to pass the Cline truck at an intersection in violation of the statute codified as G.S. 20-150 (c), and in so doing proximately contributed to the collision and the resultant injury to plaintiff's automobile.

The contention of the defendants necessitates an appraisal of the plaintiff's evidence in the light most favorable to it. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307. When the plaintiff's evidence is thus appraised, it makes out this case:

1. United States Highway 29, which runs north and south, is paved to a width of 20 feet. It is linked to the Town of Landis on the westward by a connecting road which joins its western margin.

2. At 2 p.m. on 17 November, 1950, Freeman drove the Cline truck northward along the right half of the highway at a speed of from 25 to 30 miles an hour. Hinton, who was driving the plaintiff's automobile northward along the highway at a speed of 45 miles an hour, overtook the Cline truck a substantial distance south of the intersection of the highway and the connecting road.

3. Hinton observed that the left half of the highway ahead was free from oncoming traffic for a distance of 1,000 feet. Hinton thereupon drove onto the left half of the highway for the purpose of passing the truck, gave Freeman an audible signal by his horn of his intention to pass the truck, accelerated the speed of the automobile to approximately 50 miles an hour to facilitate passing, and undertook to pass to the left of the truck, which was still proceeding northward along the right half of the highway at a speed of from 25 to 30 miles an hour. Hinton was at least 300 feet south of the intersection of the highway and the con-

necting road when he drove onto the left half of the highway for the purpose of passing the truck.

4. When the automobile and the truck were running side by side, Freeman turned the truck sharply to the left without any signal or warning, and crossed onto the left half of the highway, striking and demolishing the plaintiff's automobile and injuring Hinton. The collision occurred before the vehicles reached the intersection.

5. These events took place in an area outside a business or residence district where highway signs stated that the absolute speed limit for automobiles was 55 miles an hour.

It thus appears that the plaintiff's evidence warrants the inferences that Hinton reasonably assumed that he could pass the truck in safety before the vehicles reached the intersection, and that he would have done so had it not been for Freeman's improvident act in suddenly driving onto the left half of the highway. This being true, the plaintiff's evidence does not compel the conclusion that Hinton attempted to pass the Cline truck at an intersection in violation of the statute codified as G.S. 20-150 (c). As a consequence, the instant case falls under *Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538, and *Howard v. Bingham*, 231 N.C. 420, 57 S.E. 2d 401, rather than *Cole v. Lumber Co., supra.*

To be sure, the defendants offered evidence tending to show that Hinton rendered the collision inevitable by attempting to traverse the intersection while Freeman was endeavoring to make a left turn into the connecting road. While this evidence would have justified the jury in answering either the first issue or the second issue in favor of the defendants had the jury accepted it, the trial judge rightly ignored it in ruling on the motion to nonsuit. This evidence was presented by the defense and merely contradicted that offered by plaintiff. *Hansley v. Tilton*, 234 N.C. 3, 65 S.E. 2d 300; *Register v. Gibbs*, 233 N.C. 456, 64 S.E. 2d 280; *Bundy v. Powell, supra.*

For the reasons given, there is in law

No error.

J. J. HINTON v. ARCHIE CLINE AND WILLIAM FREEMAN.

(Filed 12 June, 1953.)

Trial § 49½—

A motion to set aside the verdict on the ground that the damages awarded were inadequate is addressed to the discretion of the trial court, and the denial of the motion will not be held for error when abuse of discretion does not appear.

HINTON *v.* CLINE.

APPEAL by plaintiff from *Bone, J.*, and a jury, at September Term, 1952, of ALAMANCE.

Civil action arising out of a collision between two motor vehicles proceeding along the highway in the same direction.

The accident happened on United States Highway 29 near Landis in Rowan County on 17 November, 1950, when an automobile driven by the plaintiff J. J. Hinton overtook and attempted to pass a truck owned by the defendant Archie Cline. The truck was operated by the defendant William Freeman, an employee of Cline, who was carrying out a business mission for his employer. The plaintiff sought damages from the defendants Cline and Freeman for injury to his person upon a complaint charging that such injury was caused by the actionable negligence of Freeman in the management of Cline's truck. The defendants denied this charge, and pleaded contributory negligence on the part of the plaintiff as an affirmative defense.

Both sides offered evidence at the trial. These issues were submitted to the jury: (1) Was the plaintiff injured in his person through the negligence of the defendants, as alleged in the complaint? (2) If so, did plaintiff by his own negligence contribute to his injury and damage, as alleged in the answer? (3) What damages, if any, is the plaintiff entitled to recover of the defendants? The jury answered the first issue "Yes," and the second issue "No," and the third issue "$50.00."

The plaintiff moved the trial judge to set the verdict aside and award him a new trial on the ground that the damages were inadequate. The trial judge denied the motion, and rendered judgment for plaintiff for $50.00 and costs. The plaintiff excepted and appealed.

H. Clay Hemric for plaintiff, appellant.
Long & Long and Paul H. Ridge for defendants, appellees.

ERVIN, J. The plaintiff assigns as error the refusal of the trial judge to set the verdict aside and award him a new trial on the ground of inadequacy of the damages.

The granting or the denying of a motion for a new trial on the ground that the damages assessed by the jury are excessive or inadequate is within the sound discretion of the trial judge. *McClamroch v. Ice Co.*, 217 N.C. 106, 6 S.E. 2d 850; *Johnston v. Johnston*, 213 N.C. 255, 195 S.E. 807; *Waller v. Hipp*, 208 N.C. 117, 179 S.E. 428; *Blum v. R. R.*, 187 N.C. 640, 122 S.E. 562; *Hoke v. Whisnant*, 174 N.C. 658, 94 S.E. 446; *Harvey v. Railroad Company*, 153 N.C. 567, 69 S.E. 627; *Billings v. Observer*, 150 N.C. 540, 64 S.E. 435; *Braddy v. Elliott*, 146 N.C. 578, 60 S.E. 507; *Boney v. Railroad*, 145 N.C. 248, 58 S.E. 1082; *Slocumb v. Construction Co.*, 142 N.C. 349, 55 S.E. 196; *Phillips v. Telegraph Co.*,

130 N.C. 513, 41 S.E. 1022; *Burns v. Railroad,* 125 N.C. 304, 34 S.E. 495; *Benton v. Collins,* 125 N.C. 83, 34 S.E. 242, 47 L.R.A. 33; *Benton v. Railroad,* 122 N.C. 1007, 30 S.E. 333; *Norton v. Railroad,* 122 N.C. 910, 29 S.E. 886; *Goodson v. Mullin and Derr,* 92 N.C. 211; *Brown v. Morris,* 20 N.C. 565; *Young v. Hairston,* 14 N.C. 54. His decision on the motion will not be disturbed on appeal unless it is obvious that he abused his discretion. *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49; *Francis v. Francis,* 223 N.C. 401, 26 S.E. 2d 907; *Freeman v. Bell,* 150 N.C. 146, 63 S.E. 682.

An abuse of discretion does not appear in the case at bar. Indeed, the evidence at the trial was consistent with the view that the plaintiff's personal injuries were limited to temporary bruises.

No error.

WILLIE M. ANDERSON, PLAINTIFF, v. WRAY PLUMBING & HEATING COMPANY, INC., EMPLOYER; AND IOWA NATIONAL MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS.

(Filed 12 June, 1953.)

1. Master and Servant § 55c—

On appeal to the Superior Court from the Industrial Commission, a certified transcript of the record before the commission must be filed in the Superior Court, and thus the transcript of the evidence must be in question and answer form as transcribed from the reporter's notes. G.S. 97-86.

2. Appeal and Error § 20a—

On appeal to the Supreme Court, the record must contain the evidence in narrative form, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. Rule of Practice in the Supreme Court No. 19 (4).

3. Appeal and Error § 31g—

The rule requiring that the evidence be set out in narrative form in the record on appeal to the Supreme Court is mandatory, and the failure to comply with the rule requires dismissal of the appeal.

4. Appeal and Error § 6c (1)—

The Supreme Court will enforce *ex mero motu* the rule requiring that the evidence be set out in the record in narrative form.

5. Master and Servant § 55c—

The requirement that the evidence be set out in the record in narrative form applies to an appeal from the Superior Court to the Supreme Court of a case originating before the Industrial Commission.

6. Master and Servant § 55d—

The evidence in this case *is held* to support the finding of the Industrial Commission that plaintiff did not sustain an injury by accident within the meaning of the Workmen's Compensation Act, and judgment denying compensation is affirmed.

APPEAL by plaintiff from *Rudisill, J.*, at 2 March, 1953, Civil Term of GUILFORD (Greensboro Division).

Proceeding under Workmen's Compensation Act to determine liability of defendants to plaintiff Willie M. Anderson, employee.

The Full Commission, with one Commissioner dissenting, found and concluded that the plaintiff did not sustain an "injury by accident" within the meaning of that term as used in the Compensation Act. Whereupon compensation was denied.

On appeal to the Superior Court, the decision of the Commission was upheld. The plaintiff excepted and appealed to this Court.

Tim G. Warner for plaintiff, appellant.

Jordan & Wright and Percy C. Henson for defendants, appellees.

JOHNSON, J. When an appeal is taken from the Industrial Commission to the Superior Court the statute, G.S. 97-86, requires that a certified transcript of the record before the Commission be filed in the Superior Court. This necessarily carries to the Superior Court a transcript of the evidence in question and answer form as transcribed from the reporter's notes.

However, on appeal from the Superior Court, the procedure must be in accordance with the Rules of Practice in the Supreme Court. 221 N.C. 544 *et seq.* And Rule 19 (4), (p. 556), requires that the evidence "shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception." This Rule further provides that "If the case is settled by agreement of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, . . . the appeal will be dismissed."

The primary purpose of the Rule is to facilitate the work of this Court and expedite decisions on appeal by freeing the Court of the burden of reading and digesting great masses of evidence in question and answer form, when the essential meaning and content may be preserved, and unnecessary portions eliminated, by narrative statement.

Under the Rule, the process of reducing the testimony to narrative form is made the responsibility of counsel, to be worked out in preparing the case on appeal. This is as it should be, so that if a question be raised

respecting whether the meaning of the original testimony is preserved or varied in the process of narration, the question posed may be resolved by the trial judge in settling the case on appeal, with both sides being afforded an opportunity to be heard. G.S. 1-283. Thus this Court is relieved largely of the responsibility of preserving the testimonial meaning of crucial phases of the evidence in cases like the instant one, where exceptions brought forward challenge the sufficiency of the evidence to support the findings of fact and necessitate, in connection with the written opinion, a narrative statement of the controlling phases of the evidence.

The Rule is mandatory and will be enforced *ex mero motu.* See *Rhoades v. Asheville,* 220 N.C. 443, 17 S.E. 2d 500; *Casey v. Railway,* 198 N.C. 432, 152 S.E. 38; *In re De Febio,* 237 N.C. 269, 74 S.E. 2d 531; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126. It must be applied in cases originating before the Industrial Commission no less than in other cases.

Here the case on appeal was settled by counsel. The record discloses that all the evidence is brought forward in mass in question and answer form. The Rule will be enforced, and it is so ordered.

Nevertheless, an examination of the evidence as brought forward in question and answer form discloses that the findings and conclusions and the decision of the Industrial Commission, as affirmed by the Superior Court, are supported by the record and should be sustained under application of authoritative decisions of this Court.

Accordingly the judgment will be affirmed and the appeal dismissed. (*Casey v. Railway, supra; Cf. Brewer v. Manufacturing Co.,* 161 N.C. 211, 76 S.E. 237.)

Judgment affirmed; appeal dismissed.

D. J. TODD, SR., ADMINISTRATOR OF D. J. TODD, JR., DECEASED, v. E. J. SMATHERS.

(Filed 12 June, 1953.)

1. Trial § 22a—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference therefrom.

2. Automobiles § 8i—

In this action to recover for the death of a motorcyclist, killed in a collision with a truck which turned across the highway in the path of the oncoming motorcycle to enter a private driveway to the truck driver's left, defendant's motion to nonsuit upon conflicting evidence *is held* properly denied.

TODD *v.* SMATHERS.

APPEAL by defendant from *Armstrong, J.*, at 12 January, 1953, Term, of FORSYTH.

Civil action by plaintiff to recover damages for alleged wrongful death, and for punitive damages.

This action grew out of a collision on Highway No. 70 a few miles east of Greensboro, N. C., on early night of 1 October, 1949, between a motorcycle operated by intestate of plaintiff, accompanied by another, and a motor truck, owned and operated by defendant. The highway runs in general east-west direction. A driveway to defendant's home is on north side of the highway. It was at the entrance to this driveway that the collision occurred. The paved highway is thirty feet wide, divided into three lanes of equal width. From a point several hundred feet east of the driveway into defendant's home, to a point 700 to 800 feet west of it, two of the lanes, the center and the north, were marked for westbound traffic, and one, the south, was marked for eastbound traffic. The motorcycle was traveling west with the heavy motor traffic returning from Georgia-Carolina football game at Chapel Hill, N. C.

The truck of defendant, after crossing the highway from north to south at a point to the west, had traveled east on the south lane of the highway to a point nearly opposite the entrance to the driveway into defendant's home, where defendant says he stopped it, with his motor running, and his hand extended to the left, waiting for a break in the westbound traffic so that he might drive the truck into his driveway; that after waiting four or five minutes such a break occurred, the nearest car to the east being 535 feet away, in his opinion, he put the truck in motion, directly across the highway to his left toward the entrance to his driveway; and that before the truck cleared the highway it was struck by the motorcycle. There is evidence from which other inference might be drawn.

Defendant also testified that he had "looked in direction where cars would come up behind me," and after starting, and hearing brakes squealing, he stopped and had his foot on the brakes; that he looked back through the glass; that he did not see the motorcycle until it was within 20 feet of him.

And there is evidence that at a point a mile or so east of the point of collision the motorcycle had passed a car which was traveling around 50 miles per hour. The motorist who so testified was in the second car behind the motorcycle at the scene and time of accident. And there is evidence as to skid and other physical marks made by the motorcycle.

The case was submitted to the jury on issues as to (1) negligence of defendant, (2) contributory negligence of intestate of plaintiff, and (3) damages. The jury answered the first "Yes"; the second "No," and the

third $4,500. From judgment in accordance therewith defendant appeals to Supreme Court and assigns error.

Deal, Hutchins & Minor for plaintiff, appellee.

Ratcliff, Vaughn, Hudson, Ferrell & Carter, Jordan & Wright, and Wharton, Poteat & Wharton for defendant, appellant.

WINBORNE, J. Only one question is presented: Is there error in denial of motion of defendant for judgment as of nonsuit? Taking the evidence in the light most favorable to plaintiff, and giving to him the benefit of every reasonable inference, as is done in considering motions for judgment as of nonsuit, it would seem that the case is one for the jury, under well established principles of law. Since there is no exception to the charge, the court must have properly instructed the jury as to applicable principles of law. And the jury has accepted plaintiff's view of the occurrence. Hence elaboration on the law and the facts is not deemed necessary.

In the judgment below, we find

No error.

W. C. CHAMBERS AND WIFE, MILDRED BARNES CHAMBERS, W. J. TILLEY AND WIFE, AILENE BROWN TILLEY, RONALD WILKINSON AND WIFE, MARGARET RHODES WILKINSON, T. L. KANOY AND WIFE, CORA WELLS KANOY, ROY L. LATHAM, W. E. BUTNER AND WIFE, KATHRYN S. BUTNER, NELIA NEWSOME BUTNER, A. E. SPILLMAN AND WIFE, BERTIE KETNER SPILLMAN, v. J. McRAE DALTON, ROBERT I. DALTON AND WIFE, EDITH GOSSETT DALTON, AND J. H. GWYN, SR., J. H. GWYN, JR., ALLEN GWYN, TRADING AS GWYN MOTOR SALES.

(Filed 12 June, 1953.)

Deeds § 16b: Pleadings § 19b—

Demurrer for misjoinder of parties and causes is properly sustained in an action for breach of restrictive covenants instituted by separate groups of owners of lots in a subdivision against the owner of another lot therein.

APPEAL by plaintiffs from *Godwin, Special Judge,* January Term, 1953, FORSYTH. Affirmed.

There are seven groups of plaintiffs. Each group owns a lot in a subdivision allegedly developed according to a uniform plan for residences only. Each group alleges that it has been damaged by the breach of the restrictive covenants which formed a part of the uniform plan of development. Defendants filed two demurrers: In the first they demur for that the complaint fails to state a cause of action; and in the second, for that

there is a misjoinder of parties and causes of action. The court below sustained both demurrers, and plaintiffs appealed.

Hayes, Hatfield & McClain for plaintiff appellants.
Ratcliff, Vaughn, Hudson, Ferrell & Carter for defendant appellees.

PER CURIAM. The judgment entered is somewhat novel in that it is decreed that the complaint fails to state a cause of action and at the same time it is adjudged that there is a misjoinder of parties and causes. *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295. Be that as it may, the judgment entered must be affirmed. The several causes of action the plaintiffs seek to state are separate and distinct. The only relation of the one to the others is that they are all of the same nature and assert the same general type of grievance. *Davis v. Whitehurst,* 229 N.C. 226, 49 S.E. 2d 394; *Burleson v. Burleson,* 217 N.C. 336, 7 S.E. 2d 706. No one cause affects all the parties to the action. *Lucas v. Bank,* 206 N.C. 909, 174 S.E. 301. No one group has any interest in the claims asserted by the others. Therefore, if any cause of action is stated, there is clearly a misjoinder of parties and causes.

The judgment entered in the court below is

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1953

THE MERCHANTS & PLANTERS NATIONAL BANK OF SHERMAN v. G. T. APPLEYARD.

(Filed 23 September, 1953.)

1. Courts § 14—

In a suit on a transitory cause of action arising in another state, the substantive rights of the parties are governed by the *lex loci*, while procedural matters are governed by the *lex fori*.

2. Same: Constitutional Law § 18: Limitation of Actions §§ 1, 8—In action instituted here on cause arising in another state between nonresidents, G.S. 1-21 tolling statute of limitations applies.

A resident of another state there executed a note not under seal to a corporation having its principal place of business in such other state. The maker thereafter moved to this State. The corporation instituted action against the maker here more than three years after the maturity of the note but less than three years after the latter had moved to this State. The cause of action was not barred by the applicable statute of such other state at the time the action was instituted here. *Held:* Our statute of limitations, as well as applicable provisions tolling the running of the statute, are applicable as matters of procedure, and therefore G.S. 1-21 tolls the running of the statute, and the nonresident plaintiff is entitled to the benefit of its provisions as a privilege guaranteed by Art. IV, sec. 2, of the Constitution of the United States.

BARNHILL, J., concurring in result.

APPEAL by defendant from *Armstrong, J.*, February Term, 1953, of FORSYTH.

This is a civil action to recover on a promissory note.

The defendant Appleyard, on 6 December, 1947, executed and delivered to the plaintiff a promissory note, not under seal, in the sum of $6,000, payable sixty days after date, to wit: 4 February, 1948. At the time the note was executed, the defendant was a resident of the State of Texas, and the plaintiff, a national bank, was duly organized and engaged in the banking business at Sherman, Texas, where its principal office and place of business is located. The defendant prior to 1946 was a resident of North Carolina. He returned to this State in December, 1951, and again became a resident thereof.

The statute of limitations on a note, not under seal, in the State of Texas, is four years. This action was instituted on 29 January, 1952, a few days prior to the expiration of four years from and after the maturity of the above note.

The defendant in his answer plead the three-year statute of limitations as provided in North Carolina by G.S. 1-52, as a bar to plaintiff's cause of action.

When this cause came on for hearing, the plaintiff moved for judgment on the pleadings on the ground that the only defense raised by the defendant in his answer was the legal defense of the statute of limitations. The defendant admitted, through his counsel, that the only issue raised by his answer was his plea to the effect that the plaintiff's cause of action was barred by the North Carolina three-year statute of limitations. Whereupon, the court, after hearing argument of counsel, allowed the plaintiff's motion and entered judgment accordingly. The defendant appealed, assigning error.

Ratcliff, Vaughn, Hudson, Ferrell & Carter for plaintiff, appellee.
Deal, Hutchins & Minor for defendant, appellant.

DENNY, J. The note in question having been executed in the State of Texas, the substantive rights of the parties are subject to the *lex loci.* However, since the plaintiff has instituted an action in this jurisdiction for the enforcement of its substantive rights against the defendant, its remedial rights are governed by the *lex fori.* McIntosh, North Carolina Practice and Procedure, section 103, page 104; Restatement, Conflict of Laws, section 603 (1934); 53 C.J.S., Limitations of Actions, section 28, page 972; *Wells v. Simonds Abrasive Co.,* 345 U.S. 514, 97 L. Ed. ....., 73 U. S. Rep. 856; *Sayer v. Henderson,* 225 N.C. 642, 35 S.E. 2d 875; *Webb v. Webb,* 222 N.C. 551, 23 S.E. 2d 897; *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11; *Smith v. Gordon,* 204 N.C. 695, 169 S.E. 634; *Tieffenbrun v. Flannery,* 198 N.C. 397, 151 S.E. 857, 68 A.L.R. 210; *Vanderbilt v. R. R.,* 188 N.C. 568, 125 S.E. 387, 52 A.L.R. 287; *Patton v. W. M. Ritter Lumber Co.,* 171 N.C. 837, 73 S.E. 167; *Arrington v.*

Arrington, 127 N.C. 190, 37 S.E. 212, 52 L.R.A. 201, 80 Am. St. Rep. 791; *Haws v. Cragie,* 49 N.C. 394. Therefore, it must be conceded that the plaintiff's cause of action is barred unless section 1-21 of our General Statutes is applicable. This statute in pertinent part reads as follows: "If, when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the state, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this state, . . . the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment."

The plaintiff is not now and never was a resident of the State of North Carolina. The defendant was a resident of North Carolina for approximately thirteen years before moving to the State of Texas in 1946. However, he was a nonresident of this State on 6 December, 1947, when he executed and delivered the note in controversy to the plaintiff and remained so until December, 1951.

The defendant was a resident of the State of Texas when the note was executed and when it matured. Therefore, he was not a resident of North Carolina when the cause of action arose; and the fact that the defendant had formerly lived in this State has no bearing on the interpretation or construction to be placed on the above statute.

The crucial question to be determined is whether the above statute is applicable to causes of action that arise out of the State and between parties who were nonresidents of this State when such actions arose, or whether the statute is applicable only to causes of action that arise in this State in favor of creditors residing therein. It appears that this precise question has not been decided by this Court. In our decisions in which the statute has been construed and applied by this Court, the creditors, or at least some of them, were residents of the State at the time the respective obligations were created and the causes of action arose. *Armfield et al. v. Moore,* 97 N.C. 34, 2 S.E. 347; *Alpha Mills v. Engine Co.,* 116 N.C. 797, 21 S.E. 917; *Lee v. McKoy,* 118 N.C. 518, 24 S.E. 210; *Williams v. Building and Loan Association,* 131 N.C. 267, 42 S.E. 607; *Love v. West,* 169 N.C. 13, 84 S.E. 1048; *Cuthbertson v. Bank,* 170 N.C. 531, 87 S.E. 333; *Hill v. Lindsay,* 210 N.C. 694, 188 S.E. 406.

In *Armfield et al. v. Moore, supra,* the defendant executed a note under seal to the plaintiffs in the town of Monroe, in this State, and at the time of its execution, the maker thereof, the defendant, was a nonresident of this State and remained so thereafter. The plaintiffs instituted an action to recover on the note more than ten years after its maturity, and the Court held that the defendant being a nonresident of the State would not be permitted to take advantage of the ten-year statute of limitations which he pleaded, in view of the provisions of the Code 162 (now G.S.

1-21). The Court, in considering the statute, said: "The purpose is, to prevent defendants from having the benefit of the lapse of time—the statute of limitation—while they permit debts against them, past due, to remain unpaid, or other causes of action against them to remain undischarged, and keep beyond the limits of the State and the jurisdiction of its courts, and thus prevent the person having the right to sue, from doing so. It is not the policy or purpose of the State, to drive its citizens, directly or indirectly, to seek their legal remedies abroad, or to encourage nonresidents to keep out of it and beyond the jurisdiction of its courts, as would in some measure be the case, if by keeping out of the State, the debtor or person against whom a cause of action exists, could avail himself of the lapse of time during his absence. The counsel for the appellant insisted in the argument, that the statute under consideration does not embrace nonresidents of this State. We cannot so interpret it. The words 'any person,' employed to designate the persons to be affected and embraced by it, are very comprehensive, and there is nothing in its scope or purpose that excludes them."

We think it must be conceded that the statute under consideration was enacted for the primary purpose of tolling the statute of limitations in favor of the citizens and residents of this State whenever a cause of action arises in their favor, and the debtor, either resident or nonresident, is beyond the reach of process of our courts. Even so, this does not mean that our courts should not be open to a nonresident plaintiff to enforce a claim on a cause of action that is not barred in the jurisdiction where such cause of action arose, where the debtor has not been a resident of this State for the statutory time necessary to bar the action. Statutes like ours and those substantially and essentially in accord therewith, have been held to toll the statute in such cases where neither the plaintiff nor the defendant was a resident of the state of the forum at the time of the institution of the action and never was, as well as in those cases where the obligation arose out of the state of the forum and the debtor had not resided in the state of the forum for a time sufficient to bar the action by the *lex fori*. *Steen v. Swadley,* 126 Ala. 616, 28 So. 620; *Western Coal & Mining Co. v. Hilvert,* 63 Ariz. 171, 160 P. 2d 331; *McKee v. Dodd,* 152 Cal. 637, 93 P. 854, 14 L.R.A. (N.S.) 780, 125 Am. St. Rep. 82; *Cvecich v. Giardino,* 37 Cal. App. 2d 394, 99 P. 2d 573; *Simon v. Wilnes,* 97 Colo. 78, 47 P. 2d 406; *Newton v. Mann,* 111 Colo. 76, 137 P. 2d 776, 147 A.L.R. 767; *Hatch v. Spofford,* 24 Conn. 432; *Jones v. Wells,* 7 Del. 209, 2 Houst 209; *Van Deren v. Lory,* 87 Fla. 422, 100 So. 794; *West v. Theis,* 15 Idaho 167, 96 P. 932, 17 L.R.A. (N.S.) 472, 128 Am. St. Rep. 58 (Idaho now has a provision in its statute which prevents recovery on a claim in that State, if barred in the jurisdiction where the cause of action arose, Idaho Code 5-239; *Ross v. Rees,* 55 Iowa 296, 7 N.W.

611; *McNamara v. McAllister,* 150 Iowa 243, 130 N.W. 26, 34 L.R.A. (N.S.) 436, Ann. Cas. 1912D 463; *Bonifant v. Doniphan,* 3 Kan. 26 (Kansas has amended its statute so as not to toll the statute of limitations where the plaintiff and defendant were nonresidents of the State when the cause of action accrued and such cause of action is barred in the State where it arose, *Bruner v. Martin,* 76 Kan. 862, 93 P. 165, 14 L.R.A. (N.S.) 775, 123 Am. St. Rep. 172, 14 Ann. Cas. 39); *Thompson v. Reed,* 75 Me. 404; *Frye v. Parker,* 84 Me. 251, 24 A. 844; *Mason v. Union Mills Paper Co.,* 81 Md. 446, 32 A. 311, 29 L.R.A. 273, 48 Am. St. Rep. 524; *John v. John,* 307 Mass. 514, 30 N.E. 2d 542 (it is pointed out in this case that the statute contains a provision to the effect that an action cannot be maintained in Massachusetts on a cause of action arising out of the State, if such cause of action is barred in the State where it arose); *Belden v. Blackman,* 118 Mich. 448, 76 N.W. 979; *Tagart v. Indiana,* 15 Mo. 209 (statute in Missouri has been changed so as to apply only to any debtor who is a resident of that State, *Koppel v. Rowland,* 319 Mo. 602, 4 S.W. 2d 816); *Hartley v. Crawford,* 12 Neb. 471, 11 N.W. 729; *Paine v. Drew,* 44 N.H. 306; *In re Goldsworthy,* 45 N. Mex. 406, 115 P. 2d 627, 148 A.L.R. 722; *Ruggles v. Keeler* (N.Y.), 3 Johns. 263, 3 Am. Dec. 482; *Meyers v. Credit Lyonnais,* 259 N.Y. 399, 182 N.E. 61, 83 A.L.R. 268 (this case expressly disapproves *Garrison v. Newman,* 222 App. Div. 498, 227 N. Y. Supp. 78, which held that where the creditor and debtor were nonresidents and the cause of action accrued outside the State of New York, that the exception to the statute did not apply); *Bean v. Rumrill,* 69 Okla. 300, 172 P. 452; *Crocker v. Arey,* 3 R.I. 178; *McConnell v. Spicker,* 15 S.D. 98, 87 N.W. 574; *Raymond v. Barnard,* 71 S.D. 630, 28 N.W. 2d 700; *Kempe v. Bader,* 86 Tenn. 189, 6 S.W. 126 (overruling *Barbour v. Erwin,* 14 Lea 721); *Burnes v. Crane,* 1 Utah 179. See Annotations 83 A.L.R. 271; 148 A.L.R. 732 and 17 A.L.R. 2d 502.

In the recent case of *Howle v. Express, Inc.,* 237 N.C. 667, 75 S.E. 2d 732, *Winborne, J.,* assembled our decisions to the effect that a nonresident has the right to bring an action in our courts as one of the privileges guaranteed the citizens of the several states by the Constitution of the United States, Article IV, section 2. A nonresident is entitled to the benefit of statutory provisions such as those contained in G.S. 1-21, and may bring his action in the state of the forum under the same terms and conditions which would have been applicable to him if he had been a resident thereof at the time the action arose.

Let us consider carefully that part of G.S. 1-21 which is applicable to this case. A casual examination of the statute might lead to the conclusion that the debtor must have been a resident of this State or temporarily residing therein at the time the obligation was created and upon

which the cause of action arose, since we usually do not speak of returning to a place we have never been. The origin of the statute and the construction placed upon some of the words and phrases contained therein, by other courts, may be helpful to us in answering the question posed on this appeal. The Statute of 4 & 5 Anne, chapter 16, section 19, provided in substance that if any person against whom there should be any cause of action was, at the time such action accrued, beyond the seas, the action might be brought against him on his return within the time limited for bringing such action. 65 C.J.S., Limitations of Actions, section 208, page 229, *et seq.* The original English statute may be found in English Statutes at Large, Volume 4, page 207. The term "beyond the seas," used in the English statute, was construed by the English courts to be synonymous with "beyond the realm," or "out of the realm." Since we have the several states, each with its own judicial system, each state is a separate realm in the sense in which the term "beyond the seas" was used in the English statute. But with our citizens constantly engaged in interstate commerce among the several states, and nonresident debtors contracting with citizens of the several states, the term "out of the state," having been substituted for the term "beyond the seas," in most of the statutes now in effect in the several states; the courts, generally, in effect and in some cases expressly, have held that the words "return of the person to this state," or "into the state," mean "return to the state," or "come into the state." Likewise, the words "absence" and "return" do not restrict the operation of the exception to those only who have been in the state. Otherwise, the pertinent provisions of the statute which we are considering would not toll the statute of limitations and stop it from running in favor of a nonresident debtor who had never been a resident of this State. *Steen v. Swadley, supra; Van Deren v. Lory, supra; West v. Theis, supra; Paine v. Drew, supra; Meyers v. Credit Lyonnais, supra; Cvecich v. Giardino, supra;* Anno. 17 A.L.R. 2d 506; 34 Am. Jur., Limitations of Actions, section 215, page 172, *et seq.;* 54 C.J.S., Limitations of Actions, section 210 (b), page 231. The last cited authority states: "The word 'return,' used in the statute to indicate the starting point of the running of the time, cannot restrict the operation of the exception to those only who have been in the state."

In the early case of *Ruggles v. Keeler, supra, Chief Justice Kent* used this language: "Whether the defendant be a resident of this state, and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso. If the cause of action arose out of the state, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within our jurisdiction." This Court reached a similar conclusion in *Green v. Insurance Co.,* 139

N.C. 309, 151 S.E. 887; *Williams v. Building and Loan Association, supra,* and *Cuthbertson v. Bank, supra.*

Likewise, with respect to actions accruing out of the state of the forum, the Supreme Court of Arizona, in the case of *Western Coal & Mining Co. v. Hilvert, supra,* stated the majority view in the following language: "To construe the act as limited to claims arising in this state would be a strained and narrow construction. It would require us to add to the broad scope of the act applying to any 'person against whom there shall be a cause of action' the limiting words 'arising in this state.' If the action was not barred by the law of the place of the breach or residence of the defendant, we see no reason in justice or policy why we should construe this act to extend the tolling provisions of the statute only to causes of action arising within this state, the legislature having declared no such purpose." The Arizona Court, in its opinion, quoted with approval what was said in the early case of *Hartley v. Crawford, supra,* to the effect that to hold that the statute "applies only to causes of action accruing in this state, 'or in behalf of one of our citizens' would be exceedingly forced, and entirely unsupported, as we think, by reason or authority. The language of the statute is general, and applies to all personal causes of action to which a bar is provided in the preceding sections."

The States of Mississippi and Pennsylvania have limited the tolling of their statutes of limitation by amending statutes similar to the one under consideration so as to make them applicable only to causes of action arising within those respective States. *Wright v. Mordaunt,* 77 Miss. 537, 27 So. 640, 78 Am. St. Rep. 536; *United States Fidelity & G. Co. v. Ransom,* 192 Miss. 286, 5 So. 2d 238; *Shaffer's Estate,* 228 Pa. 36, 76 A. 716; *Continental Illinois Nat. Bank & T. Co. v. Holmes* (D.C.), 21 F. Supp. 309.

The State of Minnesota has enacted legislation to the effect that where a cause of action has arisen out of the State, an action thereon cannot be maintained within that State if it is barred by the laws of the State or foreign country where it arose, unless the cause of action from the time it accrued had been in favor of a citizen of Minnesota. *Powers Mercantile Co. v. Blethen,* 91 Minn. 339, 97 N.W. 1056. The State of Oregon, by legislative action, has likewise limited actions that may be brought on causes of actions arising outside of the State to those that are not barred in the jurisdiction where they arose. *McCormick v. Blanchard,* 7 Ore. 232; *Re Wemple,* 92 Ore. 41, 179 P. 674. In line with this view, New York's Civil Practice Act, section 13, provides: "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of a state or country where the cause of action arose, for bringing an action upon such cause of action, except where the cause

of action originally accrued in favor of a resident of this state." Thompson's Laws of New York (1939, Part II).

The statute in Illinois, in pertinent part, is identical with ours; however, it contains this proviso: "But the foregoing provision of this section shall not apply to any cause, when, at the time the cause of action accrued, or shall accrue, neither the party against nor in favor of whom the same accrued, or shall accrue, were or are residents of this state." *Mitchell v. Comstock,* 305 Ill. App. 360, 27 N.E. 2d 620.

The minority view, holding that a statute similar to ours, does not apply to actions accruing outside the state between a nonresident creditor and a nonresident debtor, has been followed by New Jersey and Texas. *Shapiro v. Friedman,* 132 N.J.L. 456, 41 A. 2d 10; *Stone v. Phillips,* 142 Texas 216, 176 S.W. 2d 932.

In the case of *Shapiro v. Friedman, supra,* the Court said: "These statutes, in our view, are predicated on the idea of saving a resident creditor's action against a debtor who is nonresident when the action accrues or who leaves the state after the accrual and before the statute of limitations has run. It is true that the majority of the states have construed statutes of similar import differently on this point. See 83 A.L.R., p. 273; also *Id.,* p. 276; 148 A.L.R., p. 732, p. 736. Some of the statutes, we gather from reading the reports, are quite different from our own. *Meyers v. Credit Lyonnais Co.,* 259 N.Y. 399, 182 N.E. 61, 83 A.L.R. 268."

Other states have also added provisions to their statutes which take them out of the majority or minority line of cases, among them being Georgia, Kentucky, Vermont, and Wisconsin. *Moore v. Carroll,* 54 Ga. 126; *Sword v. Scott,* 293 Ky. 630, 169 S.W. 2d 825; *Troll v. Hanauer,* 57 Vt. 139; *National Bank v. Davis,* 100 Wisc. 240, 75 N.W. 1006. It will also be noted that many jurisdictions, while adhering to the majority view, have adopted legislation which may prevent recovery on a cause of action arising out of the state of the forum, if such action, at the time of its institution, was barred in the jurisdiction in which it arose. Whether we should take similar action is a matter for the Legislature. Be that as it may, the cause of action involved herein was not barred in the jurisdiction in which it arose at the time the present action was instituted.

After a careful review and consideration of the authorities bearing on the question presented, we are inclined to follow the majority view.

The judgment of the court below is

Affirmed.

BARNHILL, J., concurring in result: The court below rendered judgment on the pleadings. This in itself presents a question worthy of some

consideration. The answer contains an unequivocal denial that defendant is indebted to plaintiff in any amount. He likewise pleads our three-year statute of limitations, and it appears that this action was instituted more than three years after plaintiff's cause of action accrued. G.S. 1-15, G.S. 1-52. While the briefs filed and arguments made by counsel disclose that plaintiff is relying on the provisions of G.S. 1-21, plaintiff does not allege in reply that the statute was tolled by the fact defendant was "out of the State" when its cause of action arose and did not become a resident of this State until December 1951, shortly before the institution of this action.

We have consistently held that a litigant must plead the provisions of our prescription statutes upon which he relies. The statute so provides. G.S. 1-15. Why should not that rule apply here? *Le Mieux Bros. Corporation v. Armstrong,* 91 F. 2d 445.

Decision in the court below was made to turn on our three-year statute of limitations. Since this action was not instituted until almost four years after plaintiff's cause of action arose, it is apparent the trial judge concluded that the provision of G.S. 1-21, which tolls the statute if the debtor is out of the State at the time the cause of action arose, is controlling. If that be the case, then the beginning date of the three-year period is the date of the debtor's return to the state rather than the date the cause of action accrued. G.S. 1-15. That is the rationale of the majority opinion.

The majority conclude that G.S. 1-21 applies even when both the creditor and debtor were nonresidents when the plaintiff's cause of action accrued and the cause of action arose in the State of their residence. I find it utterly impossible to concur in this conclusion. While I concur in the affirmance of the judgment, my concurrence is bottomed on the reasons hereinafter stated.

I readily concede that the majority view follows the apparent weight of authority which is the usual practice when the exact question presented has not been decided in this State. However, in my opinion, there has been more unsound, superficial, and illogical writing by the courts in construing provisions somewhat similar to those contained in G.S. 1-21 than on any other subject it has been my privilege to investigate. There has been as much judicial flirtation on this question as on any in the books.

In 1808, *Kent, C. J.,* in his opinion in *Ruggles v. Keeler,* 3 Am. Dec. 482, construing the New York statute, held that a statute of limitations of a State (Conn.) in which the cause of action accrued could not be pleaded in a suit instituted in New York; that "out of the State" as used in the New York statute tolling the statute of limitations applies to all foreigners; and that "after the return" embraces those who enter the

State for the first time. He gave no reason for his conclusions and engaged in no analytical discussion of the New York statute. Instead, the statements are more or less categorical in nature.

Since that time the courts of the several States (except Texas, New Jersey, and Kansas) which have applied similar though not identical statutes, have picked up and followed the opinion in the *Ruggles case.* This has been done in most cases with perfunctory or superficial discussion.

These cases, relied on by the majority, hold that the term "out of the State" has a universal meaning, notwithstanding the context of its use, and includes foreigners who have never been within the State; and "after the return of the person (debtor) into this State" includes not only those who depart and later return but also any and all who come into the State for the first time. "The word 'return' as used in the statutes does not confine the exception to residents, and a nonresident coming into the State for the first time after a cause of action has accrued is regarded as returning to the state." 54 C.J.S. 237.

To my mind to say that a man was "out of the State" at a certain time or that he "returned" to the State on a certain date, when theretofore he had never been in the State, gives these terms a connotation which is strained, unnatural, and unrealistic, and wholly unsupported by reason or logic.

I must confess that my mental reaction to such conclusions invites much writing. However, I shall attempt to confine my comment to the subject at hand.

It should be noted in the beginning that the cases cited and relied on are clearly distinguishable and cannot be considered authoritative on the question here presented. While I may be the one who is entirely off the beam, I cannot follow the logic of these cases or concede that they are sufficiently in point to be controlling.

Instead, I prefer to follow the well-reasoned opinions in *Stone v. Phillips,* 176 S.W. 2d 932 (Tex.); *Shapiro v. Friedman,* 132 N.J.L. 456, 41 A. 2d 10; and *Bruner v. Martin,* 93 Pac. 164 (Kan.).

In *Armfield v. Moore,* 97 N.C. 34, and *Lee v. McKoy,* 118 N.C. 518, plaintiffs were residents of North Carolina and the cause accrued here. In *Ewbank v. Lyman,* 170 N.C. 507, the action was to vacate a deed for fraud. It was of course necessary to maintain that action in this State. In *Hill v. Lindsay,* 210 N.C. 694, at least one of the plaintiffs was a resident.

The cases cited from other jurisdictions involve statutes which vary so greatly in their wording that decisions relating thereto must be considered with regard to the particular phraseology employed in creating them. 34 A.J. 173; 83 A.L.R. 272; 17 A.L.R. 2d 503.

In many of the cases the plaintiff was a resident of the state of the forum, and the cause of action accrued in that state. With these decisions I am in full accord. A creditor is not required to pursue his debtor from state to state. It is instead the duty of the debtor to seek out his creditor and pay him what is due. If the debtor is a nonresident or is out of the State at the time the cause of action accrues, the creditor may wait for him to return to the State, and the statute is tolled so long as the debtor is beyond the jurisdiction of the local courts. To my mind that is the very purpose of the exceptive provisions contained in G.S. 1-21.

There are only a few cases in which both plaintiff and defendant were nonresidents of the State of the forum when the cause of action accrued, and the plaintiff was a nonresident of the State of the forum at the time suit was instituted. In these few cases the majority of the courts apply the same rule. Apparently only Texas, *Stone v. Phillips, supra;* New Jersey, *Shapiro v. Friedman, supra;* and Kansas, *Bruner v. Martin, supra,* take the opposite view in accord with my way of thinking. See also *Skaggs v. Fyffe,* 299 Ky. 751, 187 S.W. 2d 280; *Wright v. Mordaunt,* 27 So. 640; *In re Shaffer's Estate,* 76 A. 716.

Even those cases in which the facts are substantially on all fours with the instant case, in which the majority rule is applied, are factually distinguishable. Here defendant was a resident of plaintiff's home State and amenable to process issued out of a court of competent jurisdiction of that State for three years and ten months next after plaintiff's cause of action accrued. Notwithstanding the fact plaintiff had the right to sue and defendant was subject to the service of process, it delayed action more than the three-year period prescribed by our statute.

So then, the question comes to this: Where a cause of action on an unsealed promissory note accrues in favor of a Texas bank against a citizen of Texas who continues to reside in Texas thereafter for three years and ten months, amenable to process issued by a Texas court of competent jurisdiction, and then comes into this State where the bank appears and institutes an action on its note just seven days less than four years after its cause of action accrued, does our three-year statute, G.S. 1-52, apply and was the running of said statute tolled by reason of the fact the defendant was out of this State when the cause of action accrued and came into this State less than three years prior to the institution of said action, G.S. 1-21?

In my opinion the answer should be in the negative. Our statute, when correctly construed, is not controlling. Instead, we must look to the prescription statute of the State in which the parties resided at the time the contract was made and the cause of action accrued to determine whether plaintiff's claim is barred. That was the statute in the contemplation of the parties when the contract was made.

The fundamental principle of statutory construction is to give effect to the intent of the Legislature, for the heart of the law is the intention of the lawmaking body. Strict adherence to literalness is the cardinal sin of statutory construction. And so we are not required to accord the language used an unnecessarily literal meaning. Context and purpose are controlling and the right to be protected or the evil to be remedied is to be accorded prime consideration. Statutory provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. *Perry v. Stancil,* 237 N.C. 442; *In re Yelton: Advisory Opinion,* 223 N.C. 845.

Furthermore, "An inhibition or prohibition usually extends no farther than the reason on which it is founded. *Cessante ratione, cessat ipsa lex." In re Yelton, supra.*

To these general rules I may add with confidence that in proper cases such as this the limitations upon the power of the lawmaking agency in large measure determines the intent, purpose, and scope of the language used, for we may not assume the Legislature intentionally exceeded its lawmaking authority.

G.S. 1-15 provides that "Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute." G.S. 1-21, which is a part of the same statute and must be considered *in pari materia,* is in the nature of a proviso and is one of the "special cases" excepted in G.S. 1-15. G.S. 1-15 provides the general rule and G.S. 1-21 sets forth the exceptions thereto.

So then, in effect, the pertinent part of our statute reads as follows: "Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, provided, however, if, when the cause of action accrues . . . against a person, he is out of the State, action may be commenced . . . within the times herein limited, after the return of the person into this State . . ."

The General Assembly in enacting this statute was legislating for the people of this State and regulating their right to maintain actions in our courts. The statute is a declaration of local policy without force or effect beyond the borders of the State. It was designed and intended to prescribe, regulate, and protect the rights of residents. This was the extent of its legislative authority.

"The object of the section was for the protection of domestic creditors . . . And it was intended to protect them from the inconvenience and loss, to which they would be exposed by the absence of their debtors and consequent immunity of the latter from process and judgment." *Stone v. Phillips, supra; Wilson et al. v. Daggett,* 88 Tex. 375, 31 S.W. 618.

Its purpose is to secure to plaintiff the same time in which to commence an action against an absent or nonresident defendant that he would have if defendant were an actual resident of the State. 54 C.J.S. 232; *McLaughlin v. Aetna Life Ins. Co.*, 221 Mich. 479, 191 N.W. 224.

The exceptive provision is based on the premise that the statute was intended to protect or save the action because it accrued here and the debtor is not to be benefited because he leaves this State. *Shapiro v. Friedman, supra.* It contemplates an absence from the State that will prevent plaintiff from reducing his cause of action to a judgment *in personam, Niblack v. Goodman,* 67 Ind. 174, and its purpose is to prevent the defendant from defeating plaintiff's right to prosecute his action. *Embrey v. Jemison,* 131 U.S. 336, 33 L. Ed. 172.

On the one hand, the statute is intended to limit the right of a plaintiff to institute his action, and it specifies the time limitation in respect to each and every type of action—three years when the action is bottomed on an unsealed promissory note as in this case. On the other hand, it is designed to prevent the debtor from evading the jurisdiction of the court by departing the State either before or after the cause of action accrues. It thus assures the plaintiff the full time stipulated in the statute in which to institute his action.

In construing similar Acts, the courts, in my opinion, have placed undue emphasis upon the terms "out of the State" and "return into the State" and have overlooked or failed to consider the limiting provision, "If, when the cause of action accrues." That is the key provision of the section. Determine what causes of action it includes and you solve the meaning and purpose of the whole section.

In determining what causes of action are included in this provision, neither the removal of defendant to this State after plaintiff's cause of action accrued in Texas nor the length of time he had been in this State when this action was instituted is material. The decisive facts are these: The note described in the complaint and plaintiff's cause of action bottomed thereon are items of property which belong to a nonresident; and the plaintiff is now, and was at the time its cause of action accrued in its home state, a nonresident of this State.

The note held by plaintiff is property. Likewise, the cause of action created by defendant's default in the payment thereof is property. It is a chose in action. "A vested right of action is property in the same sense in which tangible things are property . . ." *Williams v. R. R.,* 153 N.C. 360.

This property which is involved in this litigation constitutes a part of the mass of property located in the State of Texas. In respect thereto, there was no right to be protected or evil to be remedied by our Legislature. It is no concern of our Legislature as to when a nonresident shall

institute his action. Nor is a nonresident disadvantaged because his debtor is beyond the jurisdiction of our courts. Why then should the Legislature undertake to provide for the tolling of our prescription statute in behalf of one who is not himself within the State and has no cause to come to this State to institute his action so long as his debtor is "out of the State?"

Plaintiff was not inconvenienced by the fact defendant was out of the State of North Carolina. From the date defendant's cause of action accrued until the date defendant established residence in this State, it was unaffected by defendant's nonresidence here. During the full time he was amenable to process and plaintiff was free to prosecute its action in its home state. It was defendant's departure from Texas that has caused plaintiff inconvenience and loss.

Furthermore, our General Assembly was without authority to legislate in respect to property located in another State or to regulate the rights of nonresidents possessing a cause of action against one of its debtors, which cause accrued in the State of their residence.

Of necessity the absence of any right to be protected or any evil to be remedied by our Legislature in respect to property located in another State and its want of authority to legislate in respect thereto have a direct bearing on the meaning of the language used.

Strangely enough, however, no court, so far as I have been able to ascertain, has considered the limitations upon the authority of the lawmaking agency of government in determining the meaning of similar language used in prescription statutes.

Our statute was designed and intended to prescribe, regulate, and protect the rights of residents. That was the extent of the legislative authority of the General Assembly. I cannot conceive that it intended to undertake to legislate in respect to Texas property, or regulate the rights of a Texas bank against one of its Texas debtors, or to protect such bank against its inability to procure service of summons on one of its debtors without suffering the inconvenience of going to another State. To my mind there is no conceivable reason why our General Assembly should undertake to provide for the tolling of our prescription statute in behalf of one who is not himself in the State and has no cause to come to this State to institute his action so long as his debtor is "out of the State." If our General Assembly intended that G.S. 1-21 should have that force and effect, it was indeed solicitous of the rights of nonresidents.

So then, when we consider the legitimate objective of the statute and the limitations upon the lawmaking power of our General Assembly, the language used, by clear implication, limits the provisions of the statute to a resident creditor possessing a cause of action against one who was in the State when the contract was made or the liability was incurred but

left the State before the cause of action accrued or after its accrual but before the statute of limitations had run its course. *Otis v. Bennett,* 302 U.S. 727, 82 L. Ed. 561; *Banco-Ky's Rec'r. v. Nat. Bank of Ky's Rec'r.,* 187 S.W. 2d 357; *Daly v. Power,* 59 S.W. 2d 10; *Carter v. Burns,* 61 S.W. 2d 933; 54 C.J.S. 235.

"If, when the cause of action accrues" means "if, when the cause of action accrues in this State." This meaning is as implicit as if the term "in this State" was actually written in the statute. The other language in the statute fortifies this conclusion. We do not ordinarily speak of a person as being out of the State unless he is customarily in the State, and "return" ordinarily means "come back to."

At first blush the answer that the statute regulates procedure in the courts of the State and not the rights of the parties would seem to be sufficient, but such is not its purpose or effect. The statute provides that "civil actions can only be commenced within the periods prescribed within this statute after the cause of action has accrued . . ." G.S. 1-15. Since a civil action is a proceeding to enforce a cause of action, and a cause of action is, in a legal sense, property, it would seem to be clear that the statute constitutes a limitation of a property right. Expiration of the time limitation destroys the property. It ceases to exist.

However, the majority hold that our statute applies and is controlling under the *lex fori* doctrine on the theory it is adjective or procedural law. On this phase of the case, at least, the majority opinion is sustained by the cases cited. If those cases settle any one legal question, it is that the prescription statutes of the State of the forum are procedural in nature and are controlling in cases where the cause of action accrued in some other State. Unfortunately the judicial mind sometimes becomes closed. Apparently on this question it has become closed, clamped down, and padlocked. While some of the cases are distinguishable, there is no escaping the fact that a large majority of the courts which have ruled on the question so hold. There is little, if any, reason advanced in support of the conclusion. The courts, since the decision in *Ruggles v. Keeler, supra,* have been content to make a categorical statement of the rule as set forth in that case. In this conclusion I am unable to concur.

Our statute prescribes no procedure. It cuts off the right as well as the remedy. It imposes a limitation upon the right of a plaintiff to reduce his claim to a judgment *in personam,* and G.S. 1-21 merely fixes the beginning date of the limitation in the event the debtor is out of the State when the cause of action accrues.

Strictly speaking, our statute does not create a condition precedent. It does not enter the picture unless pleaded. Yet, when pleaded, it immediately becomes a condition precedent. The plaintiff may recover only in the event he proves that he instituted his action within the time pre-

scribed by the statute. If the action was not instituted within the time prescribed, plaintiff's right to judgment on its claim is destroyed and his action must be dismissed. *Vail v. Vail,* 233 N.C. 109; *Marks v. McLeod,* 203 N.C. 257; *Southerland v. Crump,* 199 N.C. 111; *Phillips v. Penland,* 196 N.C. 425.

The plaintiff did not come to this State and institute its action under authority of any provision contained in our statutes. It came under authority of the "privileges and immunities" provision of Art. IV, sec. 2, of the United States Constitution. Since its cause of action is a transitory one, it was privileged to institute its action and enforce its rights in respect thereto in the courts of this State where it could procure service of summons. Its claim is unaffected by the laws of this State. The only requirement to which it is subjected is the requirement that in prosecuting its action it follow the procedural law of this State. *Clodfelter v. Wells,* 212 N.C. 823.

In this connection I may note that plaintiff, a corporation, is not a citizen of the United States within the meaning of Art. IV, sec. 2, of the Federal Constitution. *Bode v. Flynn,* 252 N.W. 284, 94 A.L.R. 480; *Blake v. McClung,* 172 U.S. 239, 43 L. Ed. 432. However, we have always extended to foreign corporations the courtesy of the use of our courts, and I willingly treat plaintiff as a citizen for the purpose of this discussion, for it is immaterial whether it is here by comity or as a matter of right. In either event it is bound only by our law of procedure of which, in my opinion, the statute of limitations forms no part.

The Texas General Assembly which possessed legislative authority over plaintiff and its property has declared that plaintiff must exercise its right to reduce its claim to a judgment *in personam* within four years after its cause of action accrued. But this Court says no. It had three years from and after defendant established residence in this State, irrespective of the date of the accrual of its cause of action in the State of Texas. In this conclusion I cannot concur. As heretofore stated, in my opinion our statute has no application to the facts in this case. We must, instead, look to the prescription statute of Texas to ascertain the merits of any contention that plaintiff's cause of action is now stale. Since the plaintiff brought to this State a live claim and instituted its action within the time allowed by the Texas statute, it has the right to maintain its cause in the courts of this State.

If we adopt the view of the majority opinion, then we open the door for serious discrimination in favor of nonresidents. It makes no difference how old a claim may be or what opportunity a nonresident claimant has had to reduce his claim to judgment, our statute is tolled in his behalf so long as the debtor remains out of this State, and it begins to run anew so soon as he removes to this State, whether the claim has been stale for

one year, ten years, or twenty years under the *lex domicilii.* Thus, we open the doors of our courts for the enforcement of a claim of a nonresident which is barred by the laws of the State in which the cause of action accrued. The removal of the debtor to this State resurrects the claim and gives it new life so that it may be enforced in the courts of this State though long since dead in the State of its origin.

It has been suggested, however, that we would not entertain a claim which is stale under the *lex loci.* But we cannot blow hot and cold on the same question by applying the *lex loci* in one case and the *lex fori* in another. That is what that policy would require, for we would be compelled to look to the *lex domicilii* in every case to determine whether the claim is stale. If so, the *lex loci* would control decision. If not, our statute would apply. We must choose one course or the other.

The construction of the statute I advocate would establish a sound, consistent, and uniform rule which would not discriminate against citizens of this or any other State. A nonresident possessing a transitory cause of action against a citizen of this State may maintain an action thereon in the courts of this State if it is a live claim under the *lex domicilii* where the cause accrued. If it is stale under such laws, an action thereon cannot be maintained in the courts of this State. Happily at least the decisions of the courts of Texas, New Jersey, and Kansas are in accord with and support my views.

To summarize, I am of the opinion that:

(1) The residence or nonresidence of defendant in this State is immaterial.

(2) The nonresidence of plaintiff and the accrual of its cause of action in the State of Texas are the vital, determinative facts.

(3) Our statute of limitations has no application to the facts in this case. Instead, the rights of the parties are controlled by the prescription statute of the State where the contract was made and the cause accrued.

(4) It is not the intent or purpose of our prescription statute to resurrect and give new life to a cause of action which is stale under the law of the State in which the cause accrued. A construction thereof which would give it that force and effect is unsound and should not be adopted.

(5) Plaintiff's cause of action is property located in and subject to the laws of Texas.

(6) Since its cause of action is a transitory one and is not barred by the prescription statutes of Texas, the plaintiff has the right to maintain its action in the courts of this State and is, on the admissions made in the answer, entitled to judgment.

It follows that I vote to affirm for the reason plaintiff's claim is a live one under the laws of Texas where it now exists as property, and the debt is admitted, and for no other reason.

PRISCILLA DEAN WAGONER, ADMINISTRATRIX OF THE ESTATE OF WALTER HASLEY WAGONER, v. NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 23 September, 1953.)

1. Trial § 22a—

On motion to nonsuit, the evidence is to be considered in the light most favorable to plaintiff and plaintiff must be given the benefit of every inference which the testimony fairly supports.

2. Negligence § 23—

Ordinary negligence is based on negligent conduct under circumstances in which probable injury should have been foreseen; wanton and willful negligence rests on the assumption that the negligent party knew the probable consequences of his act but was recklessly, wantonly or intentionally indifferent to the results.

3. Negligence § 4f (3): Railroads § 5—

Where pedestrians walk up and down and across tracks in a railroad yard for a number of years, a pedestrian so using the yard is a licensee and not a trespasser.

4. Negligence § 4f (3)—

The owner of property owes the duty to a licensee upon his premises not to increase the hazard by active and affirmative negligence.

5. Railroads § 5—

Evidence tending to show that an engineer made a flying switch, and that the coal car so shunted ran over and killed a licensee on a track at a place wholly within the railroad company's yard, near the center of a city, while sufficient to support an issue of negligence on the part of the railroad company, is insufficient to support an issue of wanton negligence on its part. The distinction between the act of a railroad company in making flying switches within its freight yard, and in making flying switches at public crossings, is pointed out.

6. Same—

Where the evidence discloses that a licensee in defendant's freight yard was struck and killed by a shunted freight car on a fair day, and that the licensee's view was not obstructed when he walked upon the track, such licensee is guilty of contributory negligence as a matter of law barring recovery for his death even though the car which struck him was moving noiselessly so that he could not hear it.

7. Negligence § 10—

In order for plaintiff to invoke the doctrine of last clear chance, he must plead it.

8. Same—

The doctrine of last clear chance does not apply if the party injured is guilty of contributory negligence as a matter of law.

APPEAL by the defendants from *McLean, Special J.,* November Term 1952. ALAMANCE.

Civil action for damages for wrongful death resulting from the alleged actionable negligence of the defendants.

The plaintiff offered evidence; the defendants did not. These facts are admitted in the pleadings. The North Carolina Railroad Co. is a North Carolina corporation, and is now, and was at the time complained of, the owner of a railroad from Goldsboro to Charlotte, which includes a right of way 200 feet in width through Burlington with roadbeds, railroad tracks, spur tracks and buildings located thereon. The Southern Railway Co., a Virginia corporation, prior to the death of plaintiff's intestate had leased the railroad from its codefendant, and at the time complained of was operating and using the railroad property in its business as a common carrier of passengers and freight for hire, under the lease.

The plaintiff's evidence is summarized below. The plaintiff's intestate, Walter Hasley Wagoner, about 2:00 p.m. 21 May 1951 was killed in the freight shifting yard of the Southern Railway at Burlington, North Carolina, when two wheels of a single detached coal car passed over his body cutting it in two. The area of the railway freight yard between the Main Street and Lexington Avenue Crossings has six railway tracks. The track next to the Freight Depot is known as the House Track, the next track north is known as the Short Track, the next north as the Main Track, the next north as the Passing Track, the next north as the Dead Track, the next north as the Spur Track. On the south side of the Freight Depot next to Webb Avenue there are four Spur Tracks. We are concerned with the area north of the Freight Depot which has six tracks. The distance between the Main Street Crossing and the Lexington Avenue Crossing was 300 steps, according to one witness: according to another about 575 to 650 feet. The Lexington Avenue Crossing is east of the Main Street Crossing. The Passenger Station is on the west side of the Main Street Crossing and the Freight Depot is on the east side of the same crossing. The Freight Depot is on the south side of the railway tracks. There is a continuous platform or connected building all the way along the south side of the railway tracks for the entire distance from the Main Street Crossing to the east beyond where Wagoner was killed. In the same area there are a shed and sandpit near the Spur Track. One sentence in the Case on Appeal states the sand loader is located near the Spur Track; the next sentence says it is between the Spur Track and the Dead Track. Out in this track area there is a small house "where the firemen headquarter there," and there is an unloading place for cattle. These are located between the Spur Track and the Dead Track. Between the Dead Track and the Freight Depot Building on the south side of the House Track there are no other structures in the area between the Main

Street and Lexington Avenue Crossings out on the tracks. Wagoner was killed on the track known as the Short Track about 225 or 250 feet west of the Lexington Avenue Crossing. The distance from the body under the coal car west to the Main Street Crossing was about 350 or 400 feet. This area is bounded east, west, north and south by public streets, and is within a block and a half of the center of Burlington. The area is surrounded by the Freight Depot, the sandpit, the cattle loading zone and the coal yards. Across the streets which surround this area are many stores and places of business. It is about 150 or 175 feet from the south edge of the freight yard over to the northern edge of the freight yard. The general area of the freight yard is level. There are no fences or gates on North Main Street or Lexington Avenue to keep people out of this area: nor any fence or gate along the north of the area.

The rails of the Short Track are level with the ground; its cross ties are completely bedded in the ground. The height of the Main Line is above the level of the other tracks: the rail does not stand above the ground. The distance between the north rail of the Short Track and the south rail of the Main Track is about ten feet, or as another witness said wide enough for an automobile to pass. West of the point where Wagoner was killed, the Short Track joins the Main Track.

From the point where Wagoner was killed looking east toward Lexington Avenue one could see down the tracks about a quarter of a mile. Standing at the Main Street Crossing and looking east toward Lexington Avenue one can see in the neighborhood of four blocks.

When Vestal Long reached the body under the coal car there were some other cars on the Short Track west of where the body was. Long testified, "I do not think there were any east of that back toward the engine, only the one coal car. I don't remember seeing any cars on the Main Track just north of this Short Track." He also testified "there were some cars on the siding track between me and the switch engine." There were no cars between where Wagoner's body was and the sandpit. There were some cars on the House Track along where the body was.

Vestal Long and Maynard Coleman were the only eyewitnesses. On 21 May 1951, about the middle of the day, Long was working at the sandpit unloading sand with a conveyor. About the lunch hour the Southern Railway was moving a sand car, and threw it off the track. Long helped put the car back on the track with the help of the shifting engine. About 2:00 p.m. Bray with this engine went on down the track. A lot of sand had been spilled along the conveyor. Long was using the bulldozer moving backward and forward in his work. About 2:00 p.m. Long saw Wagoner near the Dead Track watching him work—he saw him there 20 or 30 minutes. Wagoner had a particular interest in mechanical things. At this time Long saw the shifting engine east of Lexington

Avenue Crossing placing cars, pulling out from one track going into another. This engine was carrying cars back down the line, and pulling them into other places. Long testified: "I saw them push a car in there on the Short Track . . . The coal car was detached from the shifting engine at the crossing or below it. When I say at the crossing or below the crossing, I mean east of Lexington Avenue. The coal car was moving west on the Short Track. If there was a brakeman on top of it, I didn't see him. I didn't see any employee of the railroad company down the Short Track west of Lexington Avenue. The empty coal car was not moving very fast, it was barely moving. The next time I saw Mr. Wagoner the second set of truck wheels rolled off his body, the third set rolled up on him and stopped. A coal car has eight wheels, two front ones, a little ways back two more . . . I did not see the first set of wheels crossing the body . . . I went to the place where his body was. His body was on the north rail of the Short Track . . . I did not see him at all from the time I saw him standing watching me work until I saw him under the wheels. I didn't see him cross there." Long saw the brakeman, and believed he was coming from in front of the engine near the crossing. The point where Long found Wagoner's body was just a little farther east toward Lexington Avenue from where Long had seen him standing watching him work. When Long saw this detached coal car coming down the Short Track he did not hear any train whistle, and did not see any signal given. Long couldn't hear this coal car making any noise, as he was running the bulldozer, which makes more noise than an automobile.

Maynard Coleman was hauling sand and stone. He drove into the railway yard from Main Street, and went across the tracks to the conveyor, which was loading sand. He crossed the Spur Track right at the conveyor. The first thing he saw, when he reached the sandpit, was a man's leg move under a hopper coal car. This coal car was on the Short Track. Coleman did not see anybody on the coal car, nor anyone around the area. No engine was attached to the car. There were no cars on the tracks either way according to Coleman's testimony. The car was just stopping still, when Coleman saw it. The body of Wagoner was under the third set of wheels of the car—those are the ones near the back when the car was moving west. Coleman helped to move the car off the body.

Wagoner's body was cut in two across the stomach. The upper part of his body from the waist up was on the inside of the Short Track between the rails. The lower part of his body was on the outside or north side of the north rail of the Short Track.

Wagoner lived on Kime Street in Burlington about eight blocks southwest of the Main Street Crossing. Wagoner worked for the Central Grocery Co., which is one block north of the railway tracks on North Main Street.

Wagoner was 47 years old at the time of his death. He was killed about 2:00 p.m. The weather was fair and the sun shining.

D. D. Matthews, Chief of Police of Burlington, testified he had read an ordinance against loitering around the railroad yard.

Vestal Long testified he has seen "quite a few people" crossing the railway yards between the Main Street and Lexington Avenue Crossings —some were railway workers, some not: he has seen children ride bicycles through there, and has seen people who worked there run them off.

For more than 14 years there has been much pedestrian traffic in the railroad yard between the Main Street and Lexington Avenue Crossings. During the school period pedestrian traffic in that area is heavy. The traffic is mostly between the Main Track and the Short Track. Chief of Police D. D. Matthews testified that he frequently observed the area between the Main Street and Lexington Avenue Crossings and that "over a period of time prior to 21 May 1951 I observed pedestrians there practically all the time, walking up and down the railway tracks, crossing practically every day and every night."

The plaintiff introduced from Paragraph 3 of the defendants' further answer the following, limiting it to the fact of death resulting from a railway car switch operation on the tracks of the defendants: "Plaintiff's intestate negligently, carelessly and heedlessly walked into a railroad car switch operation being conducted wholly within said railroad yard, and that all injuries suffered by plaintiff's intestate on said date and while in said railroad yard, were solely and proximately caused and brought about by the negligence and unlawful conduct of plaintiff's intestate."

The following issues were submitted to the jury: (1) Is the plaintiff the duly appointed administratrix of her alleged intestate?; (2) Was the plaintiff's intestate injured and killed by the willful or wanton negligence of the defendants, as alleged in the complaint?; (3) What damages, if any, is the plaintiff entitled to recover?

The jury answered the first issue Yes; the second issue Yes; and awarded substantial damages under the third issue.

From the judgment signed in accordance with the verdict the defendants excepted and appealed.

Cooper, Long, Latham & Cooper for plaintiff, appellee.

Long & Long, W. T. Joyner, and H. E. Powers for defendants, appellants.

PARKER, J. The defendants assign as Error No. One the denial of the defendants' motions for nonsuit made at the close of the plaintiff's evidence. The defendants offered no evidence. The defendants further assign as errors the court's refusal to submit issues of negligence and

contributory negligence, as requested by the defendants, and the court's submitting only the issue as to willful or wanton negligence; and also assigns as errors parts of the charge, and part of the argument of one of counsel for the plaintiff.

We shall discuss first the motions for judgment of nonsuit, for if those motions should have been allowed, a discussion of the other assignments of error will become academic.

The duty of the court in passing upon a motion for nonsuit has been stated so frequently and so clearly, that to attempt to restate it would be like carrying coal to Newcastle. Suffice it to say that on such a motion the court interprets the evidence in the light most favorable to the plaintiff, and gives to him the benefit of every inference which the testimony fairly supports. *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25; *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757.

The plaintiff appellee in her brief states "our case was bottomed upon the doctrine of that conduct on the part of the railroad which amounts to wantonness, willfulness, or the like, precluding the defense of contributory negligence."

These two questions are first presented. First, considering the evidence as set forth above in the light most favorable to the plaintiff, was it sufficient to show that the defendants committed an act of willful or wanton negligence in detaching a car from the shifting engine at or east of the Lexington Avenue Crossing, and without anyone on the car and without any signal or warning, and without any employee of theirs being in the yard to warn anyone of the moving car, letting it move at a slow speed on its Short Track entirely in their freight yard and on their property, under the conditions then and there existing? Second, if the evidence was not sufficient to show willful or wanton negligence, was it sufficient to show that the defendants were guilty of ordinary negligence?

"An act is wanton when, being needless, it manifests no rightful purpose, but a reckless indifference to the interests of others; and it may be culpable without being criminal." *Wise v. Hollowell,* 205 N.C. 286, 171 S.E. 82. "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Foster v. Hyman,* 197 N.C. 189, 148 S.E. 36.

"The term 'wanton negligence' . . . always implies something more than a negligent act. This Court has said that the word 'wanton' implies turpitude, and that the act is committed or omitted of willful, wicked purpose; that the term 'willfully' implies that the act is done knowingly and of stubborn purpose, but not of malice . . . Judge Thompson says: 'The true conception of willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract

or which is imposed on the person by operation of law. Willful or intentional negligence is something distinct from mere carelessness and inattention, however gross. We still have two kinds of negligence, the one consisting of carelessness and inattention whereby another is injured in his person or property, and the other consisting of a willful and intentional failure or neglect to perform a duty assumed by contract or imposed by operation of law for the promotion of the safety of the person or property of another.' Thompson on Neg. (2d Ed.), Sec. 20, *et seq.*" *Bailey v. R. R.*, 149 N.C. 169, 62 S.E. 912.

To constitute willful injury there must be actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences probable to result therefrom. Ordinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results. *Everett v. Receivers*, 121 N.C. 519, 27 S.E. 991; *Ballew v. R. R.*, 186 N.C. 704, 120 S.E. 334; *Foster v. Hyman, supra; S. v. Stansell*, 203 N.C. 69, 164 S.E. 580; 38 Am. Jur., negligence, Sec. 48.

"In strictly accurate use, the terms 'willfulness' and 'wantonness' express different ideas and are clearly distinguishable, the distinction resting chiefly in the nature and extent of intent involved. It has been said that 'the difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not.'" 65 C.J.S., Negligence, p. 379.

The plaintiff vigorously contends that the movement of the detached coal car under all the circumstances was willful or wanton negligence on the part of the defendants, and quotes copiously from the opinion in *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690, and also cites and relies upon *Wilson v. R. R.*, 142 N.C. 333, 55 S.E. 257; *Vaden v. R. R.*, 150 N.C. 700, 64 S.E. 762; *Farris v. R. R.*, 151 N.C. 483, 66 S.E. 457; 151 A.L.R., p. 37; 167 A.L.R., p. 1253; and other authorities. The defendants as vigorously contend otherwise.

Our following cases are where a detached car movement caused injury or death at a *public crossing*. *Bradley v. R. R.*, 126 N.C. 735, 36 S.E. 181 (the view was also obstructed by a line of boxcars on a sidetrack); *Wilson v. R. R., supra; Johnson v. R. R., supra; Lutterloh v. R. R.*, 172 N.C. 116, 90 S.E. 8 (a 12-year-old boy). In the *Johnson case* the Court said: "This Court has recently declared, in *Vaden v. R. R.*, 150 N.C. 700,

that, 'making flying switches' on the railway tracks and sidings running across and along the streets of populous towns is *per se* gross negligence, and has been so declared by all courts in this country and by text-writers generally. It is stated in one of the best known textbooks that the use of a running switch in a highway in the midst of a populous town or village is of itself 'an act of gross and criminal negligence on the part of the Company,' " citing authorities. In *Lutterloh v. R. R., supra,* this Court stated: "It is established with us by repeated decisions that it is negligence *per se* to make one of these flying switches along the streets of populous towns or at public or much frequented crossings," citing the *Johnson case, supra,* and others. In the *Lutterloh case* issues of ordinary negligence and contributory negligence were submitted to the jury, as well as in the *Bradley* and *Wilson cases.*

In *Vaden v. R. R., supra,* a 13-year-old boy was struck and killed by a flying switch about 30 feet from where Tomlinson Street crosses the tracks. He was killed on a switch track located in a populous part of High Point immediately in front of a factory where he worked. The factory had just closed for the day, and employees were filling the streets and crossings. Issues of negligence and contributory negligence were submitted. *Brown, J.,* wrote the opinion for the Court.

In *Bordeaux v. R. R.,* 150 N.C. 528, 64 S.E. 439, these facts appeared from the evidence. Plaintiff's intestate was a car repairer employed in defendant's switching and repair yards at South Rocky Mount. To protect its workmen the defendant had long since adopted and published rules requiring those repairing cars on tracks in the yards to place a blue flag on the car to give notice to the switch enginemen not to move cars or run other cars in on them. The intestate with two fellow-workmen went to repair a tank car on Track No. 1. There was much shifting on the yard tracks at the time. They decided it was a short job, and put out one person to watch, who failed to do so. While the intestate was under the car repairing it, the switch engine "kicked" or "pitched" a car loaded with lumber on to Track No. 1, which struck another car, and that against the tank car, running it over intestate and killing him. It was a custom of long standing in the yards, and well known, that if the job was short, the flag was not put out. *Brown, J.,* speaking for the Court wrote: "We admit that the rulings of the Court in regard to 'kicking' cars, or making flying switches at public or much frequented crossings, do not apply to the constant changing or switching of cars that is inevitable in the extensive repair and switch yards of a large railway system." Issues of ordinary negligence, contributory negligence and damages were submitted to the jury.

In *Farris v. R. R.,* 151 N.C. 483, 66 S.E. 457, these facts appeared. The intestate was an employee of the defendant. He was walking down

a space 6 to 8 feet wide between the first and second tracks of the defendant in a busy yard of the defendant in Asheville. An engine on the third track passed him from behind blowing off his hat, which fell on the second track. He stopped to pick it up and was run over and killed by four gondola cars coming from behind. The engine had made a "flying switch," and the four coal cars were sent on the second track. Issues of ordinary negligence, contributory negligence, last clear chance and damages were submitted. The Court said quoting 3 Elliott on R. R. (2d Ed.), sec. 1265G: "The practice of making running or flying switches is inherently dangerous, and is considered by the Court in numerous decisions. The Courts have not hesitated to hold railroad companies liable for injuries to trespassers, on the track, thus inflicted, on the grounds of negligence. The case of this negligence seems specially plain where the cars are sent in swift motion, with no one at the brakes, upon switch tracks commonly used by persons for foot paths and crossings, without objection from the company, though not a public crossing. It would seem a duty owed by the railroad company, even to trespassers, to station lookouts in such positions on the moving cars, that they can watch ahead of them and warn persons thereon of their danger."

See *Hudson v. R. R.*, 142 N.C. 198, 55 S.E. 103, where a flying switch was made into a spur track in the yard of an oil company. An employee of the oil mill was killed. Issues of negligence and contributory negligence were submitted to the jury.

In *Bordeaux v. R. R., supra,* it is recognized that an accident in a railroad yard and on its property caused by a flying switch presents quite a different problem from accidents caused by flying switches across and along the streets of populous towns or villages. After a thorough search we have been able to find only a few cases that deal with flying switches in a busy railroad yard. The text-writers' references to the subject are meager.

"It is a negligent act to send detached cars along a railroad track, without adequate means of control and with no warning signal, at a place where it is the duty of the railroad company to keep a lookout for people who are likely to be using the track; and where such negligent act results in the infliction of personal injuries, the railroad company is liable for the injuries. And under some circumstances the company may be held liable though the negligent act is committed in its own yard, and though the person injured is a trespasser or a licensee." 10 Anno. Cases Note on p. 18, citing many authorities.

It is said in 44 Am. Jur., Railroads, Sec. 454: "The practice of making flying switches or of kicking detached cars along a railroad track without adequate means of control and with no warning at a place where persons are likely to be on the track has been universally condemned by the courts

as constituting negligence, as where the cars are shunted or kicked along a track across which persons are constantly passing on a well defined pathway. Under some circumstances the company may be held liable though the negligent act is committed in its own yard, and though the person injured is a trespasser or a licensee . . . It cannot ordinarily be said that it is negligence *per se* for a railroad company to make a "running," "flying," or "gravity" switch in its yard in a city, at a point where its tracks neither occupy nor cross a street . . ." See also 75 C.J.S., Railroads, p. 287; *Hawkins v. Beecham,* 168 Va. 553, 191 S.E. 640.

It is said in 167 A.L.R. Anno. p. 1273: "Although the cases are not in complete accord, most courts that adhere to the general rule that imposes a duty of reasonable care on the part of the railroad company toward persons using a path across railroad tracks where that use is a long continued and general one, apparently acquiesced in by the railroad company, take the position that the mere fact that the crossing in question is one over the railroad tracks in the railroad yards or is one over railroad switching tracks, does not necessarily make one using the crossing a trespasser or bare licensee and relieve the railroad company from the duty of keeping a lookout for such person and of exercising due care to avoid injuring him." Citing numerous cases. It is further stated in the Anno. p. 1277: "It is, of course, necessary in order to raise any general duty on the part of the railroad company to look out for persons using footpaths leading across its railroad yards, to show a general and notorious use of the crossing through the yards for such length of time as to raise an inference of knowledge and acquiescence on the part of the railroad company from which an invitation or license to cross may be implied."

Apparently the intestate was in the railroad yard to watch a derailed car being put back on the rails by the switch engine and a bulldozer, as he had a particular interest in mechanical things. Over a period of 14 years pedestrians, and during school times children, have been walking up and down the tracks in the yard and crossing the tracks in the yard, practically every day and night.

The evidence classifies the intestate as a licensee in the freight yard. *Murphy v. Murphy,* 202 N.C. 394, 162 S.E. 901; *Gibbs v. R. R.,* 200 N.C. 49, 156 S.E. 138; *Peterson v. R. R.,* 143 N.C. 260, 55 S.E. 618; *Willis v. R. R.,* 122 N.C. 905, 29 S.E. 941.

In *Brown v. R. R.,* 172 N.C. 604, 90 S.E. 783, it is said: "In *Troy v. R. R.,* 99 N.C. 298, *Davis, J.,* held that where the public had been 'in the habit for a series of years of using the track, with the acquiescence of the defendant, this amounts to a license or permission and imposes upon the railroad company the duty to exercise care on that account.' "

In *Norris v. R. R.,* 152 N.C. 505, 67 S.E. 1017, the Court said: "It has been repeatedly held with us that . . . where a person is on the track,

at a place where travellers are habitually accustomed to use the same for a walkway, they have a right to rely, to some extent and under some conditions, upon the signals and warnings to be given by trains at public crossings and other points where such signals are usually and ordinarily required, and that a failure on the part of the company's agents and employees operating its train to give proper signals at such a point, is ordinarily evidence of negligence; and where such failure is the proximate cause of an injury it is, under some circumstances, evidence from which actionable negligence may be inferred."

As to a licensee the duties of a property owner are substantially the same as with respect to a trespasser. But a vital difference arises out of conditions which impose upon the owner of property the duty of anticipating the presence of a licensee. If the owner, while the licensee is upon the premises exercising due care for his own safety, is affirmatively and actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased danger, the owner will be liable for injuries sustained as a result of such active and affirmative negligence. *Jones v. R. R.*, 199 N.C. 1, 153 S.E. 637.

At the time the detached car movement began near or east of Lexington Avenue no one was in the freight yard except the intestate, and possibly Long on the bulldozer. The intestate was on or near the Dead Track when last seen before being seen under the coal car. The coal car was coming down he Short Track. Between these two tracks were the Main Track and the Passing Track. There was nothing to obstruct the intestate's view. He was 47 years old; it was 2:00 p.m.; the day was fair; the yard was generally level. There is no evidence where the intestate was, when the car was detached. There was no brakeman on the coal car; no whistle or signal was given of its movement. If the intestate had remained on or near the Dead Track during the movement of the coal car, he would not have been killed.

Considering the evidence in the light most favorable to the plaintiff, and giving to the plaintiff every inference fairly to be drawn therefrom, we think there is no evidence that the defendants had actual knowledge, or that which the law deems to be equivalent of actual knowledge, that the intestate was in a position of peril, and designedly, purposely and intentionally killed him, and that there is no evidence that the defendants under the circumstances intentionally made the detached car movement with a reckless indifference to the rights of the intestate and others.

While there is no evidence of willful or wanton negligence on the part of the defendants, considering the evidence that for 14 years or more pedestrians day and night walked up and down the tracks in the railroad yard, and all the other facts, we do think there is evidence from which actionable negligence may be inferred.

The defendants have pleaded the contributory negligence of the plaintiff's intestate as a bar to recovery. The learned counsel for the plaintiff most adroitly selected the doctrine of willful or wanton negligence as their battlefield in an endeavor to preclude the defense of contributory negligence. The approach of the detached coal car was totally unobstructed for a distance of a quarter of a mile. There existed no unusual conditions created by the defendants tending to distract and divert the attention of a man of ordinary prudence and self-possession from the duty of looking and listening for an approaching train or car. It is not a case of sudden peril, imminent danger and emergency not brought about by the negligence of the intestate. *Pope v. R. R.*, 195 N.C. 67, 141 S.E. 350. The intestate was 47 years old; it was 2:00 p.m.; it was fair and the sun shining. The freight yard was level. The presumption of due care on the part of the intestate is repelled by the evidence which shows that the intestate must have seen the coal car if he had looked, in time to have prevented the accident. If the coal car was moving noiselessly, that would not relieve the intestate of the duty of looking. *Dowdy v. R. R.* and *Burns v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639; *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137. The car was barely moving when the intestate was run over. It is the centuries old story of those who "have eyes to see, and see not." Ezekiel, Ch. 12, v. 2. *Davidson v. R. R.*, 171 N.C. 634, 88 S.E. 759.

The intestate, a pedestrian, in the *daytime*, got upon the Short Track, in the freight yards of the defendants, the view of which was totally unobstructed, and was killed by a detached car barely moving, and did not look; that was negligence on the part of the intestate, and such negligence was the proximate cause of the intestate's death precluding recovery of damages by the plaintiff, even if the car was moving noiselessly so he could not hear it. *Rimmer v. R. R.*, 208 N.C. 198, 179 S.E. 753; *Young v. R. R.*, 205 N.C. 530, 172 S.E. 177; *Tart v. R. R.*, 202 N.C. 52, 161 S.E. 720; *Coleman v. R. R.*, 153 N.C. 322, 69 S.E. 251, where it is said: "The doctrine that such negligence bars recovery has been consistently recognized by this Court in at least thirty-five cases beginning with *Parker v. R. R.*, 86 N.C. 221, and ending with *Mitchell v. R. R.*, this term."

The plaintiff's case is not saved by the doctrine of last clear chance. In the first place it was not pleaded. In order to invoke this doctrine, the plaintiff must plead and prove that the defendants, after perceiving the danger, and in time to avoid it, negligently refused to do so. *Bailey v. R. R.* and *King v. R. R.*, 223 N.C. 244, 25 S.E. 2d 833; *Hudson v. R. R.*, 190 N.C. 116, 129 S.E. 146. Second, if the plaintiff had pleaded this doctrine, there is no evidence in the case to support the allegation. Further, *Stacy, C. J.*, speaking for the Court in *Rimmer v. R. R., supra,* says

this doctrine does not apply when the contributory negligence of the party injured, as a matter of law, bars recovery, citing *Redmon v. R. R.*, 195 N.C. 764, 143 S.E. 829. To the same effect *Dowdy v. R. R.*, and *Burns v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639; *Sherlin v. R. R.*, 214 N.C. 222, 198 S.E. 640, in which many cases are cited; *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337.

For the reasons stated above we are of the opinion, and are impelled to hold, that the motions for judgment as in case of nonsuit duly lodged by the appealing defendants should have been allowed. It, therefore, follows that the judgment below must be reversed, and it is so ordered.

Reversed.

J. E. HAWKINS v. M & J FINANCE CORPORATION.

(Filed 23 September, 1953.)

1. Estoppel § 5—

The doctrine of estoppel by conduct rests upon principles of equity, and is designed to aid the law in the administration of justice by precluding a party from asserting legal rights which in equity and good conscience he should not be allowed to assert.

2. Same—Elements of estoppel by conduct.

Equitable estoppel arises upon conduct of one party which amounts to a false representation or concealment of material facts or conduct reasonably calculated to mislead the other party as to the true facts, in respect to which facts the other party lacks knowledge or the means of ascertaining the truth; with intention or expectation that such conduct shall be acted on by the other party or conduct calculated to induce a reasonably prudent person to believe such conduct is intended or expected to be relied upon, and which is relied upon by the other party and induces him to change his position to his prejudice.

3. Sales § 12: Estoppel § 6e—

The owner of personal property will not be estopped to assert his title by merely entrusting its possession and control to another.

4. Same: Bailment § 7—

A bailor of personal property for sale by the bailee is not estopped to assert his title as against a third person merely because he entrusts the possession of the property to the bailee unless he further clothes the bailee with *indicia* of ownership, even though such third person be an innocent purchaser or encumbrancer.

5. Principal and Agent § 7a: Sales § 12—

An agent authorized to sell property of his principal has no implied authority to mortgage the property.

6. Estoppel § 5: Automobiles § 5—Certificates of title endorsed in blank are not indicia of title so as to estop owner.

The owner of motor vehicles delivered them to a dealer for sale. Later he delivered to the dealer the certificates of title signed by him in blank, with authority to a notary public, upon the sale of the vehicles by the dealer, to notarize the instruments in his absence and hold the purchase price for him. Thereafter the dealer mortgaged the vehicles, representing himself to be the owner, and showed the mortgagee the blank endorsements of title. *Held:* In the true owner's action to recover the vehicles, the Mortgagee may not rely upon estoppel by conduct to preclude the owner from asserting his title, since under our registration statutes the endorsements of the titles in blank were not *indicia* of title in the dealer, but to the contrary were sufficient to give the mortgagee constructive notice of the dealer's want of title. G.S. 20-56, G.S. 20-57, G.S. 20-72 (b), G.S. 20-73, G.S. 20-78.

7. Automobiles § 5—

Our statutes regulating the registration of motor vehicles are designed to facilitate the enforcement of highway safety statutes, minimize the hazards of theft and provide safeguards against fraud and imposition, and they are mandatory and not merely directory and may not be circumvented or disregarded at the will or pleasure of the purchaser or seller of a motor vehicle.

8. Same: Customs and Usages § 1—

The custom of used car dealers to accept a blank endorsement of the title by the owner and to transfer title directly to a purchaser upon an anonymous notarization, is violative of the letter and spirit of our motor vehicle registration statutes and may not be asserted as ground for equitable estoppel.

9. Estoppel § 11c—

Where only one inference can reasonably be drawn from the undisputed facts, the question of estoppel is one of law for the court and the court may direct a verdict upon the issue.

BARNHILL, J., dissents.

APPEAL by defendant from *Bone, J.*, and a jury, at October Civil Term, 1952, of DURHAM.

Civil action in claim and delivery involving question of estoppel.

The plaintiff, being the owner of a Plymouth sedan and a Chevrolet truck which he desired to sell, delivered the vehicles to one George A. Thorne, a used-car dealer in Durham, under an agreement whereby Thorne was to sell the vehicles for the plaintiff, who resides at Cedar Grove in Orange County, which is about 25 miles from the City of Durham.

The certificates of title issued to the plaintiff by the North Carolina Department of Motor Vehicles were not delivered to Thorne at the time the vehicles were left with him. However, after the vehicles had been

on the used car lot two or three months, Thorne asked the plaintiff to leave the certificates with someone in Durham so as to save him the drive to plaintiff's home when they should be needed to complete the sales. In response to this request, the plaintiff brought the certificates to Thorne's place of business and delivered them to him, with the assignment forms on the reverse side endorsed in blank. To facilitate completion of the assignments, the plaintiff arranged with a notary friend, one Sears, who was employed at a nearby tobacco warehouse, to fill in the blanks, notarize the assignments, and receive and hold for him the purchase money when the vehicle should be sold and the certificates presented by Thorne.

No sale was made by Thorne, and notary Sears was not called upon to complete the assignments. Instead, Thorne, on 27 February, 1951, about three weeks after getting possession of the certificates of title, without the knowledge or consent of the plaintiff, wrongfully mortgaged the vehicles to the defendant Finance Company to secure loans on the car and truck in the respective amounts of $700 and $500 (later paid down to $500 and $300 respectively). The plaintiff received no consideration as a result of the mortgage. At the time it was made Thorne represented himself as the owner of the vehicles and exhibited both of them to Robert Richardson, manager of the defendant Finance Company, and also left with him the two certificates of title signed in blank by the plaintiff. The mortgage was filed for registration the day following its execution and in due course was recorded in the Public Registry of Durham County.

In December, 1951, the plaintiff, learning of Thorne's insolvency, visited the used car lot and took possession of the Chevrolet truck, but was unable to locate the Plymouth sedan or the certificate of title to either vehicle.

In January, 1952, the plaintiff, having learned that the defendant Finance Company was in possession of the Plymouth and the two certificates of title, made demand therefor, and on refusal instituted this action in claim and delivery to obtain possession thereof. The defendant, after replevying and retaining possession of the seized property, filed answer denying the material allegations of the complaint, and by further defense and counterclaim alleged the pertinent facts in respect to the mortgage loan and prayed judgment that the plaintiff be not permitted to claim title to the two vehicles as against the defendant's mortgage thereon.

At the trial evidence was offered substantially in accord with the foregoing statement. Also, in amplification of the facts respecting the plaintiff's delivery of the certificates of title to used car dealer Thorne, the plaintiff testified on cross-examination: "I signed them (the assignment blanks on the reverse side of the certificates) and delivered them (the certificates of title) to Mr. Thorne in his place of business. . . . No one was present except Thorne. . . . I left with Mr. Sears authority to

notarize the certificates of title and put his seal on them whenever Mr. Thorne asked him to notarize them. . . . I left them with Mr. Thorne . . . and told him that whenever he sold the cars Mr. Sears would notarize them and he could leave the money with Mr. Sears."

Other relevant facts appear in the opinion.

The jury, in response to peremptory instructions of the trial court, found for their verdict that the plaintiff was the owner of the two motor vehicles free of the defendant's chattel mortgage.

From judgment entered on the verdict, the defendant appeals, assigning errors.

White & White for plaintiff, appellee.

L. H. Mount, Victor S. Bryant, Robert I. Lipton, and Victor S. Bryant, Jr., for defendant, appellant.

JOHNSON, J. The defendant insists that the plaintiff's conduct in delivering his certificates of title to used-car dealer Thorne, endorsed in blank, was sufficient, when considered with the rest of the evidence adduced below, to estop the plaintiff from asserting title to the two motor vehicles as against the chattel mortgage made by Thorne to the defendant Finance Company.

Decision here turns on whether the trial court erred in failing to submit to the jury this question of estoppel.

The doctrine of estoppel by conduct—estoppel *in pais*—rests upon principles of equity. It is designed to aid the law in the administration of justice when without its aid injustice would result, the theory being that it would be against the principles of equity and good conscience to permit a party against whom the estoppel is asserted to avail himself of what must otherwise be his undisputed legal rights. *Long v. Trantham,* 226 N.C. 510, 39 S.E. 2d 384; *McNeely v. Walters,* 211 N.C. 112, 189 S.E. 114; *Scott v. Bryan,* 210 N.C. 478, 187 S.E. 756; *Stone v. Bank of Commerce,* 174 U.S. 412, 43 L. Ed. 1028.

Therefore, in determining whether the doctrine of estoppel applies in any given situation, the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity. As to these, the essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a

reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Bank v. Winder,* 198 N.C. 18, 150 S.E. 489; *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824; 19 Am. Jur., Estoppel, Sections 42 and 46.

It is elemental that the owner of personal property will not be estopped to assert his title by merely entrusting its possession and control to another. *Bank v. Winder, supra; Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312; *Ellison v. Hunsinger,* 237 N.C. 619, 75 S.E. 2d 884; 19 Am. Jur., Estoppel, Sec. 68; 6 Am. Jur., Bailments, Sec. 129.

And this general principle applies none the less in the case of a bailment of personal property for the purpose of sale. In such case, the general rule is that the mere possession by a bailee of the bailor's goods, with authority as agent to sell them, however, unaccompanied by the bailor's further act in clothing the bailee with other *indicia* of ownership inconsistent with the bailor's title, works no estoppel upon the bailor to deny the title of one to whom the property has been transferred in violation of the terms of the bailment, even though he may be an innocent purchaser or encumbrancer. 6 Am. Jur., Bailments, Sec. 130; *Norris v. Boston Music Co.,* 129 Minn. 198, 151 N.W. 971.

Moreover, the rule is that an agent authorized merely to sell has no implied authority to mortgage the property. 2 Am. Jur., Agency, Sec. 119. As to this, the governing principle is thus stated in American Law Institute, Restatement, Agency, Sec. 201: "(1) An undisclosed principal who entrusts a special agent with the possession of a chattel with directions to deal with it in a particular way, as by sale, barter, pledge or mortgage, is not thereby affected in his interests therein by a transaction of a kind different from that authorized." See also Restatement, Agency, Sec. 175.

However, where the owner of a chattel clothes another not only with possession thereof, but also with such *indicia* of ownership as is reasonably calculated to mislead others having a right to rely thereon into believing that the ownership or power of disposition is vested in the bailee, and does so mislead a purchaser or encumbrancer, who, acting in reliance upon such apparent ownership or right of disposition, parts with value or extends credit to the bailee, in good faith and without knowledge, actual or constructive, of the true ownership of the property, such purchaser or encumbrancer will be protected and the true owner will be estopped from denying the possessor's right to sell or encumber the chat-

tel. Under such circumstances, equity will not permit the true owner to gainsay the reasonable inference drawn from his conduct in clothing the possessor with such *indicia* of ownership. 19 Am. Jur., Estoppel, Sec. 68; 6 Am. Jur., Bailments, Sec. 129; American Law Inst., Restatement, Agency, Sec. 202; Annotations: 151 A.L.R. 690; 18 A.L.R. 2d 813. See also Annotation 95 A.L.R. 1319; *Bank v. Winder, supra; Mason v. Williams,* 53 N.C. 478; *Mason v. Williams,* 66 N.C. 564. The rule rests upon the broad equitable doctrine that where one of two equally innocent persons must suffer, he who has so conducted himself, by his negligence or otherwise, as to occasion the loss, must sustain it. *S. v. Sawyer,* 223 N.C. 102, 25 S.E. 443; *Bank v. Liles,* 197 N.C. 413, 149 S.E. 377; *Railroad Co. v. Kitchin,* 91 N.C. 39.

However, he who claims the benefit of an equitable estoppel on the ground that he has been misled by the representations of another must not have been misled through his own want of reasonable care and circumspection. And where the element of actual fraud is absent, the effect of an estoppel ordinarily will be denied where the party claiming it was put on inquiry as to the truth and had available the means for ascertaining it. 19 Am. Jur., Estoppel, Sec. 86.

The evidence in this case discloses that used-car dealer Thorne as bailee was authorized merely to sell the two vehicles belonging to the plaintiff. First, the plaintiff delivered the vehicles to Thorne, unaccompanied by the title certificates. Then two or three months later, the plaintiff turned over to Thorne the title certificates, with the printed assignment forms on the back of the certificates signed by the plaintiff in blank. No sale was made by Thorne, and notary Sears was not called upon to complete the assignment forms or certify execution by the plaintiff.

The question thus posed is whether these incompleted assignments, when considered with the rest of the evidence in the case, were sufficient *indicia* of title to justify the defendant Finance Company in inferring that used-car dealer Thorne was the absolute owner of the two vehicles so as to estop the plaintiff from asserting his title thereto.

In resolving this question it is necessary that we give consideration to pertinent phases of our statute law governing (1) the registration of motor vehicles ownership with the North Carolina Department of Motor Vehicles, and (2) the statutory rules pertaining to the transfer and reissuance of certificates of title issued by the Department of Motor Vehicles.

Subject to certain exceptions not pertinent to this case (G.S. 20-51 and G.S. 20-79), every resident owner of a motor vehicle intended to be operated on any highway of this State is required, before it is so operated, to make application for registration and cause the ownership to be registered with the North Carolina Department of Motor Vehicles. G.S. 20-50.

When the ownership of a motor vehicle is first registered with the Department of Motor Vehicles, a distinctive registration number is assigned to the vehicle and the Department is required to keep a record thereof in suitable books or on card indexes with cross-indexes to the registration keyed to the name of the owner and the motor number or other identifying number of the vehicle, so as to keep current, through successive transfers, the registered ownership of all motor vehicles required to be registered in this State. G.S. 20-56 and G.S. 20-78.

When a motor vehicle is first registered, the Department of Motor Vehicles is required to issue to the owner a registration card and a certificate of title as separate documents. The registration card, required to be carried in the vehicle to which it refers or by the person operating such vehicle for display on demand by any peace officer, contains upon its face the name and address of the owner, space for the owner's signature, the registration number assigned to the vehicle, and a specific description of the vehicle. The certificate of title contains upon its face the identical information which appears upon the face of the registration card, and in addition thereto the date of issuance and a statement of the owner's title, together with a statement of such liens or encumbrances on the vehicle as are disclosed by the application for registration. The certificate of title also contains on the reverse side a printed form for assignment of title, with space for the notation of liens and encumbrances upon the vehicle at the time of transfer. G.S. 20-57.

Upon sale or transfer of any registered motor vehicle, the owner is required to execute the assignment and warranty of title, in printed form as approved by the Department of Motor Vehicles appearing on the reverse side of the certificate of title. G.S. 20-72 (b).

Subject to an exception not pertinent here, the provisions of G.S. 20-73 require that upon sale of a vehicle and transfer of the certificate of title as required by G.S. 20-72 (b), the new owner, within 20 days after the purchase, shall apply to the Department of Motor Vehicles for a transfer of the registration on its books and for the issuance to him of a new certificate of title showing ownership in him.

However, when the transferee of a vehicle is a dealer who holds the same for resale, such transferee is not required to register the vehicle or forward the certificate of title to the Department as provided by G.S. 20-73, but such dealer-transferee, upon transferring his title to another person is then required to (1) give notice of such transfer to the Department of Motor Vehicles and (2) execute and acknowledge an assignment and warranty of title in form approved by the Department. G.S. 20-75.

Thereupon, the certificate of title, as so transferred and acknowledged by the dealer, is forwarded by him or by the new owner to the Department of Motor Vehicles, with the new owner's application for transfer of regis-

tration, and the Department, upon receipt of a properly endorsed certificate of title and application for transfer of registration, accompanied by the required fee, is required to transfer registration of the vehicle under its registration number to the new owner and issue a new registration card and certificate of title as upon original registration. G.S. 20-78.

Accordingly, when a dealer acquires a motor vehicle and resells it, his intermediate ownership, no less than that of any other purchaser from the original owner, is required to be reported to the Department of Motor Vehicles. G.S. 20-75. And to facilitate re-assignment of title and report of intermediate ownership of the dealer in such cases, an extra printed form appears on the reverse side of the regular form certificate of title issued by the Department of Motor Vehicles. This re-assignment form for execution by the dealer appears just below the form required to be executed by the registered owner.

In the case at hand, these printed forms on the reverse side of the certificate of title to the Plymouth sedan are as shown below, with the plaintiff's blank endorsement and address being shown in italics. (The forms on the back of the certificate of title to the Chevrolet truck are substantially the same.)

IMPORTANT NOTICE

An assignment of this certificate is not valid until it has been properly assigned by the individual, firm or corporation named on the face hereof and recorded in the office of the Motor Vehicle Bureau. . . .

A. ASSIGNMENT OF TITLE BY REGISTERED OWNER.

For value received, the undersigned hereby sells, assigns or transfers the motor vehicle described on the reverse side of this certificate unto the purchaser whose name appears below in this block, and the undersigned hereby warrants the title to said motor vehicle and certifies that at the time of delivery the same is subject to the following named liens or encumbrances and none other:

RECORD OF ASSIGNMENT	LIENS OR ENCUMBRANCES
Purchaser_____	Amount of Lien_____ $_____
Street or R.F.D._____	Date of Lien_____
Post Office_____	Kind of Lien_____
Date of Sale_____	In favor of_____
	Address_____
J. E. Hawkins	All answers supplied and completely
Signature of Assignor (Seller)	subscribed and sworn to before me
Use pen and ink	this_____ day of_____ 19____. My
Cedar Grove, N. C.	commission expires_____
Address	Notary Public

B. RE-ASSIGNMENT OF TITLE BY REGISTERED DEALER.

For value received, the undersigned hereby sells, assigns or transfers the motor vehicle described on the reverse side of this certificate unto the purchaser whose name appears below in this block, and the undersigned hereby warrants the title to said motor vehicle and certifies that at the time of delivery the same is subject to the following named liens or encumbrances and none other:

Purchaser_____	Amount of Lien_____ $_____
Street or R.F.D._____	Date of Lien_____
Post Office_____	Kind of Lien_____
Date of Sale_____	In Favor of_____
Dealer's License Plate NO._____	Address_____
_____	All answers supplied and completely subscribed and sworn to before me
Dealer—use pen and ink	this____day of_____19__. My Commission expires_____.
By_____	_____
Official Title	Notary Public

It is manifest from the language of the controlling statutes, as well as the printed notice and instructions appearing on the reverse side of the certificate of title, that there can be no valid assignment of a certificate unless and until the printed form assignment on the reverse side is executed in substantial compliance with the language of the form. And there can be no assignment in substantial compliance with the form unless the assignee is named and designated and proof of execution by the assignor is completed by certificate of acknowledgment executed by a notary or other proper officer at the place indicated therefor.

These statutes regulating State registration of motor vehicle ownership derive in the main from the Motor Vehicle Acts of 1923 and 1937 (Ch. 236, Public Laws of 1923, and Ch. 407, Public Laws of 1937.)

The regulations prescribed by these statutes are not mere directory rules incidental to the sale and transfer of motor vehicles, to be observed, to be circumvented, or to be disregarded at the will or pleasure of the seller or purchaser of a motor vehicle. On the contrary, they are salutary police regulations designed and intended to provide a simple, expeditious mode of tracing titles to motor vehicles so as to (1) facilitate the enforcement of our highway safety statutes, (2) minimize the hazards of theft, and (3) provide safeguards against fraud, imposition, and sharp practices in connection with the sale and transfer of motor vehicles. See *Corporation v. Motor Co.*, 190 N.C. 157, 129 S.E. 414.

It is manifest both from the express language of these registration statutes and from the companion penal enforcement statutes that compliance with the registration statutes is mandatory and calls for substantial observance. See G.S. 20-74.

In the case at hand, assignment form "A" on the reverse side of each certificate was incomplete. No purchaser was named in the blank space designated therefor. The forms merely bore the plaintiff's endorsement in blank, without certificate of proof by notary or other certifying officer. These incompleted assignments are fatally defective. The defects are patent. They appear on the face of the printed forms. The defendant had no right to rely on such incompleted assignments as *indicia* of title in Thorne; on the contrary, they are sufficient to have given the defendant constructive notice of Thorne's want of title.

True, the plaintiff had arranged with used-car dealer Thorne and notary Sears for the blanks to be filled in and notarized by Sears. Nevertheless, the crucial fact is that since the defendant knew nothing of this arrangement, he could not have relied on it. Besides, as between the parties to the arrangement, the plaintiff's attempt to authorize notarization was qualified and conditioned on sale by Thorne and collection of the purchase money by Sears. Thorne was a mere agent to sell. He had no authority to mortgage. Therefore, on the record as presented, with the plaintiff's endorsements standing unauthenticated by notary or other certifying officer, the defendant was without actual knowledge that the plaintiff's endorsements were his genuine signature. The defendant in so assuming necessarily relied not on the act of the plaintiff in endorsing the certificates, but wholly upon the affirmative representation of used-car dealer Thorne that he owned the two vehicles.

This in effect is admitted by the defendant. Its manager Richardson, who closed the mortgage loan with Thorne, testified in pertinent part: "I did not know J. E. Hawkins and made no effort to contact J. E. Hawkins to find if that was his signature. I did not know that it was and I don't remember if Mr. Thorne told me it was. All I know is that J. E. Hawkins appeared on the back. I made no effort to contact Mr. Hawkins to find if he had disposed of these vehicles and I had no knowledge of how Mr. Thorne came into their possession. . . . *I relied solely on G. A. Thorne.*" (Italics added.)

Moreover, the defendant in assuming that Thorne was the owner of the vehicles and in making the mortgage loan admittedly was relying on a practice alleged to have developed in the used-car trade whereby a dealer in purchasing a vehicle takes the certificate of title from the seller endorsed in blank, and on resale inserts the name of the new owner and then by anonymous notarization clears the transaction as one solely between the original seller and the new owner, thus withholding from the Depart-

ment of Motor Vehicles disclosure of the intermediate ownership of the used-car dealer.

This practice is specially pleaded and relied upon by the defendant as the chief ground for support of its plea of estoppel. The defendant alleges: "that it is customary in the used car business for the dealer to take the title of a car purchased with the signature of the seller and to fill in the purchaser's name when a sale is made so that two transfers of title would be unnecessary."

In support of this allegation the defendant's manager Richardson testified in part: "It is a common practice for a dealer to bring a certificate of title like that (signed in blank by the owner) because all the dealers that I can name today are notaries. They bring in a certificate of title with just the name of the former owner signed and we go ahead and loan money on that basis." And on cross-examination this witness further testified: "When a dealer comes into my place of business and has a title made out to anybody on the face of it with no purchaser named and the dealer's name not appearing on the title I do not hesitate to loan him money. I am relying on the dealer and his honesty and credibility."

This practice of clearing a purchase and a resale as a simulated single transaction, whereby the intermediate ownership of the used-car dealer is not shown on the registration records of the Department of Motor Vehicles, is violative of both the letter and spirit of our statutes requiring registration of motor vehicle ownership. Whereas, the companion practice of anonymous notarization of legal instruments strikes at the very integrity of our probate procedure.

These practices may not be used as a basis for invoking the doctrine of estoppel. To permit such would be to legalize by indirection this practice of suppressing notice of intermediate dealer ownership as well as the companion practice of anonymous notarization of transfer certificates, and thereby override the salutary procedure fixed by statute for the prevention and suppression of the very type of fraud and chicanery with which we are at grips in the instant case. The public policy of this State as fixed by these statutes may not be put to naught in such manner. The principles of equity will not permit.

This question does not appear to have been presented heretofore to this Court for determination, nor does the precise factual situation here involved appear to have been presented in any of the cases from other jurisdictions brought to our attention. However, decision here reached is supported in principle by well-considered decisions from other jurisdictions, among which are these: *Moberg v. Commercial Credit Corporation*, 230 Minn. 469, 42 N.W. 2d 54; *A. C. Nelsen Auto Sales, Inc. v. Turner*, 241 Iowa 927, 44 N.W. 2d 36; *Erwin v. Southwestern Investment Co.*, 147 Texas 260, 215 S.W. 2d 330; *Pearl v. Interstate Securities Co.*, 357

Mo. 160, 206 S.W. 2d 975; *S. c.*, 217 S.W. 2d 302. See also *State ex rel. Connecticut Fire Ins. Co. v. Cox*, 306 Mo. 537, 268 S.W. 87, 37 A.L.R. 1456; *Security Credit Corp. v. Whiting Motor Co.*, 98 N.J.L. 45, 118 A. 695.

It follows from what we have said that the certificates of title, endorsed in blank, are insufficient, when considered with the rest of the evidence in the case, to raise an estoppel against the plaintiff's undisputed legal right, and Judge Bone correctly so held in peremptorily instructing the jury in favor of the plaintiff on the issues submitted. The rule is that where only one inference can reasonably be drawn from undisputed facts, the question of estoppel is one of law for the court to determine. 19 Am. Jur., Estoppel, Sections 200 and 201. See also *Davis v. Warren*, 208 N.C. 174, 179 S.E. 329; *Mercantile Co. v. Ins. Co.*, 176 N.C. 545, 97 S.E. 476.

No error.

BARNHILL, J., dissents.

G. W. MORGAN AND WIFE, ALTA LEE MORGAN, v. HIGH PENN OIL COMPANY AND SOUTHERN OIL TRANSPORTATION COMPANY, INC.

(Filed 23 September, 1953.)

1. Nuisance § 1—

A nuisance *per se* or at law is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. A lawful enterprise cannot constitute a nuisance *per se* or at law.

2. Same—

A private nuisance *per accidens* may be intentional or unintentional. An unintentional non-trespassory invasion which results from conduct which is negligent, reckless or ultrahazardous creates liability when it substantially interferes with the use and enjoyment of the property of another.

3. Same—

The improper use of property, or a use which is improper or unreasonable under the circumstances of the particular case, which results in substantial interference with the use and enjoyment of the land of another, constitutes a private nuisance *per accidens*, and when such non-trespassory invasion is intentional in that the feasor acts for the purpose of causing it, or knows that it is resulting from his conduct, or knows that it is substantially certain to result from his conduct, negligence is not an element and the feasor may be held liable regardless of the degree of care or skill exercised by him to avoid injury. *Sic utere tuo ut alienum non laedas.*

4. Same—

Evidence tending to show that defendant, in operating its oil refinery, intentionally and unreasonably caused noxious gases and odors to escape into the air to such a degree as to impair in a substantial manner the plaintiffs' use and enjoyment of their land, is sufficient to overrule defendant's motion to nonsuit in an action by plaintiffs to recover temporary damages resulting from such nuisance.

5. Injunctions § 4d—

Evidence tended to show that defendant was maintaining a private nuisance causing irreparable injury to plaintiff by interfering with plaintiff's use and enjoyment of his land, and that defendant intended to operate its plant in the future in the same manner as in the past, is sufficient to establish the existence of an abatable private nuisance, entitling plaintiff to injunctive relief.

6. Nuisance § 5: Trial § 23f—

Where the allegations and the evidence are sufficient to make out a case against defendant for the intentional maintenance of a private nuisance, the fact that there is also allegation that defendant was negligent, without supporting evidence of any acts of negligence by defendant in the operation of its plant, does not justify nonsuit on the ground of variance.

7. Same—

Where the complaint alleges that one defendant actively participated with its codefendant in the construction and operation of an oil refinery constituting a private nuisance *per accidens*, but the proof is to the effect that it did not participate in the construction or operation of the plant but owned the land upon which the plant is situate and thus knowingly permitted its codefendant to operate the plant, such defendant's motion to nonsuit for variance must be allowed.

8. Appeal and Error § 39f—

An erroneous instruction on a material aspect of the case is not rendered harmless by the fact that in another portion of the charge the court may have given correct instructions to the jury on such phase, since it cannot be determined on appeal that the jury did not follow the erroneous instruction.

APPEAL by defendants from *Rudisill, J.*, and a jury, at January Term, 1953, of GUILFORD.

Civil action to recover temporary damages for a private nuisance, and to abate such nuisance by injunction.

The salient facts appear in the numbered paragraphs which immediately follow.

1. The plaintiffs G. W. Morgan and Alta Lee Morgan are husband and wife. They are seized in fee simple as tenants by the entireties of nine acres of land in the Friendship section of Guilford County.

2. The land of the plaintiffs is a composite tract, which they acquired by two separate purchases antedating 3 August, 1945. It contains a

dwelling-house, a restaurant, and accommodations for thirty-two habitable trailers. The dwelling-house existed at the time of the purchases of the plaintiffs, and has been occupied by them as their home since 3 August, 1945. The plaintiffs constructed the restaurant and the trailer accommodations immediately after they established their residence on the premises, and have been renting these improvements since their completion to third persons. They have been supplementing their income from these sources by taking lodgers in their dwelling.

3. From 3 August, 1945, until 10 September, 1952, the Southern Oil Transportation Company, which is a private corporation engaged in the transportation of petroleum products by motor tank trucks for hire, held the complete record title to an entire tract of land adjoining the nine acres of the plaintiffs. From 3 August, 1945, till the present time, the Southern Oil Transportation Company has devoted a portion of this tract to use as the site of its principal place of business.

4. The High Penn Oil Company is a private corporation, whose stockholders are identical with those of the Southern Oil Transportation Company. During 1950, the High Penn Oil Company erected an oil refinery upon the then unused portion of the tract of the Southern Oil Transportation Company to renovate used lubricating oil drained from motor vehicles. The oil refinery was completed 10 October, 1950.

5. The High Penn Oil Company operated the oil refinery at virtually all times between 10 October, 1950, and the date of the rendition of the judgment in this action.

6. The Southern Oil Transportation Company did not participate in the construction or operation of the oil refinery.

7. The Southern Oil Transportation Company permitted the High Penn Oil Company to occupy and use the portion of the tract containing the oil refinery from the beginning of the erection of that structure until 10 September, 1952.

8. Ten months after the commencement of this action, to wit, on 10 September, 1952, the Southern Oil Transportation Company, which still holds title to the portion of the tract containing its principal place of business, transferred the record title to the portion of the tract on which the oil refinery stands to the High Penn Oil Company. All the pleadings in this case antedated this transfer and in consequence do not mention it.

9. The oil refinery is approximately 1,000 feet from the dwelling of the plaintiffs.

10. These structures are situated within a radius of one mile of the oil refinery: a church; at least twenty-nine private dwellings; four tourist and trailer camps; a grocery store; two restaurants; a nursery appropriated to the propagation of young trees, shrubs, and plants; three motor vehicle service stations; two motor vehicle repair shops; a railroad track;

the terminus of a gasoline pipe line; numerous large storage tanks capable of storing sixty million gallons of gasoline; and the headquarters of at least four motor truck companies engaged in the transportation of petroleum products and other property for hire. Railway tank cars and motor tank trucks are filled with gasoline at the storage tanks for conveyance to various places at virtually all hours of the day and night.

11. On 2 October, 1951, the plaintiffs advised the Southern Oil Transportation Company and the High Penn Oil Company that the oil refinery created a nuisance by polluting the atmosphere of the neighborhood, and demanded that they forthwith put an end to the atmospheric pollution. The Southern Oil Transportation Company ignored this demand. The High Penn Oil Company continued its operation of the oil refinery.

12. On 7 November, 1951, the plaintiffs brought this action against the Southern Oil Transportation Company and the High Penn Oil Company, which are hereinafter called the defendants. The original pleadings are summarized in *Morgan v. Oil Company*, 236 N.C. 615, 73 S.E. 2d 477, where a previous attempted appeal by the defendants was dismissed.

13. The complaint was amended after the dismissal of the attempted appeal so as to claim temporary rather than permanent damages. It alleges in detail that the plaintiffs own and occupy their nine acres; that the nine acres adjoin the tract on which the oil refinery stands; that the Southern Oil Transportation Company owns the tract which contains the oil refinery; that the oil refinery was constructed and is operated by the defendants acting jointly; that the oil refinery is so constructed and operated as to constitute a nuisance in that it substantially pollutes the atmosphere of the entire neighborhood and thus injuriously affects the plaintiffs in the use and enjoyment of their land; that the defendants persist in maintaining the nuisance after notice from the plaintiffs to abate it; and that the plaintiffs will suffer an irreparable loss of their property rights if the nuisance is not abated. The complaint prays for temporary damages and an abatement of the alleged nuisance by injunction.

14. The defendants filed a joint answer denying all of the material allegations of the complaint other than the averment that the Southern Oil Transportation Company holds the record title to the land on which the oil refinery is located. The answer asserts in express terms that the Southern Oil Transportation Company did not participate in any way in the construction or operation of the oil refinery; that the High Penn Oil Company had exclusive control of the parcel of land on which the oil refinery now stands under a contract with the Southern Oil Transportation Company at the times named in the complaint; that the High Penn Oil Company was the sole builder of the oil refinery, and is its sole operator; that the oil refinery is a modern plant of the type in approved,

known and general use for renovating used lubricating oil; that the oil refinery is suited to the locality in which it stands; and that the oil refinery is not so constructed or operated as to pollute the atmosphere of the neighborhood or to inflict any injury upon the plaintiffs.

15. The action was tried on its merits before Judge Rudisill and a jury at the January Term, 1953, of the Superior Court of Guilford County. The evidence of the plaintiffs and consistent explanatory evidence presented by the defendants revealed the truth of the matter set out in paragraphs 1 to 11, both inclusive, of this statement of facts. There was sharp conflict, however, in the testimony of the parties bearing on the factual issue whether the oil refinery polluted the atmosphere of the neighborhood.

16. The evidence of the plaintiffs tended to show that for some hours on two or three different days during each week of its operation by the High Penn Oil Company, the oil refinery emitted nauseating gases and odors in great quantities; that the nauseating gases and odors invaded the nine acres owned by the plaintiffs and the other lands located within "a mile and three-quarters or two miles" of the oil refinery in such amounts and in such densities as to render persons of ordinary sensitiveness uncomfortable and sick; that the operation of the oil refinery thus substantially impaired the use and enjoyment of the nine acres by the plaintiffs and their renters; and that the defendants failed to put an end to the atmospheric pollution arising out of the operation of the oil refinery after notice and demand from the plaintiffs to abate it. The evidence of the plaintiffs tended to show, moreover, that the oil refinery was the only agency discharging gases or odors in annoying quantities into the air in the Friendship section.

17. The testimony of the defendants indicated that the High Penn Oil Company was the sole builder and operator of the oil refinery; that the High Penn Oil Company had the exclusive occupation and use of the portion of the tract containing the oil refinery rent-free from the beginning of the erection of that structure until 10 September, 1952, under an oral contract with the Southern Oil Transportation Company, which undertook to obligate the Southern Oil Transportation Company to convey that portion of the tract to the High Penn Oil Company, and to confer on the High Penn Oil Company the right to the possession of that portion of the tract pending the conveyance; that the oil refinery is a modern plant of the type in approved, known, and general use for renovating used lubricating oils; that the oil refinery is not so constructed or operated as to give out noxious gases or odors in annoying quantities; and that the oil refinery has not annoyed the plaintiffs or any other persons save on a single occasion when it suffered a brief mechanical breakdown.

18. The trial judge submitted these issues to the jury: (1) Are the plaintiffs, G. W. Morgan and wife, Alta Lee Morgan, owners as tenants by the entirety of the property described in paragraph 2 of the complaint? (2) Did the defendants maintain and operate the oil refinery referred to in the complaint so as to create a nuisance, as alleged? (3) What damages, if any, have the plaintiffs sustained up to the time of this trial? The jury answered the first issue "yes," the second issue "yes," and the third issue "$2,500.00." The trial judge entered a judgment on the verdict awarding the plaintiffs damages against both defendants in the sum of $2,500.00, and enjoining both defendants "from continuing the nuisance alleged in the complaint." Both defendants excepted and appealed, assigning errors.

Frazier & Frazier for plaintiffs, appellees.

Roberson, Haworth & Reese and Brooks, McLendon, Brim & Holderness for the defendants, appellants.

ERVIN, J. Each defendant assigns as error the disallowance of its motion for a compulsory nonsuit. We consider these assignments of error separately because the defendants urge different reasons to sustain their respective positions.

The High Penn Oil Company contends that the evidence is not sufficient to establish either an actionable or an abatable private nuisance. This contention rests on a twofold argument somewhat alternative in character. The High Penn Oil Company asserts primarily that private nuisances are classified as nuisances *per se* or at law, and nuisances *per accidens* or in fact; that when one carries on an oil refinery upon premises in his rightful occupation, he conducts a lawful enterprise, and for that reason does not maintain a nuisance *per se* or at law; that in such case the oil refinery can constitute a nuisance *per accidens* or in fact to the owner of neighboring land if, and only if, it is constructed or operated in a negligent manner; that there was no testimony at the trial tending to show that the oil refinery was constructed or operated in a negligent manner; and that consequently the evidence does not suffice to establish the existence of either an actionable or an abatable private nuisance. The High Penn Oil Company insists secondarily that the plaintiffs in a civil action can recover only on the case presented by their complaint; that the complaint in the instant action states a cause of action based solely on negligence; that there was no testimony at the trial indicating that the oil refinery was constructed or operated in a negligent manner; and that consequently the evidence is not sufficient to warrant the relief sought and obtained by the plaintiffs, even though it may be ample to establish a nuisance.

The case on appeal discloses some substantial reasons for contesting the soundness of the thesis of the High Penn Oil Company that there was no testimony at the trial tending to show that the oil refinery was constructed or operated in a negligent manner. Even expert witnesses for the defendants testified in substance on cross-examination that the oil refinery would not emit gases or odors in annoying quantities if it were "operated properly." We would be compelled, however, to reject the argument of the High Penn Oil Company on the present aspect of the appeal even if we should accept at face value its thesis that there was no testimony at the trial tending to show that the oil refinery was constructed or operated in a negligent manner.

The High Penn Oil Company asserts with complete correctness that private nuisances may be classified as nuisances *per se* or at law, and nuisances *per accidens* or in fact. A nuisance *per se* or at law is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. 39 Am. Jur., Nuisances, section 11; 66 C.J.S., Nuisances, section 3. Nuisances *per accidens* or in fact are those which become nuisances by reason of their location, or by reason of the manner in which they are constructed, maintained, or operated. *Swinson v. Realty Co.*, 200 N.C. 276, 156 S.E. 545; *Cherry v. Williams*, 147 N.C. 452, 61 S.E. 267, 125 Am. S. R. 566, 15 Ann. Cas. 715; *Dargan v. Waddill*, 31 N.C. 244, 49 Am. D. 421. The High Penn Oil Company also asserts with complete correctness that an oil refinery is a lawful enterprise and for that reason cannot be a nuisance *per se* or at law. *Waier v. Peerless Oil Co.*, 265 Mich. 398, 251 N.W. 552; *Midland Empire Packing Co. v. Yale Oil Corp. of S. D.*, 119 Mont. 36, 169 P. 2d 732; *Purcell v. Davis*, 100 Mont. 480, 50 P. 2d 255. The High Penn Oil Company falls into error, however, when it takes the position that an oil refinery cannot become a nuisance *per accidens* or in fact unless it is constructed or operated in a negligent manner.

Negligence and nuisance are distinct fields of tort liability. 39 Am. Jur., Nuisances, section 4. While the same act or omission may constitute negligence and also give rise to a private nuisance *per accidens* or in fact, and thus the two torts may coexist and be practically inseparable, a private nuisance *per accidens* or in fact may be created or maintained without negligence. *Butler v. Light Co.*, 218 N.C. 116, 10 S.E. 2d 603; *Swinson v. Realty Co., supra;* 39 Am. Jur., Nuisances, section 24; 65 C.J.S., Negligence, section 1; 66 C.J.S., Nuisances, section 11. Most private nuisances *per accidens* or in fact are intentionally created or maintained, and are redressed by the courts without allegation or proof of negligence. *Godfrey v. Power Co.*, 190 N.C. 24, 128 S.E. 485; *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F. 2d 908; *King v. Columbian Carbon Co.*, 152 F. 2d 636; *E. Rauh & Sons Fertilizer Co. v. Shreffler,*

139 F. 2d 38; *Actiesselskabet Ingrid v. Central R. Co.*, 216 F. 72, L.R.A. 1916B, 716; *Terrell v. Alabama Water Service Co.*, 245 Ala. 68, 15 So. 2d 727; *Beam v. Birmingham Slag Co.*, 243 Ala. 313, 10 So. 2d 162; *Gus Blass Dry Goods Co. v. Reinman & Wolfort*, 102 Ark. 287, 143 S.W. 1087; *Curtis v. Kastner*, 220 Cal. 185, 30 P. 2d 26; *Kafka v. Bozio*, 191 Cal. 746, 218 P. 753, 29 A.L.R. 833; *Swift & Co. v. Peoples Coal & Oil Co.*, 121 Conn. 579, 186 A. 629; *Cunningham v. Wilmington Ice Mfg. Co.* (Del. Super.), 2 W. W. Harr. 229, 121 A. 654; *Dilucchio v. Shaw* (Del. Super.), 1 W. W. Harr. 509, 115 A. 771; *District of Columbia v. Totten*, 55 App. D. C. 312, 5 F. 2d 374, *certiorari* denied 269 U.S. 562, 46 S. Ct. 21, 70 L. Ed. 412; *Pitner v. Shugart Bros.*, 150 Ga. 340, 103 S.E. 791, 11 A.L.R. 1399; *Laflin & R. Powder Co. v. Tearney*, 131 Ill. 322, 23 N.E. 389, 7 L.R.A. 262, 19 Am. S. R. 34; *Menolascino v. Superior Felt & Bedding Co.*, 313 Ill. App. 557, 40 N.E. 813; *City of Lebanon v. Twiford*, 13 Ind. App. 384, 41 N.E. 844; *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 N.W. 2d 435; *Andrews v. Western Asphalt Paving Corporation*, 193 Iowa 1047, 188 N.W. 900; *Bowman v. Humphrey*, 132 Iowa 234, 109 N.W. 714, 6 L.R.A. (N.S.) 1111, 11 Ann. Cas. 131; *Carlson v. Mid-Continent Development Co.*, 103 Kan. 464, 173 P. 910, L.R.A. 1918F, 318; *Bailey v. Kelly*, 93 Kan. 723, 145 P. 556, L.R.A. 1916D, 1220, 86 Kan. 911, 122 P. 1027, 39 L.R.A. (N.S.) 378; *Rogers v. Bond Bros.*, 279 Ky. 239, 130 S.W. 2d 22; *O'Neal v. Southern Carbon Co.*, 211 La. 1075, 31 So. 2d 216; *Foley v. H. F. Farnham Co.*, 135 Me. 29, 188 A. 708; *Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 4 A. 2d 757; *Bern v. Boston Consol. Gas Co.*, 310 Mass. 651, 39 N.E. 2d 576; *Ferriter v. Herlihy*, 287 Mass. 138, 191 N.E. 352; *Hakkila v. Old Colony Broken Stone & Concrete Co.*, 264 Mass. 447, 162 N.E. 895; *Wilkinson v. Detroit Steel & Springs Works*, 73 Mich. 405, 41 N.W. 490; *H. Christianson & Sons v. City of Duluth*, 225 Minn. 475, 31 N.W. 2d 270; *Johnson v. Fairmont*, 188 Minn. 451, 247 N.W. 572; *Pearson v. Kansas City*, 331 Mo. 885, 55 S.W. 2d 485; *Boyle v. Neisner Bros.*, 230 Mo. App. 90, 87 S.W. 2d 227; *Jeffers v. Montana Power Co.*, 68 Mont. 114, 217 P. 652; *Toft v. City of Lincoln*, 125 Neb. 498, 250 N.W. 748; *Brownsey v. General Printing Ink Corporation*, 118 N.J.L. 505, 193 A. 824; *Dixon v. New York Trap Rock Corporation*, 293 N.Y. 509, 58 N.E. 2d 517, motion for reargument denied, 294 N.Y. 654, 60 N.E. 2d 385; *Hogle v. H. H. Franklin Mfg. Co.*, 199 N.Y. 388, 92 N.E. 794, 32 L.R.A. (N.S.) 1038, affirming judgment, 128 App. Div. 403, 112 N.Y.S. 881; *Bohan v. Port Jervis Gas-Light Co.*, 122 N.Y. 18, 25 N.E. 246, 9 L.R.A. 711; *Kremer v. City of Uhrichsville*, 67 Ohio App. 61, 35 N.E. 2d 973; *Ohio Stock Food Co. v. Gintling*, 22 Ohio App. 82, 153 N.E. 341; *Vantier v. Atlantic Refining Co.*, 231 Pa. 8, 79 A. 814; *Gavigan v. Atlantic Refining Co.*, 186 Pa. 604, 40 A. 834; *Rogers v. Philadelphia Traction Co.*, 182 Pa.

473, 38 A. 399, 61 Am. S. R. 716; *Rose v. Standard Oil Co. of New York,* 56 R.I. 272, 185 A. 251, reargument denied, 56 R.I. 472, 188 A. 71; *Braun v. Iannotti,* 54 R.I. 469, 175 A. 656; *Frost v. Berkeley Phosphate Co.,* 42 S.C. 402, 20 S.E. 280, 46 Am. S. R. 736, 26 L.R.A. 693; *Cuffman v. City of Nashville,* 26 Tenn. App. 367, 175 S.W. 2d 331; *Soap Corp. of America v. Balis* (Tex. Civ. App.), 223 S.W. 2d 957; *Columbian Carbon Co. v. Tholen* (Tex. Civ. App.), 199 S.W. 2d 825; *G. L. Webster Co. v. Steelman,* 172 Va. 342, 1 S.E. 2d 305; *Terrell v. Chesapeake & O. R. Co.,* 110 Va. 340, 66 S.E. 55, 32 L.R.A. (N.S.) 371; *Bartel v. Ridgefield Lumber Co.,* 131 Wash. 183, 229 P. 306, 37 A.L.R. 683; *Flanagan v. Gregory & Poole, Inc.,* ..... W. Va. ....., 67 S.E. 2d 865; *Wilson v. Phoenix Powder Mfg. Co.,* 40 W. Va. 413, 21 S.E. 1035, 52 Am. S. R. 890; *Dolata v. Berthelet Fuel & Supply Co.,* 254 Wis. 194, 36 N.W. 2d 97; *Brown v. Milwaukee Terminal Ry. Co.,* 199 Wis. 575, 227 N.W. 385, reversing 199 Wis. 575, 224 N.W. 748.

The law of private nuisance rests on the concept embodied in the ancient legal maxim *Sic utere tuo ut alienum non laedas,* meaning, in essence, that every person should so use his own property as not to injure that of another. *Barger v. Barringer,* 151 N.C. 433, 66 S.E. 439, 25 L.R.A. (N.S.) 831, 16 Ann. Cas. 472; *Tennessee Coal, Iron & R. Co. v. Hartline,* 244 Ala. 116, 11 So. 2d 833; *Beam v. Birmingham Slag Co., supra; G. L. Webster Co. v. Steelman, supra.* As a consequence, a private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor. *King v. Ward,* 207 N.C. 782, 178 S.E. 577; *Holton v. Oil Co.,* 201 N.C. 744, 161 S.E. 391; 39 Am. Jur., Nuisances, section 3.

Much confusion exists in respect to the legal basis of liability in the law of private nuisance because of the deplorable tendency of the courts to call everything a nuisance, and let it go at that. *Moran v. Pittsburgh-Des Moines Steel Co., supra; Taylor v. City of Cincinnati,* 143 Ohio St. 426, 55 N.E. 2d 724. The confusion on this score vanishes in large part, however, when proper heed is paid to the sound propositions that private nuisance is a field of tort liability rather than a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial non-trespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance; that the invasion which subjects a person to liability for private nuisance may be either intentional or unintentional; that a person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case; and that a person is subject to liability for an unintentional invasion when his conduct is negligent, reckless or ultrahazardous. See

Scope and Introduction Note to Chapter 40, American Law Institute's Restatement of the Law of Torts; *Moran v. Pittsburgh-Des Moines Steel Co., supra; Soukoup v. Republic Steel Corp.*, 78 Ohio App. 87, 66 N.E. 2d 334; 66 C.J.S., Nuisances, section 8.

An invasion of another's interest in the use and enjoyment of land is intentional in the law of private nuisance when the person whose conduct is in question as a basis for liability acts for the purpose of causing it, or knows that it is resulting from his conduct, or knows that it is substantially certain to result from his conduct. Restatement of the Law of Torts, section 825; *E. Rauh & Sons Fertilizer Co. v. Shreffler, supra; Harman v. City of Buffalo*, 214 N.Y. 316, 108 N.E. 451; *Bohan v. Port Jervis Gas-Light Co., supra; Columbian Carbon Co. v. Tholen, supra.* A person who intentionally creates or maintains a private nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised by him to avoid such injury. *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 106 P. 581, 26 L.R.A. (N.S.) 183, 21 Ann. Cas. 1247; *Blackman v. Iowa Union Electric Co.*, 234 Iowa 859, 14 N.W. 2d 721; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 39 A. 270, 63 Am. S. R. 533; *Robinson v. Westman*, 224 Minn. 105, 29 N.W. 2d 1; *Bollinger v. Mungle* (Mo. App.), 175 S.W. 2d 912; *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. App. 713, 78 S.W. 646; *Wallace & Tiernan Co. v. U. S. Cutlery Co.*, 97 N. J. Eq. 408, 128 A. 872, decree affirmed, 98 N. J. Eq. 699, 130 A. 920; *Monaco v. Comfort Bus Line*, 134 N.J.L. 553, 49 A. 2d 146; *Jutte v. Hughes*, 67 N.Y. 267; *Whaley v. Citizens' Nat. Bank*, 28 Pa. Super. 531; *Western Texas Compress Co. v. Williams* (Tex. Civ. App.), 124 S.W. 493; *Flanagan v. Gregory & Poole, Inc., supra;* 39 Am. Jur., Nuisances, section 24. One of America's greatest jurists, the late *Benjamin N. Cordozo*, made this illuminating observation on this aspect of the law: "Nuisance as a concept of the law has more meanings than one. The primary meaning does not involve the element of negligence as one of its essential factors. One acts sometimes at one's peril. In such circumstances, the duty to desist is absolute whenever conduct, if persisted in, brings damage to another. Illustrations are abundant. One who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions. He is not to do such things at all, whether he is negligent or careful." *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 160 N.E. 391.

When the evidence is interpreted in the light most favorable to the plaintiffs, it suffices to support a finding that in operating the oil refinery the High Penn Oil Company intentionally and unreasonably caused noxious gases and odors to escape onto the nine acres of the plaintiffs to such a degree as to impair in a substantial manner the plaintiffs' use and

enjoyment of their land. This being so, the evidence is ample to establish the existence of an actionable private nuisance, entitling the plaintiffs to recover temporary damages from the High Penn Oil Company. *Webb v. Chemical Co.*, 170 N.C. 662, 87 S.E. 633; *Duffy v. Meadows*, 131 N.C. 31, 42 S.E. 460; *Hyatt v. Myers*, 71 N.C. 271; *Bohan v. Port Jervis Gas-Light Co., supra;* 39 Am. Jur., Nuisances, sections 58, 59; 66 C.J.S., Nuisances, sections 23, 60. When the evidence is taken in the light most favorable to the plaintiffs, it also suffices to warrant the additional inferences that the High Penn Oil Company intends to operate the oil refinery in the future in the same manner as in the past; that if it is permitted to carry this intent into effect, the High Penn Oil Company will hereafter cast noxious gases and odors onto the nine acres of the plaintiffs with such recurring frequency and in such annoying density as to inflict irreparable injury upon the plaintiffs in the use and enjoyment of their home and their other adjacent properties; and that the issuance of an appropriate injunction is necessary to protect the plaintiffs against the threatened irreparable injury. This being true, the evidence is ample to establish the existence of an abatable private nuisance, entitling the plaintiffs to such mandatory or prohibitory injunctive relief as may be required to prevent the High Penn Oil Company from continuing the nuisance. *Barrier v. Troutman*, 231 N.C. 47, 55 S.E. 2d 933; *Pruitt v. Bethell*, 174 N.C. 454, 93 S.E. 945; *Hyatt v. Myers, supra; Hedrick v. Tubbs*, 120 Ind. App. 326, 92 N.E. 2d 561; *Kepler v. Industrial Disposal Co.*, 84 Ohio App. 80, 85 N.E. 2d 308; 39 Am. Jur., Nuisances, sections 156, 158, 172; 66 C.J.S., Nuisances, sections 115, 116, 134.

The contention of the High Penn Oil Company that the complaint states a cause of action based solely on negligence is untenable. To be sure, the plaintiffs assert that the defendants were "negligent and careless" in specified particulars in constructing and operating the oil refinery. When the complaint is construed as a whole, however, it alleges facts which show a private nuisance resulting from an intentional and unreasonable invasion of the plaintiffs' interest in the use and enjoyment of their land. *Bohan v. Port Jervis Gas-Light Co., supra; Braun v. Iannotti, supra; Flanagan v. Gregory & Poole, Inc., supra;* 39 Am. Jur., Nuisances, section 142.

For the reasons given, the evidence is sufficient to withstand the motion of the High Penn Oil Company for a compulsory nonsuit.

The reverse is true with respect to the motion of the Southern Oil Transportation Company. The complaint charges the Southern Oil Transportation Company with responsibility for the nuisance alleged solely upon the theory that it actively participated in the construction and operation of the oil refinery. According to all the evidence, the Southern Oil Transportation Company had no part in these undertakings.

The evidence for the plaintiffs indicates that the Southern Oil Transportation Company was the absolute owner of the land on which the oil refinery stands until 10 September, 1952; that it possessed the consequent power to control the use of the land until that date; and that it knowingly permitted the High Penn Oil Company to operate the oil refinery upon the land owned and controlled by it down to 10 September, 1952, in such a manner as to constitute a nuisance despite notice and protest from the plaintiffs. The complaint does not invoke this evidence as a foundation of liability on the part of the Southern Oil Transportation Company for the nuisance alleged. *McManus v. Railroad,* 150 N.C. 655, 64 S.E. 766; *Maynard v. Carey Const. Co.,* 302 Mass. 530, 19 N.E. 2d 304; 66 C.J.S., Nuisances, section 88. These things being true, there is a fatal variance between the pleading and the proof of the plaintiffs with respect to the Southern Oil Transportation Company, and the action ought to have been involuntarily nonsuited as to the Southern Oil Transportation Company in the court below under the fundamental procedural rule that a recovery cannot be had in a civil action on the basis of matters alleged, but not proved, or proved but not alleged. *Wilkins v. Finance Co.,* 237 N.C. 396, 75 S.E. 2d 118; 66 C.J.S., Nuisances, sections 126, 147.

While the evidence is ample to overcome its motion for a compulsory nonsuit, the High Penn Oil Company is entitled to have the cause tried anew because of prejudicial error in the instruction covered by its sixteenth assignment of error. This portion of the charge is thus phrased: "The court charges you . . . that before you can find that the defendants operated and maintained their plant and premises as a nuisance, you must find from the evidence and by the greater weight thereof that their operation injuriously affected the health, safety, morals, good order, or general welfare of the community, or infringed upon the property rights of the individual complainants. If you so find from the evidence and by its greater weight, you will answer the second issue 'Yes.' If you fail to so find, you will answer it 'No.' "

The core of this instruction is lifted bodily out of its context in *Kass v. Hedgpeth,* 226 N.C. 405, 38 S.E. 2d 164, and is without relevancy to the pleadings, the testimony, and the issues in the instant action. What has already been said respecting the basis of liability in the law of private nuisance makes it obvious that the instruction under scrutiny conveyed to the jury a rather vague and a quite incorrect notion as to the essential elements of a private nuisance. The instruction is not robbed of its prejudicial character by the fact that the court may have given the jury correct instructions on this phase of the case in other parts of the charge. "It is elementary that where there are conflicting instructions with respect to a material matter—one correct and the other not—a new trial must be granted, as the jurors are not supposed to know which one is

correct, and we cannot say they did not follow the erroneous instruction." *Hubbard v. R. R.*, 203 N.C. 675, 166 S.E. 802.

New trial as to the High Penn Oil Company.

Reversed as to the Southern Oil Transportation Company.

JOHN S. CANSLER, AS SOLE SURVIVING EXECUTOR AND TRUSTEE, UNDER THE LAST WILL AND TESTAMENT OF EDWIN T. CANSLER, DECEASED, PETITIONER, *v.* CATHERINE CANSLER McLAUGHLIN; ANNE CAVE McLAUGHLIN, A MINOR; NELL W. CANSLER; EDWIN T. CANSLER III, BARBARA LYNN CANSLER, A MINOR; BETSY CANSLER THOMAS; CHARLES L. C. THOMAS III, A MINOR; DIANA CANSLER THOMAS, A MINOR; NELL C. CANSLER, AS EXECUTRIX UNDER THE WILL OF EDWIN T. CANSLER, JR., DECEASED; SARAH CANSLER CARROLL; JEAN CARROLL BIGGERSTAFF; JOHN F. BIGGERSTAFF, JR., A MINOR; PATRICIA CANSLER COVINGTON; JAMES R. COVINGTON, JR., A MINOR; JOAN CANSLER MARSHALL; THE UNBORN DESCENDANTS OF CATHERINE CANSLER McLAUGHLIN; THE UNBORN DESCENDANTS OF NELL W. CANSLER; THE UNBORN DESCENDANTS OF EDWIN T. CANSLER III; THE UNBORN DESCENDANTS OF BETSY CANSLER THOMAS; THE UNBORN DESCENDANTS OF SARAH CANSLER CARROLL; THE UNBORN DESCENDANTS OF JEAN CARROLL BIGGERSTAFF; THE UNBORN DESCENDANTS OF JOHN S. CANSLER; THE UNBORN DESCENDANTS OF PATRICIA CANSLER COVINGTON; AND THE UNBORN DESCENDANTS OF JOAN CANSLER MARSHALL, DEFENDANTS.

(Filed 23 September, 1953.)

1. Wills § 33e—

An annuity to testator's daughter "to be used by her for the support and maintenance of herself and my granddaughter . . . during the time of her natural life and until my said granddaughter shall have reached the age of 25 years" *is held*, construing the language contextually with other portions of the instrument to ascertain the testator's intent, to provide the annuity to testator's daughter for life, the arrival of the granddaughter at the age of 25 years having the effect of terminating the daughter's obligation to use part of the income for her support but not the daughter's right to receive the annuity.

2. Trusts § 28—

Under the terms of the trust set up by the will in suit, *it is held*, construing the language of the will contextually to ascertain the testator's intent, that none of the ultimate beneficiaries of the *corpus* of the estate is entitled to distribution of his share of the *corpus* during the lifetime of testator's daughter, the primary beneficiary of the income of the trust.

APPEAL by defendants Catherine Cansler McLaughlin, Nell W. Cansler, Edwin T. Cansler III, and Betsy C. Thomas, from *Sharp, Special Judge*, at 16 February, 1953, Extra Civil Term of MECKLENBURG.

Petition by John S. Cansler, surviving Executor and Trustee under the will of Edwin T. Cansler, for advice and instruction.

Edwin T. Cansler, an eminent member of the Charlotte Bar, died on 19 July, 1943, possessed of an estate consisting of both real and personal property. He was survived by his widow, Mrs. Lillie S. Cansler, who died 21 August, 1946, and by three children, namely: Edwin T. Cansler, Jr., who died 13 June, 1950, the defendant Sarah C. Carroll (then 52 years of age), and the petitioner John S. Cansler (then 54 years of age); and by the following grandchildren, all of whom are more than 21 years of age, namely: Catherine Cansler McLaughlin, Nell W. Cansler, Edwin T. Cansler III, and Betsy Cansler Thomas, children of Edwin T. Cansler, Jr.; Jean Carroll Biggerstaff, daughter of Sarah C. Carroll; and Patricia Cansler Covington and Joan Cansler Marshall, children of John S. Cansler.

The part of the will immediately in question is Item VII under which the testator set up a trust comprising the bulk of his estate, to be administered by his two sons, who were his law partners, or the survivor, the declared uses and purposes of the trust being as follows:

"(a) The net income . . . to my . . . wife monthly during her lifetime, . . .; provided, that in case said net income, together with the net income from her own personal estate, shall be insufficient to yield her an annual income of $5,000.00, then I direct that my trustees shall annually use so much of the *corpus* of my said estate as shall be necessary for the purpose of guaranteeing to her an annual income of $5,000.00.

"(b) Upon her death, $3600.00 of the income from my said estate shall be paid over annually by my said trustees in monthly installments to my said daughter, to be used by her for the support and maintenance of herself and my granddaughter, Jean Carroll, during the time of her natural life and until my said granddaughter shall have reached the age of twenty-five years, and the balance of said income shall be equally divided between my two sons during their natural lives, respectively, until each shall have received an annual income of $3,000.00; provided, that if and when said total annual income from my estate shall exceed $9,600.00, the excess shall be equally divided among my three children or the child or children of such as may be dead, *per stirpes.*

"(c) Upon the death of my said daughter, said trustees shall use one-third of the net income from said estate for the support and maintenance of my granddaughter, Jean Carroll, until she shall have reached the age of thirty years, after which time the *corpus* of said fund shall be paid to her, free from the trusts hereby created; provided, that in case my said granddaughter shall die before reaching the age of thirty years, leaving child or children surviving, then my said trustees shall hold said fund for the use of such child or children until each of such children shall have

reached the age of twenty-one years, at which time, the share of such child or children shall be turned over to him, her or them, free from the limitations of this trust; however, should my said granddaughter die before reaching the age of thirty years, without leaving child or children surviving, then said fund shall revert to and become a part of the *corpus* of my estate, and be held, managed, invested and re-invested, according to the trusts and limitations in this will imposed upon the income and *corpus* of said trust estate.

"(d) Upon the death of either of my said sons before a division of the *corpus* of said trust estate shall have been made pursuant to subsection (h) hereof, the survivor, as trustee, shall hold, use and dispose of one other third of said net income for the use and benefit of his deceased brother's surviving children or grandchildren, upon trusts and limitations similar to those imposed by subsection (c) hereof, upon the income from and *corpus* of the one-third of said trust estate devised and bequeathed for the use and benefit of my said granddaughter, Jean Carroll.

"(e) Upon the death of both of my said sons before a division of said trust estate, a suitable trustee, to be appointed in the manner hereinafter provided, shall use and hold said trust estate and the net income therefrom for the benefit of the surviving descendants of my said children, upon trusts and limitations similar to those imposed by subsection (c) hereof, upon the income from and the *corpus* of the one-third of said trust estate devised and bequeathed for the use and benefit of my granddaughter, Jean Carroll.

"(f) In case one or more of my said children shall die without leaving surviving child or children or the descendants of such, then the income, as well as the *corpus* herein willed for the use and benefit of the child or children so dying shall be held in trust for the use and benefit of my other surviving child or children or his, her or their surviving descendants born within twenty-one years after the death of my last surviving child, as hereinbefore provided for the share originally willed for the benefit of each of my said children.

"(g) In case one or more of my grandchildren shall die without child or children surviving, born within twenty-one years after the death of my last surviving child, then the share or shares of such grandchild or grandchildren shall be held for the use and benefit of his or her surviving brothers and sisters, either or both, born within the period aforesaid; but if there be no such surviving brothers or sisters, then such share or shares shall be used and held in trust for the benefit of his, her or their cousins of the whole blood, born within the period aforesaid, *per stirpes*.

"(h) Upon the death of all of my grandchildren entitled to take under this will, this trust shall be dissolved and the *corpus* of said trust estate shall be paid out and conveyed to the beneficiaries entitled thereto under

the foregoing provisions of this will; provided, that whenever, after the death of my dearly beloved wife, the total net income of my estate shall exceed the sum of $9,600, and the same can be divided into three equal parts so that each part will yield an annual net income of at least $3,600, then the same may be so divided, either by the mutual consent of all of my then surviving children or the personal representative of such as may be dead, or by the court, upon petition of at least two of my said children or the legal representative of each, after which division, the part or share allotted for the benefit of my said daughter or her descendants hereinbefore named, shall be held upon the trusts hereinbefore imposed upon the undivided one-third interest in said estate directed to be held for her and their use and benefit, and my said sons or their descendants shall each hold one of the other two thirds of said estate, free from the trusts and limitations herein imposed thereon. However, this division shall not be made unless and until it shall be made to appear that the annual net income from the whole of said estate shall not be substantially diminished by reason of such division."

Following the probate of the will, Edwin T. Cansler, Jr., and John S. Cansler, in accordance with the terms thereof, qualified as Executors and entered upon the administration of the estate as Executors and as Trustees thereunder, and continued therein until the death of Edwin T. Cansler, Jr., on 13 June, 1950; thereafter the petitioner John S. Cansler, as surviving Executor and Trustee, continued such administration until 19 February, 1951, when he completed the administration of the estate as Executor and filed his final account for settlement, which was duly audited and approved by the Clerk of the Superior Court of Mecklenburg County.

Likewise, since the death of Edwin T. Cansler, Jr., the petitioner has continued, as surviving Trustee, to administer the trust created by the will.

As shown by the Trustees' annual accounts, the Trustees, Edwin T. Cansler, Jr., and the petitioner, for each of the years from the death of the testator on 19 July, 1943, to 31 December, 1949, and the petitioner as surviving Trustee for each of the years 1950 and 1951, allocated and distributed the net annual distributable income of the trust estate, pursuant to their construction of Item VII (b) of the will, according to the following formula: (1) the first $3,600 of such income to the testator's daughter, Sarah C. Carroll, in equal monthly installments; (2) the net income over $3,600 and up to $9,600 to E. T. Cansler, Jr., and the petitioner in equal shares; and (3) the net income in excess of $9,600 to Sarah C. Carroll, E. T. Cansler, Jr., and John S. Cansler in equal shares, except that for the part of the year 1950 from 14 June to 31 December, and for the year 1951, the share of the net annual income which E. T.

Cansler, Jr., would have received, had he lived, was allocated and paid to his children, the defendants Catherine Cansler McLaughlin, Nell W. Cansler, Edwin T. Cansler III, and Betsy C. Thomas, one-fourth to each.

However, these defendants—the children of Edwin T. Cansler, Jr.—on or about 9 July, 1952, through counsel, notified the petitioner of their contention, based on their interpretation of Item VII (b) of the will, that from and after the death on 21 August, 1946, of the testator's widow, Mrs. Lillie S. Cansler, the first income beneficiary of the trust, Jean Carroll Biggerstaff being then more than 25 years of age, the net income of the trust estate should have been distributed one-third each to Sarah C. Carroll, Edwin T. Cansler, Jr., and John S. Cansler; and that since the death of Edwin T. Cansler, Jr., on 13 June, 1950, these claimants, his surviving children, were entitled to one-third of the net annual distributable income of the trust estate, to be divided equally among them.

Also, Catherine Cansler McLaughlin, child of Edwin T. Cansler, Jr., became 30 years of age on 29 January, 1952, following which she informed the petitioner of her contention, based on Item VII (d) of the will, that, her father having predeceased her, she thereby became vested, upon her arrival at 30 years of age, with an indefeasible 1/12 interest in the *corpus* of the trust estate and entitled to the possession of an undivided 1/12 interest in each of the assets, real and personal, then constituting the *corpus* of the trust estate, free and discharged of the trust.

Thereupon the petitioner brought this suit, asking advice and instruction of the court with respect to the contentions made by the children of Edwin T. Cansler, Jr., deceased, and joined as parties defendant all parties having any possible interest in the trust estate—both those *in esse* and those *in posse*.

The defendants Catherine Cansler McLaughlin and other children of Edwin T. Cansler, Jr., put in an answer reiterating the foregoing contentions and by cross-petition against the petitioner asked that he be required to account to them for their portion of the income payments which they claimed had been improperly paid by the petitioner to the defendant Sarah C. Carroll.

When the cause came on for hearing below on the issues joined, the trial court, after hearing the evidence offered by both sides, found facts, made conclusions of law, and entered judgment based thereon sustaining the Trustee's interpretation of the will and denying the contentions made by the children of Edwin T. Cansler, Jr., the pertinent findings and adjudications being in summary as follows:

1. "The defendant Sarah C. Carroll was the favorite child of the testator and her daughter Jean Carroll (now Biggerstaff) was his favorite grandchild. Said Sarah C. Carroll was married in July, 1918, to Dan Carroll, who was then and had been ever since he left College, in military

service. Said Carroll had no business or professional training or experience and, after his discharge from the Army in February, 1919, never provided adequate support for said Sarah C. Carroll or their daughter. He was likewise an alcoholic and unreliable. As a result thereof, the testator supported his daughter throughout her married life and until his death and supported her daughter Jean Carroll until her marriage in 1940. During the greater part of the period from 1919 to 1925 said Sarah C. Carroll and her husband and daughter lived in the testator's home or at the testator's summer home at Little Switzerland, N. C. In the spring of 1925, the testator built a house on the westerly side of Carmel Road, across the road from his new residence, and made such house available to the Carroll family and they lived there from 1925 to about 1934, when said Sarah C. Carroll and her daughter Jean Carroll returned to the testator's home where they lived continuously until the death of the testator in July, 1943. After 1934, Dan Carroll was away from Charlotte, and in 1937 or 1938, said Sarah C. Carroll effected a permanent separation from him, and in April, 1941, she obtained an absolute divorce."

2. "In 1919, as well as for many years prior thereto, the testator had a large and profitable law practice in the City of Charlotte. His sons E. T. Cansler, Jr., and John S. Cansler, who had been practicing law only a short while before entering military service during World War I, had established no substantial practice prior to that time. Following their return from military service, in 1919, the testator entered into a law partnership with them on terms very favorable to them, which partnership continued until the testator's death."

3. "For the year 1929, the year in which the testator executed his will, his gross income from investments was approximately $6,000.00; for the year 1931, in which he executed the codicil to his will, his gross income from investments was approximately $3,000.00; and for the year 1942, the last full year before his death, his income from investments was approximately $4,000.00, but in addition thereto his wife, Mrs. Lillie S. Cansler, received during said year net income of $4,205.00 from a long-term lease on the property at 509 East Fourth Street which the testator had previously entered into and thereafter had assigned to her."

4. That "the dominant intent of the testator, to be gathered from the whole will and from the conditions surrounding the testator and his beneficiaries, was to provide adequate support for his daughter, the defendant Sarah C. Carroll, after the death of his wife and as long as Sarah C. Carroll lived, that for that purpose, after the death of his wife, said Sarah C. Carroll should receive the net annual distributable income from the trust created by Item VII of said will up to the sum of $3600.00, together with one-third of said annual distributable income, if any, in

excess of $9600.00, and that the same should be a charge upon the entire trust estate created by Item VII of said will."

5. "The defendant Catherine Cansler McLaughlin did not, upon reaching 30 years of age, become vested with an indefeasible 1/12 interest in the principal of the trust estate created by Item VII of said will, free and discharged from said trust, but that said trust will continue during the lifetime of said Sarah C. Carroll. The matter of when said trust will terminate thereafter is not now before the Court."

6. "The proper formula for computing the amounts of the net distributable income of the trust created by Item VII of said will to which the respective income beneficiaries of said trust are entitled, for the year 1951 and other years in which the beneficiaries are the same as in 1951, is as follows: the first $3600.00 of said net annual distributable income to Sarah C. Carroll in equal monthly installments, together with one-third of said net annual distributable income, if any, over $9600.00; one-half of said net annual distributable income over $3600.00 and up to $9600.00 together with one-third of said net annual income over $9600.00, if any, to John S. Cansler; and one-half of said net annual distributable income over $3600.00 and up to $9600.00, together with one-third of said annual distributable income over $9600.00, to Catherine C. McLaughlin, Nell W. Cansler, Edwin T. Cansler III, and Betsy C. Thomas, one-fourth to each."

7. Subject to a designated correction as to the payment of taxes for 1951 not pertinent to this appeal, the petitioner's final account for settlement as Executor and his annual account as Trustee for the period up to 31 December, 1951, as filed with the Clerk, were approved.

The defendants Catherine C. McLaughlin and other children of Edwin T. Cansler, Jr., excepted and appealed.

McDougle, Ervin, Horack & Snepp and Tillett, Campbell, Craighill & Rendleman for defendants Catherine Cansler McLaughlin, Nell W. Cansler, Edwin T. Cansler III, and Betsy Cansler Thomas, appellants.

John S. Cansler, Petitioner, appellee, in propria persona.

Robinson & Jones for defendants Sarah Cansler Carroll and Jean Carroll Biggerstaff, appellees.

W. T. Covington, Jr., Guardian ad litem for Unborn Children of John S. Cansler and Sarah Cansler Carroll, appellee, in propria persona.

B. Irvin Boyle, Guardian ad litem for Anne Cave McLaughlin, Barbara Lynn Cansler, Charles L. C. Thomas III, Diana Cansler Thomas, John F. Biggerstaff, Jr., and James R. Covington, Jr.; and the Unborn descendants of Catherine Cansler McLaughlin, Nell W. Cansler, Edwin T. Cansler III, Betsy Cansler Thomas, Jean Carroll Biggerstaff, Patricia

Cansler Covington and Joan Cansler Marshall, appellee, in propria persona.

JOHNSON, J. The judgment entered below adjudges in effect (1) that the testator's gift to his daughter, Sarah Cansler Carroll, of the first $3,600 of annual income from the trust estate was to continue for her lifetime rather than until her daughter, Jean Carroll Biggerstaff, reached 25 years of age, and (2) that there can be no distribution of the *corpus* of the trust estate until after the death of the testator's daughter, except by voluntary action of a majority in interest under the provisions of paragraph (h) of Item VII of the will.

A study of the record impels the conclusion that the judgment correctly interprets the will.

1. The clear meaning of Item VII (b) is that the $3,600 was to be used by the testator's daughter, Sarah Cansler Carroll, for her own support and maintenance "during the time of her natural life" and for the support and maintenance of her daughter, Jean Carroll Biggerstaff, until she reached 25 years of age. The arrival of Jean at age 25 worked a limitation on the obligation of Mrs. Carroll to use part of the $3,600 to support Jean, but it did not limit Mrs. Carroll's right to receive it, it already having been provided that she was to receive this sum during her lifetime.

This appears manifest when paragraph (b) is read in connection with the preceding and succeeding paragraphs. Paragraph (a) disposes of all the income until Mrs. Cansler's death. Paragraph (b) disposes of the income from the death of Mrs. Cansler until the death of Mrs. Carroll, and nowhere else does the testator specify what income Mrs. Carroll is to get. Paragraph (c) provides that on the death of Mrs. Carroll, her daughter Jean shall get one-third of the income until she is 30. If Mrs. Carroll had died before Jean was 25, paragraph (c) rather than paragraph (b) would apply. Thus it seems inescapable that the death of Mrs. Carroll, rather than when Jean reached the age of 25, is the termination date of the $3,600 payments.

2. The language of the will, when read and considered from its four corners, does not support appellants' contention that the children of Edwin T. Cansler, Jr., are entitled to piecemeal distributions of *corpus* during the lifetime of Mrs. Carroll as they arrive at 30 years of age. This contention is based on the language of paragraph (d) of Item VII.

It may be doubted that paragraph (d) was intended to deal at all with the *corpus* of the shares ultimately going to the children of the testator's sons. The language is that the surviving Trustee "shall hold, use and dispose of one other third of said *net income* for the use and benefit of

his deceased brother's surviving children or grandchildren." (Italics added.)

This paragraph expressly refers to paragraph (h) for provisions having to do with the division of the *corpus*. And it is significant that in paragraph (h) in making provision whereby the beneficiaries, by consent or upon petition of the majority in interest, could divide the *corpus*, the testator was careful to provide that this could not be done until it was assured that the income from each third of the estate would be at least $3,600 per year. If paragraph (d) should be construed to permit piecemeal distribution of *corpus* during the life of Mrs. Carroll, such construction would override this clearly expressed provision of paragraph (h) by which the testator manifestly intended to assure to his daughter, Mrs. Carroll, a yearly income for life of at least $3,600. As to this, it is noted that all four of the children of Edwin T. Cansler, Jr., will be 30 years of age within the next three years and that the children of John S. Cansler will attain that age within a few years.

But be this as it may, and conceding that paragraph (d) deals with *corpus* as well as income, even so, by its express language it is subject to limitations "similar to those imposed" by paragraph (c).

And in so far as *corpus* is concerned, the limitations contained in paragraph (c) include a limitation that there shall be no distribution until the death of Mrs. Carroll. Jean Carroll Biggerstaff has already passed 30 years of age. Nevertheless, by the clear language of paragraph (c) she is not entitled to distribution of *corpus* until her mother dies. Therefore, if paragraph (d) should be construed as dealing with *corpus*, necessarily it would carry with it the limitations imposed by the language of the paragraph. And manifestly the testator did not mean by "similar limitations" to substitute the death of his son in paragraph (d) for the death of his daughter in paragraph (c), because paragraph (d) itself contains express limitations with respect to the death of the son, and then imposes, in addition, limitations similar to those imposed in paragraph (c). Thus the death of Mrs. Carroll stands as a limitation upon both paragraph (c) and paragraph (d). Moreover, paragraph (d) applies only to "one other third of said net income." Paragraph (c) applies to one-third of the net income from the whole estate for the use and benefit of Jean Carroll Biggerstaff after her mother's death. "One other third" could not come into being until the first third was created by the death of Mrs. Carroll. Therefore, in any event paragraph (d) by its clear terms imposes the death of Mrs. Carroll as a condition precedent to its operation.

The appellants' contentions and arguments *contra*, ably presented with considerable force of logic, have been considered with care. However, a contextual study of the grammatical meaning and logical sense of the

language of the will in the light of the manner in which the testator and the objects of his testamentary disposition were circumstanced, impels the conclusion that the court below correctly declared the testator's intent. Neither technical interpretation nor involved rules of construction seem necessary in sustaining the judgment below. *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

The question of when the trust will terminate after the death of Sarah Cansler Carroll is not presented for decision.

The judgment below is

Affirmed.

STATE v. HOWARD SEABOY TICKLE.

(Filed 23 September, 1953.)

1. Criminal Law § 12a—

A court must have jurisdiction of the subject matter and of the person of defendant in order to render a valid judgment in a criminal prosecution.

2. Same—

A nonresident voluntarily entered this State and was arrested here for reckless driving and hunting without a license. While in jail, he was arrested on the warrant in this case, and was present in person during his trial. *Held:* The court had jurisdiction of the person of defendant.

3. Criminal Law § 12b—

An act to be punishable as a crime in this State must be an act committed here and against this sovereignty.

4. Same: Bastards § 1—Offense of willful failure to support illegitimate child may be committed in this State by out-of-state defendant.

Defendant, a resident of another state, was charged with the willful failure and refusal to support his illegitimate child which he had begotten upon the body of prosecutrix in such other state. The mother moved to this State before the child was born, and the mother and child have continued to reside here since its birth. Prosecutrix demanded by registered letter that defendant contribute to the support of the child, and defendant made no contention that he had provided any support for the child. *Held:* The offense of willful failure and refusal to support the child was committed in this State, G.S. 49-2, G.S. 49-3, and defendant was constructively in this State when the offense was committed, since he had voluntarily set in motion the chain of circumstances resulting in the commission of the offense here, and therefore our State court has jurisdiction of the offense.

5. Criminal Law § 52a (8)—

Motion for nonsuit at the close of the State's evidence is waived when the defendant thereafter introduces evidence.

6. Indictment § 9—

It is not necessary that an indictment for a statutory offense follow the language of the statute verbatim, but it is sufficient if it substantially follows the words of the statute.

APPEAL by defendant from *Godwin, Special J.*, at February Special Term 1953. CASWELL.

Criminal prosecution upon a bill of indictment charging that the defendant on 25 December 1951 at and in Caswell County after notice of paternity and demand for support did unlawfully and willfully refuse to provide for the support of his illegitimate child begotten upon the body of Ruby Elizabeth Hamlett, contrary to the statute, etc. G.S. 49-2.

The State's evidence is summarized below: Ruby Elizabeth Hamlett, a resident of Caswell County, went to Danville, Virginia, to work in 1947, returning to her home every week or two. She met the defendant in Danville in 1949. He was a resident of Virginia, and has never lived in North Carolina. After she met the defendant they began going together. About October 1950 she began having sexual intercourse with the defendant, and it continued at frequent intervals until she had been pregnant two months. All the acts of intercourse occurred in Virginia.

In March 1951 she returned to her Aunt's home in Caswell County, and there on 17 June 1951 gave birth to a bastard. That the defendant is the father of her bastard, and admitted to several people that he was father of her bastard.

Her testimony as to her returning to Caswell County is as follows: "I told him"—the defendant—"I was coming out in the country and stay; no, I didn't tell him where; I told him that in February 1951 before I came over here. He hadn't said anything to me about coming over to Caswell County, hadn't mentioned the matter one way or the other to me; he had nothing to do with my coming over here to have the baby, that's right; how was I going to stay in town, I didn't have any money or couldn't work; I had to come to the country." Later, on redirect examination, she testified: "After I became pregnant and about the time I got ready to come back to Caswell County, Tickle knew that I was coming back to Caswell County, I told him I was coming out in the country to my aunt's and stay; I guess he understood the reason why I had to come—he didn't say anything about he didn't or he did; he did not undertake to give me any help by way of keeping me over there or offering me another home . . . the only place I had to return was Caswell County."

About two weeks after the child's birth she moved with her child from her aunt's to her parents' home in Caswell County, and she and her child have lived there since. Her bastard has been sickly. Her parents have paid the child's medical and doctor's bills, and supported the child. The

defendant furnished no support. During the trial Mr. Dalton, the defendant's lawyer, in response to a question of the court stated the defendant made no contention that he had furnished support. Since the bastard's birth Ruby Elizabeth Hamlett has not been able to hold a job; she has not been well—she has fainting spells.

On 13 July 1951 she sent the defendant a registered letter notifying him "our child, Donna Kay Hamlett, was born 17 June 1951 and is getting along nicely," and asking him to meet her and "make arrangements about the support of our daughter." She received the return receipt of this registered letter dated 17 July 1951 signed by the defendant. She received no reply from the defendant.

On 20 July 1951 she swore out a warrant against the defendant in Caswell County charging him on 17 June 1951 at and in said county with unlawfully and willfully neglecting and refusing to support his bastard child. The State of Virginia declined extradition.

About 19 December 1951 the defendant was arrested in Caswell County for reckless driving and hunting without a license. While in jail he was arrested on the warrant in this case. On the warrant in this case he was tried and convicted in the Recorder's Court of Caswell County. From the judgment imposed he appealed to the Superior Court. In the Superior Court he was tried and convicted upon a bill of indictment.

Verdict: The jury answered the issue "is the defendant the father of Donna Kay Hamlett, illegitimate child of Ruby Hamlett," Yes; and the issue "has the defendant wilfully neglected or refused to provide support for the said child," Yes, and found the defendant guilty.

From the judgment imposed thereon, the defendant appeals, assigning error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

William Reid Dalton for defendant, appellant.

PARKER, J. The defendant in this Court made a motion to dismiss for want of jurisdiction.

For a crime to be prosecuted and judgment given it is necessary that the trial court have jurisdiction of the subject matter and of the person of the defendant. Jurisdiction of the subject matter is derived from the law. *S. v. Oliver,* 186 N.C. 329, 119 S.E. 370; 10 Am. Jur., p. 917.

The defendant came voluntarily into Caswell County, this State, and was arrested for reckless driving, hunting without a license, and then on the warrant in this case. The defendant was present in person during his trial in the Recorder's Court and the Superior Court. Those courts had jurisdiction of the person of the defendant. *S. v. Oliver, supra;*

Pettibone v. Nichols, 203 U.S. 192, 51 L. Ed. 148; 22 C.J.S. Crim. Law, Sec. 144.

The bastard was begotten in Virginia, where her mother domiciled in this State, was working. The bastard's father was domiciled in Virginia, where he has always lived. The mother having no money and being unable to work about three and one-half months before the bastard's birth returned to Caswell County, where she was domiciled, and gave birth to the bastard. Since then the bastard and her mother have lived in Caswell County, where they are domiciled. The court here had jurisdiction over the person of the defendant. Did the court have jurisdiction over the subject matter charged in the indictment?

Our bastardy statute applies whether the child shall have been begotten or born within or without the State, provided the child to be supported is a *bona fide* resident of this State at the time of the institution of the action for support of the child. G.S. 49-3.

An act to be punishable as a crime in this State must be an act committed here and against this sovereignty. *S. v. Cutshall,* 110 N.C. 538, 15 S.E. 261, 16 L.R.A. 130; *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700; *Commonwealth v. Lanoue,* 326 Mass. 559, 95 N.E. 2d 925.

But as to some crimes the physical presence of the accused at the place where the crime is committed is not essential to his guilt is well settled. "The constitutional requirement is that the *crime* shall be tried in the state and district where committed; not necessarily in the state or district where the party committing it happened to be at the time." *Burton v. U. S.,* 202 U.S. 344, 50 L. Ed. 1057; *S. v. Johnson,* 212 N.C. 566, p. 570, 194 S.E. 319.

"There may be a constructive presence in a jurisdiction, distinct from a personal presence, by which a crime may be consummated, and a person beyond the limits of a state or country putting in operation a force which produces a result constituting a crime within those limits, is as liable to indictment and punishment, if jurisdiction can be obtained of his person, as if he had been within the limits of the state or country when the crime was committed." 22 C.J.S., Crim. Law, p. 219, citing numerous cases.

At common law the father of a bastard child is under no legal obligation to support it. 7 Am. Jur., p. 673. However, the father of a bastard is under a natural and moral duty to support his bastard. *Kimborough v. Davis,* 16 N.C. 71; *Burton v. Belvin,* 142 N.C. 151, 55 S.E. 71; *Sanders v. Sanders,* 167 N.C. 319, 83 S.E. 490; 10 C.J.S., p. 86. Recognizing that the common law rule is not adapted to the public opinion of a modern Christian state and that a poor innocent child should not be suffered to famish as a victim of his father's lust, unless supported at the public charge or by charity, statutes in most states impose on the father the legal duty to support his bastard child. 10 C.J.S., p. 86. G.S. 49-2

makes this moral obligation of the father, legal and enforceable, and we see no good reason why our courts should not enforce it in this case, where the father is subject to our jurisdiction. *Roy v. Poulin,* 105 Me. 411, 74 A. 923.

We have found no case embodying the exact facts of this case, nor have counsel for the State or the defendant in their briefs referred us to any such case.

In Am. Law Inst. Restatement, Conflict of Laws, p. 545, it is stated: "Bastardy Proceedings at Domicil of Father. A statute of the state of domicil of the father of a minor bastard child will be there applied to compel him to contribute to the support of the child, irrespective of where the mother is domiciled, unless the statute provides otherwise. Comment: a. Rationale. Whether a bastardy statute is criminal or civil in nature, it represents the exercise of the state's police power either to punish misconduct or to impose the onus of supporting a child upon its natural parent to prevent the child becoming a dependent upon society."

The same work on p. 546 states: "Bastardy Proceedings at Domicil of Mother. A statute of the state of domicil of the mother of a minor bastard child will be there applied, if a court there obtains jurisdiction over the father, to compel him to contribute to the support of the child, unless the statute provides otherwise."

The above statement of the law is copied almost verbatim in 7 Am. Jur., Bastards, p. 684.

The prosecution in this action is based on our statute. Whether under the Virginia law a father is required or not required to support his bastard child is not involved.

In 1 R.I. 356 *Chief Justice Greene* wrote these words which have become classic: "The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."

Where bastardy statutes do not expressly provide that the proceedings shall be brought by a woman resident within the state, the question has often arisen whether such a statute may be invoked where the father is domiciled in the state, and the mother and child are nonresidents. The courts have taken two views of the question. The rule in a majority of jurisdictions is that a nonresident of the state may institute a prosecution under the statute. These decisions are based on the reason that the principal object of such a statute is to convert the moral obligation of the father into a legal duty by compelling him to assist the mother in support of the child. 18 Ann. Cas. 574, note, where numerous cases are cited. 7 Am. Jur., Bastards, Sec. 85, says this seems to be the better view "the bastardy proceedings being considered transitory in their nature and the

father subject to suit in the county of his residence. A sound reason for this view is that if the rule were otherwise, there might be no remedy where the father took care to cross state lines at the proper time or where the complainant and her child were, by force of circumstances, compelled to reside outside the state." In *S. v. Etter,* 24 S.D. 636, 124 N.W. 957, 140 Am. S. R. 801—a bastardy case—the Court said: "The defendant is a resident of this state. It would be unreasonable to hold that he was not amenable to our laws because from distress the complainant sought shelter in her father's home in another state—the only place for her to go—outside the almshouse." The minority rule is that a nonresident cannot maintain the action, and the rationale of those cases is that the primary purpose of the statute is to prevent the child becoming a charge upon the public. 18 Ann. Cas. 575, citing cases; 7 Am. Jur., Sec. 85.

In *S. v. Wellman,* 102 Kan. 503, 170 P. 1052, the defendant was convicted of failing to support his child under the age of 16. The period within which the defendant was charged to have been guilty of such omission extended from 10 November 1916 to 10 February 1917. During that time and until his arrest he was not in Kansas, but was living in Missouri, and his three children with their mother, his divorced wife, in Kansas. Because of his ill treatment his wife left him in Missouri, and went to Kansas. In February 1916, in Kansas, she divorced her husband, and the court awarded her the custody of the children. In affirming the judgment based upon his conviction the Court said in speaking of the defendant's legal duty to provide for his children while they were with their mother in Kansas: "The omission to perform this duty occurred here. The defendant is not being prosecuted for any wrongful behavior which resulted in his wife and children leaving him; such misconduct, if it occurred, could not be a violation of a Kansas statute, but might bring about a condition under which the defendant was under an affirmative obligation to act, and by merely remaining passive might become a violator of our laws. He is under prosecution for his disobedience of the statute which took place between November 10, 1916 and February 10, 1917, by his then neglecting and refusing to provide for the support of his children. If he had sent his wife and children into Kansas, it would hardly be doubted that he became responsible for their care here. If as a result of his wrongdoing they were obliged to leave him and seek refuge elsewhere, the circumstance that they found shelter in a state which undertakes to punish the neglect of parental duty under such circumstances, when they might have chosen one having a different policy in that regard, imposes upon him no hardship of which he has any standing to complain. Their being here was not due to his deliberate choice, but according to the state's theory it was the result of his voluntary misconduct."

In *Osborn v. Harris,* 115 Utah 204, 203 P. 2d 917, the matter was before the Court upon a writ of *habeas corpus* to secure the defendant's release from prison upon a conviction for failing to support his wife and children. This issue was raised: Was an offense committed in the State of Utah? In denying the writ the court decided that the defendant could be convicted in Utah where he permitted his wife and children to live, or in which his misconduct had induced them to seek refuge, though he resided in a different state. The Court after stating that the authorities are divided, and reviewing or citing cases from Louisiana, Massachusetts, Missouri, Kansas, Ohio, Montana, Delaware, Illinois and Michigan says: "We are of the opinion that the better rule is this: the husband may be charged with the offense of failure to provide in the state in which he has permitted his wife or children to live, or in which his misconduct has induced them to seek refuge . . . It seems clear from the authorities cited that petitioner would not be criminally liable in Utah for the non-support that occurred while his wife was in Idaho, but as failure to provide is a continuing offense, the courts of this state have jurisdiction of that part of the failure to provide that was charged to have occurred between December 1947 and March 1948—the time the wife and children were in Utah."

In 27 Am. Jur., Husband and Wife, Sec. 444, it is written: "Where he (the husband) sends the wife or child to another place, he is properly indicted and tried for the offense in the jurisdiction where the wife or child becomes dependent, regardless of his non-residence, for that is the place where the duty of support should be discharged, and consequently the place where the offense of failure to support is committed."

We realize that the cases of a husband's failure to support his wife or legitimate child do not present the exact facts before us, but they are cited by analogy.

The defendant got the prosecutrix pregnant. She testified after she became pregnant the defendant knew she was going back to her aunt's in Caswell County. He did not undertake to give her any help. She didn't have any money, and couldn't work—and in her sore distress the only place she had to return to was Caswell County, the place of her domicil, and where she and her child have been domiciled since. Caswell County is the place where the defendant's duty to support his bastard child should be discharged, and the place where the failure to support has been committed.

There may be a constructive presence in a jurisdiction distinct from a personal appearance by which a crime may be consummated. There is a constructive presence of the defendant in this jurisdiction for by his lust in Virginia he begot a bastard child upon the body of Ruby Elizabeth Hamlett, and thereby put into operation a force which produced the result

of his bastard child and her mother being domiciled in this State from the date of the child's birth until now, and further produced the result of his willful failure to support his bastard child in North Carolina, which is a crime under our law, G.S. 49-2, and our courts have jurisdiction over the defendant's person. *U. S. v. Steinberg,* C.C.A.N.Y., 62 F. 2d 77; *certiorari* denied *Steinberg v. U. S.,* 53 S. Ct. 526, 289 U.S. 729, 77 L. Ed. 1478; *People v. Ware,* 67 Cal. App. 81, 226 P. 956; *Updike v. People,* 92 Colo. 125, 18 P. 2d 472; *S. v. Vetrano,* 121 Me. 368, 117 A. 460; *Lumber Co. v. R. R.,* 78 N.H. 553, 103 A. 263; *Burton v. U. S., supra; Travelers Health Ass'n. v. Virginia,* 188 Va. 877, 51 S.E. 2d 263, Affd. 339 U.S. 643, 94 L. Ed. 1154; 22 C.J.S., Crim. Law, p. 219. The defendant was present *in personam* in this jurisdiction during his trial and with counsel, and the maintenance of this action against him does not offend against "traditional notions of fair play and substantial justice," and due process. *Travelers Health Ass'n. v. Virginia, supra.*

State ex rel. Gildar v. Kriss, 191 Md. 568, 62 A. 2d 568, was a *habeas corpus* proceeding by the State of Maryland, on the relation of Sam Gildar, for release from the custody of Henry J. Kriss, Captain of Detectives of Baltimore, under an extradition warrant. From an order remanding petitioner to respondent's custody, petitioner appeals. The case presented questions as to the constitutionality and application of Section 18 of the Uniform Criminal Extradition Act, which provides extradition of persons not present in demanding state at time of commission of crime. The petitioner was in custody, pursuant to a warrant of the Governor of Maryland, to be delivered to an agent of the State of North Carolina. From a North Carolina warrant and also from affidavits, which were parts of the demand of the Governor of North Carolina to the Governor of Maryland, it clearly appears that the warrant charged the petitioner and others on or about 23 July 1947 in Guilford County, North Carolina, with conspiring to violate the laws of North Carolina by engaging and carrying on the business of transporting, handling and dealing in spirituous liquors, wholesale and retail, and in carrying out said conspiracy, they, on 21 July 1947, purchased in Baltimore, Md., 215 cases of liquor and transported them by truck from Baltimore, Md., into Guilford County, North Carolina, for the purpose of sale contrary to law, and have transported and sold to various bootleggers in North Carolina from 19 February 1947 to 31 July 1947 a total of 54,426 cases, all in flagrant violation of the North Carolina laws. One of the affidavits alleges that petitioner was not present in North Carolina at the time of the commission of the crime of which he is charged and has not fled from said State, but while in the State of Maryland entered into a conspiracy with other defendants in North Carolina intentionally resulting in the commission of a series of crimes in North Carolina. The Maryland Court in affirm-

ing the order remanding petitioner to respondent's custody quoted this language in *Strassheim v. Daily,* 221 U.S. 280, 285, 55 L. Ed. 735: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."

In respect to a person committing a crime in a state where he was not physically present, see the statement in *S. v. Hall,* 114 N.C. 909, 19 S.E. 602; *S. v. Patterson,* 134 N.C. 612, 47 S.E. 808; *S. v. Clayton,* 138 N.C. 732, 50 S.E. 866.

The defendant's motion to dismiss the case for want of jurisdiction is overruled. The defendant's assignment of error No. 2 based in large part upon substantially the same ground is overruled. There was plenary evidence to carry the case to the jury. It appears in the record that during the court's charge, the court inquired of the defendant's lawyer if there was any contention made by the defendant that he had supported the child, and the defendant's lawyer replied No. The defendant's assignment of error that all the evidence shows the defendant is not guilty is overruled.

The defendant's assignment of error No. 1 based upon his motion for judgment of nonsuit made at the close of the State's evidence is untenable for the defendant introduced evidence.

The defendant was tried under a bill of indictment. While the sufficiency of the indictment is not mentioned in the assignments of error, the defendant in his brief challenges its correctness because it does not copy verbatim the statute under which it was drawn. The indictment follows substantially the words of the statute and is sufficient. *S. v. Maslin,* 195 N.C. 537, 143 S.E. 3; *S. v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132. The cases relied upon by the defendant *S. v. Tyson,* 208 N.C. 231, 180 S.E. 85; and *S. v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157, are not in point.

The defendant in his brief contends G.S. 49-2 and 49-3 are unconstitutional. This Court has decided that question against the defendant's contention in *S. v. Spillman,* 210 N.C. 271, 186 S.E. 322.

The defendant's other assignments of error have been examined, and are overruled.

There is no exception to the charge of the court

In the trial in the court below we find

No error.

CHARLIE BARBEE v. C. C. EDWARDS.

(Filed 23 September, 1953.)

1. Mortgages § 27—

Payment of the debt secured by a mortgage or deed of trust prior to foreclosure extinguishes the power of sale and terminates the title of the mortgagee or trustee, and a foreclosure sale made thereafter is invalid and ineffectual to convey title to the purchaser.

2. Same: Quieting Title § 2—

In an action to remove cloud upon title, plaintiff's testimony that he paid the debt secured by deed of trust executed by him on the property and that defendant was claiming under *mesne* conveyances from the trustee at a foreclosure sale, *is held* sufficient to make out a *prima facie* case entitling plaintiff to go to the jury, since it is sufficient to justify, though not necessarily to impel, the inference that the debt was paid prior to the foreclosure, and therefore that the foreclosure was void.

3. Limitation of Actions § 16—

Ordinarily, where a statute of limitations is properly pleaded, the burden is upon plaintiff to show that he has not brought a stale claim into court.

4. Quieting Title § 2: Adverse Possession § 17—

Where plaintiff in an action to quiet title establishes a *prima facie* case, defendant's plea of title by adverse possession under color for seven years does not justify nonsuit of plaintiff's cause, since the plea of adverse possession raises an issue of fact for the jury upon which defendant had the burden of proof. G.S. 1-38.

5. Quieting Title § 2: Adverse Possession § 18—

Where plaintiff, in an action to quiet title, makes out a *prima facie* case, and defendant sets up a plea of title by adverse possession under color for seven years, plaintiff's admission that he gave a certain person possession more than seven years prior to the institution of the action does not justify nonsuit of plaintiff's cause, since mere admission of possession without evidence in respect to the nature or character of such possession does not amount to an admission of adverse possession in law, even if defendant be given the benefit of presumptions arising from *mesne* conveyances from such person.

6. Quieting Title § 2: Mortgages § 16b—

Where plaintiff, in an action to quiet title, establishes a *prima facie* case that the debt secured by the deed of trust executed by him on the property was fully paid prior to foreclosure and that defendant claims under *mesne* conveyances from the trustee, the action is not one to redeem the property, and G.S. 1-47 (4) and G.S. 1-56 cannot bar plaintiff's cause.

7. Quieting Title § 2—

In an action to quiet title under G.S. 41-10, plaintiff is not required to show that he is either in or out of possession or that defendant is in possession, but only that plaintiff has title and that defendant asserts an adverse claim, and while defendant may defend the validity of his alleged claim

on every relevant ground available in any type of action involving recovery of possession of real property, such defenses cannot change the nature of plaintiff's action or dilute the force of plaintiff's *prima facie* proofs so as to warrant nonsuit of plaintiff's cause.

8. Trial § 22c—

It is the function of the jury, and not the court, to dissolve discrepancies and dispose of contradictions in the evidence.

9. Adverse Possession § 13f: Quieting Title § 2—

Where plaintiff in an action to quiet title establishes *prima facie* that he holds the legal title, he has the benefit of the presumption created by G.S. 1-42. G.S. 1-39 and G.S. 1-42 should be construed together.

10. Adverse Possession § 13f—

Where plaintiff in an action to quiet title testifies that he was in possession under his deed up to a period less than twenty years from the institution of his action, his testimony shows possession within the twenty year period prescribed by G.S. 1-39, and defendant is not entitled to nonsuit upon his plea of that statute.

APPEAL by plaintiff from *Grady, Emergency Judge,* at January Term, 1953, of DURHAM.

Civil action to remove alleged cloud upon title to real estate.

The plaintiff acquired title to the land in controversy by deed of C. L. Lindsey and wife dated 1 January, 1917. The same day the deed was made, the plaintiff executed a purchase money deed of trust on the land to Mrs. C. L. Lindsey, Trustee, securing an indebtedness to C. L. Lindsey. The defendant claims title under *mesne* conveyances which connect with an alleged foreclosure of the deed of trust.

The plaintiff challenges the validity of the foreclosure and alleges that the defendant's deed based thereon and the claim made thereunder constitute a cloud upon his title. The plaintiff admits, however, that he surrendered possession of the premises in 1934 or 1935. His allegation in this respect is that "C. C. Weaver (under whom the defendant claims) did by means of duress deprive the plaintiff of his possession."

The defendant, answering, alleges: that the land was duly sold on 15 September, 1927, by Mrs. C. L. Lindsey, Trustee, under the power contained in the deed of trust and was bid in by C. L. Lindsey; that the Trustee's deed to C. L. Lindsey "was either not made upon the expiration of 10 days after said report of sale, or, if made, it was lost or mislaid or not recorded, or, if recorded, it was not properly indexed; . . ."; that thereafter C. L. Lindsey conveyed the property to C. C. Weaver and wife, Lovie C. Weaver, by deed dated 1 January, 1934; that following this, it was discovered there was no record of a trustee's deed to C. L. Lindsey and thereupon Mrs. C. L. Lindsey, Trustee, executed to C. L. Lindsey a trustee's deed pursuant to the foreclosure sale, the deed being dated 31

May, 1945; that thereafter Lovie C. Weaver conveyed the property to W. E. Hiatt, and Hiatt later conveyed to the defendant; and by reason of these conveyances the defendant asserts that his record title is valid and superior to that of the plaintiff.

The defendant also sets up and relies upon these statutes of limitation: adverse possession under color of title for seven years, G.S. 1-38; the ten-year statute barring redemption by the mortgagor where the mortgagee has been in possession, G.S. 1-47 (4); the general residuary statute of ten years, G.S. 1-56; and the statute requiring that seizin or possession be shown within twenty years before action commenced, G.S. 1-39. The defendant further pleads (1) estoppel and (2) laches of the plaintiff in bar of recovery.

The plaintiff offered evidence which may be summarized as follows:

1. Deed of C. L. Lindsey and wife to the plaintiff, dated 1 January, 1917, duly registered 21 September, 1927, conveying the land in controversy.

2. Purchase money deed of trust made by the plaintiff to Mrs. C. L. Lindsey, Trustee, securing a series of notes made by the plaintiff to C. L. Lindsey in the aggregate amount of $725.00, the last note being due and payable 1 January, 1924, registered 19 January, 1917. The recorded entry of the deed of trust (Book 80, page 337) contains a memorandum written across the face thereof as follows: "This property foreclosed & Sold to C. L. Lindsay Sept. 15, 1927. See Deed recorded in Office of Reg. of Deeds Book 159 Page 51. This 5 day of June, 1945. Mrs. C. L. Lindsay, Trustee. By M. Hugh Thompson, Atty."

3. Testimony of the plaintiff in substance that he bought the land from C. L. Lindsey in 1917 and gave him a deed of trust to secure the purchase price of $725.00. The plaintiff further testified: "I paid to Mr. Lindsey all the money that I agreed to pay on the property. . . . I stayed on this property 17 or 18 years. The last time I lived there was in 1934 or 1935. . . . I raised a crop on this farm every year I was there, . . . As to how I came to get off the land in 1934-35, I will say that a constable . . . came down there to my farm and told me and the other people living there to get off of there. . . . he didn't tell me why I was to get off. He gave me 10 days to leave and I left . . . in ten days. That was in 1934. I have not been in possession of that land since that time. Mr. Cooper (C. C.) Weaver has been in possession of it."

4. In obedience to the direction of the court, plaintiff offered in evidence the following records of deeds describing the land in question, and other documents:

(a) Deed made by C. L. Lindsey and wife, May McCauley Lindsey, to C. C. Weaver and wife, Lovie C. Weaver, dated 1 January, 1934, filed for registration 20 January, 1934, and duly recorded.

(b) Deed made by Lovie C. Weaver, widow, to W. E. Hiatt (single), dated 26 May, 1945, filed for registration 5 June, 1945, and duly recorded.

(c) Deed made by W. E. Hiatt (single) to C. C. Edwards, dated 4 April, 1952, filed for registration 4 April, 1952, and duly recorded.

(d) Record of Sale Book 2, page 122, Office Clerk of the Superior Court of Durham County, indicating that on 26 September, 1927, "Mrs. May McCauley Lindsey, Trustee," through counsel, entered with the Clerk report of a sale made by her on 15 September, 1927, under the power contained in the purchase money deed of trust made to her by the plaintiff, Charlie Barbee. The report indicates that "C. L. Lindsey became the last and highest bidder for the sum of $300.00." This report appears to have been written into the Clerk's Record of Mortgage Sales Book, kept by him under the provisions of Ch. 146, Public Laws of 1915 (codified as Section 2591 of the Consolidated Statutes of 1919, from which former G.S. 45-28 and present G.S. 45-21.26 *et seq.* derive). This record book contains no reference to any further proceedings in connection with the report of sale, and all the printed forms appearing in the Clerk's book immediately following the form used for making the report of sale, for use in case of raised bid and order of resale, confirmation, and final account of the trustee, are blank.

(e) Deed made by Mrs. C. L. Lindsey, Trustee, to C. L. Lindsey, dated 31 May, 1945, filed for registration 5 June, 1945, and duly recorded. This deed recites that it is made in execution of the power of sale contained in the deed of trust made by the plaintiff on 1 January, 1917; that on default of the indebtedness thereby secured the Trustee duly advertised and sold the land at the courthouse door in Durham County on 15 September, 1927, when and where it was bid off by C. L. Lindsey at the high bid of $300.00; that the sale was reported to the Clerk and remained open for more than ten days and no advance bid or objection was made.

This action was instituted 6 May, 1952.

From judgment of involuntary nonsuit entered at the close of the plaintiff's evidence, he appeals.

W. J. Brogden, Jr., and Blackwell M. Brogden for plaintiff, appellant.
Spears & Hall for defendant, appellee.

JOHNSON, J. The general rule is that where a mortgage or deed of trust is given to secure a specific debt, payment of the debt extinguishes the power of sale and terminates the title of the mortgagee or trustee, and all outstanding interests in the land revert immediately to the mortgagor by operation of law. *Crook v. Warren,* 212 N.C. 93, 192 S.E. 684; *Saleeby v. Brown,* 190 N.C. 138, 129 S.E. 424; *Stevens v. Turlington,*

186 N.C. 191, 119 S.E. 210; *Walker v. Mebane,* 90 N.C. 259; 59 C.J.S., Mortgages, Sec. 550, p. 887; *Id.* Sec. 453, pp. 708 and 709; 36 Am. Jur., Mortgages, Sec. 413, p. 894.

And ordinarily a sale conducted under the power after full payment of the debt is invalid and ineffectual to convey title to the purchaser. *Crook v. Warren, supra; Fleming v. Barden,* 126 N.C. 450, p. 457, 36 S.E. 17; 59 C.J.S., Mortgages, 594, p. 1024; 37 Am. Jur., Mortgages, Sec. 803; Annotations: 19 Am. St. Rep. 274; 92 *id.* 597, 598. See also *Layden v. Layden,* 228 N.C. 5, 44 S.E. 2d 340; *Oliver v. Piner,* 224 N.C. 215, 29 S.E. 2d 690.

In the case at hand the plaintiff testified: "I paid to Mr. Lindsey all the money that I agreed to pay on the property." This testimony is sufficient, when considered with the rest of the evidence in the case, to justify, though not necessarily to impel, the inference that the debt secured by the deed of trust was fully paid before, rather than after, the trustee's deed was made to Lindsey in 1945. This by virtue of the presumption, shown by human experience, that in the ordinary course of affairs a rational person does not "lock the stable door after the steed is stolen." And if the debt was so paid, it necessarily follows that the trustee's deed made to Lindsey in 1945, more than seventeen years after the alleged foreclosure sale, is void. And on the record as presented the deed to Lindsey controls the validity of the subsequent deed made by Hiatt to the defendant under the doctrine of title by estoppel. Therefore, if the trustee's deed fails, so does the defendant's. And it is to remove these two deeds and put to rest the defendant's claim made thereunder, as an alleged cloud on the plaintiff's title, that this action is brought.

It necessarily follows that the plaintiff made out a *prima facie* case entitling him to go to the jury. See *Combs v. Porter,* 231 N.C. 585, 58 S.E. 2d 100, and cases cited.

In this view of the case we do not reach for decision the question whether, conceding that the plaintiff was in default at the times when the foreclosure sale and the trustee's deed were made, his surrender of possession to Weaver tolled the statute of limitations against foreclosure so as to give legal validity to the trustee's deed made some seventeen years after the foreclosure sale. See *Ownbey v. Parkway Properties,* 222 N.C. 54, 21 S.E. 2d 900; *Crews v. Crews,* 192 N.C. 679, 135 S.E. 784; *Woodlief v. Wester,* 136 N.C. 162, 48 S.E. 578.

We have given consideration to the other pleas of limitation set up by the defendant under various statutes, but conclude that on this record none of them may be invoked at the nonsuit level to defeat the plaintiff's *prima facie* case.

In reaching this conclusion we have not overlooked the rule which obtains with us that, except when a statute is relied upon to confer title

to land where the defendant must make good his asserted title to defeat the plaintiff's title when proved (*Land Co. v. Floyd,* 171 N.C. 543, 88 S.E. 862), where the statute of limitations is properly pleaded, the burden of proof is upon the plaintiff to show that his claim is not barred. The rationale of this rule is that when the statute is pleaded, it is then incumbent upon the plaintiff to show he has not brought to court a stale claim. *Muse v. Muse,* 236 N.C. 182, 72 S.E. 2d 431; *Rankin v. Oates,* 183 N.C. 517, 112 S.E. 32; *Pinnix v. Smithdeal,* 182 N.C. 410, 109 S.E. 265; *Tillery v. Lumber Co.,* 172 N.C. 296, 90 S.E. 196.

In the light of the foregoing principles we discuss the statutes relied on by the defendant.

As to his plea of title by adverse possession under color for seven years, G.S. 1-38, it is enough to say that this plea raised an issue of fact for the jury, with the burden of the issue being on the defendant. *McCracken v. Clark,* 235 N.C. 186, 69 S.E. 2d 184; *Land Co. v. Floyd, supra.*

It may be conceded that the plaintiff's admission that he gave Weaver possession of the premises in 1934 and has been out of possession since that time amounts to substantial proof tending to support the defendant's claim of title by adverse possession. But even so, the record is silent in respect to the duration of Weaver's possession, and there is no testimony whatsoever that either the defendant or his grantor Hiatt ever had possession. Moreover, there is no evidence in respect to the nature or character of Weaver's acts of possession or user of the land. As to this, the plaintiff merely said: "I have not been in possession of that land since that time (1934). Mr. Cooper Weaver has been in possession of it." It is elemental that mere possession does not necessarily amount to adverse possession in law. *Price v. Whisnant,* 236 N.C. 381, 72 S.E. 2d 851; *Cox v. Ward,* 107 N.C. 507, 12 S.E. 379; *Williams v. Wallace,* 78 N.C. 354. Thus the record fails to show either the character of user or the duration of possession or the continuity of possession necessary to ripen title under the seven-year statute. The presumptions do not supply these deficiencies to the point of justifying affirmance of the nonsuit under application of the doctrine of harmless error on the theory that the right result was reached, as applied in *Rankin v. Oates, supra,* and cases there cited. Here the evidence is wholly inconclusive on the issue of adverse possession. See *Price v. Whisnant, supra; Newkirk v. Porter,* 237 N.C. 115, 74 S.E. 2d 235.

Next, it is noted that the defendant sets up and relies on (1) the statute limiting the period of redemption by a mortgagor to ten years where the mortgagee has been in possession, G.S. 1-47 (4), and (2) the ten-year residuary statute, G.S. 1-56, which by its terms applies only to actions for relief not specifically enumerated in other statutes of limitation. (*Woodlief v. Wester, supra,* 136 N.C. 162, 48 S.E. 578).

In the outset it is to be noted that on the record as presented the plaintiff's action is not one to redeem. Rather, it is an action to quiet title under the Jacob Battle Act. Ch. 6, P.L. 1893, now codified as G.S. 41-10. Under this Act, the plaintiff is not required to show that he is either in or out of possession. *Vick v. Winslow,* 209 N.C. 540, 183 S.E. 750; *Satterwhite v. Gallagher,* 173 N.C. 525, 92 S.E. 369. Nor is the plaintiff required to show that the defendant is an occupant or any more than a claimant of the land in controversy. *Wells v. Clayton,* 236 N.C. 102, 107, 72 S.E. 2d 16; *Duncan v. Hall,* 117 N.C. 443, 23 S.E. 362.

Here the plaintiff neither alleges nor attempts to prove that the defendant is in possession. The defendant's possession, if any there be, is left for the defendant to prove under his special pleas. The plaintiff asks nothing by way of accounting and redemption. He alleges that the adverse claim of the defendant is "based solely" upon the deed made to him by Hiatt dated 4 April, 1952, as bottomed upon the alleged activating foreclosure deed made by the trustee to C. L. Lindsey, 31 May, 1945. The gravamen of the plaintiff's cause of action is that there was no valid foreclosure of the deed of trust or effective conveyance by the trustee; that until the trustee's deed was put to record in 1945, the plaintiff held clear, unmistakable record title. He proceeds upon the theory that he was not menaced to the point of being exposed to the running of limitations (except perhaps G.S. 1-39) until the defendant's claim arose under the activating effect of the trustee's deed. He brings this action in 1952, within ten years after the execution of that deed. He does not join as defendant either Hiatt, Weaver, or Lindsey. He only sues Edwards, who purchased from Hiatt in 1952. The question of the sufficiency of the plaintiff's pleadings is not challenged. See *Wells v. Clayton, supra; Ricks v. Brooks,* 179 N.C. 204, 102 S.E. 207.

The fact that the plaintiff brings this action under the Battle Act, G.S. 41-10, deprives the defendant of no right. He has the right to defend the validity of his alleged title on every relevant ground available in any type of action involving recovery or possession of real property. However, the setting up of such defenses does not perforce change the fundamental character of the plaintiff's main action as charted by him, nor may the plaintiff's evidence which tends in part to support one or more of the defenses set up by the defendant be construed as dissolving or diluting the plaintiff's *prima facie* proofs to the point of justifying nonsuit at the close of his evidence. It is the function of the jury, and not the court, to resolve the discrepancies and dispose of the contradictions in the evidence. *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864.

As to the plea that the plaintiff has not been in possession within twenty years next prior to the commencement of the action, it may be doubted that this plea shifted to the plaintiff the burden of showing he had been

in actual possession within the statutory period. This for the reason that on showing of title under the common source deed from Lindsey to him in 1917, followed by *prima facie* proof that the foreclosure deed is void because of prior payment of the debt secured by the deed of trust, he had the benefit of the presumption created by G.S. 1-42, under which one who establishes legal title to the *locus in quo* is presumed to have been possessed thereof within the twenty-year period limited by G.S. 1-39. The two statutes, G.S. 1-39 and G.S. 1-42, are construed together. *Conkey v. Lumber Co.*, 126 N.C. 499, 36 S.E. 42. But be this as it may, the record indicates that the plaintiff met all the requirements of G.S. 1-39 when he offered the deed made to him by Lindsey in 1917 and testified he held under it and farmed the land from year to year until 1934 or 1935. The action was brought in 1952. Hence he has shown possession within the twenty-year period limited by G.S. 1-39. *Conkey v. Lumber Co., supra.*

In this state of the record, for the reasons given, the plaintiff's action survives the motion for nonsuit when tested by the various statutes of limitation set up and relied on by the defendant.

And it is manifest from what we have said that the pleas of estoppel and laches are unavailing to justify the nonsuit below.

We make no intimation respecting the ultimate merits of the case. But upon the record as presented, with the defendant's defenses undeveloped and in repose, it appears that the plaintiff has made out a *prima facie* case. The judgment below is

Reversed.

STATE v. NOAH DOCKERY.

(Filed 23 September, 1953.)

1. Homicide §§ 20, 21—

In a homicide prosecution, testimony of a declaration made by defendant amounting to a general threat or showing a general malevolent spirit is incompetent on the question of malice, premeditation and deliberation, but if the other evidence gives defendant's statement individuation so that the jury may infer that such threat or statement referred to the deceased or to a class to which deceased belonged, the testimony is competent.

2. Same—

Testimony that defendant declared ". . . they are trying to make outlaws out of us and there will be plenty of trouble over this" *is held* competent in this prosecution of defendant for the fatal shooting of the sheriff of the county, in view of the fact that the other evidence adduced discloses that the statement was made in connection with defendant's attempt to

have his son released on bail and was directed to the law enforcement officers of the county.

3. Criminal Law § 50f—

While counsel are entitled to wide latitude in making their arguments to the jury, counsel may not go outside the record and inject into their arguments facts not included in the evidence.

4. Homicide § 28—

In a homicide prosecution, the jury has the right, in its unbridled discretion, in all cases in which a verdict of guilty of murder in the first degree is reached, to recommend that the punishment shall be imprisonment for life. G.S. 14-17.

5. Criminal Law § 50f—

In a homicide prosecution, neither counsel for the private prosecution nor the solicitor is entitled to argue, in appealing to the jury not to recommend life imprisonment, that life sentences are always commuted in North Carolina, since such argument is not only outside the record, but also contrary to the spirit and purpose of G.S. 14-17.

6. Criminal Law § 78c—

Ordinarily, a new trial will not be awarded on appeal for improper argument of the solicitor or private prosecution unless an exception thereto has been timely entered and duly preserved, but when a sentence of death is mandatory upon the verdict, and statement disclosing an improper and prejudicial argument to the jury by the private prosecution appears of record by order of the trial court, a new trial will be awarded.

APPEAL by defendant from *Gwyn, J.*, March Term, 1953, of CHEROKEE.

Criminal prosecution tried upon an indictment charging the defendant with the premeditated murder of one Frank Crawford.

The evidence of the State discloses that about 4:00 p.m., on 3 March, 1953, Frank Crawford, Sheriff of Cherokee County, went to the home of the defendant, which is located about five miles northwest of Murphy, for the purpose of serving a warrant on the defendant. The warrant charged him with the crime of arson.

According to the evidence, the defendant recognized the deceased as Sheriff while he was standing outside of the defendant's house. He called him by his first name and inquired what he wanted. The Sheriff replied that he had papers for him. The Sheriff entered the house after the wife of the defendant opened the door, and went into the back room where the defendant had been lying down. Before the Sheriff opened the door to the bedroom, the defendant got his shotgun and loaded it, and as the Sheriff was apparently attempting to take something from his pocket, the defendant raised the shotgun and fired. The charge from the gun entered the chest of the deceased and resulted in his death within a few minutes.

Verdict: "Guilty of murder in the first degree."

Judgment: Death by asphyxiation.

Defendant appeals and assigns error.

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

O. L. Anderson and G. L. Houk for appellant.

DENNY, J. The defendant excepts to and assigns as error the admission of a statement made by him in connection with a preliminary hearing of his son, Allen Dockery, before a Justice of the Peace on 1 March, 1953. His son having been bound over to the Superior Court, the defendant, Noah Dockery, made inquiry as to the amount of bond required for the release of his son pending his trial in the Superior Court. He was advised that the bond was $500.00. He then inquired if he could make it. He was informed that he could do so if he was worth $500.00 over and above exemptions. He said: "I can't make it," and mentioned some other Dockery. He was likewise informed that the same financial requirement applied to him. He then said: "I won't make it and he can lay there and rot . . . they are trying to make outlaws out of us and there will be plenty of trouble over this."

The statement was admitted for the purpose of showing malice, premeditation, and deliberation. This declaration, standing alone, at most, would constitute no more than a general threat or statement showing a malevolent spirit. But, such statement, in our opinion, when considered with other facts adduced in the trial below, was admissible as a threat. It is ordinarily the rule that a general threat to kill or injure someone, or a statement showing a general malevolent spirit, not shown to have any reference to the deceased, is not admissible on the question of malice, premeditation, or deliberation. However, such threat or statement becomes admissible when other evidence adduced in the trial gives individuality to it so that the jury may infer that such threat or statement referred to the deceased or to a class to which he belonged. 40 C.J.S., Homicide, section 206 (c), page 1110, *et seq.*

"A threat to kill or injure someone, not definitely designated, is admissible in evidence, where other facts adduced give individuation to it; but general threats not shown to have any reference to the deceased cannot be proved." 21 Cyc. 922; *S. v. Ellis,* 101 N.C. 765, 7 S.E. 704; *S. v. Hunt,* 128 N.C. 584, 38 S.E. 473; *S. v. Shouse,* 166 N.C. 306, 81 S.E. 333; *S. v. Burton,* 172 N.C. 939, 90 S.E. 561; *S. v. Casey,* 201 N.C. 185, 159 S.E. 337; *S. v. Payne,* 213 N.C. 719, 197 S.E. 573; *S. v. Bowser,* 214 N.C. 249, 199 S.E. 31; *S. v. Hudson,* 218 N.C. 219, 10 S.E. 2d 730.

The record before us discloses that shortly after his arrest, the defendant made the following statement to one of the arresting officers: "That

he had been sore after his boy had been put in jail on Saturday and he said that the next one come (*sic*) after him was going to read a warrant to him or he wasn't going." It is further disclosed by the defendant's confession, which was offered in evidence by the State, that the defendant saw the Sheriff through a window before he entered his home on 3 March, 1953, and asked him what he wanted. The Sheriff replied that he had papers for him. The defendant said: "Read them to me." However, before the Sheriff reached the room where the defendant was, the defendant had gotten his gun, loaded it, and was standing holding the gun pointed toward the floor. The Sheriff opened the door and was apparently trying to get something out of his pocket with one hand and with the other hand still on the door knob, when the defendant aimed his gun and shot him. It is also stated in the confession that the Sheriff never threatened him; that he was always nice to him, but when he shot him he knew he was going to kill him or the Sheriff would kill him.

In *S. v. Burton, supra,* the defendant kept a small store in which he took his meals and slept. For several nights he had been annoyed by persons knocking at the door of his store and then running off. On the night of the homicide, about 10 o'clock, the deceased, a boy of 16 years of age, went with several other boys to the store and threw a piece of wood against the door and then ran off. The defendant shot at them, and killed the deceased. On the evening of the homicide the defendant was heard to say: "I expect to kill the first G—d d—n man that taps on my door tonight." The defendant was tried and convicted of murder in the second degree. He appealed and assigned as error the admission in evidence of the above statement. The court held it was admissible on the ground that it tended to show premeditation and deliberation and that the evidence offered by the State might have justified the jury in finding the defendant guilty of murder in the first degree.

Likewise, in *S. v. Hunt, supra,* the declaration of the defendant that he intended to get some whiskey and go down to the party that night and "raise some hell," was held competent to show malice in a trial for second degree murder for a killing committed at the party. The Court said: "It was not necessary to show special malice as to the deceased, since he was one of the persons at the party and embraced within the declaration of the defendant."

In the case of *S. v. Ellis, supra,* William and Amma Ellis, who were brothers, were sharpening their knives. William said, "somebody will be surprised tonight," and Amma said, "somebody will be surprised tonight." That night, when the deceased returned to his home, Amma stabbed him. The above statement was held admissible as a threat.

"Threats made by a person against one of a class are admissible on a prosecution for committing a crime against another of the same class."

20 Am. Jur., Evidence, section 347, page 322; *S. v. Baity,* 180 N.C. 722, 105 S.E. 200; *S. v. Miller,* 197 N.C. 445, 149 S.E. 590; *S. v. Casey, supra; S. v. Payne, supra.*

This assignment of error will not be upheld.

Another very serious question, however, is presented on this record. Counsel for private prosecution in making his argument to the jury, said: "There is no such thing as life imprisonment in North Carolina today."

This argument was made as a part of counsel's plea for a verdict of guilty of murder in the first degree without recommendation that punishment be life imprisonment. The reason advanced by counsel in support of this argument was that in cases where sentences are for life imprisonment, petitions are filed for commutation; that the commutations are allowed and persons thus sentenced to life imprisonment are finally paroled and allowed to go free.

Only one of the counsel for defendant was present in the courtroom at the time this argument was made and no objection was interposed to it at the time or later. However, the able trial judge, fearing that the prisoner's defense may have been prejudiced by the argument and his failure *ex mero motu* to instruct the jury not to consider it, directed that the facts with respect thereto be incorporated in the record and in the prisoner's statement of case on appeal to this Court.

It is generally recognized that wide latitude should be given to counsel in making their arguments to the jury. *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466; *S. v. Little,* 228 N.C. 417, 45 S.E. 2d 542. Even so, counsel may not go outside the record and inject into their arguments facts not included in the evidence. When this is done, it is the duty of the presiding judge, upon objection, to correct the transgression at the time of its occurrence or wait and do so when he comes to charge the jury. *S. v. Little, supra,* and cited cases. Moreover, where objection is made to the argument of counsel and the court refuses to instruct the jury to disregard it, such argument, if deemed prejudicial, will be held for error if an exception is duly and timely entered thereto. *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720. McIntosh, North Carolina Practice and Procedure, page 621. In such instances, however, if the argument is improper and not warranted by the evidence, and is calculated to mislead or prejudice the jury, it is the duty of the court to interfere *ex mero motu* and stop the argument and instruct the jury to disregard it. *McLamb v. R. R.,* 122 N.C. 862, 29 S.E. 894; *S. v. Noland,* 85 N.C. 576. Furthermore, an exception to improper argument of a solicitor or other counsel for the State may be entered after verdict, where the verdict rendered requires the court to enter a death sentence and the harmful effect of the argument is such that it may not be removed from the minds of the jurors.

S. v. Hawley, 229 N.C. 167, 48 S.E. 2d 35; *S. v. Little, supra; S. v. Noland, supra.*

G.S. 14-17, as amended by the 1949 Session Laws of North Carolina, Chapter 299, section 1, pertaining to punishment for murder in the first degree, reads as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate, any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury." The proviso was added by the 1949 amendment.

In construing the proviso in the above statute, *Winborne, J.,* in speaking for the Court in *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212, said: "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison. . . . No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right. Therefore, any instruction, charge or suggestion as to the causes for which the jury could or ought to recommend is error sufficient to set aside a verdict where no recommendation is made." This decision was cited with approval and followed in *S. v. Simmons,* 234 N.C. 290, 66 S.E. 2d 897.

The sort of argument made by counsel for private prosecution in the trial below was held to be prejudicial and by reason of which new trials were granted in *S. v. Little, supra,* and *S. v. Hawley, supra.* Moreover, the argument was directly in conflict with the spirit and purpose of the 1949 proviso contained in G.S. 14-17. It was an appeal calculated and intended to induce the members of the jury not to exercise the "unbridled discretionary right" given to them by law. Furthermore, in support of this appeal, counsel "traveled outside of the record" and argued facts which were not in the evidence. Even so, it was the duty of defendant's counsel to have requested the court to stop the argument and instruct the jury to disregard it as soon as the nature and purport of it became evident. If this had been done, the court, doubtless, could have cured any prejudicial effect the argument might have had up to that time on the minds of the jurors. But, since counsel for the defendant permitted the argument to proceed without objection, it is doubtful the court could

have given an instruction that would have removed the harmful effect the argument might have had on their minds if it had undertaken to do so. *S. v. Hawley, supra; S. v. Little, supra; S. v. Noland, supra.*

It is the rule of this Court to review all death cases in which an appeal is taken whether the appeal is perfected or not. In such cases, it is the custom of the Attorney-General, where the appeal is not perfected, to docket the record proper and move to dismiss the appeal under Rule 17, Rules of Practice in this Court, 221 N.C. 551. Where the Court finds no error on the record proper, the judgment of the court below will be affirmed and the appeal dismissed. *S. v. Watson,* 208 N.C. 70, 179 S.E. 455; *S. v. Lewis,* 230 N.C. 539, 53 S.E. 2d 528; *S. v. Medlin,* 231 N.C. 162, 56 S.E. 2d 396.

As we have heretofore pointed out, we have no assignment of error based on an exception to the argument we have discussed. However, the trial judge ordered that his statement with respect thereto be made a part of the record. Hence, we have taken cognizance of the improper argument of counsel since the verdict rendered made it mandatory for the court to enter a sentence of death. *S. v. Watson, supra.* Except in death cases, however, a new trial will not be granted because of improper argument of counsel, unless an exception thereto has been timely entered and duly preserved.

In light of our decisions applicable to the facts presented on this record, in our opinion the defendant is entitled to a new trial and it is so ordered.

New trial.

STATE v. ROBERT EARL DOUGHTIE.

(Filed 23 September, 1953.)

1. Criminal Law § 15—

A municipal trial justice's court, given by statute jurisdiction of mayors, has jurisdiction to bind a defendant over to the recorder's court upon a warrant charging a general misdemeanor committed within the municipality. G.S. 160-13.

2. Constitutional Law § 32—

A defendant convicted in a recorder's court having final jurisdiction of the offense charged may be tried in the Superior Court on appeal upon the original warrant without an indictment. Constitution of N. C., Art. I, secs. 12 and 13.

3. Criminal Law § 56—

A motion in arrest of judgment must be based upon want of jurisdiction or fatal defect or insufficiency in the record.

4. Same: Indictment and Warrant § 11¼—

Where the warrant or indictment fails to charge an essential element of the offense a motion in arrest of judgment will lie, but when the indictment or warrant charges every essential element of the offense, defendant, by appearing before the court having jurisdiction and pleading guilty, waives any mere irregularity, such as that the officer issuing the warrant was without authority.

5. Constitutional Law § 40—

A defendant may waive a constitutional right relating to a matter of mere practice or procedure.

APPEAL by the defendant from *Joseph W. Parker, J.*, June Term, 1953. EDGECOMBE.

Criminal action wherein the defendant appealed from the court's refusing to allow his motion in arrest of judgment.

On 11 August 1951, R. C. Robbins swore to and subscribed before D. M. Ruffin, Desk Sergeant of the Police Force of the Town of Tarboro —Tarboro is the county seat of Edgecombe County—a complaint charging that at and in Edgecombe County and in the Town of Tarboro (or the Town of Princeville) the defendant did unlawfully and wilfully assault him with a deadly weapon, to wit a pistol contrary to the statutes, etc. The said Ruffin issued a warrant addressed to the Chief of Police of Tarboro or to the Sheriff of said county or to any lawful officer commanding the arrest of the defendant on the charge in the attached complaint, and that the defendant be brought before the Trial Justice's Court of the Town of Tarboro to answer the charge in the complaint. On 13 August 1951, after hearing the evidence in the case the Trial Justice found probable cause, and bound the defendant over to the Recorder's Court for Edgecombe County.

On 13 August 1951 the defendant was tried on this warrant in the said Recorder's Court and found guilty. From a road sentence imposed he appealed to the Superior Court of Edgecombe County.

At the October Term 1951 of the Superior Court of said county the defendant came into court, and pleaded guilty to this warrant: The court sentenced the defendant to imprisonment for two years suspended on condition that he leave North Carolina and not return or enter the State for two years.

On 24 April 1952 the defendant was in the custody of the sheriff of Edgecombe County on the charge of having willfully violated the condition upon which the sentence imposed against him at the October Term 1951 of the Superior Court was suspended, and appeared before Frizzelle, J., holding the courts of the Second Judicial District, requesting that he be allowed to give bond for his appearance at the June Term 1952 of the Superior Court. His request was granted.

At the November Term 1952 of the Superior Court, the presiding judge found that the defendant had willfully violated the condition upon which the sentence of imprisonment imposed at the October Term 1951 had been suspended, and put said sentence into effect. The defendant appealed to this Court. On this appeal this Court held in *S. v. Doughtie,* 237 N.C. 368, 74 S.E. 2d 922, that the suspension of sentence on condition that the defendant leave the State and not return to or enter the State for two years was void, and remanded the case for a proper sentence.

At the June Term 1953 of the Superior Court the defendant was present, and the solicitor for the State prayed judgment against him. Whereupon for the first time in the case the defendant made a motion in arrest of judgment. The motion was denied, and the defendant excepted. The court then sentenced the defendant to imprisonment for one year.

The defendant excepted to the judgment, and appeals assigning error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Weeks & Muse for defendant, appellant.

PARKER, J. The defendant in his brief contends that the warrant issued by Ruffin, Desk Sergeant of the Tarboro Police Force, was unconstitutional and void by reason of G.S. 15-18, which specifies who may issue warrants. That though Ch. 275 of the Public-Local Laws of 1941, Section 4½, gives authority to the Desk Sergeant of the Police Department of Tarboro to issue warrants for offenses committed and to be tried in the Trial Justice's Court provided for in Ch. 126, Private Laws 1935, the offense charged in the warrant is a general misdemeanor and the Trial Justice's Court had no jurisdiction. That therefore the warrant was void; there has been no trial in the Trial Justice's Court; that an appeal may be tried in the Superior Court only where the case has been appealed after a trial in the inferior court, citing *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283. That to impose judgment upon him on a void warrant is in violation of Art. One, Sections 12 and 13 of the State Constitution. That because the purported warrant was void, the Superior Court had no jurisdiction.

The defendant makes no contention that the warrant does not charge a criminal offense, nor that the punishment imposed by the court is in excess of that authorized by law for an assault with a deadly weapon.

The Act creating the Trial Justice's Court in the Town of Tarboro gave that court jurisdiction in all criminal matters as are now or may hereafter be conferred by law upon mayors of cities or incorporated towns, and that the Trial Justice shall qualify for the office by subscribing to an oath in form substantially as provided for justices of the peace.

The N. C. Code of 1939 (now G.S. 160-13) provides that the mayor of every city or incorporated town is hereby constituted an inferior court, and as such court shall have the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the State or under the ordinances of such town or city. The Trial Justice had jurisdiction to bind the defendant over to the Recorder's Court of Edgecombe County for trial. N. C. Code of 1939 (now G.S. 7-129); *S. v. Myrick,* 202 N.C. 688, 163 S.E. 803. The defendant was found guilty in the Recorder's Court, which had final jurisdiction, and appealed to the Superior Court. The Superior Court then had jurisdiction to try him upon the original accusation of the inferior court and without an indictment of a grand jury. Such a trial in the Superior Court did not violate the provisions of Art. One, Sections 12 and 13, of the State Constitution. *S. v. Thomas, supra.* The defendant by his general appearance in the Trial Justice's Court and the Recorder's Court and his plea of guilty in the Superior Court waived irregularity, if any, in the issuance of the warrant or any objection predicated upon any irregularity in the warrant, provided the warrant charged every element of an assault with a deadly weapon. *S. v. Harris,* 213 N.C. 648, 197 S.E. 142; *S. v. Abbott,* 218 N.C. 470, 11 S.E. 2d 539; *S. v. Turner,* 170 N.C. 701, 86 S.E. 1019; *S. v. Cale,* 150 N.C. 805, 63 S.E. 958; *People v. Jury,* 252 Mich. 488, 233 N.W. 389.

A motion in arrest of judgment is one made after verdict or a plea of guilty to prevent entry of judgment. *S. v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503; 15 Am. Jur., Crim. Law, p. 101 (citing cases from other states). For the motion to be sustained it must appear that the court is without jurisdiction, or that the record is in some respect fatally defective and insufficient to support a judgment. *S. v. Scott,* 237 N.C. 432, 75 S.E. 2d 154; *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. McCollum, supra.*

Where the warrant or indictment fails to charge the essential elements of the offense a motion in arrest of judgment will lie. *S. v. Vanderlip,* 225 N.C. 610, 35 S.E. 2d 885; *S. v. Phillips,* 228 N.C. 446, 45 S.E. 2d 535.

Any defect in the process by which a defendant is brought into court may be waived by him by appearing before the court having jurisdiction of the case. *S. v. Turner, supra; S. v. Cale, supra.* The defendant may waive a constitutional right relating to a mere matter of practice or procedure. *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513. If the law were otherwise, a defendant could take his chance of acquittal on a trial on the merits and, if convicted, contend that he was not in court.

Incidentally, it is not necessary that a true bill found by the grand jury should have been signed by the solicitor. *S. v. Shemwell,* 180 N.C. 718, 104 S.E. 885.

In *S. v. Harris, supra,* the defendant was convicted in the municipal court of the City of High Point of operating an automobile upon the public highway while under the influence of intoxicating liquor. He appealed to the Superior Court, and upon a trial *de novo* was again convicted and appealed to the Supreme Court. The defendant assigned as error the court disallowing a motion in arrest of judgment for the reason that the warrant was not signed by the proper officer. In deciding that this assignment of error cannot be sustained because the defendant entered a general appearance both in the municipal court and in the Superior Court, this Court said: "Such an appearance was a waiver by the defendant of any objection predicated upon any irregularity in the warrant."

In *S. v. Turner, supra,* the defendant was convicted in the municipal court of High Point for having liquor in his possession for sale, and appealed to the Superior Court. In the Superior Court he moved to quash the proceeding on the ground that the Chief of Police of High Point had no authority to take the affidavit of the complainant who applied for the warrant and signed as complainant, and, therefore, had no authority to issue the warrant. The defendant was again found guilty, and made the same motion in arrest of judgment. This Court said: "There is no defect here in the charge of the offense, and the defendant waived any objections to the regularity of the process by which he had been brought into court by appearing generally in the municipal court and going to trial."

In *S. v. Cale, supra,* the warrant of the justice was unsigned and the deputation of the special officer was unwritten though the statutes required both signature and writing. Speaking for the Court *Hoke, J.,* later *C. J.,* said: "When considered in reference to process by which a defendant may be brought into court on a criminal charge, they may be waived by him; and if a defendant voluntarily appears or is forcibly brought before a court having jurisdiction to hear and determine the cause, and such court does hear and decide it, whatever may be the rights of the defendant against the officers, in the absence of other objection, the defects suggested in the process do not in any way affect the validity of the judgment rendered."

In *S. v. Abbott,* 218 N.C. 470, 11 S.E. 2d 539, this Court said: "In *S. v. Warren,* 113 N.C. 683, it was held: 'where a defendant pleads guilty, his appeal from a judgment thereon cannot call into question the facts charged, nor the regularity and correctness of the proceedings, but brings up for review only the question whether the facts charged and admitted by the plea, constitute an offense under the laws and Constitution.'"

In *People v. Jury, supra,* the defendant was convicted of an attempt to kill and murder. On appeal he raised this question that the complaint, warrant and his arrest and all subsequent proceedings are void because the complaint made against him was not signed and sworn to. That Court wrote "when defendant was arraigned and informed against, he pleaded guilty to the charge made against him in the information, and thus waived any defect in the prior proceedings."

Many of the cases relied upon by the defendant, for instance, *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. Albarty,* 238 N.C. 130, 76 S.E. 2d 381, are not in point, for they are cases where the warrant or indictment fails to allege all the elements of a criminal offense.

If there were any irregularity in the process by which the defendant was brought into the Superior Court, he waived it. The warrant charges every element of an assault with a deadly weapon, and the Superior Court had jurisdiction of the case. No rights of the defendant under Art. One, Sections 12 and 13, of the State Constitution were violated. The record is in no respect fatally defective and insufficient to support the sentence.

The court's action in refusing the defendant's motion in arrest of judgment was correct.

The judgment of the lower court is

Affirmed.

J. A. PERRY AND EULA D. PERRY v. ALBERT DOUB, TRUSTEE, L. A. DOUB, TRUSTEE, AND CARY N. ROBERTSON.

(Filed 23 September, 1953.)

1. Pleadings § 2—

Causes of action for breach of agreement to lend stipulated sums of money, based upon allegations that sums less than those agreed upon were made available to plaintiffs, with allegations seeking special damages resulting from such breach, and a cause of action for forfeiture of interest for alleged usury, are all *ex contractu* relating to one agreement and may be properly joined. G.S. 1-123 (2).

2. Parties § 4—

A party holding funds in dispute as trustee until claimants should reach an agreement or the controversy legally determined is a proper party to the action to determine the legal rights in the funds.

3. Pleadings § 19b—

There must be a misjoinder of both parties and causes of action in order to work a dismissal upon demurrer, and a joinder of an unnecessary party defendant alone is insufficient ground for dismissal.

4. Pleadings § 19c—

Where the complaint is sufficient to state a cause of action, it may not be overthrown upon demurrer on the ground that additional facts alleged as the basis for recovery of punitive or special damages were insufficient for this purpose, since a complaint which sufficiently states a cause of action in any respect or to any extent may not be overthrown by general demurrer, and further, demurrer is not the proper mode of testing the extent of recovery or determining the rule for the measurement of damages, nor may a demurrer *ore tenus* to the cause of action for special damages be sustained.

5. Pleadings § 17a—

Where matter constituting an estoppel is shown on the face of a pleading, ordinarily the question of estoppel may be raised by demurrer, but even in such instance the demurrer must point out specifically the matter constituting the estoppel, and where only a general demurrer is interposed and the question of estoppel is not ruled upon in the lower court, the Supreme Court on appeal will not rule thereon.

6. Appeal and Error § 37—

The function of the Supreme Court is to review alleged errors and rulings of the trial court and not to chart the course of trial in the lower court in advance of its rulings.

APPEAL by plaintiffs from *Harris, J.*, at February Civil Term, 1953, of WAKE.

Civil action arising out of contracts, heard below on demurrer to the complaint.

In the Spring of 1951, the plaintiffs, a farmer and his wife, were indebted to several persons and firms and were in need of capital with which to conduct farming operations that year. On 16 April, 1951, they executed to the defendant Robertson their note in the amount of $22,000, secured by deed of trust to the defendant L. A. Doub, Trustee. Following this, and on 23 April, 1951, the plaintiffs executed to Robertson a second note in the amount of $3,000, secured by a second deed of trust to Doub, Trustee. The first note was intended to consolidate all the plaintiffs' debts in one note, with any surplus proceeds to be used in the plaintiffs' farming operations. The second note was intended to provide the plaintiffs additional moneys to purchase necessary farm supplies and finance current farming operations.

The plaintiffs allege that the defendant Robertson paid over to them, or for their use and benefit, only $16,449.77 out of the $22,000 note, and only $2,182.57 out of the $3,000 note, notwithstanding repeated demands were made for the full amount of each note before the due dates thereof.

On 11 December, 1951, the plaintiffs met with Robertson for the purpose of paying off the notes and having the deeds of trust canceled. A dispute arose over the amounts due when Robertson claimed the full face

amount of each note. Thereupon the plaintiffs, desiring to have the two deeds of trust canceled, that day made a payment to Robertson and also placed in the hands of Albert (L. A.) Doub, Trustee, a stipulated sum under a trust agreement executed by J. A. Perry, Doub, Trustee, and Robertson, the pertinent parts of which are as follows: ". . .; whereas the said J. A. Perry and wife, Eula D. Perry, are paying on said indebtedness as of this date the sum of $17,415.41 to C. N. Robertson; and whereas there is a dispute as to the balance owed and that there is a balance on hand of $7,677.18, which the said J. A. Perry and C. N. Robertson have agreed to deposit with Albert Doub, as trustee to be held by him as trustee until a settlement can be reached between said J. A. Perry and C. N. Robertson, which both parties have agreed shall be done on or before the 1st day of January, 1952. If said agreement has not been reached by that date the party aggrieved shall commence an action by the 1st day of February, 1952, to legally determine the correct amount, failure to institute action as provided shall authorize the said trustee to pay said amount in his hands to C. N. Robertson on his stated account and any balance to J. A. Perry. It is agreed that said stated account shall be filed with said trustee on or before the 1st day of January, 1952, and that copy of same will be furnished the said J. A. Perry."

No agreement was reached, and the plaintiffs instituted this action within the time limited in the trust agreement.

The plaintiffs in their complaint declare on five separate causes of action: In the first and second causes, they allege that the defendant Robertson in paying over to or for the benefit of the plaintiffs on the notes of $22,000 and $3,000 only the respective sums of $16,449.77 and $2,182.57, and in refusing to pay over the balance of the face amount of each note thereby breached the contract in respect to each loan, thus entitling the plaintiffs to recover as against the defendant Robertson, and out of the trust fund in the hands of Doub, Trustee, the amounts so withheld. In the third and fourth causes of action, the plaintiffs allege that the defendant Robertson made usurious interest charges against them in connection with each of the two loan transactions, by reason of which Robertson should be required to forfeit all interest on the loans pursuant to the provisions of G.S. 24-2. In the fifth cause of action, the plaintiffs seek to recover damages, both actual and punitive, for crop failures and farm losses, alleged to have resulted from plaintiffs' inability to finance farming operations on account of the refusal of Robertson to pay them the full amounts due under the loan contracts.

The defendant Robertson demurred to the complaint on the grounds of misjoinder of causes of action and also misjoinder of parties and causes.

The trial judge concluded that there was a misjoinder of causes of action and also a misjoinder of parties and causes, and entered judgment

sustaining the demurrer as to the last three causes of action, but overruling it as to the first two and leaving the case pending as to these.

The plaintiffs excepted and appealed; and in this Court the defendant Robertson demurred *ore tenus* to the plaintiffs' fifth cause of action for failure to state a cause of action.

Samuel Pretlow Winborne and Vaughan S. Winborne for plaintiffs, appellants.

Mordecai & Mills for defendant, appellee.

JOHNSON, J. G.S. 1-123 provides in part: "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of— . . . 2. Contract, express or implied."

Here all five causes of action declared on in the complaint arise out of contract. The first two are for the recovery, by way of recoupment as against the defendant Robertson, for moneys alleged to have been wrongfully withheld by him under the loan contracts of $22,000 and $3,000. 47 Am. Jur., Set-off and Counterclaim, Sections 2 and 9. The third and fourth causes are to have the interest stricken from the loans as the penalty for charging usury. G.S. 24-2. An action for such relief from usury is deemed an action on contract. *Finance Co. v. Holder,* 235 N.C. 96, 68 S.E. 2d 794. In the fifth cause of action the plaintiffs seek special damages for breach of express contracts to lend money.

It necessarily follows that there is no misjoinder of causes of action.

Nor does the joinder of Doub, Trustee, work a misjoinder of parties. The terms of the trust agreement and the deposit of settlement funds with Doub, Trustee, make him a proper party to the action. Besides, the joinder of an unnecessary party defendant is mere surplusage. *Moore County v. Burns,* 224 N.C. 700, 32 S.E. 2d 225; *Sullivan v. Field,* 118 N.C. 358, 24 S.E. 735. It is the misjoinder of both parties and causes that works a dismissal of an action (*Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481); and where both occur, severance is not permissible. *Teague v. Oil Co.,* 232 N.C. 65, 59 S.E. 2d 2.

The demurrer as interposed does not present for review the question whether the plaintiffs are entitled to recover punitive damages. If good in any respect or to any extent, a plea will not be overthrown by general demurrer. *Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471; *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466; *Griffin v. Baker,* 192 N.C. 297, 134 S.E. 651. Besides, the rule is that ordinarily a general demurrer is not the proper mode of testing the extent of recovery to be had or of determining the rule that shall govern for the measurement of damages. 41 Am. Jur., Pleading, Sec. 219; 15 Am. Jur., Damages, Sec. 310.

Nor does this record present for review the question whether the plaintiffs are estopped by the terms of the trust agreement from prosecuting claim for any sum other than the $7,677.18 referred to in the trust agreement. Conceding that where matter constituting an estoppel is shown on the face of the opponent's pleading, ordinarily the question of estoppel may be raised by demurrer, even so, the demurrer must be special, rather than general, and point out specifically the matter constituting the estoppel. *Williams v. Aldridge Motors,* 237 N.C. 352, 75 S.E. 2d 237; *Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750; *Oldham v. McPheeters,* 201 N.C. 35, 158 S.E. 702; 19 Am. Jur., Estoppel, Sec. 182, p. 839; Annotation 120 A.L.R. 8, p. 84. Here the demurrer is silent on the question of estoppel, and it does not appear to have been ruled upon in the court below. Hence we refrain from doing so. The function of this Court is to review alleged errors and rulings of the trial court and not to chart the course of the lower court in advance of its rulings. *Grandy v. Walker,* 234 N.C. 734, 68 S.E. 2d 807; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488.

The defendant's demurrer *ore tenus* to the fifth cause of action for failure to state facts sufficient to constitute a cause of action is without merit. In point of fact and in legal contemplation the fifth cause is but an amplification of the first two causes of action by the addition of averments of special damages. In the first two causes only the loan moneys allegedly withheld are sought to be recovered by way of recoupment as against Robertson, whereas in the fifth cause of action the allegations are extended to cover special damages based on crop failure and farm losses resulting from Robertson's failure and refusal to pay the plaintiffs the full amounts due under the loan contracts, the pertinent allegations of the fifth cause of action being in substance (1) that the purpose of the loan contracts of $22,000 and $3,000 was in part "to provide capital for the plaintiffs' farming operations for that farm year"; (2) that the defendant Robertson wrongfully withheld from the plaintiffs $6,367.66; and (3) that on account of the defendant's refusal to pay over these moneys the plaintiffs were unable to cultivate, harvest, and house their five acres of tobacco, and that as a result they suffered financial loss in a stated amount. *Scott v. Ins. Co.,* 205 N.C. 38, 169 S.E. 801; *Wilson v. Motor Lines, supra.* See also *Williams v. Aldridge Motors, supra.*

We are not concerned with whether the plaintiffs may be able to make out their case, nor with the extent of their right of recovery. These are matters to be determined when the plaintiffs have produced their proofs. See *Brewington v. Loughran,* 183 N.C. 558, 112 S.E. 257; *Perry v. Kime,* 169 N.C. 540, 86 S.E. 337; *Herring v. Armwood,* 130 N.C. 177, 41 S.E. 96; *Spencer v. Hamilton,* 113 N.C. 49, 18 S.E. 167. Upon the record as presented we conclude that they are entitled to be heard on the merits of their case.

The demurrer *ore tenus* is overruled and the judgment below is Reversed.

J. W. WELBORN AND WIFE, MARY R. WELBORN, v. BATE LUMBER COMPANY.

(Filed 23 September, 1953.)

1. Trespass to Try Title § 1: Boundaries § 6—

Where, in an action in trespass, the parties stipulate that each has title to his respective tract and that the only controversy is as to the true location of the dividing line between the tracts, the action is converted into a processioning proceeding.

2. Boundaries § 6—

In a processioning proceeding what constitutes the true dividing line between the respective tracts of the parties is a question of law for the court while the location of the line must be settled by the jury under correct instructions based upon competent evidence.

3. Boundaries § 10—

In a processioning proceeding the question as to the location of the true dividing line must be submitted to the jury upon the conflicting evidence, and nonsuit may not be entered even though the evidence be such as to warrant a peremptory instruction on the issue, since a nonsuit in an action *in rem* settles nothing.

APPEAL by plaintiffs from *Bone, J.*, May Term, 1953, BEAUFORT. Reversed.

Civil action in trespass *quare clausum fregit,* converted into a processioning proceeding by stipulation of the parties.

In 1929 Eliza B. Branch, Burton Craig, and others, heirs at law of Nancy H. Branch, owned a boundary of land in Beaufort County containing more than 3,200 acres, lying partly within and partly without Little Swift Creek Drainage District. On 3 October 1929 they conveyed all of said tract of land lying within said district, containing 920 acres, to James H. Cassell. The northern boundary line of the district between Lateral No. 3 and Lateral No. 4 is the northern boundary line of the tract conveyed and the southern boundary of the land retained by the grantors. Defendant, through *mesne* conveyances, has acquired title to and now owns said Cassell tract lying within said district. Plaintiffs have acquired title to and now own the original boundary lying north of the northern boundary line of the district not conveyed to Cassell.

The establishment of the drainage district including the cutting of the canals or laterals was completed in 1924. The description in the deed to

Cassell executed in 1929 contains the following: "Bounded on the South and West by Lateral No. 3 of Little Swift Creek Drainage District, on the East by Lateral No. 4 of Little Swift Creek Drainage District, on the North by the boundary line of said District, it being tract No. 8 as shown on the maps of said Drainage District . . ." Plaintiffs contend that the true dividing line extends from the head of Lateral No. 4 to the head of Lateral No. 3 as they were originally cut and now exist. Defendant contends that the cutting of Lateral No. 3 was never completed in accord with the plans and specifications of the district, and its true head, according to such plans and the final map thereof, is at a point 38 chains and 59 links beyond its head as actually cut. That is, it contends that the head of Lateral No. 3 as contemplated by the description in the deeds which constitute its chain of title is the Lateral No. 3 extended approximately one-half mile, and that the true dividing line runs from the head of Lateral No. 4 to this point.

Plaintiffs instituted a special proceeding under G.S. Ch. 38 to locate, establish, and fix the true boundary line between the two tracts. Defendant proceeded to cut and remove timber from the area in dispute and refused the request of plaintiffs to cease and desist until the line was judicially determined. Plaintiffs thereupon instituted this action for damages and to restrain the alleged trespass.

During the trial in the court below, at the conclusion of plaintiffs' evidence, the parties entered of record a stipulation as follows:

"IT WAS STIPULATED that the line claimed by the plaintiff Wellborn extends from the head of Canal No. 4 to the head of Canal No. 3 as the said two canals have been cut and are located on the ground. The line claimed by the defendant Bate Lumber Company extends from the head of Canal No. 4 to a point North 43 deg. 45' West 38.59 chains from the head of said canal 3 which is 2,545 feet and the land in controversy is a triangle formed by these three lines. Defendant Bate Lumber Company has cut timber on this triangle. IT IS FURTHER STIPULATED that if the line is as claimed by plaintiff and plaintiff is the owner of the triangle, the defendant Bate Lumber Company will compensate plaintiff for the timber cut in an amount to be agreed upon or, upon failure to agree as to the amount, an issue may be submitted at a subsequent term of the Court."

At the conclusion of the evidence, the court, on motion of defendant, entered judgment dismissing the action as in case of nonsuit, and plaintiffs appealed.

Rodman & Rodman for plaintiff appellants.

McMullan & McMullan and John A. Wilkinson for defendant appellee.

BARNHILL, J. Title to real property is not at issue in this action. Plaintiffs and defendant admit the parties own the respective tracts claimed by them. The two tracts are contiguous and the northern boundary of the drainage district is the true dividing line. The exact location of this line is the question at issue. Realizing this, the parties entered into certain stipulations quoted in the statement of fact. These stipulations converted the trial in the court below into a processioning proceeding. *Goodwin v. Greene,* 237 N.C. 244. Thereafter, the action was not subject to dismissal as in case of nonsuit. *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633; *Plemmons v. Cutshall,* 230 N.C. 595, 55 S.E. 2d 74.

In any event, there is evidence in the record tending to locate the true dividing line as contended by the plaintiffs. At the time the unity of title was severed by the Branch heirs and that part of the original tract which is now owned by defendant was conveyed to Cassell, the canals had been cut. The head of Canal No. 3 was an ascertainable point then in existence. And on this question the engineer who made the preliminary survey testified: "When the District was established, I was familiar with its boundaries and the canals to be cut. I was likewise familiar with the plans and specifications for the canals. The canals in that District were all cut in accordance with the plans and specifications and orders of the Court."

There is other evidence in the record tending to establish the head of Canal No. 3 at a point in the northern boundary of the district and as the terminus of the line in controversy.

"It is settled law in this State that, in processioning proceedings to establish a boundary line, which is in dispute, what constitutes a dividing line is a question of law for the court, but a controversy as to where the line is must be settled by the jury under correct instructions based upon competent evidence. (citing cases)" *Winborne, J.,* in *Huffman v. Pearson,* 222 N.C. 193, 22 S.E. 2d 440.

Therefore, on this record, it was the duty of the court to submit an issue similar in form to the one suggested in *Greer v. Hayes,* 216 N.C. 396, 5 S.E. 2d 169; *Huffman v. Pearson, supra;* and *Goodwin v. Greene, supra,* except that it should read "where" rather than "what" is the true dividing line, etc. It should then have instructed the jury what, under the law and the evidence in the case, constitutes such boundary or dividing line.

That the evidence may be such as to warrant a peremptory instruction on the issue does not alter the rule that requires a jury to say, under proper instructions, where the line is actually located or justify a dismissal of the action. In an action *in rem* a judgment of nonsuit settles

nothing. And plaintiffs are entitled to judgment judicially locating and fixing the true dividing line even if it is finally located as contended by defendant. Only in this manner may it be determined whether defendant has committed a trespass on the land of plaintiffs.

The judgment entered in the court below is

Reversed.

STATE v. JOSEPH COOPER.

(Filed 23 September, 1953.)

1. Criminal Law § 62a—

A judgment that defendant be confined in the State's Prison at hard labor for a term of not less than two nor more than five years, entered upon defendant's plea of *nolo contendere* in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, *is held* in accordance with statute, G.S. 14-32, G.S. 148-42, G.S. 148-26, and exception to the judgment is untenable. The term "hard labor" means compulsory or involuntary labor required by law of prisoners in the State and does not signify labor of unusual severity.

2. Criminal Law § 17c—

A plea of *nolo contendere* admits for the purposes of the particular prosecution all the elements of the offense charged against the accused and gives the court complete power to sentence the accused for such offense, and therefore defendant may not contend that the court should acquit him or at most find him guilty of a less degree of the offense on the ground that evidence heard by the court for the purpose of determining punishment was insufficient to support conviction of the offense charged.

3. Same—

Upon a plea of *nolo contendere*, the hearing of evidence by the court for the purpose of determining the punishment is not limited to evidence which would be competent upon a trial of the defendant for the offense charged, but the court may look anywhere, within reasonable limits, for facts calculated to enable it to act wisely in fixing punishment.

APPEAL by defendant from *McLean, Special Judge,* at March Term, 1953, of BUNCOMBE.

Criminal prosecution upon an indictment charging that the defendant Joseph Cooper assaulted and wounded T. W. Simpson with a deadly weapon, to wit, a pistol, with intent to kill him, and in that way inflicted upon him serious injury not resulting in his death.

When the case was heard in the court below, the defendant was represented by counsel of his own selection. He entered an absolute plea of *nolo contendere,* which the presiding judge allowed the solicitor to accept.

After the acceptance of the plea, the presiding judge heard the testimony of five witnesses for the State and that of the defendant in his own behalf for the purpose of determining what punishment should be imposed. The witnesses for the State deposed to facts sufficient to show not only that the defendant committed the crime charged in the indictment, but also that he willfully discharged a firearm in the restaurant of one Tony Katsekos several months before that event. The defendant testified that he shot Simpson by accident. He denied discharging a firearm in the eating place operated by Katsekos.

The defendant objected to the receipt of the evidence relating to his conduct in the restaurant owned by Katsekos, and noted an exception to the overruling of this objection. The defendant asserted primarily that the State's testimony showed he shot the prosecuting witness by accident, and moved the court for a complete acquittal on that ground. The presiding judge denied this motion, and the defendant reserved an exception to this ruling. The defendant insisted secondarily that the State's evidence was insufficient to show an intent to kill even if it was ample to establish the other elements of the felonious assault and battery charged in the indictment, and moved the court to convict him of an assault with a deadly weapon without intent to kill rather than the crime charged on that ground. The presiding judge denied this motion, and the defendant saved an exception to this ruling.

After hearing all of the testimony on both sides and making the rulings set out above, the presiding judge entered this judgment: "It is the judgment of the court that the defendant be confined in the State's prison at hard labor for a term of not less than two nor more than three years." The defendant excepted to the judgment, and appealed.

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

S. J. Pegram and William J. Cocke for defendant, appellant.

ERVIN, J. We deem it advisable to make certain observations at the outset. The plea of *nolo contendere* entered by the defendant and accepted by the solicitor with the approval of the presiding judge was absolute in character. This being true, there is no basis for the contention of the defendant that his plea of *nolo contendere* was a conditional one with the ultimate issue of his guilt or innocence to be determined by the presiding judge. It necessarily follows that the decisions condemning conditional pleas of *nolo contendere* are not germane to the case in hand. *S. v. Horne,* 234 N.C. 115, 66 S.E. 2d 665; *S. v. Camby,* 209 N.C. 50, 182 S.E. 715.

It conduces to clarity of understanding to consider the exceptions in the inverse order of their taking. For this reason, we now address ourselves to the exception to the judgment.

The defendant's plea of *nolo contendere* constituted a formal declaration on his part that he would not contend with the State in respect to the charge, and was tantamount to a plea of guilty for the purposes of this particular criminal action. Consequently, the presiding judge acquired full power to pronounce judgment against the defendant for the crime charged in the indictment, *i.e.*, a felonious assault and battery with a deadly weapon with intent to kill resulting in serious injury as defined by G.S. 14-32, when he allowed the solicitor to accept the plea tendered by the defendant. *S. v. Thomas,* 236 N.C. 196, 72 S.E. 2d 525; *S. v. Jamieson,* 232 N.C. 731, 62 S.E. 2d 52; *S. v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79; *S. v. Stansbury,* 230 N.C. 589, 55 S.E. 2d 185; *S. v. Ayers,* 226 N.C. 579, 39 S.E. 2d 607; *S. v. Beasley,* 226 N.C. 580, 39 S.E. 2d 607; *S. v. Parker,* 220 N.C. 416, 17 S.E. 2d 475; *S. v. Burnett,* 174 N.C. 796, 93 S.E. 473, L.R.A. 1918A, 955.

G.S. 14-32 provides that "any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the State Prison or be worked under the supervision of the State Highway and Public Works Commission for a period not less than four months nor more than ten years." G.S. 148-42 specifies that "the several judges of the superior court are authorized in their discretion in sentencing prisoners for a term in excess of twelve months to provide for a minimum and maximum sentence." G.S. 148-26 stipulates that "all able-bodied prisoners of the State" shall be compelled to work at gainful employments during their imprisonment.

These statutory provisions fully sanction the judgment. The term "hard labor" as used in the judgment does not signify labor of unusual severity. It merely means the compulsory or involuntary labor required by law of prisoners of the State. *Ex Parte Brede,* 279 F. 147; *Brown v. State,* 74 Ala. 478; *In re Danton,* 108 Kan. 451, 195 P. 981; *State v. Huffstetter,* 213 S.C. 319, 49 S.E. 2d 585.

Since the witnesses for the State testified to facts sufficient to show that the defendant committed the felonious assault and battery charged in the indictment, there is no factual foundation for the alternative assumptions underlying the motion for an acquittal and the motion for a conviction of a less aggravated assault than that charged. The legal standing of the defendant would not be bettered a single whit, however, even if the State's evidence did afford him a factual foundation for one or the other of his assumptions. The court did not hear the State's testimony to determine

either the fact or the degree of the defendant's guilt. It was not incumbent upon the State to offer proof upon either of those matters. This is so because a plea of *nolo contendere* admits for the purposes of the particular case all of the elements of the offense charged against the accused, and gives the court complete power to sentence the accused for such offense. *S. v. Beasley, supra; S. v. Ayers, supra; S. v. Burnett, supra.* The court heard the evidence of the State as well as that of the defendant merely to enable it to exercise a sound discretion in determining the extent of the punishment. In passing from this phase of the appeal, we note that the defendant did not apply to the court at any time for permission to withdraw his plea.

This brings us to the exception to the admission of the testimony of the State showing that several months before the time mentioned in the indictment the defendant willfully discharged a firearm in a public eating place. We accept as valid the contention of the defendant that this evidence would have been incompetent if the State had offered it against the defendant in a trial on the merits necessitated by a plea of not guilty.

When it received this evidence, the court was not conducting a trial in the ordinary sense of the word. It was hearing testimony on a plea of *nolo contendere* for the sole purpose of determining what punishment it should impose upon the defendant.

In making a determination of this nature after a plea of guilty or *nolo contendere*, a court is not confined to evidence relating to the offense charged. It may look anywhere, within reasonable limits, for other facts calculated to enable it to act wisely in fixing punishment. Hence, it may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced. *S. v. Stansbury, supra.* In so doing the court is not bound by the rules of evidence which obtain in a trial where guilt or innocence is put in issue by a plea of not guilty. *People v. McWilliams,* 348 Ill. 333, 180 N.E. 832.

For the reasons given, the judgment is

Affirmed.

HIX STILES AND WIFE, ALICE STILES, FRED SUTTON AND WIFE, NORA SUTTON, FRANK GIBSON AND WIFE, PEARLIE GIBSON, v. JARVIS TURPIN, JOHN BROWN AND CHARLIE WILKEY, DEFENDANTS, INDIVIDUALLY, AND IN A REPRESENTATIVE CAPACITY OF MEMBERS OF DIX CREEK MISSIONARY BAPTIST CHURCH.

(Filed 23 September, 1953.)

Trusts § 3f: Cancellation of Instruments § 8—Allegations held insufficient to show any equity in favor of plaintiffs.

Allegations to the effect that the owner of land deeded same to a school committee for the "purpose of school and religious worship," that the property was thereafter used as a community building, especially for meetings of a religious nature without regard to denomination, until the county board of education conveyed it to a particular church, that thereafter the church denied the use of the building for religious purposes to nonmembers of the church, and that the deed from the board of education to the church was invalid, *is held* insufficient to allege a cause of action in plaintiff's favor against individual defendants, as individuals or as representatives of the church. The grantor and the grantees in the deed are not parties and the allegation of want of power in the grantor to convey is a mere conclusion of law. There were no allegations of facts sufficient to show fraud or undue influence, or adverse user, or any equitable interest in the property in favor of plaintiffs.

APPEAL by plaintiffs from *Gwyn, J.*, February Term, 1953, JACKSON. Affirmed.

Civil action to invalidate a deed to real property to compel defendants to permit plaintiffs and others similarly situated to use the building located on said property as a community house of worship, heard on demurrer.

Plaintiffs instituted this action in behalf of themselves and others similarly situated against the defendants individually and as representatives of the membership of the Dix Creek Missionary Baptist Church.

On 29 August 1896, David W. Turpin and wife conveyed the property described in the complaint to three named grantees, "School Committee for District #41, of the white race, of Barkers Creek Township, Jackson County, N. C."

On 16 July 1947 the Jackson County Board of Education conveyed said property to the Dix Creek Missionary Baptist Church. Whether this deed conveys the property to the church as such or to its proper officials who are authorized to hold title to church property is not disclosed.

The plaintiffs allege that (1) the Turpin deed was executed in 1896 "for the specific purpose of school and religious worship;" (2) the Christian citizens of the Dix Creek community erected a building on the land for the purpose of conducting school and religious worship; (3) said

building has since been used by all members of the Christian faith without regard to denomination; (4) said building was used as a community building, especially for meetings of a religious nature; (5) said building has been repaired from time to time by members of different denominations and no one church has ever claimed possession or control prior to 1947 when the members of the said Dix Creek Missionary Baptist Church "placed locks and bars on the entrance to said building and permitted no use of the same, except by the members who affiliated with the Dix Creek Missionary Baptist Church;" (6) repeated requests by plaintiffs who are not affiliated with said church and by others similarly situated have been denied, as a result of which plaintiffs and other nonmembers have suffered and will continue to suffer great and irreparable loss.

They pray that the deed executed in 1947 by Jackson County Board of Education be declared null and void and canceled of record, "and that said building be opened for worship by members of orthodox churches of any and all denominations residing in said Dix Creek community."

W. R. Francis and M. V. Higdon for plaintiff appellants.

Hugh Monteith, Orville D. Coward, and David M. Hall for defendant appellees.

BARNHILL, J. The plaintiffs allege record title in the Dix Creek Missionary Baptist Church. Altogether they seek to invalidate this deed to real property, neither the grantor nor the grantees are made parties to the action. No fraud or undue influence is alleged. While they do allege want of power in the grantor to convey title, this is a conclusion of law and not an allegation of fact. G.S. 115-45.

Furthermore, they allege in themselves and others similarly situated no equitable or other beneficial interest in the property such as would entitle them to the use and possession thereof. They allege nothing more than the permissive use of the building located on the property over a long period of time and the termination of that use by those who hold title to the property.

While they seek to allege a parol agreement between the members of the various religious denominations who resided in that community in 1896 and the grantees in the Turpin deed in respect to the use of the property, no sufficient facts are alleged to charge the grantees in that deed as trustees other than for the public school system of the county. In particular, they fail to allege facts sufficient to vest in them any equitable interest which may have been created by such an agreement.

In this connection it may be well to note that the authority of public school officials such as the grantees in the Turpin deed to enter into a binding agreement to hold title to property conveyed to them in their

official capacity in trust for any use or purpose other than the one expressed in the deed is at least subject to serious challenge.

The noted defects in the complaint clearly demonstrate plaintiffs have failed to state a cause of action against defendants either individually or as representatives of an unincorporated association of persons. Should the cause of action be permitted to proceed to judgment in favor of plaintiffs, they would be in no better position in respect to the *locus* than they were before this action was instituted. The judgment could not be enforced against those now in possession.

For that reason it is unnecessary for us to discuss or decide whether an action may be maintained against an unincorporated church under the class representation doctrine in the manner here attempted.

Carswell v. Creswell, 217 N.C. 40, 7 S.E. 2d 58, and the other cases cited and relied on by plaintiffs are factually distinguishable.

The judgment entered in the court below must be

Affirmed.

HYDE COUNTY v. MERRITT BRIDGMAN AND WIFE, MRS. MERRITT BRIDGMAN; O. L. WILLIAMS, TRUSTEE; SARAH O. WATSON AND HUSBAND, JACK WATSON.

(Filed 23 September, 1953.)

1. Taxation § 40b—

In a county's action to foreclose tax lien certificates, the introduction in evidence by the county of the tax lien certificates for the years in question, with tax certificates attached, on one hundred fifty acres of land outstanding in the name of a certain person, but without evidence that the hundred and fifty acre tract listed in the name of such person and referred to in the tax lien certificates is the same land as that described in the deed executed to defendants by another, is insufficient to make out a *prima facie* case to sell the land of the defendants.

2. Appeal and Error § 40l—

The Supreme Court will not decide the constitutionality of a statute when the appeal may be disposed of on other grounds.

APPEAL by plaintiff from *Bone, J.,* May Term, 1953. HYDE.

Civil action to foreclose tax lien certificates upon land for alleged nonpayment of taxes for the years 1922, 1923 and 1924.

This action was instituted 16 January 1952. The plaintiff in paragraph 6 of its complaint alleges the land is situated in Currituck Township, Hyde County, North Carolina, and is described on the tax list as 150 acres Cox land, and is more particularly described in deed from Jack Watson and wife to Merritt Bridgman and wife dated 24 February 1949

and properly recorded. The defendants in their answer deny the allegations of paragraph 6 of the answer and plead the indefiniteness of the description of the land to support a judgment for "taxes listed for said years."

The plaintiff introduced the following evidence. The 1922 Tax Abstract of Hyde County for Currituck Township which shows there was regularly listed for that year in the name of Bryan Gray 150 acres Cox land. The oath to this abstract was signed Bryan Gray, and was subscribed and sworn to 11 May 1922 before Gratz Credle. The 1922 Tax scroll of Hyde County for Currituck Township showing 150 acres Cox land listed for that year in the name of Bryan Gray and its value. The 1922 official Tax Yearbook for Hyde County duly certified to the Sheriff of said county for collection by the Clerk of the Board of Commissioners of the county, showing a tax regularly assessed for 1922 against the real and personal property of Bryan Gray, and showing the county and school rate. In the column entitled "when paid" appears the following: "L. Sale" (written in blue pencil). Tax Lien Certificate No. 1129 with Tax Ticket No. 528 attached outstanding in the name of Bryan Gray for the 1922 tax, issued to Hyde County. This tax lien certificate shows that it is against 150 acres Cox land. The attached tax ticket has stamped on its face "land sale" and also written thereon in red pencil "unpd." In these tax records appear two other small tracts of land listed in the name of Bryan Gray. All reference to them is omitted, because they are not involved in this action. Similar tax records for the years 1923 and 1924 were introduced in evidence by the plaintiff, showing substantially the same facts.

The defendants in open court admitted that all of these tax records were a part of the official tax records of Hyde County.

After the introduction of this evidence the plaintiff rested. Whereupon the defendants moved for judgment of nonsuit upon three grounds: 1. The indefiniteness of the description of the land in the tax records, and a failure to show that the 150 acres Cox land is the land owned by them; 2, that it has not been shown that taxes are unpaid on the land owned by the defendants; and 3, that the action is barred by H. B. 760, Ch. 775, Session Laws 1953. The motion was allowed by the court, and from the judgment of nonsuit entered the plaintiff excepts, and appeals.

George T. Davis for plaintiff, appellant.
O. L. Williams for defendants, appellees.

PARKER, J. The plaintiff contends that having introduced in evidence the tax lien certificates for the years 1922, 1923 and 1924 with tax tickets attached for the taxes for those years outstanding in the name of Bryan

Gray issued to Hyde County that it has made out a *prima facie* case according to G.S. 105-388 (c). That these records are presumptive evidence of the regularity of all prior proceedings incident to the sale and the due performance of all things essential to the validity thereof; that this includes the presumption that the property was lawfully listed and that the taxes for those years were lawfully assessed and levied; so that, unless the defendants should produce positive evidence of some defect, it has made out its case.

The plaintiff has introduced no evidence that the 150 acres Cox land listed in the name of Bryan Gray and referred to in the tax lien certificates with the tax tickets attached issued to Hyde County is the same land as that described in the deed from Jack Watson and wife to Merritt Bridgman and wife. Conceding for the sake of argument that the plaintiff has made out a *prima facie* case for the 150 acres Cox land listed in the name of Bryan Gray against Bryan Gray, it is attempting to sell the land of Merritt Bridgman and wife, and it has not made out a *prima facie* case to sell the land of the defendants. See *Rexford v. Phillips,* 159 N.C. 213, at 218, 74 S.E. 337.

The defendants contend that the plaintiff's action is barred by H. B. 760, Ch. 775, Session Laws 1953. The plaintiff contends that the provision of this act applying to cases now pending in the Superior Court of Hyde County is unconstitutional. It is not necessary to consider that question to decide this case. It is stated by all the cases and text-writers that the courts rigidly adhere to the rule never to anticipate a question of constitutional law in advance of the necessity of deciding it, and never to consider the constitutionality of legislation, unless it is imperatively required. Absolute necessity is the moving cause for decision of a constitutional question, and the court will not decide the challenged constitutionality of an act when the appeal may be disposed of on other grounds. *S. v. High,* 222 N.C. 434, 23 S.E. 2d 343; *Turner v. City of Reidsville,* 224 N.C. 42, 29 S.E. 2d 211; *Jarrell v. Snow,* 225 N.C. 430, 35 S.E. 2d 273; *S. v. Stallings,* 230 N.C. 252, 52 S.E. 2d 901; *S. v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198; *S. v. Wilkes,* 233 N.C. 645, 65 S.E. 2d 129; *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 96 L. Ed. 1153. 72 S. Ct. 863, 26 A.L.R. 2d 1378.

The judgment of nonsuit is

Affirmed.

DAVID LANGLEY v. WILLIAM A. PATRICK, NATIONAL SURETY CORPORATION, GEORGE TAYLOR, CHAIRMAN, AND TOMMIE SPARROW AND J. L. LANCASTER, MEMBERS, COMPRISING THE BEAUFORT COUNTY ALCOHOLIC BEVERAGE CONTROL BOARD.

(Filed 23 September, 1953.)

Principal and Surety § 5a—

A bond executed to a county alcoholic beverage control board indemnifying insured against loss of money or personal property and covering the employees of the board, but not executed by any of such employees, cannot render the surety liable to a third person for a tort committed by an employee of the board in the discharge of his duties, and since the bond does not purport to be in any sense a peace officer's performance bond, G.S. 128-9, the provisions of that statute may not be incorporated into the contract under the doctrine of aider by statute.

APPEAL by plaintiff from *Bone, J.*, May Term, 1953, of BEAUFORT.

Civil action to recover of Beaufort County Alcoholic Beverage Control Board, William A. Patrick, one of its enforcement officers, and National Surety Corporation damages for an alleged assault and battery upon the plaintiff.

The plaintiff's evidence discloses that on the night of 15 June, 1951, he was walking along a woods path near his home in Pitt County looking for his cow, when suddenly someone near the path hollered at him, "Halt, Claude." The plaintiff, being startled, broke and ran. He was pursued by the defendant Patrick who shouted again, "Halt, Claude," and at that time shot the plaintiff in the leg, and again in the hip after he had fallen. The plaintiff further testified: "Mr. Patrick then jumped astraddle of me . . . and said, 'What in the Hell you doing out here, Claude?' I replied, 'This ain't Claude.' Then he wanted to know who I was and where I lived."

The defendant Patrick was employed by the Beaufort County ABC Board as an enforcement officer and had been sent to Pitt County by his superiors, as permitted by G.S. 18-45 (o), to assist the officers of that county in raiding an illicit liquor still.

Under date of 20 July, 1940, the defendant National Surety Corporation issued a blanket indemnity contract covering the employees of the Beaufort County ABC Board. To this contract a rider was attached covering William A. Patrick for an annual period including 15 June, 1951, in the principal sum as to Patrick of $1,250, in consideration of the payment of an annual premium of $5.

The pertinent provisions of the contract are:

"INDEMNITY SECTION—ACTS COVERED: . . . NATIONAL SURETY CORPORATION, hereinafter called the Underwriter, in consideration of an

annual premium, hereby agrees to indemnify BEAUFORT COUNTY ALCOHOLIC BEVERAGE CONTROL BOARD of Washington, N. C., hereinafter called the Insured, to the extent and upon the terms and conditions specified by this bond, against any loss of money or other personal property, belonging to the Insured or for which the Insured is legally liable, caused by larceny, embezzlement, forgery, misappropriation, wrongful abstraction or wilful misapplication or any other fraudulent or dishonest act or acts committed by any of the Insured's employees while covered under this bond."

At the close of the plaintiff's evidence, judgment of involuntary nonsuit was entered in favor of all defendants except William A. Patrick. Exception by plaintiff. The jury returned a verdict in favor of the plaintiff and against the defendant Patrick in the sum of $2,000, and judgment was entered thereon. The record discloses that execution on this judgment has been returned unsatisfied.

From the judgment as of nonsuit entered at the close of the plaintiff's evidence, he appeals.

LeRoy Scott and John A. Wilkinson for plaintiff, appellant.
Rodman & Rodman for American Surety Corporation, appellee.

JOHNSON, J. The plaintiff concedes in this Court that the judgment as of nonsuit was properly entered as to the Beaufort County ABC Board. He insists, however, that the trial court erred in dismissing the case as to the defendant National Surety Corporation.

Thus, the appeal presents this single question: Does the indemnity contract in suit cover liability for the alleged assault and battery committed by enforcement officer Patrick? The record impels a negative answer.

By the terms of the contract the Surety Corporation agrees "to indemnify Beaufort County Alcoholic Beverage Control Board . . . against any loss of money or other personal property, belonging to the Insured or for which the Insured is legally liable, caused by larceny, embezzlement, . . . or any other fraudulent or dishonest act or acts" of the defendant Patrick.

The contract is not conditioned "for the faithful performance" of the duties of enforcement officer Patrick as a peace officer as required by G.S. 128-9. In fact, the instrument is not executed by Patrick or any of the covered employees of the Board. At most the contract is one of indemnity, in the nature of a fidelity bond, and in no sense does it purport to be a peace officer's performance bond as required by G.S. 128-9. Accordingly, the terms of that statute, requiring peace officers to give bond for the faithful performance of their duties as such, may not be treated

as being incorporated in the instant contract on the theory that the statute was within the contemplation of the parties and that they intended to include the conditions thereof in the contract. The doctrine of aider by statute, recognized in *Dunn v. Swanson,* 217 N.C. 279, 7 S.E. 2d 563, and *Price v. Honeycutt,* 216 N.C. 270, 4 S.E. 2d 611, does not cover the factual situation here presented. See also 43 Am. Jur., Public Officers, Sec. 406; Annotation 109 A.L.R. 501. The cases from other jurisdictions relied on by the appellant, including *Holland v. American Surety Company,* 149 Fla. 285, 6 So. 2d 280, 140 A.L.R. 1451, are factually distinguishable, and are not considered as controlling here.

The judgment as of nonsuit below is sustained under authority of *Midgett v. Nelson,* 214 N.C. 396, 199 S.E. 393, and cases there cited. See also 67 C.J.S., Officers, Sec. 161; *Salisbury v. Lyerly,* 208 N.C. 386, 180 S.E. 701. *Cf. Jordan v. Harris,* 225 N.C. 763, 36 S.E. 2d 270.

On this record, we are not concerned with other remedies available to the plaintiff. See G.S. 128-9.

Affirmed.

STATE v. O. A. DAVIS.

(Filed 23 September, 1953.)

Criminal Law §§ 53f, 53m—Instruction upon juror's inquiry as to whether they could recommend mercy held without error.

In this prosecution for drunken driving, the jury several times reported disagreement, and on one of these occasions the foreman asked whether it would be within the jury's right to ask mercy in rendering the verdict. The court instructed the jury that the matter of judgment was the responsibility of the judge and that the jury should arrive at a verdict of guilty or not guilty according to how it found the facts from the evidence in applying the law as given it by the court. *Held:* The occurrence does not entitle defendant to a new trial upon his appeal from a verdict of guilty, and in fact any other instruction would have been improper as tending to influence the jury.

APPEAL by defendant from *Bobbitt, J.,* February Term, 1953, of SURRY. No error.

The defendant was charged with operating a motor vehicle on the highway while under the influence of intoxicating liquor or narcotic drugs. G.S. 20-138. The jury returned verdict of guilty, and from judgment pronounced thereon the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State.

Allen, Henderson & Williams for defendant, appellant.

DEVIN, C. J. The defendant's motion for judgment as of nonsuit was properly denied. The evidence was sufficient to carry the case to the jury. *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

The defendant's assignments of error based upon exceptions noted to rulings of the court in the admission of testimony are without merit. The court's general charge to the jury was free from error, but the defendant noted exception to subsequent instructions given to the jury by the court in response to inquiry from a juror. The circumstances were these: The jury apparently had experienced difficulty in arriving at a verdict. Several times they reported disagreement but were instructed to continue their deliberations. On one of those occasions a juror asked to speak to the court. The court replied he could not have a private conversation with a juror, "You have to return a verdict of guilty or not guilty and no more." However, the court stated if the jury was confused as to a matter of law bearing on the case, he would be glad to give further instructions. Thereupon the foreman asked, "Would it be within our rights to ask mercy in this case in rendering the verdict?" To this the court replied as follows: "Your responsibility is to answer whether or not you find the defendant guilty or not guilty. The matter of the judgment to be pronounced upon the verdict is entirely the responsibility of the judge, and it is not part of your responsibility at all; in arriving at your verdict, you arrive at a verdict of guilty or not guilty according as you find the facts from the evidence and apply the law as given you by the Court. You may retire and deliberate further." Thereafter the jury returned verdict of guilty, and the Court rendered the judgment appealed from.

The exceptions based on these expressions of the trial judge afford insufficient basis upon which to award a new trial.

Evidently some of the jurors were unwilling to agree to a conviction, and if the judge had expressly authorized the jury to recommend mercy in rendering their verdict, it would doubtless have been understood as an intimation that if they agreed to such a verdict the court would be lenient. This would have afforded ground for the claim that the court had improperly influenced the verdict. *S. v. Matthews,* 191 N.C. 378, 131 S.E. 743. Hence it would seem to follow when the judge in effect declined to authorize a verdict in the form suggested, or to authorize more than a verdict of guilty or not guilty, his action should not be regarded as prejudicial to the defendant or held for error.

If the jury of its own motion had added to its verdict a recommendation of mercy, the judge would not have been bound to consider it in pronouncing judgment. Under our system the trial judge may not express or intimate an opinion as to the issuable facts to be found by the jury. Correct instruction as to the law and a fair statement of the evi-

dence limit his responsibility. Equally so the jury must be content to leave to the judge the responsibility imposed upon him to render judgment upon their verdict within the limits prescribed by statute. The minds of the jurors engaged in the trial of a criminal case should not be diverted from the question of the guilt or innocence of the accused under the evidence by improper reference to the significance or *quantum* of punishment possible or probable upon conviction. *S. v. Howard,* 222 N.C. 291, 22 S.E. 2d 917; *S. v. Ward,* 222 N.C. 316, 22 S.E. 2d 922.

We conclude that in the trial there was

No error.

GAITHER CORPORATION v. MARK L. SKINNER, ORIGINAL DEFENDANT, AND C. R. HOPKINS, NEW PARTY DEFENDANT.

(Filed 23 September, 1953.)

1. Parties § 3—

Parties whose interests are such that no decree can be rendered which will not affect them, so that the court cannot proceed to judgment until they are brought in, are necessary parties.

2. Parties § 4—

Where the court can proceed to adjudicate the rights of the parties to the action without necessarily affecting the rights of others, but such strangers to the action have an interest in the subject of the action or have rights therein which might be properly determined if they were brought in, they are proper parties.

3. Parties § 10—

Whether persons who would be proper but not necessary parties to the action should be joined, rests in the sound discretion of the court.

4. Contracts § 19: Torts § 4—Owner is entitled to sue contractor without joining subcontractor performing defective work.

The owner sued his contractor for breach of the contract on the ground that the roof was defective and leaked. Defendant contractor sought to have his subcontractor joined as a party defendant upon allegations that if the roof were defective, the subcontractor had failed to erect it in accord with the specifications, and that in such event the subcontractor was responsible to plaintiff and the contractor, with prayer that if plaintiff should recover judgment against him that he should recover judgment against his subcontractor. *Held:* G.S. 1-240 is not applicable since the contractor and the subcontractor are not joint tort-feasors, and plaintiff has a right to pursue his action against the contractor without being compelled to have contested litigation between the contractor and the subcontractor projected into the suit.

GAITHER CORP. *v.* SKINNER.

APPEAL by defendant Skinner from *Bone, J.*, June Term, 1953, of PASQUOTANK. Affirmed.

The plaintiff entered into a contract with defendant Mark L. Skinner whereby the latter agreed to furnish all labor and materials and to construct a building for the plaintiff in Elizabeth City for an agreed price, in accordance with the plans and specifications prepared by plaintiff's architect. The building was completed about 1 July, 1950, and the contract price paid in full.

In February 1953 plaintiff instituted this action against defendant Skinner alleging faulty and defective materials knowingly used by defendant in the construction of the roof of the building in breach of the contract, resulting in serious and continued leaking. Plaintiff demanded damages in an amount sufficient to replace the defective roof with one in accordance with the original plan.

The defendant Skinner denied that the roof constructed by him was otherwise than in accord with the plans and specifications furnished him; alleged that the construction of the roof had been let to a competent subcontractor, one C. R. Hopkins, who had constructed it in accord with the plans and specifications; and that if Hopkins failed to erect the roof in accord with the specifications, which was denied, then and in that event Hopkins was responsible to plaintiff and to defendant Skinner for any damages suffered by reason of his failure so to do; and he prayed that Hopkins be made a party to the action, and that if plaintiff should recover judgment of the defendant that he, Skinner, recover judgment over against Hopkins.

C. R. Hopkins having been made a party by the clerk and served with summons, entered special appearance and moved that he be dismissed from the action.

The court being of opinion that defendant Hopkins was not a necessary party to the action between plaintiff and defendant Skinner, entered order allowing Hopkins' motion.

Defendant Skinner excepted and appealed.

LeRoy & Goodwin for C. R. Hopkins, appellee.

Barden, Stith & McCotter and John H. Hall for defendant, appellant.

DEVIN, C. J. We concur with the view of the court below that C. R. Hopkins is not a necessary party to the action which the Gaither Corporation has instituted against defendant Skinner for damages for faulty and defective material used by him in the construction of plaintiff's building in breach of the terms of the contract entered into between plaintiff and Skinner. We think the action of the court in dismissing Hopkins from the action should not be held for error.

It may be conceded that plaintiff might have maintained action against Hopkins on his subcontract with Skinner, as one made for the benefit of the plaintiff (*Brown v. Construction Co.*, 236 N.C. 462, 73 S.E. 2d 147), and that Hopkins might have been a proper party in a suit involving the liability of both, but that would not entitle appellant to reversal of the order of Judge Bone dismissing Hopkins from the present action which plaintiff has instituted against defendant Skinner. *Spruill v. Bank*, 163 N.C. 43, 79 S.E. 262; *Aiken v. Mfg. Co.*, 141 N.C. 339, 53 S.E. 867. "The making of new parties defendants where they are not necessary is a matter within the discretion of the trial judge, and his refusal is not reviewable." *Guthrie v. Durham*, 168 N.C. 573, 84 S.E. 859. "Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the Court." McIntosh, Prac. and Proc., Sec. 209, p. 184; *Colbert v. Collins*, 227 N.C. 395, 42 S.E. 2d 349; *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231.

The plaintiff has elected to pursue his action against the contractor with whom he contracted in order to recover damages for an alleged breach of that contract, and plaintiff should be permitted to do so without having contested litigation between the contractor and his subcontractor projected into the plaintiff's lawsuit. *Montgomery v. Blades*, 217 N.C. 654, 9 S.E. 2d 397.

The exact question here presented does not seem to have been heretofore decided by this Court. However, in *Board of Education v. Deitrick*, 221 N.C. 38, 18 S.E. 2d 704, where the general contractor, who had been sued for damages for using green and defective lumber in the building, moved to make the lumber dealer from whom he obtained the material a party, it was held that the motion was properly denied. Under the facts of that case there was no privity between plaintiff and the lumber dealer, nor were the contractor and subcontractor joint tort-feasors.

The statute permitting joint tort-feasors to be brought in for the purpose of enforcing contribution does not apply here. G.S. 1-240. Nor does an issue as to primary and secondary liability arise in this case as in *Guthrie v. Durham*, 168 N.C. 573, 84 S.E. 859, and in cases of similar nature. See also *Moore v. Massengill*, 227 N.C. 244, 41 S.E. 2d 655; *Mullen v. Louisburg*, 225 N.C. 53, 33 S.E. 2d 484.

We conclude on the record here presented that the order dismissing defendant Hopkins from the action should be

Affirmed.

STATE v. IVAN MILTON GREEN.

(Filed 23 September, 1953.)

Criminal Law § 40d—

While the State is entitled to cross-examine defendant's character witnesses as to particular vices or virtues, it is error to permit the solicitor to cross-examine the character witnesses of defendant as to particular acts of misconduct on the part of defendant, and in this case such repeated and extended cross-examination *is held* prejudicial.

APPEAL by defendant from *Patton, Special Judge,* April Term, 1953, of BUNCOMBE.

Criminal prosecution tried upon an indictment charging the defendant with rape.

The State offered evidence tending to show that the defendant did on the night of 15 November, 1951, make a felonious attack upon the prosecutrix, and did ravish and carnally know her against her will.

Verdict: Guilty of assault with intent to commit rape.

Judgment: Imprisonment in the State's prison for not less than eight years nor more than twelve years.

The defendant appeals, assigning error.

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

Monroe M. Redden, Monroe M. Redden, Jr., and I. C. Crawford for the appellant.

DENNY, J. The defendant concedes that his assignment of error based on the exceptions to the refusal of the court below to sustain his motion for judgment as of nonsuit, interposed at the close of the State's evidence and renewed at the close of all the evidence, is without merit.

The defendant, however, seriously contends that his assignment of error grounded on his exceptions to the failure of the trial judge to sustain his objections to certain questions propounded by the solicitor on cross-examination of some of the character witnesses for the defendant, entitles him to a new trial.

The defendant offered twenty witnesses, each of whom testified on direct examination that the defendant was a man of good character. Whereupon, the solicitor, on cross-examination, over objection of the defendant, in substance, asked several of these witnesses if they knew anything about the defendant having been charged and tried for being the father of an illegitimate child by Myrtle Edwards; if they knew anything about the defendant having attacked an eleven-year-old child; if

they knew anything about his having been indicted for raising a disturbance in Rock Creek community. Except for one witness who answered "Yes" when asked if he knew anything about the defendant being charged and tried for being the father of an illegitimate child by Myrtle Edwards, the answers to these and many other questions of a similar nature were answered in the negative.

When a defendant introduces evidence of his good character, the State has the right to introduce evidence of his bad character, but it is error to permit the State to cross examine the character witnesses as to particular acts of misconduct on the part of the defendant. Neither is it permissible for the State to introduce evidence of such misconduct. The general rule is that a character witness may be cross-examined as to the general reputation of the defendant as to particular vices or virtues, but not as to specific acts of misconduct. *S. v. Shepherd,* 220 N.C. 377, 17 S.E. 2d 469; *S. v. Church,* 229 N.C. 718, 51 S.E. 2d 345; *S. v. Robinson,* 226 N.C. 95, 36 S.E. 2d 655; *S. v. Lee,* 211 N.C. 326, 190 S.E. 234; *S. v. Shinn,* 209 N.C. 22, 182 S.E. 721; *S. v. Adams,* 193 N.C. 581, 137 S.E. 657; *S. v. Holly,* 155 N.C. 485, 71 S.E. 450.

This assignment of error is well taken and will be sustained.

Since the defendant is entitled to a new trial, we deem it unnecessary to discuss the other assignments of error presented on the record. They may not arise upon another hearing.

For the reasons stated, there must be a

New trial.

STATE v. DAVID GIBBS.

(Filed 23 September, 1953.)

1. Intoxicating Liquor § 9d—

Evidence tending to show that nontax-paid liquor was found within the curtilage of defendant's home is sufficient to take the case to the jury on the charge of illegal possession of nontax-paid liquor, G.S. 18-48, and the charge of illegal possession of nontax-paid liquor for the purpose of sale, G.S. 18-50.

2. Intoxicating Liquor § 4a—

The possession of any quantity of nontax-paid liquor raises the presumption that the possession is for the purpose of sale. G.S. 18-11.

APPEAL by defendant from *Bone, J.,* June Term, 1953, of BEAUFORT.

Criminal prosecution tried upon a two-count bill of indictment charging the defendant with (1) illegal possession of nontax-paid liquor in

violation of G.S. 18-48, and (2) illegal possession of nontax-paid liquor for the purpose of sale in violation of G.S. 18-50. The jury returned a verdict of guilty on both counts as charged, and from judgment thereon imposing penal servitude of six months, the defendant appealed, assigning errors.

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

Taylor & Mitchell for defendant, appellant.

JOHNSON, J. The defendant challenges the sufficiency of the evidence to carry the case to the jury on each count over his motions for judgment as of nonsuit. This is the essence of the appeal.

The evidence relied on by the State may be summarized as follows: The arresting officers found two half-gallon jars of nontax-paid liquor in an old stable building located some 25 or 30 feet from the back door of the defendant's home. The defendant was not at home when the officers reached the premises, but he arrived a few minutes later and was present when the liquor was found. The defendant owned the residence lot, on which the stable is located, and had lived there for several years. The back yard and stable building were partially enclosed by a fence, and the defendant had been seen entering and leaving the rear portions of his property in the vicinity of the stable on various occasions.

This evidence, showing nontax-paid liquor found within the curtilage of the defendant's home, was sufficient to take the case to the jury on both counts, and the court below properly overruled defendant's motions for judgment as of nonsuit. *S. v. Hill,* 236 N.C. 704, 73 S.E. 2d 894; *S. v. Avery,* 236 N.C. 276, 72 S.E. 2d 670; *S. v. Rhodes,* 233 N.C. 453, 64 S.E. 2d 287; *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600. See also *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268.

On the second count, the State had the benefit of the *prima facie* rule created by G.S. 18-11. The limitation placed upon that statute by *S. v. Peterson,* 226 N.C. 255, 37 S.E. 2d 591, and cases therein cited no longer obtains. The limitation was removed by *S. v. Hill, supra.*

We are not concerned with the probative force of the evidence offered by the defendant in refutation of the State's *prima facie* case. That was for the jury, and they have resolved the controverted issues of fact against the defendant.

Other assignments of error brought forward by the defendant are formal and are without merit. The verdict and judgment will be upheld.

No error.

STATE v. SUSIE BROWN.

(Filed 23 September, 1953.)

1. Intoxicating Liquor § 9d—

Evidence that officers found a jug of nontax-paid whiskey under the house of defendant, that defendant's husband did not live there, and that defendant disappeared during the search and was not again seen by the officers until she appeared with her attorney the next day and posted bond, *is held* sufficient to be submitted to the jury upon the question of defendant's constructive possession of the nontax-paid whiskey.

2. Intoxicating Liquor § 4a—

Possession of nontax-paid whiskey in any quantity anywhere in the State is unlawful.

3. Intoxicating Liquor § 4b—

Possession of intoxicating liquor within the meaning of the statute may be either actual or constructive. G.S. 18-48.

APPEAL by defendant from *Parker (Joseph W.)*, *J.*, at March Term 1953, of EDGECOMBE.

Criminal prosecution upon a warrant issued by a justice of the peace of Edgecombe County on affidavit charging that at and in Number One Township in said County, on 17 October, 1952, Susie Brown, the defendant, did unlawfully have in her possession nontax-paid whiskey. The warrant was returned to the Recorder's Court of Edgecombe County, and defendant was tried and convicted there. And from judgment rendered she appealed to Superior Court, where the case was submitted to a jury of twelve men upon the evidence offered by the State.

This evidence, as it appears in the record of case on appeal, tends to show, in substance, these facts: On night of 17 October, 1952, ABC enforcement officers, armed with a search warrant, went to the home of Susie Brown for a search of it. She was there. Her husband did not live there. The officers read the warrant to her, and searched inside the house but "found nothing." They then went outside and one of them, attracted by toe prints at the edge of the house, "followed them" under the house, and found a jug of nontax-paid whiskey in a hole covered by and concealed in trash and other debris. Thereupon, the officers, returning to the inside of the house, did not find defendant. And though they remained there about an hour defendant was not again seen by them until she appeared, with her attorney, around noon of the next day and posted bond. (Other details need not be recited.)

Verdict: Guilty.

Judgment: Pronounced.

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.

W. O. Rosser for defendant, appellant.

PER CURIAM. The only assignment of error presented by defendant for decision on this appeal is based upon exceptions to rulings of the trial court in denying her motions, aptly made, for judgment as of nonsuit. As to this, it is sufficient to say that the evidence offered by the State is enough to take the case to the jury on the question of constructive possession by defendant of nontax-paid whiskey, and to support the verdict returned by the jury.

Possession of nontax-paid whiskey in any quantity anywhere in the State is unlawful. G.S. 18-48. *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; also *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907. And possession, within the meaning of the statute, may be either actual or constructive. See *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268, and cases cited; also *S. v. Parker, supra,* and cases cited.

Hence in the judgment from which this appeal is taken, there is found

No error.

HENRY C. BOURNE v. FRED EDWARDS, ADMINISTRATOR OF DOUGLASS EDWARDS, DECEASED.

(Filed 23 September, 1953.)

Appeal and Error § 6c (2)—

An exception to the signing and entering of the judgment presents only the face of the record for review, and when the judgment is supported by the record the appeal must fail.

APPEAL by defendant from *Parker, J.,* and a jury, at April Term, 1953, of EDGECOMBE.

Civil action to recover on claim rejected by the defendant administrator under G.S. 28-112.

An issue of debt was submitted to and answered by the jury as follows: "In what amount, if any, is defendant indebted to plaintiff?

"Answer: $636.80, plus 6% interest after June 18, 1952."

From judgment on the verdict, the defendant appealed.

Herbert H. Taylor, Jr., for plaintiff, appellee.

Floyd T. Hall and P. H. Bell for defendant, appellant.

PER CURIAM. The only exception appearing in the record is to the signing and entering of the judgment from which the appeal is taken. This presents only the face of the record for inspection and review, and when the judgment is supported by the record the appeal must fail. *Query v. Insurance Co.*, 218 N.C. 386, 11 S.E. 2d 139; *Smith v. Smith*, 226 N.C. 506, 39 S.E. 2d 391. Here the verdict supports the judgment and no error appears on the face of the record.

No error.

LAURA MAE PURVIS AND WILLIE EARL PURVIS, MINOR, BY HIS NEXT FRIEND, LAURA MAE PURVIS, v. EARL WHITAKER AND WIFE, CARTHENIE WHITAKER; R. T. WHITAKER AND H. L. SWAIN, TRUSTEE, AND H. D. BATEMAN, TRUSTEE.

(Filed 23 September, 1953.)

Appeal and Error § 40f—

An appeal will not lie from the denial of a motion to strike made after demurrer has been filed and overruled. G.S. 1-153.

APPEAL by defendants, other than H. D. Bateman, Trustee, from *Parker, J.*, March Term, 1953, of MARTIN. Affirmed.

This was an action to set aside certain conveyances executed by defendants Earl Whitaker and wife and R. T. Whitaker, alleged to have been made in fraud of creditors. G.S. 39-15.

Demurrer of H. D. Bateman, Trustee, was sustained and action dismissed as to him. The remaining defendants moved to strike certain portions of the complaint. From judgment denying the motion the defendants other than Bateman, Trustee, appealed.

Robt. H. Cowen, Elbert S. Peel, and Lemuel H. Davis for plaintiffs, appellees.

H. L. Swain and Leroy Scott for defendants, appellants.

PER CURIAM. An examination of the complaint in connection with the portions thereof sought to be stricken leads to the conclusion that the ruling of the trial judge should be upheld. The allegations complained of were relevant and tended to set forth facts material to a proper statement of plaintiffs' cause of action. *Garrett v. Rose*, 236 N.C. 299, 72 S.E. 2d 843; *Ledford v. Transportation Co.*, 237 N.C. 317, 74 S.E. 2d 653. Furthermore, defendants' motion to strike was filed after their demurrer had been overruled. G.S. 1-153. *Parrish v. R. R.*, 221 N.C. 292, 20 S.E. 2d 299. Appellees' motion to dismiss the appeal on this ground is allowed.

Appeal dismissed.

S. J. ODOM AND WIFE, BLANCHE B. ODOM, v. S. & W. RENDERING COMPANY.

(Filed 23 September, 1953.)

APPEAL by defendant from *Parker (Joseph W.), J.*, April Term, 1953, NASH. Affirmed.

Civil action to abate a nuisance and to recover compensation for alleged damages to plaintiffs' real property proximately resulting from the maintenance thereof, heard on motion to strike allegations contained in defendant's "further answer and defense." The motion was allowed and defendant excepted and appealed.

O. B. Moss for plaintiff appellees.

Cooley & May for defendant appellants.

PER CURIAM. The facts alleged in defendant's further answer which were stricken by the order entered in the court below constitute no valid defense. They are wholly extraneous and irrelevant. If the defendant has any affirmative defense or relevant new matter it desires to plead, it is fully protected in this respect by the order granting leave to amend.

The order entered in the court below must be

Affirmed.

STATE v. AMBLER GARRIS.

(Filed 23 September, 1953.)

APPEAL by defendant from *Parker, J.*, January Term, 1953, of EDGECOMBE.

Criminal prosecution tried upon an indictment charging the defendant with a felonious assault on one James Bradley with a deadly weapon, to wit: a knife, with intent to kill, inflicting serious injuries, not resulting in death.

There was a verdict of guilty as charged.

Judgment: Imprisonment in the State's prison for a term of not less than three nor more than five years.

Defendant appeals, assigning error.

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

Fountain, Fountain & Bridgers for appellant.

PER CURIAM. We have carefully considered the exceptions presented on this appeal and do not find any of sufficient merit to justify interference with the results of the trial. The State offered ample evidence to support the verdict, and in law there is

No error.

MRS. JANE LASSITER LINEBERRY v. THE SECURITY LIFE & TRUST COMPANY, WINSTON-SALEM, N. C., A CORPORATION.

(Filed 30 September, 1953.)

1. Novation § 2—

The fact that the parties have entered into a contract containing certain provisions does not preclude them from thereafter changing or modifying such provisions or substituting conflicting ones in lieu thereof by novation.

2. Insurance § 18a—

The objective in construing a policy of insurance is to ascertain the intention of the parties as expressed in the language used, without disregarding any of its words or clauses or inserting words or clauses not used, and if the intent is expressed in clear and unambiguous language such intent must be given effect.

3. Same—

The terms of an insurance policy must be given their plain, ordinary and popular connotation unless they have acquired a technical meaning in the field of insurance.

4. Insurance § 27—Conversion of group certificate into individual policy constitutes novation and not continuance of old insurance.

Where a policy of group insurance and certificate issued thereunder provide that at the termination of the employment the holder of the certificate should have the right to convert it into any one of the forms customarily issued by the company in an amount equal to the protection under the certificate without evidence of insurability, upon application to the company within a stated period and upon payment of the premium applicable to such policy at his then attained age, and that protection under the group policy should terminate on the date and hour insurance under such individual policy becomes effective, *held* conversion of the insurance under such provision constitutes a novation, and the policy issued under the terms for conversion is a new policy and is not a continuation of the original contract under the group policy. The word "conversion" defined.

5. Insurance § 29—Where group certificate is converted into ordinary policy, date of issuance of new policy governs incontestability.

Where a policy of ordinary life insurance issued in accordance with the provisions for conversion under a group policy theretofore issued, provides that risk of self-destruction of the insured within two years from the

date of the policy is not assumed by insurer, such provision renders insurer liable only for the return of the premiums paid upon the self-destruction of the insured within the two year period, and the beneficiary may not successfully contend that the ordinary policy was a mere continuation of the original group insurance and that therefore the one year incontestability clause of the group policy precluded insurer from denying liability.

APPEAL by defendant from *Parker, J.*, June Term, 1953, EDGECOMBE. Reversed.

Civil action on life insurance policy.

On 31 July 1944, defendant issued to Washington Mills Company a group insurance policy, effective 1 August 1944, insuring the lives of the mill company's employees. Dr. John Alston Lineberry, Sr., was one of the employees so insured. The policy contained the following provisions:

(1) "The insurance of any employee covered hereunder shall terminate at the end of the month in which his employment with the employer shall terminate . . ."

(2) "Any Employee of the Employer covered under this group policy shall, in case of the termination of the employment for any reason whatsoever, be entitled to have issued to him by the Company without further evidence of insurability, and upon application made to the Company within thirty-one days after such termination and upon the payment of the premium applicable to the class of risks to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance, in any one of the forms customarily issued by the Company, except term insurance, in an amount equal to the amount of the Employee's protection under this policy at the time of the termination of his employment. The issuance of such policy shall be a conversion of the Employee's insurance hereunder and shall as of the effective date an (*sic*) hour of the insurance under such individual policy, immediately and automatically terminate and cancel any insurance of the Employee hereunder then in force."

(3) A one-year incontestability provision.

On 1 September 1945, the certificate required by the group policy was issued and delivered to Dr. Lineberry. This certificate contained provisions no. 1 and 2 of the group policy above quoted, with such changes in the language thereof as were necessary to make them conform to the provisions of the certificate.

On 15 July 1948, Dr. Lineberry terminated his employment and applied for an individual policy in the sum of $3,000 as authorized in the certificate. On 28 July 1948, the defendant, pursuant to said application, issued its ordinary life policy No. 128503, insuring the life of

Dr. Lineberry in the sum of $3,000 in which plaintiff was named as beneficiary.

This policy provides that: (1) "Self-destruction on the part of the Insured, whether sane or insane, within two years from the date of this policy is a risk not assumed by the Company under this contract, and the extent of recovery hereunder shall be the premiums actually paid by the Insured;" and (2) "This policy and the application therefor . . . shall constitute the entire contract between the parties."

On 30 June 1950 the insured died as the result of a self-inflicted pistol shot wound. Plaintiff filed due proof of death and demanded payment of the face amount of the policy. Defendant denied liability by reason of the self-destruction provision above quoted and tendered return of the premiums actually paid. Thereupon plaintiff instituted this action.

At the hearing in the court below the parties waived trial by jury and submitted the same to the judge presiding to find the facts and render judgment thereon. The court thereupon found the facts as here summarized and concluded that the individual policy issued to Dr. Lineberry, after he terminated his employment by the mill, was a mere continuation of the group policy and the certificate issued to Dr. Lineberry; that it was dependent thereon; and "that the date of Policy No. 128503 must, under the facts of this case, be determined by the date of said Certificate No. 2212 issued under Group Policy G-119, and that any provisions in Policy No. 128503 in conflict herewith is (*sic*) considered surplusage."

It appearing from the facts found that the death of the insured occurred more than two years after the date of the certificate issued pursuant to the terms of the group policy, the court entered judgment for the plaintiff and defendant appealed.

Henry C. Bourne for plaintiff appellee.

Leggett & Fountain and Womble, Carlyle, Martin & Sandridge for defendant appellant.

BARNHILL, J. Do the group policy, No. G-119, Certificate No. 2212, issued to Dr. Lineberry as provided in the group policy, and policy No. 128503 form a single contract made 31 July 1944 (the date of the group policy) so that the one-year incontestability clause contained in the group policy and the certificate nullifies the self-destruction clause in policy No. 128503 for the reason the suicide of the insured did not occur within one year next after the date of the group policy and the certificate issued pursuant thereto? This is the single question posed by this appeal. The court below answered in the affirmative. We are constrained to reverse.

The conclusion contained in the judgment entered in the court below is in effect a conclusion that when a contract is once entered into between two or more persons, there can be no subsequent modification or novation thereof and that any provision contained in an agreement between the parties relating to the same subject matter which is in conflict with the terms and provisions of the original contract must be treated as mere surplusage. It requires no citation of authority to sustain the statement that this is not sound law.

The cardinal principle pertaining to the construction and interpretation of insurance contracts is that the intention of the parties should control. If not ambiguous or uncertain, the express language the parties have used should be given effect, and the intention of the parties must be derived from the language employed. An insurance contract must be construed without disregarding words or clauses used or inserting words or clauses not used. If the intention of the parties is clear, the courts have no authority to change the contract in any particular or to disregard the express language the parties have used. If the sense and meaning of the terms employed are clear and unambiguous, they must be given their plain, ordinary and popular connotation unless they have acquired a technical meaning in the field of insurance. 29 A.J. 172; *Roberts v. Insurance Co.*, 212 N.C. 1, 192 S.E. 873, 113 A.L.R. 310; *Stanback v. Insurance Co.*, 220 N.C. 494, 17 S.E. 2d 666; *Ford v. Insurance Co.*, 222 N.C. 154, 22 S.E. 2d 235; *Indemnity Co. v. Hood*, 226 N.C. 706, 40 S.E. 2d 198; *Motor Co. v. Insurance Co.*, 233 N.C. 251, 63 S.E. 2d 538; *Johnson v. Casualty Co.*, 234 N.C. 25, 65 S.E. 2d 347.

When the three instruments involved in this litigation are considered in the light of these rules of construction, it is made to appear that the contract of insurance sued upon is a separate, distinct, and independent contract, unmodified in any respect by the language contained in either the group policy or the certificate issued thereunder.

"Conversion" as used in the group policy means the act of converting or changing property of one nature to property of another nature, from one thing to another by substitution; exchanging for some specified equivalent. Webster's New Int. Dic. So then, the conversion provision in the original contract merely granted the insured the right, at his option, to convert his certificate into a separate and independent contract of insurance between him and the insurance company, without medical examination, and for the premium charged persons at his then attained age, provided he applied for the same within the stipulated thirty-one days next after his employment is terminated.

The "privilege of continuance" clause is "a favor offered to the insured, which he is at liberty to accept or not as he chooses. That this is its true meaning is made certain by the terms of the privilege which

are distinctly stated. The party who has been insured may take out regular life insurance without medical examination. He need not furnish evidence of insurability. This is all the privilege undertakes to give." *Duval v. Ins. Co.*, 50 A.L.R. 1276 (1285) (N.H.); 29 A.J. 1029 *et seq.*

Under the express terms of the group policy and the certificate delivered to Dr. Lineberry, the protection afforded thereby ended (1) at the end of the month during which his employment was terminated, or (2) upon the prior issuance of an individual policy as provided in the certificate.

The group policy was between the employer and the insurance company for the benefit of the employees of the mill company. And when a contract is made for the benefit of another—in this case Dr. Lineberry —he can have no greater rights under that contract than are provided thereby. *Thull v. Equitable Life Assurance Soc.*, 178 N.E. 850 (Ohio).

Therefore, the conversion provision in the original contract did not have the effect of continuing the insurance on the life of the employee. When the employment terminated, coverage provided by the policy and the certificate ceased. *Baker v. Insurance Co.*, 202 N.C. 432, 163 S.E. 110; *Pearson v. Assurance Society*, 212 N.C. 731, 194 S.E. 661; *Colter v. Travelers' Ins. Co.*, 170 N.E. 407 (Mass.); *Fearon v. Ins. Co.*, 246 N.Y.S. 701; *Kowalski v. Ins. Co.*, 165 N.E. 476, 63 A.L.R. 1030; *Beecey v. Ins. Co.*, 166 N.E. 571 (Mass.); *Duval v. Ins. Co., supra; Gans v. Ins. Co.*, 108 N.E. 443 (N.Y.).

There are other provisions in the instruments which clearly mark the ordinary life policy issued to Dr. Lineberry, after his employment terminated, as a separate and independent contract.

The group policy was a contract between the mills company and defendant, terminable at the will of the mills company. The ordinary life policy was a contract between Dr. Lineberry and defendant in which the mills company had no interest.

The premium charged under the group policy was based on the age of the insured 1 August 1944 while the premium to be paid on the policy sued on was determined by the age of the insured on the date of its issuance in 1948.

The group policy contained a one-year incontestability clause, the ordinary life policy, a two-year clause. The one-year incontestability clause in the group policy was in full force and effect when the new policy was issued. The two-year period in the new policy had not expired.

There was no self-destruction clause in the group policy and the two-year period during which the risk of self-destruction was not assumed under the ordinary life policy had not expired. The group policy was effective upon the payment by the employer of the first premium as

therein provided; the ordinary life policy, upon the payment by the insured of the first premium therein stipulated.

Furthermore, the new policy granted the insured nonforfeiture, face value surrender, paid up, and extended term insurance, not contained in the group policy or certificate.

For us to hold that the ordinary life policy was merely a continuation of the group policy insurance, and not a separate and independent contract, would require us to ignore completely the stipulation therein that "this policy and the application therefor . . . constitute the entire contract between the parties" and the provision in the group policy that "the issuance of such policy shall be a conversion of the Employee's insurance hereunder and shall as of the Effective Date and hour of the insurance under such individual policy, immediately and automatically terminate and cancel any insurance of the Employee then in force" and the other provisions fixing the date of termination of the group insurance and certificate of individual employees. It would likewise require us to strike therefrom the terms "from its date of issue" and "from the date of this policy" used to limit or qualify the incontestability and self-destruction clauses therein contained and substitute therefor the date of the group policy. This we are not privileged to do.

The language used by the parties is unambiguous. Its meaning is clear. There is no room for judicial construction. As the parties contracted, so are they bound.

The self-destruction of the insured having occurred within two years after the issuance of the policy sued on, the defendant, by the express terms of the contract, is not liable under the policy for any amount other than premiums actually paid. "It is there in plain English." *Hundley v. Ins. Co.*, 205 N.C. 780, 172 S.E. 361; *Johnson v. Insurance Co.*, 207 N.C. 513, 177 S.E. 646. This amount it has duly tendered. Judgment therefor, and no more, should be entered. To that end the judgment of the court below is

Reversed.

R. M. McGEE v. L. D. LEDFORD AND WIFE, MARY SMITH LEDFORD.

(Filed 30 September, 1953.)

1. Pleadings § 28—

A motion for judgment on the pleadings is in effect a demurrer to the answer, and admits the truth of all the well pleaded facts in the answer and the untruth of plaintiff's own allegations in so far as they are controverted in the answer.

2. Same—

Where allegations of the answer have been stricken upon motion duly made prior to plaintiff's motion for judgment on the pleadings, the court in passing upon the motion for judgment on the pleadings must disregard all allegations of the answer which had been so stricken.

3. Laborers and Materialmen's Liens § 10—

Where the owner admits the alleged contract with plaintiff to repair a dwelling on her property, the contract price, the filing of a lien as required by law, her agreement to pay the contract price and the nonpayment thereof, plaintiff contractor is entitled to judgment on the pleadings in his action to recover the contract price and enforce his lien upon the property.

4. Contracts § 19: Laborers and Materialmen's Liens § 9—

Even though a contract for repair of a dwelling damaged by fire is made in contemplation that the cost of the repairs would be paid out of the proceeds of a fire insurance policy on the dwelling, the owner is not absolved from liability to the contractor for such repairs even though she alleges that the insurance company is indebted to her and that the insurance contract was made for the benefit of the contractor, insurer not being a party to the contract and its failure to pay the amount of the policy not having the effect of discharging the liability of the owner to the contractor for the repairs.

5. Payment § 2—

Where an insurance company delivers its draft to the owners of property who endorse it over to the contractor who had made repairs to the property, the delivery of the draft is but conditional payment, and upon its dishonor by the bank on order of insurer, the owners and the contractor are relegated to their original debtor-creditor status.

APPEAL by defendant from *Phillips, J.*, January Term 1953, BUNCOMBE. Affirmed.

Civil action to recover on a contract to repair a building and to enforce a laborer's and materialman's lien on the property, heard on motion for judgment on the pleadings.

Plaintiff alleges that (1) on or about 15 November 1950, he entered into a contract with the defendants to repair a dwelling on their property which had been damaged by fire; (2) the contract price was $1,000; (3) he performed the contract on his part; (4) defendants having failed to pay the contract price, he filed a laborer's and materialman's lien as provided by statute; and (5) the defendants are now indebted to him in the sum of $1,000. He seeks to recover judgment for the amount alleged to be due and unpaid and to have the same adjudged a specific lien on the property described in the complaint.

The property plaintiff seeks to subject to a lien was originally conveyed to the two defendants as tenants by the entirety. They separated

and were later divorced. They filed separate answers to the complaint herein, and the male defendant thereafter conveyed his interest in said property to the *feme* defendant. Since L. D. Ledford now has no interest in the property and judgment was rendered only against the *feme* defendant, a summary of his answer is unnecessary.

In her original answer the *feme* defendant denied that she entered into any contract with plaintiff to repair said dwelling and entered qualified denials of the other material allegations in the complaint which seek to state plaintiff's cause of action. She then alleged by way of further defense that (1) the property was insured by the Caledonian-American Insurance Company; (2) the insurance company contracted with plaintiff to repair the damages done to her residence by fire; (3) it was expressly understood at the time that she was unable to pay for said repairs, that she assumed no obligations so to do, and that plaintiff was to be paid by said insurance company; and (4) upon completion of the repairs the insurance company issued its check for $1,000 which the two defendants endorsed and delivered to plaintiff. She prayed that said insurance company be made a party defendant and that she go hence without day.

The insurance company, having been made a party defendant, appeared and moved that various specified allegations contained in *feme* defendant's answer which had reference to it and its alleged liability to plaintiff be stricken from the answer. The motion was allowed and said defendant was granted leave to amend. Thereafter she filed a new or substitute answer labeled "Amended Answer of Mary Smith Ledford."

In her new answer this defendant entered qualified denials of the material allegations in the complaint. At the same time she admits that: (1) she owns the property described in the complaint; (2) she and plaintiff entered into a contract for the repair of the dwelling located on her property, "and that the defendants agreed to pay the sum of $1,000.00 to the plaintiff for said repairs; and that they agreed that said $1,000.00 might be paid from the proceeds of a policy of fire insurance;" (3) "The defendants are due and owing the plaintiff the sum of $1,000.00, and that said defendants agreed that the plaintiff might be paid said sum from the proceeds of a fire insurance policy;" (4) a lien was filed by plaintiff as alleged in the complaint; (5) pursuant to negotiations between the plaintiff, L. D. Ledford, this defendant, and the said insurance company, the insurance company "agreed to pay to the plaintiff for and on behalf of the defendants, the sum of $1,000.00, for said repairs by reason of a fire insurance policy covering loss and damage sustained to said house by reason of fire;" and (6) she "did not contract or agree to make any repairs (*sic*) for any repairs personally, but that it was contracted between plaintiff and both defendants and the Caledonian-American Insurance Company that the said insurance company would pay the

plaintiff the sum of $1,000.00, for repairs which the plaintiff did make to said house; *and that by reason of a contract made between L. D. Ledford and this answering defendant with the Caledonian-American Insurance Company for the benefit of the plaintiff, R. M. McGee, the defendant, Caledonian-American Insurance Company is liable to this defendant in the sum of $1,000.00, which said Insurance Company contracted and agreed to pay* them for the benefit of plaintiff." (Italics supplied.)

She further alleges that she is informed and believes that *said insurance company "is liable to the defendant in the sum of $1,000.00, to be paid to plaintiff, R. M. McGee, for repairs which said R. M. McGee made on said lands and premises."* (Italics supplied.) She prays that she have and recover of said insurance company the sum of $1,000 to be paid to the plaintiff in full settlement for labor and material furnished, and that said lien be canceled of record and that she go hence without day.

The insurance company again appeared and moved to strike from the substitute answer all reference to any negotiations or contract with it and all other references to it. The motion particularized the language sought to be stricken. The admissions of liability on the part of the *feme* defendant, to which reference has been made, were not included in the motion to strike.

At the October Term 1952, Patton, S. J., being of the opinion that the allegations the insurance company moved to strike were in substance the same allegations theretofore stricken from the original answer by Gwyn, J., and that the defendant is bound by the original order to strike, from which she did not appeal, allowed the motion. The *feme* defendant expressly withdrew her appeal from the order of Patton, S. J., granting the motion to strike, and filed no further amendment as she was by said order permitted to do.

Thereafter the demurrer of the insurance company was sustained.

At the January Term 1953, plaintiff, after due notice to defendant, appeared and moved for judgment on the pleadings. The motion was allowed and judgment that plaintiff have and recover of the *feme* defendant the sum of $1,000 with interest and costs and decreeing that plaintiff's laborer's and materialman's lien be and is a specific lien upon the property described in the complaint was duly entered. Said defendant excepted and appealed.

Cecil C. Jackson for plaintiff appellee.
George F. Meadows for defendant appellant.

BARNHILL, J. Plaintiff's motion for judgment on the pleadings is in effect a demurrer to the answer. *Pridgen v. Pridgen,* 190 N.C. 102, 129

S.E. 419; *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384; *Bessire and Co. v. Ward,* 206 N.C. 858, 175 S.E. 208.

The motion in the nature of a demurrer admits (1) the truth of all well-pleaded facts in the answer, and (2) the untruth of plaintiff's own allegations in so far as they are controverted in the answer. *Raleigh v. Fisher, supra; Oldham v. Ross,* 214 N.C. 696, 200 S.E. 393; *Guerry v. Trust Co.,* 234 N.C. 644, 68 S.E. 2d 272.

There can be no judgment for plaintiff on the pleadings unless the facts entitling plaintiff to relief are admitted and no valid defense or plea in avoidance is asserted in the answer. *Hoover v. Crotts,* 232 N.C. 617, 61 S.E. 2d 705; *Bessire and Co. v. Ward, supra.* It must appear that (1) the complaint states a good cause of action which entitles plaintiff to some relief, and (2) the answer, construed liberally in favor of the pleader, raises no material issue of fact. *Dunn v. Tew,* 219 N.C. 286, 13 S.E. 2d 536; *Raleigh v. Fisher, supra.*

The pertinent pleadings in this case, considered in the light of these well-recognized rules, which have been consistently applied by this Court, compel the conclusion that the admissions contained in the answer warranted the judgment entered in the court below.

The appellant admits the ownership of the property, the alleged contract with plaintiff to repair the fire damages to her dwelling located on said property, the contract price, the filing of a lien as required by law, her agreement to pay the contract price, and the nonpayment thereof. This leaves no material issue of fact to be answered by a jury.

In this connection we must bear in mind that it is the duty of the court to consider the substitute answer stripped of any and all reference to the insurance company or any promise defendant alleges it made to pay the contract price for and on behalf of the original defendants. They had been stricken from the answer prior to the motion for judgment on the pleadings.

Even if we give consideration to such allegations, they are insufficient to absolve the defendant from liability on the contract she admits she made with plaintiff. The contract respecting the proceeds of the insurance policy was entered into between defendants and the insurance company "for the benefit of the plaintiff," and the insurance company is indebted to the defendants in the sum of $1,000, to be paid to them for the benefit of plaintiff. So she alleges. These allegations fall far short of any assertion that the contract to repair was entered into between plaintiff and the insurance company or that the insurance company is solely liable for the amount admittedly due plaintiff under a contract he made with the appellant. No doubt the defendant confidently anticipated that she would be able to discharge her liability to plaintiff out of the proceeds of

the policy. In all probability, it was so understood by all the parties. Even so, the failure of the insurance company to honor its draft does not serve to discharge defendant or shift sole liability to the insurance company. Delivery of the draft of the insurance company to defendants, and by defendants to plaintiff, was at most a conditional payment. When the draft was dishonored by the bank on order of the insurance company, the parties were relegated to their original creditor-debtor status.

For the reasons stated, the judgment entered in the court below is Affirmed.

S. M. SILVERTHORNE v. JOHN A. MAYO, EXECUTOR OF THE WILL OF DORCAS JANE SILVERTHORNE; CHARLOTTE LOUISE JOHNSON, GLADYS THOMPSON AND ANNIE O'BRIEN.

(Filed 30 September, 1953.)

1. Partnership § 10b: Wills § 1—

A partnership agreement that upon the death of one of the partners the interest of the deceased partner should become the property of the survivor upon the payment of a stipulated amount to the legal representatives of the deceased partner or to specified persons is supported by valuable consideration in the mutual promises contained therein, and is valid and enforceable when not made for any illegal purpose, subject only to the rights of the creditors of the deceased partner.

2. Same: Wills § 1—Agreement for survivorship in partnership property upon payment of certain sum to person designated is not testamentary disposition of property.

The partnership agreement in suit provided that upon the death of one of the partners the assets of the partnership should become the property of the survivor upon the payment by the survivor to the deceased's widow of a stipulated sum, payable in annual installments over a period of eight years. Upon the death of the partner, the survivor made the first annual payment to the widow, but the widow died before the second annual payment was due. *Held:* The widow was entitled to the funds as the third party beneficiary of the contract, and therefore her personal representative is entitled to receive payments of the balance due under the agreement and not the personal representative of the deceased partner, the agreement not being a testamentary disposition of property and it not being necessary that it be executed in accordance with the formalities required in the execution of a will.

APPEAL by plaintiff from *Bone, J.*, February Term, 1953, of BEAUFORT.

1. This is a civil action instituted for the purpose of having the court construe an agreement entered into by and between R. S. Silverthorne and his brother, S. M. Silverthorne, dated 22 June, 1946, and declare the rights of the plaintiff and defendants thereunder.

2. R. S. Silverthorne died intestate 29 December, 1950, leaving surviving him his widow, Dorcas Jane Silverthorne, and no children. The widow duly qualified as administratrix of his estate. Dorcas Jane Silverthorne died testate 10 October, 1951, and the defendant, John A. Mayo, is the duly qualified and acting executor of her last will and testament.

3. Prior to the death of R. S. Silverthorne, he and the plaintiff were partners in a mercantile establishment in the City of Washington, North Carolina, trading under the firm name of R. S. Silverthorne and Brother.

The agreement to be construed was duly executed, probated, and recorded in the office of the Register of Deeds for Beaufort County, and in pertinent part reads as follows:

"AGREEMENT TO BUY AND SELL: That if he is the first to die, he agrees to sell and convey to the survivor, and the survivor agrees to buy from the one that dies first, his heirs or assigns, all of the right, title and interest, which is one-half interest, shall have in and to the assets, name and good will of said partnership, as of the date of said death, by paying to the widow of R. S. Silverthorne the sum of $8,500, which is to be payable $1,000 cash per year from the stock of merchandise, or longer if necessary, and the said widow is also to receive $1,500 in bonds now in name of said partnership; and if the said S. M. Silverthorne dies first, the said R. S. Silverthorne agrees to pay to the daughter of the said S. M. Silverthorne, the sum of $8,500, which is to be payable $1,000 cash per year from the stock of merchandise, or longer if necessary, and the said daughter is also to receive $1,500 in bonds now in name of said partnership."

4. After the death of R. S. Silverthorne and pursuant to the terms of the agreement, the plaintiff delivered to Dorcas Jane Silverthorne, the administratrix of his estate, the $1,500 worth of bonds referred to in the agreement and in addition thereto paid to her one of the annual $1,000 installments, leaving an unpaid balance, under the terms of the agreement, of $7,500.

5. The plaintiff has obtained an assignment from all the heirs at law and distributees of R. S. Silverthorne, deceased, except his widow, Dorcas Jane Silverthorne, of all their interest as distributees of R. S. Silverthorne in all properties owned by the partnership.

6. The plaintiff alleges that the balance of $7,500 constitutes an obligation to the estate of R. S. Silverthorne and not to the executor of the last will and testament of Dorcas Jane Silverthorne. It is conceded that if the balance should be paid to the executor of the last will and testament of Dorcas Jane Silverthorne, the same would pass to the defendants Charlotte Louise Johnson, Gladys Thompson and Annie O'Brien as residuary legatees under the terms of the last will and testament of Dorcas Jane Silverthorne.

The court below held that the agreement was valid and that the unpaid balance in the sum of $7,500 should be paid to the executor of the last will and testament of Dorcas Jane Silverthorne, and entered judgment accordingly. The plaintiff appeals, assigning error.

Rodman & Rodman for appellant.
James W. Keel, Jr., for appellee.

DENNY, J. The plaintiff and the defendants concede that the partnership agreement under consideration is a valid, binding and enforceable contract as a partnership settlement. The plaintiff, however, contends the agreement is testamentary in character and void in so far as it directs that the payments provided therein shall be made to the widow of the deceased partner. Therefore, he takes the position that the balance due under the agreement must be paid to the estate of R. S. Silverthorne for distribution as provided by law and not to the executor of the last will and testament of the widow, Dorcas Jane Silverthorne. On the other hand, the defendants insist that the judgment of the court below should be affirmed.

Agreements between partners providing that in the event of the death of one of the partners during the existence of the partnership, the surviving partner or partners shall pay a certain amount to the legal representatives of the deceased partner, or to specified persons, and upon the payment thereof the surviving partner or partners shall become the sole owner or owners of the partnership business, are frequent, and when fairly made, for a valuable consideration and without any illegal purpose, such agreements are not open to objection and will be upheld. 40 Am. Jur., Partnership, section 311, page 347; Page on Wills, Volume 1, section 84, page 180, *et seq.; McKinnon v. McKinnon,* 56 F. 409; *Murphy v. Murphy,* 217 Mass. 233, 104 N.E. 466; *Ireland v. Lester,* 298 Mich. 154, 298 N.W. 488; *Warrin v. Warrin,* 154 N.Y.S. 458, 169 App. Div. 97; Anno. 73 A.L.R. 991; Anno. 1 A.L.R. 2d 1265.

It appears to be well settled that a provision in a partnership agreement to the effect that on the death of one of the partners his interest in the partnership shall become the property of the surviving partner or partners is not testamentary in nature, and the fact that the agreement is not executed according to the requirements of the law governing the execution of wills does not render it invalid and unenforceable. Such an agreement is enforceable if supported by fair and adequate consideration. 40 Am. Jur., Partnership, section 312, page 347; *United States v. Stevens,* 302 U.S. 623, 58 S. Ct. 388, 82 L. Ed. 484; *Hale v. Wilmarth,* 274 Mass. 186, 174 N.E. 232, 73 A.L.R. 980; *Green v. Whaley,* 271 Mo. 636, 197 S.W. 355. See Anno. 1 A.L.R. 2d page 1197, *et seq.,* where cases from

thirty-six states are cited in support of this view, including *Fawcett v. Fawcett,* 191 N.C. 679, 132 S.E. 796.

In the last cited case, two brothers had entered into an agreement whereby all the stock owned by either of them in a certain bank, at the time of death, should become the property of the survivor, upon a par basis. The survivor was to have five years in which to pay for the stock in equal annual payments. This Court held that the agreement was not void on any ground of public policy, or open to the objection that it was a testamentary disposition of property. *Howe's Estate,* 31 Cal. 2d 395, 189 P. 2d 5, 1 A.L.R. 2d 1171.

In our opinion, the provision directing that the widow of the deceased partner should receive the consideration fixed in the agreement is no more a testamentary disposition of property than that which provides that upon the payment of an agreed price the interest of the deceased partner should pass to the surviving partner. Both provisions were bottomed upon an executory contract which is not attacked for lack of adequate consideration. *Fawcett v. Fawcett, supra; Phifer v. Mullis,* 167 N.C. 405, 83 S.E. 582. Moreover, upon the execution of the agreement, the mutual promises contained therein constituted enforceable and binding rights which could not be revoked except by mutual consent of the parties. This being true, Dorcas Jane Silverthorne being a third party for whose benefit the contract was made, immediately upon the death of her husband, was entitled to have the provisions of the contract enforced. *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566; *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383; *James v. Dry Cleaning Co.,* 208 N.C. 412, 181 S.E. 341; *Foundry Co. v. Construction Co.,* 198 N.C. 177, 151 S.E. 93; *Keller v. Parrish,* 196 N.C. 733, 147 S.E. 9; *Parlier v. Miller,* 186 N.C. 501, 119 S.E. 898; *Ireland v. Lester, supra; Murphy v. Murphy, supra.*

In the case of *Ireland v. Lester, supra,* the precise question now before us was litigated. The partners entered into an agreement that upon the death of either partner, during the continuance of the contract, the interest of such decedent in the partnership business should be sold to and purchased by the survivor at a sum to be agreed upon by the partners. Thereafter they set the price at $50,000. The contract provided for an initial payment and the remainder was to be paid at the rate of $1,000 per year. The payments were to be made to the widow of the deceased partner. The widow instituted the action and the heirs at law of the deceased partner intervened alleging that the agreement was testamentary in character and void, and that they were entitled to share in the proceeds received from the sale of the partnership assets as heirs at law of the deceased partner who died intestate. The trial court in its judgment directed that "all interest that the decedent had in the partnership be conveyed to Cleveland J. Lester (the surviving partner), upon his paying

to the plaintiff the amount called for in the contract." The interveners appealed. The Supreme Court of Michigan held the agreement was not testamentary in effect and regardless of whether the money was paid to the estate or to the widow, the widow was a third party beneficiary and her rights under the contract vested at the time of its execution. Whereupon, the Court affirmed the judgment of the lower court.

Ordinarily, a surviving partner, in the absence of a partnership agreement providing otherwise, is charged with the duty to pay the firm debts, collect the partnership accounts, and account to the personal representatives of the deceased partner. It naturally follows that a partnership agreement is not binding on the firm's creditors unless they assent. 68 C.J.S., Partnership, section 401 (d), page 921. Furthermore, an interest in a partnership may be subjected to the payment of the individual debts of the partner. Therefore, the disposition of property by contract, enforceable at death, does not exempt such property from liability for the debts of the decedent any more effectually than if the property had been disposed of by will. However, it would make no difference in the instant case whether the balance due is paid to the executor of the last will and testament of Dorcas Jane Silverthorne or to an administrator of the estate of R. S. Silverthorne; provided there are no unsatisfied creditors of his estate. In no event would the distributees of R. S. Silverthorne, as such, take any interest in the balance which is due or to become due under the partnership agreement. Since there is no intimation on this record that any valid claim against the estate of R. S. Silverthorne is outstanding and unsatisfied, the judgment of the court below is

Affirmed.

THOMAS-YELVERTON COMPANY, INC., v. STATE CAPITAL LIFE INSURANCE COMPANY.

(Filed 30 September, 1953.)

1. Insurance § 37—

Ordinarily, in an action on a life insurance policy the burden of establishing affirmative defenses rests upon insurer.

2. Insurance § 31—

Ordinarily, knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to insurer, G.S. 58-197, even though contrary to a direct stipulation in the policy or the application for same, but this rule of imputed knowledge does not apply when the agent participates in the fraud or the suppression of a material fact.

8. Insurance §§ 31a (1), 31c, 37—Plaintiff's own evidence held to establish affirmative defense, and therefore nonsuit was proper.

Plaintiff's own evidence tended to show that insurer's agent was advised that applicant was suffering from an ulcerated stomach, that other companies had refused to issue insurance to him, and that to avoid detection the agent suggested that a theretofore unused middle initial be used in the application for a policy with his company, and wrote in the application negative answers to the questions as to whether applicant had been rated or turned down for other insurance, was suffering from any disease of the stomach or had been attended by a doctor during the previous two years, and in the affirmative that applicant was then in good health. *Held:* Plaintiff's own evidence discloses a misrepresentation or suppression of a material fact in the application sufficient to avoid the policy, and that the agent participated in such misrepresentation or suppression of facts, and therefore plaintiff's own evidence establishes affirmative defenses as a matter of law and defendant's motion to nonsuit was properly granted.

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

APPEAL by plaintiff from *Parker, J.*, February Term, 1953, of WILSON.

This action was instituted by the plaintiff, assignee, to recover on an industrial life insurance policy issued on the life of Roney D. Boykin, by the defendant.

The policy in the sum of $400.00 was issued, without medical examination, 18 June, 1951, and the insured died 27 September, 1951. The policy was assigned by the named beneficiary, Ruby Ruffin, to the plaintiff for the payment of insured's funeral expenses.

The defendant admitted the issuance of the policy and the death of the insured, but denied liability on the ground that in his application the insured had made certain false and material representations which caused the defendant to act favorably on the application and to issue the policy. The defendant tendered a check for the premiums paid and the plaintiff declined to accept it.

The plaintiff offered sufficient evidence to make out a *prima facie* case, and rested. Whereupon, the defendant moved for judgment as of nonsuit, which motion was overruled.

The application as signed by the insured contains the following questions and answers:

"22. Have you ever been rated or declined for insurance? 'No.'

"23. (a) Have you ever suffered from any disease of the: . . . stomach . . .? 'No.'

"24. Have you been attended by a doctor during the past 2 years? 'No.'

"27. Are you now in good health? 'Yes.'"

The defendant offered evidence to the effect that the insured had been a patient of a local physician within two years next preceding the date

of the application; that he had suffered from a stomach ailment; that he had had a gastro-enterostomy; that an examination of the insured was made by his physician on 9 August, 1949, at which time he was suffering, according to the diagnosis, from a peptic ulcer; that he was admitted to the hospital on 28 July, 1951, and found to be in a serious condition, vomiting blood and suffering from ulcers, and after two operations, developed a duodenal fistula which was the immediate cause of his death. The defendant also tendered as a witness in its behalf, the agent of the company who obtained the application for the insurance. This witness testified that he asked the insured each and every question contained in the application and that he wrote down the answers as given by the insured. But on cross-examination the witness testified he could not remember whether any information was given to him with respect to the insured's physical condition, or whether he had been informed that the insured had tried repeatedly to get insurance and had been turned down each time because of the condition of his health; or that the insured had had an operation for ulcers and was at that time under the care of a local physician. However, after each and every one of these pertinent questions, the witness, after stating that he could not remember whether he was given the information about which inquiry was being made, added: "I do not deny it."

The defendant rested and renewed its motion for dismissal as of nonsuit. The motion was again denied.

Thereupon, the plaintiff, apparently proceeding upon the theory that knowledge of the agent is knowledge of the principal, offered in rebuttal to the agent's testimony, the testimony of Ruby Ruffin, the beneficiary named in the policy, and that of her daughter. They testified that Tony Boykin, a brother of Roney D. Boykin, who had a policy with the defendant, inquired of defendant's agent whether he could get a policy on his brother Roney; that the agent inquired whether Roney had been to a doctor lately and was told that he had an ulcerated stomach and had been operated on and that he was then under the care of Dr. Cubberly; that the agent inquired if his brother was able to work and when informed that he was working at that time, he said: "If he's able to work, I can get insurance on him;" that he was informed that the insured had tried to get insurance with a number of companies and was given the names of several of the companies that had turned him down; that the agent inquired as to the name used in the previous applications and was informed that the former applications had been made in the name of Roney Boykin; that he then inquired if he had a middle name or initial and when told that his name was Roney Dan Boykin, he suggested that the application be made in the name of Roney D. Boykin; and according to the testimony of Ruby Ruffin, she was present when the agent came to her

home sometime later and obtained the signed application from Roney D. Boykin, who was rooming and boarding with her, and that the insured informed the agent that he had had an operation, that he had an ulcerated stomach and was under a doctor's care at that time.

The plaintiff rested, and the defendant moved the court for permission to amend its pleadings to allege fraud. The motion was allowed and the pleadings so amended, and the defendant again moved for judgment as of nonsuit. The motion was allowed and the plaintiff appeals, assigning error.

Gardner, Connor & Lee for appellant.
Carr & Gibbons and Allen & Hipp for appellee.

DENNY, J. The sole question presented for decision on this appeal is whether or not the court below committed error in sustaining the defendant's motion for judgment as of nonsuit.

Ordinarily in an action to recover on a life insurance policy, where the execution and delivery of the policy and the subsequent death of the insured are proven or admitted, and the premiums have been paid, the burden of establishing an affirmative defense rests upon the insurer. *Strigas v. Insurance Co.*, 236 N.C. 734, 73 S.E. 2d 788; *Tolbert v. Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915; *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742; *Pearson v. Pearson*, 227 N.C. 31, 40 S.E. 2d 477; *Collins v. Casualty Co.*, 172 N.C. 543, 90 S.E. 585; *Page v. Insurance Co.*, 131 N.C. 115, 42 S.E. 543.

The provisions of G.S. 58-197 read as follows: "A person who solicits an application for insurance upon the life of another, in any controversy relating thereto between the insured or his beneficiary and the company issuing a policy upon such application, is the agent of the company and not of the insured."

The plaintiff is relying on the above statute and *Fishblate v. Fidelity Co.*, 140 N.C. 589, 53 S.E. 354; *Insurance Co. v. Grady*, 185 N.C. 348, 117 S.E. 289; *Short v. Insurance Co.*, 194 N.C. 649, 140 S.E. 302; *Laughinghouse v. Insurance Co.*, 200 N.C. 434, 157 S.E. 131; *Colson v. Assurance Co.*, 207 N.C. 581, 178 S.E. 211; *Cox v. Assurance Society*, 209 N.C. 778, 185 S.E. 12; *Heilig v. Insurance Co.*, 222 N.C. 231, 22 S.E. 2d 429, and similar cases, to sustain its contention that knowledge of its agent constitutes knowledge of the defendant and that the defendant is estopped from denying the validity of the policy, now held by it as assignee.

The rule with respect to the knowledge of an agent being imputable to his principal is well stated in the case of *Insurance Co. v. Grady, supra,* in the following language: "In the absence of fraud or collusion between

the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same." However, it is otherwise when it clearly appears that an insurance agent and the insured participated in a fraud by inserting false answers with respect to material facts in an application for insurance. The knowledge of the agent in such instances will not be imputable to his principal. *Sprinkle v. Indemnity Co.*, 124 N.C. 405, 32 S.E. 734; *Gardner v. Insurance Co.*, 163 N.C. 367, 79 S.E. 806; *Inman v. Woodmen of the World*, 211 N.C. 179, 189 S.E. 496.

In the case of *Hedgecock v. Insurance Co.*, 212 N.C. 638, 194 S.E. 86, this Court, speaking through *Barnhill, J.*, said: "When the plaintiff offers evidence sufficient to constitute a *prima facie* case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered."

In *Butler v. Insurance Co.*, 213 N.C. 384, 196 S.E. 317, the defendant plead a violation of the conditions attached to the delivery of the policy, and, in addition, that it was secured by fraudulent misrepresentations and concealments. At the trial it was admitted that the plaintiff could not refute testimony concerning consultations by the applicant and her treatment by a physician within the period which was material to the issue in controversy. Whereupon, the court dismissed the action as in case of nonsuit. In sustaining the dismissal, *Stacy, C. J.*, speaking for the Court, said: "We think it is clear that the plaintiff is in no position to insist upon a recovery. Undoubtedly there was a suppression of a material fact, . . . which would have resulted in nondelivery of the policy but for such suppression. . . . A *suppressio veri* by one whose duty it is to speak is equivalent to a *suggestio falsi*. *Isler v. Brown*, 196 N.C. 685, 146 S.E. 803; 10 R.C.L., 324."

Unquestionably the defendant would not have issued a policy of insurance on the life of Roney D. Boykin if the application had disclosed the true facts with respect to his health. It is settled in this jurisdiction that a misrepresentation of a material fact, or the suppression thereof, in an application for insurance, will avoid the policy "even though the assured be innocent of fraud or an intention to deceive or to wrongfully induce the assurer to act, or whether the statement be made in ignorance or good faith, or unintentionally." *Assurance Society v. Ashby*, 215 N.C. 280, 1 S.E. 2d 830; *Petty v. Insurance Co.*, 212 N.C. 157, 193 S.E. 228; *Inman v. Woodmen of the World, supra; Insurance Co. v. Box Co.*, 185 N.C. 543, 117 S.E. 785; *Insurance Co. v. Woolen Mills*, 172 N.C. 534, 90 S.E. 574; *Hardy v. Insurance Co.*, 167 N.C. 22, 83 S.E. 5; *Gardner*

v. Insurance Co., supra; Alexander v. Insurance Co., 150 N.C. 536, 64 S.E. 432; *Bryant v. Insurance Co.*, 147 N.C. 181, 60 S.E. 983.

In the instant case, when the insured signed the application he knew the agent had written the answers to the questions contained in it; and by signing it in the form submitted, he represented that the answers were true. The plaintiff's evidence clearly establishes the truth of the affirmative defenses of the defendant. Hence, the ruling of the court below will be upheld. *Hedgecock v. Insurance Co., supra.*

Affirmed.

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

STATE v. JAMES MONROE LOVE.

(Filed 30 September, 1953.)

1. Bastards § 7—

While in a prosecution of defendant for willful failure and refusal to support his illegitimate child, the State has the burden of satisfying the jury beyond a reasonable doubt that defendant is the father of the child and that he has willfully neglected or refused to support the child, it is not required that the question of paternity should be determined in a separate and distinct action, but it may be determined in the main prosecution for the offense. G.S. 49-2.

2. Bastards § 1—

The word "support" as used in G.S. 49-2 is not restricted merely to food, but includes food, clothing and other necessaries, together with medical assistance reasonably required for the preservation of the health of the child, and thus the obligation to support the child applies even in the case of a newly born baby.

APPEAL by defendant from *Godwin, Special J.*, at February 1953 Special Term of CASWELL.

Criminal prosecution begun in Caswell County Recorder's Court upon a warrant issued on affidavit of Alene Garland, sworn to 23 April, 1951, and, on appeal thereto, tried in Superior Court upon the warrant as there amended, charging, in substance, that James Monroe Love did on ..... day of April, 1951, after notice of paternity and demand for support, unlawfully and willfully fail and neglect to provide adequate support and maintenance for his illegitimate minor child, Earl Lea, age one month, begotten upon the body of Alene Garland, against the form of the statute, etc.

Upon arraignment defendant pleaded "Not guilty."

Thereupon the State offered the testimony of Alene Garland, the prosecuting witness, then 20 years of age, briefly recited as follows: "I know James Monroe Love . . . I started going with him in 1949 and stopped in 1951. He came to see me every Saturday and Sunday and Wednesday night, and sometimes he was over there Monday morning . . . I wasn't going with anybody else at the time. After he got me pregnant, I told him about it, and he promised to slip me off and marry me. I don't know why he didn't . . . My child's name is Earl Lea, and James Monroe Love is the father of the baby . . . born March 22, 1951. I wrote him (Love) a letter after the child was born. I went to him and told him and the word he told me . . . he wished I hadn't let his daddy know . . . about it. My mother went and told his father about it before the baby was born. He promised to take me and marry me. He said he would take care of the baby when it was born. He has provided nothing for the child since it was born . . . I have had medical bills since the birth of the child. He hasn't given me nothing since the birth of the child. He hasn't furnished anything in the way of food and clothing . . ."

Then on cross-examination of the witness, this testimony was given by her: "When the baby was born, I nursed it at my breast . . . from the time it was born until the time the warrant was taken out. After the baby was born, I didn't see him (Love) any more than at the store or somewhere like that. I wrote him a letter to come over there after the baby was born. I told him to come over, the baby was there, to help get him some clothes, and I wrote the letter directly after the baby was born. I guess the baby was about a week old after I wrote the letter. He didn't come and he has never contributed anything to that baby's support. The baby needed underclothes and a gown to put on. I didn't have nothing to prepare them with. My sister gave me sufficient clothes to take care of him when he was born, but I sent him (Love) word, too . . . I bought his first clothes after he got a month old,—after the warrant was issued."

The State also offered the child, Earl Lea, in evidence, and exhibited him to the jury for inspection.

At the close of the State's evidence, defendant moved for judgment as of nonsuit (1) on the issue of paternity, and then (2) on the issue of nonsupport. Both motions were overruled respectively, and defendant excepted to each ruling. Defendant offered no evidence, and at the close of all the evidence renewed each of the motions, and they were overruled respectively, and defendant entered exception to each ruling.

The following issues were submitted to the jury, under instructions of the court:

(1) Is the defendant James Monroe Love the father of Earl Lea Garland?

(2) Did the defendant willfully fail to support the said child between the time of its birth on March 22, 1951, and April 22, 1951, after notice and request for support?

(3) Is the defendant guilty, as charged in the warrant?

(The record fails to show that defendant objected to the issues at the time they were submitted.)

The record recites that: "The charge of the court is not incorporated in the case on appeal for the reason that no exceptions are taken to the charge of the court."

The jury answered both the issue of paternity and the issue of nonsupport against the defendant, and found him guilty of nonsupport of Earl Lea Garland as charged in the warrant. Thereupon defendant moved (1) to set aside the verdict, as being "against the greater weight of the evidence," and (2) for a new trial "for errors committed in the progress of the trial." The motions were overruled and defendant excepted.

Judgment was pronounced in accordance with the verdict, and defendant objected, and excepted thereto, and appeals to Supreme Court and assigns error.

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

D. Emerson Scarborough for defendant, appellant.

WINBORNE, J. Defendant, on this appeal, raises basically two questions under his assignments of error predicated upon exceptions to denial of his motions for judgment as of nonsuit, as above set forth. (1) Conceding that there is sufficient evidence to go to the jury as to the issue of paternity, should this issue be determined in a "separate and distinct action" and by a "separate and distinct trial" from the issue as to willful nonsupport? And (2) the evidence disclosing that the child nursed at his mother's breast, is there sufficient evidence to take the case to the jury on the issue as to whether defendant willfully neglected or refused to support and maintain his child during the period of one month next after his birth?

I. As to the first question, this Court held in the case of *S. v. Spillman*, 210 N.C. 271, 186 S.E. 322, that it is not necessary that defendant's paternity of the child should be first judicially determined, but that the State must prove on the trial, first, defendant's paternity of the child, and then his willful neglect or refusal to support the child. See also *S. v. Bradshaw*, 214 N.C. 5, 197 S.E. 564.

And a review of subsequent cases on the subject, considered by this Court, it is seen that in the trial of criminal prosecutions under the stat-

ute, referred to as "An Act Concerning the Support of Children of Parents Not Married to Each Other," Chapter 49 of General Statutes, the practice has been, and is to submit to the jury issues, first, as to defendant's paternity of the child, and, secondly, as to willful neglect or refusal of defendant to support and maintain his child, and, a third, as to guilt of defendant. See *S. v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333; *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728; *S. v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9; *S. v. Bowser,* 230 N.C. 330, 53 S.E. 2d 282; *S. v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857.

Indeed, in *S. v. Robinson, supra,* only two issues were submitted to the jury, first, as to paternity, and second, as to nonsupport. The jury answered both issues in the affirmative, but did not return a verdict of guilty. On appeal to this Court the verdict on the first issue was permitted to stand. But since there was no verdict as to guilt of defendant on the fact found as to the offense charged, a new trial was ordered on the second issue, with instruction that if the issue be answered "Yes" the jury should return a verdict of guilty, or guilty as charged. This order was made solely for the reason stated, and not that there should be separate trials on the issues submitted.

In this connection the State aptly contends in brief filed that three issues are required to be submitted in a single case, and that the trial court should instruct the jury to consider them in the order in which they appear, that is: That the issue of paternity should be considered first. That if it be answered in the negative, the other issues would not be considered. But if answered in the affirmative, the jury would proceed to consider the second issue, as to willful nonsupport; that if it be answered in the negative, the answer to the third issue would be "not guilty." But if the first and second issues be answered in the affirmative, the jury would answer the third issue "guilty"; that is, the answer to the third issue would follow as a matter of law.

This argument is predicated upon proper instruction that the burden is upon the State to satisfy the jury beyond a reasonable doubt as to facts found. And it is not amiss to say that the issues may be submitted orally or in writing. However, to submit written issues would seem to be the better practice.

II. As to the second question: The statute, G.S. 49-2 declares that "Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor, and subject to such penalties as are hereinafter provided." Defendant contends that "to support and maintain" as used in the statute means to provide food. Such meaning is too restrictive.

In 50 American Jurisprudence 870, speaking of the definition and nature of the term as it relates to support of persons, the author states:

"Maintenance and support, it has been said, are not words of art, but have a relative meaning. The word 'support' is generally used to mean articles for the sustenance of persons, as food, clothing, and other conveniences. In some cases, the word 'support' will include medicines and medical services as necessaries."

This Court, too, has considered the meaning of the word "support." In *Wall v. Williams* (1885), 93 N.C. 327, the Court had under consideration a contract to furnish "plenty for to support" named persons. *Ashe, J.*, writing for the Court, said: "What does that mean? According to Webster it means 'maintenance, subsistence, or an income sufficient for the support of a family,' and 'maintenance' means 'sustenance, support by means of supplies of food, clothing and other conveniences.' And this liberal construction of the word 'support,' in its use with regard to persons, who have been contracted with for their maintenance, was held in the case of *Whilden v. Whilden,* Riley Law & Equity 205. We cite this case to show that support is held to mean something more than mere food."

To like effect is the decision in *Clark v. Hay,* 98 N.C. 421 (1887), There the Court, considering the meaning of the term "for the support of the family," held that it is confined to goods bought for the direct benefit of the members of the family, such as food, clothing and other necessaries . . .

And in *S. v. Clark,* 234 N.C. 192, 66 S.E. 2d 669, opinion by *Devin, C. J.*, speaking of the obligation of a husband to provide adequate support for his wife, had this to say: " 'Support' as the word is used in the statute means personal support, maintenance; the supplying of food, clothing and housing suitable to their condition in life and commensurate with the defendant's ability; together with medical assistance reasonably required for the preservation of health."

The interpretation of the meaning of the term "support and maintain" as thus enunciated in decisions of this Court in regard to persons would seem appropriate in considering the meaning of the term as it is used in the statute under which defendant is convicted. G.S. 49-2. Hence this Court holds that the obligation of a parent "to support and maintain his or her illegitimate child," within the purview of the statute G.S. 49-2, is not restricted merely to providing food. It includes the supplying of food, clothing and other necessaries, "together with medical assistance reasonably required for the preservation of health" of the child. *S. v. Clark, supra.* And this obligation to the child applies even in the case of a newly born baby.

Applying this principle of law to the case in hand, the evidence shown in the record is sufficient to support a finding by the jury, beyond a

reasonable doubt, that defendant willfully neglected or refused to support and maintain his illegitimate child as charged in the warrant.

Hence in the judgment from which appeal is taken, there is

No error.

W. H. LARGE v. W. W. GARDNER.

(Filed 30 September, 1953.)

Pleadings § 19b—Demurrer for misjoinder of causes of action held properly allowed.

Plaintiff's action was based on allegations that defendant cashed a check for him, that plaintiff put the money in his pocket without counting it, that several days later defendant, in company with the general manager of plaintiff's employer, accused plaintiff in a loud and threatening manner of getting a large sum of money from defendant. Plaintiff also alleged that the manager summarily discharged plaintiff because of the false accusations of defendant and that defendant thereafter had plaintiff arrested for false pretense. Plaintiff demanded damages for causing breach of plaintiff's contract of employment and also actual and punitive damages for malicious prosecution. *Held:* Defendant's demurrer for misjoinder of causes of action was properly sustained, with leave to plaintiff to file amended complaint.

ERVIN, J., dissenting.

JOHNSON and PARKER, JJ., concur in dissent.

APPEAL by plaintiff from *McLean, Special Judge,* May Term, 1953, of MADISON. Affirmed.

Carl R. Stuart for plaintiff, appellant.

Charles Hutchins and W. E. Anglin for defendant, appellee.

DEVIN, C. J. The question presented by this appeal is the sufficiency of the complaint to withstand the demurrer interposed by the defendant.

Without undertaking to set out the complaint in full, the substance of the allegations therein contained may be summarized as follows:

It is alleged that the plaintiff had entered into a contract of employment with Gennett Lumber Company to cut, skid and haul logs for which he received substantial compensation; that the Lumber Company paid plaintiff by check, and he customarily cashed these checks at the store of the defendant Gardner; that on Saturday, 8 August, 1952, plaintiff presented a check for $9.36, which, after some delay, defendant cashed and handed the money to plaintiff who put it in his pocket without counting it; that the following Thursday the defendant in company with the

general manager of the Lumber Company came to where plaintiff was at work and in a vicious and threatening manner accused plaintiff of getting $90 of defendant's money, and the manager of the Lumber Company joined with defendant in loud, boisterous and threatening manner for the purpose of intimidating the plaintiff, greatly humiliating and embarrassing the plaintiff by these false and unfounded charges; that thereupon the manager of the Lumber Company summarily discharged plaintiff, and the loss of his employment by the Lumber Company was due to the false accusations of the defendant, "causing the plaintiff to suffer to his great damage in the sum of $5,000."

Plaintiff further alleged that the defendant and the manager of the Lumber Company were working together with design to injure and damage the plaintiff, and that the defendant wrongfully, maliciously and without probable cause swore out a warrant falsely charging plaintiff with obtaining $90 by false pretense and caused plaintiff to be publicly arrested and put in jail; that thereafter the defendant caused the solicitor to send a bill of indictment to the grand jury charging plaintiff with feloniously taking defendant's money, but that the grand jury returned the bill not a true bill, and the action was dismissed.

Plaintiff alleged that the defendant by his wrongful and malicious conduct caused plaintiff to be held in disgrace and injured his reputation, and caused him to suffer anguish of mind "all to his great damage in the sum of $10,000 punitive damages and $5,000 actual damages"; that the action of the defendant in causing warrant to issue and the plaintiff to be arrested was without justification or probable cause and was prompted by malice and for the purpose of destroying plaintiff's reputation and business.

The prayer for relief was "(1) that he recover of the defendant $5,000 for the breach of the contract caused by the said defendant between plaintiff and the Gennett Lumber Company; (2) that he recover of defendant $10,000 as punitive damages, and (3) that he recover of defendant $5,000 as compensatory damages."

The defendant demurred on the ground that the complaint does not state a cause of action, and that the purported causes of action are not set out separately, and that unrelated causes are joined and put together in such manner that it is impossible to answer with precision.

The court sustained the demurrer for misjoinder of causes of action and allowed the plaintiff 30 days in which to file amended complaint. The plaintiff appealed to this Court.

While the plaintiff has set out in some detail allegations of tortious conduct on the part of the defendant, it is apparent that the complaint is faulty and does not measure up to the requirements of good pleading as pointed out in *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615. The plain-

tiff has attempted to set up several unrelated causes of action with demand for recovery of damages on several different grounds.

The ruling of the court below in sustaining the demurrer and allowing plaintiff time to file amended complaint is affirmed, and the cause is remanded with directions that plaintiff be granted reasonable time within which to file an amended complaint setting out definitely and succinctly the cause of action upon which he wishes to rely.

Judgment affirmed.

ERVIN, J., dissenting: The complaint leaves much to be desired in plainness and conciseness of statement. In my judgment, however, it can be construed to state a cause of action for malicious prosecution. *Abernethy v. Burns,* 210 N.C. 636, 188 S.E. 97. As a consequence, I vote to reverse the ruling on the demurrer.

JOHNSON and PARKER, JJ., concur in dissent.

DOVIE J. FINCH v. ROBERT MENIUS WARD, ORIGINAL PARTY DEFENDANT, AND HOWARD R. FINCH, ADDITIONAL PARTY DEFENDANT.

(Filed 30 September, 1953.)

1. Automobiles § 18b—

In the absence of anything which gives notice to the contrary, the driver of an automobile may assume and act on the assumption that others will exercise due care for their own safety and will observe the traffic laws involved.

2. Trial § 31b—

It is the duty of the trial court to instruct the jury on all substantial features of the case arising on the evidence whether there is a prayer for special instructions or not, and the court's failure to do so must be held for error. G.S. 1-180.

3. Automobiles §§ 8i, 18i—Charge held erroneous for failure to charge law as to right of way at intersection.

In this case involving a collision at an intersection, *it is held* that upon the cross action of one defendant driver against the other driver, the appealing defendant was entitled to instructions as to the law upon his contention that he had the right of way at the intersection and had the right to assume that the driver of the other car would observe the rules prescribed by statute, G.S. 20-155, which arose upon his evidence tending to show that he was first in the intersection and that the driver of the other car approached the intersection from the left at excessive speed, and crashed into his car when the front of his car was two feet over the center line.

FINCH *v.* WARD.

APPEAL by defendant, Howard R. Finch, from *Parker, J.*, February Term, 1953, of NASH. New trial.

This action grew out of a collision between automobiles at the intersection of North Swain Street and East Edenton Street in the city of Raleigh.

Dovie J. Finch, a passenger in one of the automobiles, sued defendant Ward, driver of the other automobile, for damages for personal injury sustained as result of the collision which was alleged to have been due to the negligence of defendant Ward. The defendant Ward denied the allegations of negligence, and alleged that plaintiff's injury was due to the negligence of Howard R. Finch, the driver of the automobile in which plaintiff Dovie Finch was a passenger, and asked that Howard R. Finch be made party in order to secure contribution in case plaintiff should recover. Howard R. Finch was made party, and defendant Ward filed cross-complaint against him alleging that he was joint tort-feasor, and asked contribution.

Howard R. Finch then filed answer to the cross-complaint of defendant Ward denying negligence on his part, alleging that the defendant Ward's negligence was the sole proximate cause of the collision, and further alleged that he, Howard R. Finch, suffered a personal injury as result of the collision, that this was due to the negligence of defendant Ward, and he prayed that he recover damages therefor.

Out of these pleadings and the evidence offered issues arose and were submitted to and answered by the jury as follows:

"1. Was the plaintiff Dovie J. Finch injured by the negligence of the defendant Robert Menius Ward, as alleged in the complaint?

"Answer: Yes.

"2. Was the defendant Howard R. Finch injured by the negligence of Robert Menius Ward, as alleged in the answer of Howard R. Finch?

"Answer: Yes.

"3. If so, did the defendant Howard R. Finch contribute to his injuries, and to those of the plaintiff, Dovie J. Finch, by his own negligence, as alleged in the answer of Robert Menius Ward?

"Answer: Yes.

"4. What damages is Dovie J. Finch entitled to recover?

"Answer: $5,000.

"5. What damages is Howard R. Finch entitled to recover?

"Answer ....."

O. B. Moss for Howard R. Finch, appellant.

Battle, Winslow & Merrell for defendant Robert Menius Ward, appellee.

DEVIN, C. J. The verdict of the jury on the third issue established the negligence of defendant Howard R. Finch as contributing to his own injury and to the injury of the plaintiff Dovie J. Finch, thus affording basis for denying him recovery for his own injuries and for judgment over against him for contribution as joint tort-feasor. Defendant Howard R. Finch contends that in these respects a wrong conclusion was reached, and he brings the case here for review, assigning errors of omission in the charge of the court in that the court failed to charge the jury as to material phases of the case favorable to his contentions.

According to the testimony offered by the plaintiff and defendant Howard R. Finch (the defendant Ward offered none), on 21 January, 1951, Dovie J. Finch was a passenger in an automobile driven by Howard R. Finch, her husband, and proceeding north along North Swain Street in Raleigh. As Finch approached the intersection with East Edenton Street he reduced the speed of his automobile, looked both ways along Edenton Street, and, seeing nothing, proceeded slowly into East Edenton Street at a rate of speed he placed at 3, 4, or 5 miles per hour. When he reached a point near the center of Edenton Street, with the front of his car 2 feet over the center line, his automobile was violently struck by the automobile driven by defendant Ward at a very fast rate of speed and both he and plaintiff Dovie J. Finch sustained serious injuries. Edenton Street is 42 feet wide and Swain Street is 28 feet wide. Both streets are paved at the intersection from curb to curb. Though East Edenton Street was the wider of the two, there was nothing to indicate that East Edenton Street was to be regarded as dominant. On the southwest corner of the intersection is a wall which would somewhat obstruct the view of one approaching along Edenton Street from the west. The sidewalk between the wall and the street is 5 feet wide. Looking west from the intersection along Edenton Street an automobile can be seen from a distance of 150 or 200 feet. Defendant Ward offered no evidence and has not appealed.

There is no exception to the charge of the court. The error complained of by the appellant is the court's failure to charge on certain material phases of the testimony.

The defendant Finch calls attention to the evidence offered showing that as he entered the street intersection the defendant was approaching from his left; that he was on the right and had already entered the intersection before the defendant Ward arrived, and that he had the right of way under G.S. 20-155; that he had the right to assume the driver of an automobile coming from his left would observe the rules prescribed by statute. He contends that if his evidence and that of plaintiff be accepted, he was entitled to have submitted to the jury his contention that the negligence of defendant Ward was the sole proximate cause of the collision, and failing that, that the law applicable to his evidence in respect to the

manner of his entering the intersection in the light of the statute should have been given to the jury. *Bennett v. Stephenson,* 237 N.C. 377, 75 S.E. 2d 147; *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25; *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532. It has been repeatedly declared by this Court that in the absence of anything which gives notice to the contrary the driver of an automobile may assume and act on the assumption that others will exercise due care for their own safety and will observe the traffic laws involved. *Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Morgan v. Saunders,* 236 N.C. 162, 72 S.E. 2d 411.

An examination of the judge's charge when viewed in connection with the assignments of error in these respects leads us to the conclusion that the appellant's contentions should be sustained. It is the duty of the court to instruct the jury on all substantial features of the case arising on the evidence whether there is a prayer for special instructions or not, and the court's failure to do so will be held for error. *Adams v. Service Co.,* 237 N.C. 136, 74 S.E. 2d 332; *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522; *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375; *Mack v. Marshall Field & Co.,* 218 N.C. 697, 12 S.E. 2d 235; *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630. The statute G.S. 1-180 makes it incumbent upon the trial judge to "declare and explain the law arising on the evidence given in the case."

We think there should be a new trial upon such issues as may properly determine the question of the negligence of defendant Howard R. Finch under the allegations in the pleadings and the evidence offered, and the respective rights of the parties defendant between themselves.

New trial.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION v. SANFORD W. BROWN AND N. S. HILDEBRAND, TRUSTEES UNDER THE WILL OF ELEANOR G. HILDEBRAND, DECEASED; R. D. HILDEBRAND, SR., N. S. HILDEBRAND AND ROSE HILDEBRAND BROWN.

(Filed 30 September, 1953.)

1. Injunctions § 8—

Where it appears that at the time of the hearing the act sought to be restrained had already been done, plaintiff cannot be prejudiced by the dissolution of the temporary restraining order.

2. Injunctions § 1b—

Ordinarily, a preliminary mandatory injunction will not be granted except where the threatened injury is immediate, pressing, irreparable and clearly established.

3. Same: Highways § 7—Highway Commission held not to have shown preliminary equities necessary to support preliminary mandatory injunction.

The evidence tended to show that defendants, with the permission of the State Highway and Public Works Commission, installed metal culverts in extending concrete culverts under the highway across the highway right of way in preparing their property for use as a filling station, and that authorized agents and employees of the Commission visited the job each day and observed the progress of the work without objection. The Commission sought a preliminary mandatory injunction to compel defendant to remove the metal culverts on the ground that they were of faulty design and not adequate to take care of the drainage needs, and that this resulted in an encroachment on the highway right of way. *Held:* Plaintiff Commission has failed to establish the preliminary equities necessary to the granting of the extraordinary remedy of a preliminary mandatory injunction.

APPEAL by plaintiff from *McLean, Special Judge,* at 18 May Extra Civil Term, 1953, of BUNCOMBE.

Suit by the North Carolina State Highway and Public Works Commission to remove an alleged encroachment upon the right of way of U. S. Highway 70-74 near Asheville.

The land on both sides of the highway at the place in controversy is owned by defendants N. S. Hildebrand, R. D. Hildebrand, Sr., and Rose Hildebrand Brown. They are erecting a service station on the west side of the highway. The station site is in low ground, from 10 to 15 feet below the surface of the paved portion of the highway. Also in this declivity is a strip of the highway right of way about 21 feet wide, lying between the improved portion of the highway and the service station site. The instant controversy involves this 21-foot strip of right of way.

In order to make the service station site usable as such, it was necessary that it and the intervening strip of highway right of way be filled in and brought up to the level of the traveled portion of the highway.

The defendants' task in this respect was complicated by the fact that when the highway was built years ago the waters of a creek, known as Ross' Creek, which drained the adjacent lands, were channeled from the east through a culvert under the roadway so as to empty into the low ground now being filled in and developed. Therefore it was necessary that the defendants arrange to culvert off the waters of the creek beneath the dirt filling.

The culvert under the highway is a concrete triple barrel culvert; each barrel is 7 feet high and 7 feet wide.

The defendants have installed at the outfall end of the old concrete triple barrel culvert three circular metal culverts 7 feet in diameter. One of these circular culverts fits into the outfall end of each of the three barrels of the concrete culvert and extends over the low-ground strip of

right of way and on across part of the defendants' service station lot, underneath their newly made fill, an over-all distance of about 40 feet.

The gravamen of the complaint is that, whereas the plaintiff authorized the defendants to extend the present triple barrel concrete type of construction through and across the area to be filled in, the defendants, in violation of the authorization so granted, and without due permission of the plaintiff, proceeded to install these circular metal drainage pipes; that the installation as made is of faulty design and erection, inadequate to take care of the drainage needs of the highway, will interfere with existing drainage facilities, and amounts to an encroachment on the highway right of way. The plaintiff prays that the defendants (1) be restrained and enjoined from making further installation of the circular metal drainage pipes, and (2) that mandatory injunction issue requiring the defendants to remove the pipes already laid.

The defendants, answering, deny the material allegations of the complaint and aver that the installation complained of was made under the sanction and with the approval of authorized agents and employees of the Highway Commission, and that it provides adequate facilities for the discharge of the waters of Ross' Creek passing under the highway at that point and for the proper drainage of the highway in that area.

The cause was heard below by Judge McLean on plaintiff's motions (1) that the temporary order restraining the defendants from further "erection and installation" of the drainage pipes be continued until the final hearing, and (2) that preliminary order of injunction issue requiring the defendants to remove immediately the pipes already laid.

The court, after hearing the evidence offered by both sides, found facts, made conclusions of law, and entered judgment dissolving the restraining order previously entered and denying the plaintiff the affirmative relief sought by way of mandatory injunction, the pertinent findings and conclusions of the court being in summary as follows: That during the time the pipes were being installed, the plaintiff's duly authorized agents and employees visited the job each day, observed the progress of the work, and made no objection to the mode or character of installation; that this action was brought after the completion of the work now complained of; that the installation so made cost the defendants more than $5,000; that the installation as made does not obstruct or hinder the plaintiff's right of way easement in any manner, and is adequate to take care of the drainage of the highway in that area.

From the judgment so entered the plaintiff appeals, assigning errors.

R. Brookes Peters and Gudger, Elmore & Martin for plaintiff, appellant.

William V. Burrow for defendants, appellees.

JOHNSON, J. The record discloses, and it was conceded on the argument, that the drainage pipe installation complained of is now *fait accompli,* or a fact accomplished. This being so, there was nothing to support the preliminary order restraining the defendants from "further erection and installation" of the pipes. Hence the plaintiff suffered no harm from the dissolution of the order. *Groves v. McDonald,* 223 N.C. 150, 25 S.E. 2d 387; *Rousseau v. Bullis,* 201 N.C. 12, 158 S.E. 553. See also 43 C.J.S., Injunctions, Sec. 246.

As to the court's refusal to allow the plaintiff's motion for a preliminary order of injunction requiring the defendants to remove the drainage pipes pending trial of the cause, the rule is that ordinarily "such an order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable, and clearly established, . . ." McIntosh, North Carolina Practice and Procedure, Sec. 851, p. 972; *R. R. v. R. R.,* 237 N.C. 88, 74 S.E. 2d 430; *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452. A study of the record leaves the impression that the plaintiff has failed to establish preliminary equities within the purview of this rule. The judgment below is

Affirmed.

STATE OF NORTH CAROLINA ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. W. B. SIMPSON, ROUTE #2, ASHEVILLE, NORTH CAROLINA, EMPLOYER, No. 24-11-059.

(Filed 30 September, 1953.)

1. Master and Servant § 62—

Findings of fact by the Employment Security Commission in a hearing before it are conclusive upon review when supported by any competent evidence.

2. Master and Servant § 59b—

Evidence that a municipal corporation sold certain standing timber to defendant at a stipulated price per thousand board feet and that in connection with the purchase, defendant agreed to remove all sawdust, to keep the bushes down and to pile no brush on the premises of the corporation, *is held* to support the finding of the Employment Security Commission that the defendant was not in the employ of the municipal corporation.

APPEAL by defendant from *McLean, Special J.,* at February "A," Mixed Term 1953 of BUNCOMBE. Affirmed.

This was a proceeding under the Employment Security Law, Ch. 96 G.S. to determine if W. B. Simpson was an employer during the years 1949, 1950 and 1951 within the meaning of G.S. 96-8 (f) 1; and, if so,

the amount of contributions upon wages paid his employees during those years he should have paid to the Employment Security Commission, and to collect said indebtedness.

In accord with the procedure prescribed by the Act a hearing was held 24 July 1951 in Asheville before R. B. Billings, Deputy Commissioner, and another hearing 7 November 1951 before Henry E. Kendall, Chairman of the Employment Security Commission, in Raleigh. The Commission, by Kendall, its chairman, rendered an opinion in the proceeding 16 May 1952, finding the facts, and determining these questions of law: 1. That W. B. Simpson was an employer during the years 1949, 1950 and 1951 within the meaning of G.S. 96-8 (f) 1; 2. That W. J. Simpson and H. L. Simpson were employees during that time of W. B. Simpson; and 3. That R. L. Huntsinger, J. M. Williams and W. R. Birmingham during said time were not employees of the defendant, but were independent contractors. The Commission ordered and adjudged: 1. That W. B. Simpson during the years 1949, 1950 and 1951 was a covered employer within the meaning of the Employment Security Law of the State, and that he shall report, and pay contributions upon wages paid his employees during said years; 2. That W. B. Simpson is indebted to the State Employment Security Commission for the years 1949, 1950 and the first three quarters of 1951 in the sum of $1,016.69 with interest; 3. That W. B. Simpson shall remain a covered employer unless coverage is terminated as provided by law.

On 25 May 1952, W. B. Simpson objected and excepted to each and every ruling and finding of the Commission and appealed to the Full Commission. On 22 May 1952, W. B. Simpson objected and excepted to the following findings of facts by the Commission for that said findings are not supported by any competent evidence: part of finding of facts No. 4, all of findings of facts No. 5, No. 6, No. 7, No. 8, No. 11, No. 12 and part of finding of facts No. 13. The defendant also objected and excepted to the Commission's determination of questions of law Nos. 1 and 2, and to the order of the court. On 22 August 1952, the Full Commission overruled all exceptions of the defendant to the opinion and order contained in Opinion 862 of the Employment Security Commission, and affirmed the opinion of Kendall, Chairman, ordering it to be the final decision and opinion of the Full Commission.

On 25 August 1952, W. B. Simpson excepted to the Full Commission overruling his exceptions, assigned as error the signing of the order and every ruling therein contained and the failure of the Full Commission to sustain all his exceptions, and appealed to the Superior Court.

In the Superior Court the opinion of the Full Commission was affirmed in all respects.

Defendant appealed to this Court, assigning error.

W. D. Holoman, R. B. Overton, and D. G. Ball for Employment Commission of North Carolina, appellee.

Cecil C. Jackson for defendant, appellant.

PARKER, J. The defendant's assignments of errors Nos. 1 to 8, both inclusive, are to the rulings of the Superior Court in sustaining an order of the Full Commission overruling his exceptions to the findings of facts contained in Opinion No. 862 of the Employment Security Commission as follows: part of finding of facts No. 4; all of findings of facts Nos. 5, 6, 7, 8, 11, 12 and most of finding of facts No. 13, which findings of facts were affirmed by the full Commission. A careful reading of the evidence in the record discloses that there is competent evidence to support each and every finding of fact by the Commission, to which the defendant excepts, and assigns as error. Such findings of facts by the Commission are conclusive upon review, and the defendant's Assignments of Errors, Nos. 1 to 8, both inclusive, are overruled. G.S. 96-4 (m); *S. v. Roberts,* 230 N.C. 262, 52 S.E. 2d 890; *S. v. Distributing Co., ibid.,* 464, 53 S.E. 2d 674; *S. v. Monsees,* 234 N.C. 69, 65 S.E. 2d 887.

The defendant's Assignment of Error No. 9 is to the ruling of the Superior Court in sustaining an order of the full Commission overruling his exception No. 9 to the Employment Security Commission's determination of question of law No. 1 contained in Opinion 862, and affirmed by the full Commission. The ruling of the Superior Court is correct for it is based on the Employment Security Statute. G.S. 96-8 (e) and G.S. 96-8 (f). This assignment of error is untenable.

The defendant's Assignment of Error No. 10 is to the ruling of the Superior Court in sustaining an order of the full Commission overruling his exception No. 10 to the Employment Security Commission's determination of Question of Law No. 2 contained in Opinion 862, and affirmed by the full Commission. The determination of Question of Law No. 2 is in accord with our decisions, and this assignment of error is overruled. *Wilkinson v. Coppersmith,* 218 N.C. 173, 10 S.E. 2d 670; *Rothrock v. Naylor,* 223 N.C. 782, 28 S.E. 2d 572; *Johnson v. Gill,* 235 N.C. 40, 68 S.E. 2d 788.

The defendant's Assignments of Errors Nos. 11, 12 and 13 are without merit, and are overruled.

The defendant in his brief contends that he was an employee of the Biltmore Forest Company; that such company is a municipal corporation and that the term "employment" under the Employment Security Law, G.S. 96-8 (7) (A), does not include him. The Commission's Finding of Facts No. 3, to which the defendant has not filed an exception and assignment of error, are in part as follows: "W. B. Simpson entered into a purchase agreement whereby the Biltmore Forest Company sold to him

certain standing timber at a price of $20.00 per thousand board feet measure"; that in connection with the purchase of the timber the defendant agreed to remove all sawdust, to keep brushes cut down, to pile no brush on the premises of the Biltmore Forest Company. There was competent evidence to support this finding of facts which is binding on us, and according to this finding of facts the defendant was not in the employ of the Biltmore Forest Company. In fact, there is no competent evidence in the record upon which the Commission could have found that the defendant was in the employ of the Biltmore Forest Company in cutting this timber. This contention of the defendant is not tenable.

The defendant in his brief cites only one case, *S. v. Monsees, supra,* which does not support his contentions. The judgment of the Superior Court is

Affirmed.

JOHNNIE F. WALKER v. DOROTHY HELEN WALKER.

(Filed 30 September, 1953.)

1. Divorce § 5a—

Since all material allegations of the complaint in a divorce action are denied by operation of law, G.S. 50-10, the discretionary action of the court in permitting the defendant to file a specific denial to a paragraph of the complaint cannot prejudice plaintiff.

2. Divorce § 10b—

In an action for divorce on the ground of two years' separation an issue as to whether the separation was brought about by plaintiff's own misconduct towards defendant *is held* sufficient in form to present, under proper instructions from the court, defendant's affirmative defense of abandonment, and plaintiff's assignment of error to the submission of the issue is untenable.

3. Appeal and Error § 6c (5½)—

Where there is no exception in the lower court to the submission of an issue, its submission cannot be challenged for the first time on appeal.

4. Appeal and Error § 6c (5)—

An assignment of error for that the court failed to properly charge the jury as to the law in the case and to apply the law to the facts in the case, is ineffectual as a broadside assignment of error.

5. Divorce § 9b—

Where, in an action for divorce on the ground of two years' separation, the court correctly places the burden of proof on the defendant upon the issue as to whether the separation was brought about by plaintiff's own misconduct, plaintiff's assignment of error to the charge in respect to the burden of proof on the issue cannot be sustained.

APPEAL by plaintiff from *Sink, J.*, and a jury, at February Term, 1953, of RUTHERFORD. No error.

Civil action by plaintiff husband for absolute divorce on the ground of two years' separation. G.S. 50-6.

The jury returned the following verdict:

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

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

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

"4. Was the separation brought about by the plaintiff's own misconduct toward the defendant? Answer: Yes."

From judgment on the verdict denying the plaintiff divorce, he appeals, assigning errors.

M. Leonard Lowe for plaintiff, appellant.

B. T. Jones for defendant, appellee.

JOHNSON, J. The plaintiff's first assignment of error is based on his exception to the ruling of the court in permitting the defendant to enter a specific denial to paragraph six of the complaint, in which the plaintiff alleges that he and the defendant "lived separate and apart continuously for more than two years next preceding the commencement of the action; . . ." The defendant, in answering, had made no specific denial of this allegation. But none was necessary. This because the statute, G.S. 50-10, declares in effect that the material allegations of the complaint in a divorce action shall be deemed and treated as denied. Therefore, since paragraph six of the complaint stood denied by operation of law, it was inconsequential whether or not the defendant entered a denial, and the entry of the defendant's specific denial, under discretionary leave of the court, could not have prejudiced the plaintiff.

Next, the plaintiff assigns as error the action of the trial court in submitting the fourth issue. The issue is sufficient in form to have presented to the jury, under proper instructions, the determinative question raised by the defendant's affirmative defense of abandonment. *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493. See also *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923. Besides, an inspection of the record discloses no exception in the lower court to the submission of the issue. The attempt to challenge the issue for the first time in this Court is unavail-

ing. *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488.

The plaintiff assigns error in the charge as follows: ". . . that the court failed to properly charge the jury as to the law in such cases and to apply the law to the facts of the case." This assignment is based on no specific exception. It is broadside. The assignment is insufficient to bring up for review any part of the charge as given, or any omission in respect thereto. See Rule 19 (3), Rules of Practice in the Supreme Court, 221 N.C., p. 553 *et seq.; Hodges v. Malone & Co.,* 235 N.C. 512, 70 S.E. 2d 478; *Poniros v. Teer Co.,* 236 N.C. 145, 72 S.E. 2d 9.

The plaintiff's remaining assignment of error relates to the charge in respect to the burden of proof on the fourth issue. An inspection of the charge discloses that the court properly placed on the defendant the burden of proof as to this issue. The assignment is untenable.

The verdict and judgment will be upheld.

No error.

ELLA WILLIAMS AND CLARA CARTER v. ELBERT FOREMAN AND WIFE, OLIVIA FOREMAN.

(Filed 30 September, 1953.)

1. Easements § 8—

A party claiming a right of way by prescription has the burden of proving, among other things, that the way was used over defendant's land for the requisite period, and also that such use was adverse or under a claim of right.

2. Same—

Where plaintiffs' evidence tends to show that they used a right of way over defendants' land for a period in excess of twenty years, but also shows that such use was by permission of the owners of the land, defendants' motion to nonsuit plaintiffs' action to establish a prescriptive right of way is properly sustained.

APPEAL by plaintiffs from *Bone, J.,* at May Term, 1953, of BEAUFORT.

Civil action by plaintiffs to enjoin the obstruction of a roadway leading from their land over the land of defendants to a public highway.

These are the facts:

1. The plaintiffs Ella Williams and Clara Carter and the defendants Elbert Foreman and Olivia Foreman own adjoining tracts of land in a rural section of Beaufort County.

2. During the forty years immediately preceding the event described in the next paragraph, the plaintiffs and their predecessors in title used a

roadway leading from their land over the land of the defendants to a public highway.

3. In 1952, the defendants plowed the portion of the roadway on their land and in that way obstructed its use by the plaintiffs.

4. The plaintiffs thereupon brought this action against the defendants. The complaint alleges in detail that the plaintiffs and their predecessors in title used the roadway adversely and continuously for the entire period necessary for acquiring an easement by prescription, *i.e.*, twenty years, before the defendants obstructed it, and that as a legal result the plaintiffs own a prescriptive right of way in the portion of the land of the defendants included in the roadway. The complaint prays a mandatory injunction requiring the defendants to restore the roadway to its former condition, and a prohibitory injunction enjoining them from thereafter interfering with the plaintiffs in its use. The answer denies the material averments of the complaint.

5. The action was heard before Judge Bone and a jury at the May Term, 1953, of the Superior Court of Beaufort County. The plaintiffs offered testimony sufficient to show that they and their predecessors in title used the roadway throughout the forty years specified in paragraph 2. This testimony disclosed, however, that such use of the roadway was "by favor of the people who owned the land" of the defendants.

6. When the plaintiffs had produced their evidence and rested their case, the defendants moved for a compulsory nonsuit. Judge Bone sustained the motion, and entered judgment accordingly. The plaintiffs appealed, assigning errors.

LeRoy Scott for the plaintiffs, appellants.
Carter & Ross for defendants, appellees.

ERVIN, J. The only assignment of error requiring discussion is that based upon the entry of the compulsory nonsuit.

The party claiming a right of way by prescription has the burden of proving the several elements essential to its acquisition. *McCracken v. Clark,* 235 N.C. 186, 69 S.E. 2d 184; *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371; *Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906; *McPherson v. Williams,* 205 N.C. 177, 170 S.E. 662; *Perry v. White,* 185 N.C. 79, 116 S.E. 84.

Thus he must show, among other things, not only that a way over another's land was used for the requisite period, but also that such use was adverse or under a claim of right. *Darr v. Aluminum Co.,* 215 N.C. 768, 3 S.E. 2d 434; *Gruber v. Eubank,* 197 N.C. 280, 148 S.E. 246; *Grant v. Power Co.,* 196 N.C. 617, 146 S.E. 531; *Perry v. White, supra; Snowden v. Bell,* 159 N.C. 497, 75 S.E. 721; *Boyden v. Achenbach,* 86 N.C.

397; *Ray v. Lipscomb,* 48 N.C. 185; *Smith v. Bennett,* 46 N.C. 372; *Mebane v. Patrick,* 46 N.C. 23. A mere permissive use of a way over another's land, however long it may be continued, cannot ripen into an easement by prescription. *Colvin v. Power Co.,* 199 N.C. 353, 154 S.E. 678; *Weaver v. Pitts,* 191 N.C. 747, 133 S.E. 2; *Perry v. White, supra; S. v. Norris,* 174 N.C. 808, 93 S.E. 950; *Snowden v. Bell, supra; Boyden v. Achenbach, supra; Ingraham v. Hough,* 46 N.C. 39.

The evidence of the plaintiffs does not indicate that they and their predecessors in title used the roadway over the land of the defendants adversely or under a claim or right. Indeed, it engenders the conclusion that the use of the roadway was by permission of the owners of the soil. This being true, the evidence is insufficient to establish a right of way by prescription, and the compulsory nonsuit must be upheld. *Weaver v. Pitts, supra.*

Affirmed.

IN THE MATTER OF THE CUSTODY OF TONY GWYN GUPTON, A MINOR.

(Filed 30 September, 1953.)

1. **Constitutional Law § 21—**

A litigant in every kind of judicial proceeding has the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree. Constitution of N. C., Art. I, sec. 17.

2. **Same—**

Where a claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court, and be given an opportunity to test, explain or rebut it.

3. **Same: Habeas Corpus § 3—**

In this contest between husband and wife, living in a state of separation without being divorced, to obtain custody of their minor child, it appeared that the court had an officer of the law make a private investigation of the parties, and that the court's findings and adjudication based thereon rested in large measure upon the secret information thus obtained. *Held:* The judgment must be set aside and the cause remanded for a hearing in accordance with the law of the land.

APPEAL by petitioner from the *Honorable Joseph W. Parker,* Judge assigned to the Second Judicial District, at Chambers in Tarboro, North Carolina, 1 April, 1953.

Contest between husband and wife over custody of their small daughter heard upon a writ of *habeas corpus* under G.S. 17-39.

These are the salient facts:

1. The petitioner Talmadge Gupton and the respondent Evelyn Farmer Gupton are husband and wife. They are living in a state of separation without being divorced. Each of them seeks the custody of their small daughter Tony Gwyn Gupton in this proceeding.

2. Two hearings were had in the proceeding. The first was conducted on 16 February, 1953, and the second was held on 1 April, 1953. The petitioner and the respondent were present in person and by counsel at both hearings, and offered voluminous evidence in the form of affidavits in support of their respective claims to the custody of their daughter.

3. After the first hearing and before the second, the judge made "an independent investigation of the private and home life of the parties to the controversy" through the instrumentality of "an officer of the law," whose identity is not disclosed. In so doing, the judge acted on his "own motion and without the knowledge of the litigants or their attorneys."

4. At the conclusion of the second hearing, the judge entered a judgment wherein he found as a fact that it would best promote the interest and welfare of the child for her to live with the respondent and wherein he awarded the custody of the child to the respondent.

5. The judgment recites, in essence, that the judge gathered secret information concerning the petitioner and the respondent in the manner stated in paragraph 3, that he gathered the secret information to aid him "in arriving at a proper conclusion based upon true facts," and that he founded his factual adjudication and his resultant award of custody in large measure upon the secret information because he deemed it to be "reliable."

6. The petitioner excepted to the judgment and appealed. He asserts in his assignments of error "that the judgment is based upon evidence and matters not in the record."

T. A. Burgess and Yarborough & Yarborough for petitioner, appellant.
W. O. Rosser for respondent, appellee.

ERVIN, J. The law of the land clause embodied in Article I, Section 17, of the North Carolina Constitution guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree. *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.

Where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it. *In re Edwards' Estate,* 234

N.C. 202, 66 S.E. 2d 675; *S. v. Gordon,* 225 N.C. 241, 34 S.E. 2d 414; *Interstate Commerce Commission v. Louisville & N. R. Co.,* 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431.

The judgment sets at naught the petitioner's constitutional right to an adequate and fair hearing. It deprives him of his claim to the custody of his daughter upon a factual adjudication based in substantial part upon evidence of an unrevealed nature gathered by the presiding judge in secret from undisclosed sources without his knowledge or that of his counsel.

The judgment is set aside and the proceeding is remanded to the Superior Court of Nash County to the end that it may be heard anew agreeably to the law of the land.

Error and remanded.

STATE v. JAMES MONROE McINTYRE.

(Filed 30 September, 1953.)

1. **Criminal Law § 17c—**

A plea of *nolo contendere* is tantamount to a plea of guilty for the purpose of the particular prosecution, and gives the presiding judge full power to pronounce judgment against the defendant for the crime charged in the indictment.

2. **Same—**

A plea of *nolo contendere* cannot be entered by a defendant as a matter of right, but is pleadable only by leave of the court.

3. **Same—**

The law does not sanction a conditional plea of *nolo contendere.*

4. **Same—**

The fact that the record discloses that upon defendant's tender of a plea of *nolo contendere* the court heard evidence and adjudged the defendant guilty, *held,* in the light of other facts appearing of record, not to support defendant's contention that the court did not accept his plea and proceeded to hear evidence and pass upon the question of defendant's guilt or innocence, but only that the court heard evidence before determining whether the plea should be accepted.

APPEAL by defendant from *Sink, J.,* at January Term 1953, of POLK.

Criminal prosecution on an indictment returned by the Grand Jury in open court, charging the defendant with violation of provisions of Chapter 407 of Public Laws 1937, now Part 10 of Chapter 20 of General Statutes, pertaining to operation of motor vehicles upon the public highways of the State, particularly in respect to speeding and reckless driving.

The record and case on appeal show that the January Term 1953 term of Polk County Superior Court convened on Monday, 26 January, 1953; that instanter capias was issued on 27 January, 1953, for defendant to answer the charge of the State against him on an indictment for speeding and reckless driving; that on 28 January, 1953, defendant entered "a plea of *nolo contendere* to the charge of reckless driving and speeding"; that "upon hearing the evidence the court adjudged the defendant guilty"; and that "on the charge of reckless driving the judgment of the court is that the defendant be confined in the common jail of Polk County for a period of sixty (60) days, to be assigned to work in and around the County property under the supervision of the High Sheriff and Jailer, and pay the costs in both actions"; and that "on the charge of speeding, prayer for judgment is continued for two years from this date, to wit, January 28, 1953, on condition that defendant violate no laws of the State of North Carolina during said two years, and on the further condition that he not operate a motor vehicle within the State of North Carolina within six months from this date, to wit, January 28, 1953."

And the record and case on appeal further shows that on the morning of 2 February, 1953, it being the second week of the January-February Term of Superior Court of Polk County, defendant moved that the judgment as above set forth be set aside upon the grounds that the plea of *nolo contendere* was interpreted by him (the defendant) as a conditional plea, —that he was not represented by counsel when the plea was entered, and no jury having passed upon his guilt or innocence.

That, thereupon, the court found these facts: "Any idea of the defendant that a plea of *nolo contendere* was a conditional plea was born of a figment of his imagination or inspired by the sentence that followed his plea"; that "upon opening of the court on Monday morning, January 26, 1953, the solicitor stated that there were a large number of drunken violations pending at this term of court, and if he were permitted to confer with defendants who desired to enter pleas during the charge of the court to the Grand Jury, he thought much time could be saved"; that "the court advised the solicitor in the presence of all who were in the court house that he would be permitted to follow his suggestion, but that pleas of submission and of *nolo contendere* would be without revocation and appeal," and that the solicitor requested that those who desired would give the names to him and retire to some place with him"; that "the court is unaware of where the solicitor went, but upon the advice of the solicitor a very large number left the court room with the solicitor"; that "this defendant was called for trial on the ordinary call of the solicitor and the court had never seen or heard of the defendant and the solicitor accepted his plea without qualification or promise and the statement that the defendant was under misapprehension of the plea is denied."

Motion for new trial is denied.

Defendant appeals to Supreme Court and assigns error.

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

Hamrick & Hamrick for defendant, appellant.

WINBORNE, J. Did the court err in denying defendant's motion to set aside the judgment rendered against him on the ground that the plea of *nolo contendere* entered by him was conditional, and so accepted by the court? This is the pivotal question, on which decision here turns. And in the light of well settled principles of law, applied to the facts disclosed by the record and case on appeal now before the court, the question must be answered in the negative.

The plea of *nolo contendere* has been interposed and accepted in numerous cases in the courts of North Carolina. The latest appeal in such case is *S. v. Cooper, ante,* 241. There the principle has been re-stated in opinion by *Ervin, J.,* in this manner: "The defendant's plea of *nolo contendere* constitutes a formal declaration on his part that he would not contend with the State in respect to the charge, and was tantamount to a plea of guilty for the purposes of this particular criminal action. Consequently, the presiding judge acquired full power to pronounce judgment against the defendant for the crime charged in the indictment . . . when he allowed the solicitor to accept the plea tendered by the defendant." Applicable cases, including *S. v. Thomas,* 236 N.C. 196, 72 S.E. 2d 525, are there cited, and need not be re-listed here.

But a plea of *nolo contendere* cannot be entered by a defendant as a matter of right. It is pleadable only by leave of the court. "Its acceptance by the court is entirely a matter of grace." See *S. v. Thomas, supra,* and cases cited.

Indeed, the law does not sanction a conditional plea of *nolo contendere. S. v. Horne,* 234 N.C. 115, 66 S.E. 2d 665; *S. v. Thomas, supra.*

In the light of these principles defendant contends that on the face of the record in the instant case, it appears that the trial court did not accept his plea, but proceeded to hear evidence and to pass upon the question of his guilt or innocence. True, the record does say that "upon hearing the evidence the court adjudged the defendant guilty." But in the light of the facts as found by the court, appearing in the record, as above set forth, it means no more than that, after defendant tendered the plea of *nolo contendere,* the court heard evidence before determining that the plea be accepted. No rule of procedure is prescribed by law governing the judge in making such determination.

The case of *S. v. Camby,* 209 N.C. 50, 182 S.E. 715, relied upon by defendant is distinguishable in factual situation from the present case.

Hence, the judgment from which appeal is taken will be

Affirmed.

T. D. HARRIS v. GEORGE M. CHAPMAN.

(Filed 30 September, 1953.)

Appeal and Error § 37½: Trial § 47—

Appellant's motion in the Supreme Court for a new trial on the ground of evidence relating to the merits discovered after the cause was heard in the Superior Court is allowed, the appellant having met the requirements for a new trial for newly discovered evidence.

APPEAL by defendant from *Bone, J.,* holding the courts of the First Judicial District, at Chambers in Elizabeth City, 25 June, 1953. From TYRRELL.

This action was instituted in the Superior Court of Tyrrell County 5 December, 1951, on which day the plaintiff filed duly verified complaint alleging that the defendant is indebted to him in the amount of $15,000 for services rendered in assisting in the sale of land and timber belonging to the defendant. Nine tracts of real estate belonging to the defendant situate in Tyrrell County were attached at the time of the commencement of the action. The plaintiff and the defendant are nonresidents of this State. Both reside in Washington, D. C. The defendant was served with summons by publication.

On 7 April, 1952, the Clerk of the Superior Court rendered judgment in favor of the plaintiff by default and inquiry, and the cause was transferred to the civil issue docket for inquiry and determination in respect to the amount of the recovery. At the February Term, 1953, inquiry was executed, resulting in a verdict and judgment in favor of the plaintiff and against the defendant in the amount of $15,000.

On 4 April, 1953, the defendant filed motion to set aside both judgments and for leave to defend under the provisions of G.S. 1-108. The motion as it related to the judgment by default and inquiry was heard first by the Clerk. He refused to set aside the judgment. The defendant excepted and appealed to the Judge. Thereafter, by consent, the appeal from the Clerk's ruling and also the motion as it related to the final judgment were heard by Judge Bone on affidavits offered by both sides. Following this hearing, judgment was entered affirming the Clerk and denying all phases of the defendant's motion. From the judgment so entered, the defendant appealed.

Pending appeal, the defendant lodged a motion in this Court for a new trial on the ground of newly discovered evidence, alleging that additional information vital to the merits of his cause as heard by Judge Bone, came to his attention pending the appeal to this Court.

Robert B. Lowry, Sam S. Woodley, and Pritchett & Cooke for plaintiff, appellee.

McMullan & Aydlett for defendant, appellant.

PER CURIAM. The showing made by the defendant on his motion meets the requirements for a new trial for newly discovered evidence. The motion is allowed. See *Chrisco v. Yow,* 153 N.C. 434, top p. 436, 69 S.E. 422; *Moore v. Tidwell,* 193 N.C. 855, 138 S.E. 407. This renders moot the questions presented by the appeal and restores the *status quo* as it existed immediately before the hearing before Judge Bone. The cause will be remanded for hearing *de novo* on defendant's motion (1) to set aside the judgment by default and inquiry entered by the Clerk, (2) to set aside the final judgment entered at the February Term, 1953, and (3) for leave to defend under the provisions of G.S. 1-108; and it is so ordered. See *Franklin v. School,* 213 N.C. 263, 195 S.E. 792. Let the defendant pay the costs. *Herndon v. Railroad Co.,* 121 N.C. 498, 28 S.E. 144.

The plaintiff's motion to dismiss under Rule 28 is denied.

Remanded.

HAULCY HARDISON v. ROLAND LILLEY, ELMO LILLEY, SARAH LILLEY, JOHN LILLEY, OLA LILLEY, MARY OLA PEEL AND HUSBAND, WILLIAM PEEL, LAWRENCE EASON LILLEY AND MARY OLA PEEL AND LAWRENCE EASON LILLEY, EXECUTORS OF THE ESTATE OF J. EASON LILLEY.

(Filed 14 October, 1953.)

1. Deeds §§ 13a, 15—

A provision, inserted in a deed in or following the description, which attempts to limit the quality of the estate conveyed and defined in the granting and *habendum* clauses is void for repugnancy, but a provision in or following the description which limits the quantity of the estate is not repugnant, and is effective.

2. Deeds §§ 15, 22—

In a conveyance of lands in fee simple, grantors reserved and excepted from the operation of the deed certain timber of a specified size, with right in the male grantor, or his heirs or assigns, to enter and cut and remove such timber for a period of fifty years. *Held:* While the period of time is

exceptional, the reservation in the grantors of the timber rights is valid, and the estate in the timber is not affected by the cultivation of the arable land by grantees nor the nonuse of the reserved right by grantors.

3. Deeds § 22—

In this deed in fee simple to a tract of land, grantors reserved the right to cut and remove certain timber having a size of six inches in diameter or which "may attain to the size of six inches fifteen inches above the ground" for "the period of fifty years." *Held:* The reservation of the timber applied to all trees of the specified size then upon the land as well as all young trees or seedlings capable of reaching that size within the fifty year period, but the reservation could not apply to trees which were not in existence at the time of the execution of the deed.

4. Same—

A reservation in a deed of the right to cut and remove all timber of a specified size for a period of fifty years will not be held void on the ground that it cannot be determined with sufficient certainty which of the trees attaining the specified size were in existence at the time of the execution of the deed, since the matter is capable of proof by expert testimony as to the average annual growth of each kind of tree in the locality.

APPEAL by defendants from *Parker, J.,* March Term, 1953, of MARTIN. Error and remanded.

This was a suit to enjoin defendants from cutting and removing timber from the lands of the plaintiff described in the complaint.

The defendants claim right to the timber by virtue of the reservation and exception in the deed by their ancestor in title who conveyed the land to the plaintiff's ancestor.

Upon inspection of the deed referred to and the admissions in the pleadings the court held the reservation invalid and entered judgment permanently restraining the defendants from entering upon the described lands and removing timber therefrom.

The defendants appealed.

Peel & Peel for plaintiff, appellee.
Clarence W. Griffin for defendants, appellants.

DEVIN, C. J. In 1917 Kader Lilley and his wife, for a valuable consideration, conveyed to Levi Hardison by deed in fee simple with warranty a tract of land containing 65 acres, situate in Martin County, and described by metes and bounds. Incorporated in the deed immediately following the description of the land appears the following clause:

"Reserving and excepting from the operation of this deed all the pine, cypress and poplar timber of the size of 6 inches in diameter or may attain to the size of 6 inches 15 inches above the ground and that the said Kader Lilley or his heirs or assigns shall have the period of 50 years to

cut and remove said timber and to have the right to enter either themselves, or their servants at any time within said period to cut and remove said timber."

It is admitted that the plaintiff has succeeded to the title of Levi Hardison, and that he is the owner of all rights and interests conveyed by the deed of Kader Lilley in 1917, and that the defendants are the successors in title of Kader Lilley and are the owners of any rights reserved or excepted in the deed of 1917.

The plaintiff denies that the defendants own any right in the timber on the described land by virtue of the reservation and exception contained in the deed of 1917, and has instituted this suit (1953) to restrain defendants from entering upon and cutting any timber now standing and being on this land.

The court below was of opinion that the rights claimed by defendants under the quoted clause were repugnant to the fee simple title conveyed by the deed, and ineffective to limit the absolute estate in the land which vested in the grantee Levi Hardison and descended to the plaintiff. Accordingly judgment was entered permanently restraining defendants from entering upon and cutting timber on the described land.

In making this ruling the court applied to the facts of this case the principle set forth in *Kennedy v. Kennedy,* 236 N.C. 419, 72 S.E. 2d 869, and *Jeffries v. Parker,* 236 N.C. 756, 73 S.E. 2d 783. We are unable to concur in the view that the principle enunciated in those decisions of the Court is applicable here. In the *Kennedy case* the grantor in the deed in the granting, *habendum* and warranty clauses conveyed to the grantee an unlimited fee simple estate in the land, and following the description of the land added a clause reserving a life estate in the grantor. This was held repugnant to the estate conveyed and of no effect. The same principle on similar facts was again stated in the *Jeffries case.* Having conveyed the land in fee simple the grantor could not by a clause inserted as part of or following the description limit the estate already granted. The authorities cited in those cases support this ruling.

Here, however, the reservation and exception relate only to the *quantum* of the property described, and not to the quality of the estate conveyed, and are therefore not repugnant to the fee simple estate in that which was conveyed. Thus where a grantor conveys a tract of land in fee simple and sets out in or following the description a provision that a certain definitely described number of acres of the land is reserved or excepted, the quality of the estate in the remainder in the grantee is unlimited, but the quantity, the *quantum,* of the property conveyed is reduced by the exception, and the title to the excepted portion remains in the grantor and his heirs. *Byrd v. Myers,* 211 N.C. 394, 190 S.E. 471; *Brown v. Rickard,* 107 N.C. 639, 12 S.E. 570; *Midgett v. Wharton,* 102 N.C. 14,

8 S.E. 778; *Fisher v. Mining Co.*, 97 N.C. 95, 4 S.E. 772; *Justice v. Eddings*, 75 N.C. 581; 16 A.J. 607, 610; 26 C.J.S. 449; 34 A.J. 517.

This Court has recognized and given effect to the exception of timber and timber rights in deeds conveying land. *Roberts v. Forsythe*, 14 N.C. 26; *Whitted v. Smith*, 47 N.C. 36; *Fisher v. Mining Co.*, 97 N.C. 95, 4 S.E. 772; *Bond v. R. R.*, 127 N.C. 125, 37 S.E. 63; *Bunch v. Lumber Co.*, 134 N.C. 116, 46 S.E. 24; *Hawkins v. Lumber Co.*, 139 N.C. 160, 51 S.E. 852; *Lumber Co. v. Corey*, 140 N.C. 462 (467), 53 S.E. 300; *Mining Co. v. Cotton Mills*, 143 N.C. 307, 55 S.E. 700; *Hornthal v. Howcott*, 154 N.C. 228, 70 S.E. 171; *Bateman v. Lumber Co.*, 154 N.C. 248, 70 S.E. 474; *Kelly v. Lumber Co.*, 157 N.C. 175, 72 S.E. 957; *Powell v. Lumber Co.*, 163 N.C. 36, 79 S.E. 272; *Shannonhouse v. McMullan*, 168 N.C. 239, 84 S.E. 259; *Carroll v. Batson*, 196 N.C. 168, 145 S.E. 9. The same rules apply to reservation and exception of timber rights as to grants. 34 A.J. 518.

"Where the grantor makes a valid exception in a deed, the thing excepted remains the property of the grantor and his heirs." *Fisher v. Mining Co.*, 97 N.C. 95, 4 S.E. 772.

In *Mining Co. v. Cotton Mills*, 143 N.C. 307, 55 S.E. 700, the deed for the land contained the following reservations or exception by the grantor: "all the woods and timber is reserved by me." It was said that "a deed purporting to convey all the wood and timber therein described vests in the grantee a present estate of absolute ownership in said timber defeasible as to all timber not removed within the time required by the terms of the deed. . . . Here the land was conveyed in fee with an exception or reservation of the timber. In such case, if a time or event is specified upon which the timber must be cut, the reservation expires upon the happening of the event or expiration of the time. . . . Whether the right to cut timber is a grant, or a reservation, it expires at the time specified." When no time is specified the grantor's retained right is held under the implied agreement to cut and remove within a reasonable time.

In *Hornthal v. Howcott*, 154 N.C. 228, 70 S.E. 171, the grantor, having previously conveyed the timber with right to cut and remove in 4 years, thereafter conveyed the land to the defendants, noting in the deed that the timber had been sold "and is excepted from this deed." It was held the grantee acquired the land and all timber not cut and removed within the four years. The writer of the opinion (*Justice Allen*) quoted from *Hawkins v. Lumber Co.*, 139 N.C. 160, 51 S.E. 852: "The true construction of this instrument is that the same conveys (or reserves) a present estate of absolute ownership in the timber, defeasible as to all timber not removed in the time required by the terms of the deed." This statement of the law was approved in *Lumber Co. v. Corey*, 140 N.C. 462, 53 S.E. 300.

In *Carroll v. Batson,* 196 N.C. 168, 145 S.E. 9, in the deed for the land the grantor reserved the right to all timber 8 inches in diameter for the period of 5 years. It was held the purchaser of the land acquired title to all the timber reserved by the grantor which remained uncut at the expiration of the 5-year period. "At the expiration of the 5 years the timber followed the land."

The decision of this Court in *Bond v. R. R.,* 127 N.C. 125, 37 S.E. 63, decided in 1900, illustrates the effect of the exception of timber from the operation of the deed. There the plaintiff's deed for the land dated 1871 contained exception of "the good heart timber suitable for mill timber." It was held the timber referred to was never granted to the plaintiff—was excepted from his deed—and he had no right to recover therefor. And in the same case the deed under which the defendant claimed, from Levi Harden to Hoggard, dated 1863, contained the following exception: "Except the pine timber suitable for mill timber, which I hereby reserve while I hold the mill, or my children." It was said the language in the deed "constituted a reservation, and a reservation for the life, at longest, of the grantor," and that after his death the heirs of Levi Harden could convey nothing. It may be noted in this case the court approved the submission of an issue to the jury as to how many of the timber trees cut were "good heart pine suitable for mill timber" at the date of the deed in 1871.

The language of the clause under consideration in the case at bar is "reserving and excepting." While there is a distinction between these words (*Trust Co. v. Wyatt,* 189 N.C. 107, 126 S.E. 93), they are often used interchangeably. 34 A.J. 519. Here both words were used by the grantors. We think it was the intention of the grantors to withdraw from the effect of the conveyance part of that which otherwise would have passed under the description of the land in the deed. *Vance v. Pritchard,* 213 N.C. 552, 197 S.E. 182. There is nothing in the record before us to indicate that either plaintiff or defendants or their predecessors in title have at any time attempted to assert any rights to the timber until shortly before this suit was instituted. The cultivation of the arable land, if there be such on this tract of land, would not affect the title to the timber reserved in the deed, nor would the grantors lose their rights by nonuse.

In the deed of Kader Lilley in 1917 he reserved and excepted all the pine, cypress and poplar timber 6 inches in diameter "or may attain to the size of 6 inches," and provided that Kader Lilley or his heirs "shall have the period of 50 years to cut and remove said timber." This description apparently carried all timber then 6 inches in diameter or which should attain the size of 6 inches within 50 years from the date of the deed. That is the contract the original parties made. That is the deed for which Levi Hardison paid one thousand dollars in 1917. Unquestion-

ably a deed or reservation for standing timber of a certain size and that which may (meaning "can") attain that size within the period named will be upheld. *Hardison v. Lumber Co.*, 136 N.C. 173, 48 S.E. 588; *Veneer Co. v. Ange*, 165 N.C. 54, 80 S.E. 886; *Mfg. Co. v. Thomas*, 167 N.C. 109, 83 S.E. 174. The designation of a period of 50 years within which to cut and remove timber is exceptional, but the parties so stipulated when they executed and accepted the deed in 1917, and we know of no principle of law which would justify us in striking down the contract the parties themselves have made because of the length of time reserved for cutting and removing.

But we think the plaintiff, who presently owns the land, subject to the reservation, and is now seeking to enjoin the successors in title of Kader Lilley from cutting the timber on the land, is not without remedy. Thirty-six years have elapsed since the deed was made. The presumption is that Kader Lilley did not intend to reserve to himself from the operation of the deed something that did not exist. He could in 1917 reserve existing growth on the land which had the capability of attaining 6 inches in diameter within the period named, but trees which came into being and grew from seedlings after the date of the deed were beyond the intention of the parties and were not embraced in the reservation and exceptions which the grantor appended to his deed. Such timber then not in existence, though now it may measure 6 inches in diameter, was not embraced within the reservation, and is the property of the grantee in the deed and his heirs unaffected by the reservation. This seems to be the rationale of the decisions of this Court in *Veneer Co. v. Ange*, 165 N.C. 54, 80 S.E. 886, and *Mfg. Co. v. Thomas*, 167 N.C. 109, 83 S.E. 174. It may not be presumed that the parties intended that the grantor should reserve an easement in the land conveyed for 50 years for the cultivation and growth of timber trees.

In *Veneer Co. v. Ange*, 165 N.C. 54, 80 S.E. 886, the defendant, landowner, conveyed to the plaintiff by deed the timber on described land of the size of 12 inches in diameter, or which might at any time within the period of ten years reach the size of 12 inches when cut. The plaintiff sued to enjoin the defendants, the owners of the land, from cutting undergrowth and timber which would grow to 12 inches within the 10-year period. In that case the Superior Court Judge found as facts that a pine tree not less than 7 inches in diameter and hardwood not less than 10 inches in diameter will grow to size of 12 inches in the period of time named in the deed, and enjoined defendants, the landowners, from cutting any such timber—that is, timber which though under 12 inches would within 10 years grow to 12 inches.

The ruling of the Superior Court Judge was affirmed on appeal. From the opinion by *Justice Walker* we quote:

"It may not be necessary to decide, for the purpose of this appeal and at this time, whether the estate in those trees which would, in the course of natural growth, reach the required diameter, vested absolutely at the date of the deeds, as much so as it did in those which were then of that dimension, it being susceptible of proof that trees of a certain age now will be of the required size before the expiration of the period allowed for cutting and removing the timber; for if the plaintiff has merely a contingent right or interest in the trees, which, by the natural growth of the trees, will ripen into a vested one, we should still protect it by restraining any act of defendant committed or threatened in derogation of that right or interest. But this is not even a contingent right, as we gather from the findings. It can be determined with reasonable certainty, as we have said, that a tree will, within a given period, grow to a certain size, measured diametrically, and therefore it cannot well be doubted that the parties intended, at the date of the deeds, that plaintiff should have a present estate, not only in the trees which were then 12 inches in diameter; but in those which should thereafter grow to that size within the stated period. . . . What the parties meant, if we state it more exactly, was that the vendee should acquire by the deeds a present interest in the trees which, in the unimpeded course of nature, would grow to the dimension of 12 inches in diameter within the fixed time, and not in those only which the vendor may not have cut down before that stage of their maturity was reached. Where a deed conveys trees of a certain diameter, nothing else being said, it passed only those coming within the description at the date of the deed. *Whitted v. Smith,* 47 N.C. 36; *Warren v. Short, supra; Hardison v. Lumber Co.,* 136 N.C. 173; *Whitfield v. Lumber Co.,* 152 N.C. 211; *Kelly v. Lumber Co.,* 157 N.C. 175. When it conveys trees of a certain diameter when cut, it means those which are actually of that diameter when reached in the process of cutting. *Lumber Co. v. Corey,* 140 N.C. 462. But these deeds mean more than that, and embrace trees which are, at the time of the deed, capable of increasing in size to the stipulated diameter, if left to grow according to the law of nature."

The converse of this principle must be equally sound.

The same conclusion was reached in *Mfg. Co. v. Thomas,* 167 N.C. 109, 83 S.E. 174, and the quoted language of the decision in *Veneer Co. v. Ange, supra,* was made the basis of the decision in that case. From these decisions we deduce this principle applicable to the case at bar: Since by the reservation in the deed the grantor retained not only the right to the trees measuring 6 inches in diameter in 1917, but also a "present interest" in the undergrowth then on the land which in the unimpeded course of nature would grow to that size within the period stipulated, it necessarily follows that growth not then in existence could not be held to have been

included in the reservation, as there was then no "present interest" to be reserved.

This principle finds further support in *Robinson v. Gee,* 26 N.C. 186 (190), where the Court said: "It seems to us, however, that the reservation in Reed's deed embraced only the saw-mill pine timber that was then standing, with a contingent use to him and his heirs and assigns to any pine timber standing on the land when it by growth had become fit for saw-mill purposes. . . . It could never have been intended by Reed, when he made the reservation, that the 200-acre tract of land should be a perpetual plantation for the raising of pine timber for his benefit."

Where the reservation of right to cut and remove timber was extended over a period of 50 years, of which period 36 years have now elapsed, the question arises, can the Court determine with sufficient certainty what trees, if any, now on the land were embraced within the terms of the reservation in 1917? We think the determination of this question is a matter capable of proof as pointed out in the cases cited. In *Fordson Coal Co. v. Garrard,* 277 Ky. 218, the view was expressed that trees conveyed in 1914 after twenty years' growth could be identified, as the average annual growth of each kind was a matter of proof about which experts could qualify to testify. A different conclusion was reached by the Supreme Court of South Carolina in *Holly Hill Lumber Co. v. Grooms,* 198 S.C. 118, 16 S.E. 2d 816, where it was thought the question of the rate of growth of trees was speculative and uncertain. However, in North Carolina in *Bond v. R. R.,* 127 N.C. 125, 37 S.E. 63, the submission of a similar question to the jury was approved, and in *Veneer Co. v. Ange,* 165 N.C. 54, 80 S.E. 886, the Court found as a fact from the evidence, in an injunction proceeding, the rate of growth of pine and hardwood trees in the locality of the suit as determinative of what trees now on the land were embraced within the terms of the original grant.

We reach the conclusion that there was error in the judgment permanently enjoining the defendants from entering upon and cutting timber from the described land, and that the defendants have right to cut and remove therefrom any trees of the kind described in the deed now measuring 6 inches or over in diameter which may be found to have grown to that size from those in existence at the date of the reservation in 1917.

And this cause is remanded for further proceedings not inconsistent with this opinion.

Error and remanded.

MAOLA ICE CREAM COMPANY OF NORTH CAROLINA, INC., v. MAOLA MILK AND ICE CREAM COMPANY.

(Filed 14 October, 1953.)

1. Trademarks and Trade-Names § 3—

The right of the purchaser of a business to use its trade-name or trademark may be made subject to any contractual restrictions agreed to by the parties which are not invalid as contrary to public policy.

2. Goodwill § 1—

Goodwill may not be disposed of separately from the property right to which it is incident, such as a particular trade-name or trademark.

3. Goodwill § 2—

While the sale of a business with its goodwill carries an implied obligation that the seller will do nothing to impair the advantages and benefits incident to the business sold, ordinarily it does not preclude the seller from thereafter engaging in a similar business in the vicinity provided the seller does not engage in unfair competition or interfere with the purchaser's enjoyment of the premises sold.

4. Contracts § 7a—

An agreement not to carry on a particular business within a certain territory must be in writing and signed by the party to be bound. G.S. 75, sec. 4.

5. Same: Goodwill § 2—

The owner of ice cream plants in two separate cities operated the plants with a division of territory serviced by each. Thereafter, he sold one of the plants with right in the purchaser to use the trade-name in the territory south of a specified town. *Held:* The seller or its successor may not enjoin the purchaser or its successor from thereafter engaging in the business under the trade-name in territory north of the specified town, since the agreement as to the division of territory would suppress and stifle competition and is, therefore, void.

6. Same—

In the sale of a business with its goodwill, the test to determine the validity of a restrictive agreement that the purchaser should not engage in the same business in competition with the seller within certain territory, is whether the restraint is such as to afford a fair protection to the interest of the seller and not so large as to interfere with the interest of the public.

7. Same—

An agreement by the purchaser of one of two ice cream plants that he would not engage in the business under the trade-name north of a specified town in the State, *is held* greater than required for the protection of the seller and void as detrimental to the public interest.

8. Trademarks and Trade-Names § 3—

Allegations by the owner of separate plants in two separate cities that he sold one of the plants with right to the purchaser to use the trade-name,

but that he thereafter had the trade-name registered in his own name in the office of the Secretary of State, does not support his conclusion that he is now the absolute owner of such trade-name.

9. Pleadings § 15—

Upon demurrer the complaint will be liberally construed with a view to substantial justice between the parties, giving the pleader every intendment in his favor.

10. Pleadings § 20—

The right to demur for failure of the complaint to state a cause of action is not waived by answering, but may be taken by demurrer *ore tenus*, or the Supreme Court may take notice thereof *ex mero motu*.

11. Pleadings § 19c—

The requirement that a complaint be liberally construed upon demurrer does not permit the court to construe into it that which it does not contain.

12. Pleadings § 15—

A demurrer admits facts properly pleaded but not inferences or conclusions of law.

JOHNSON, J., dissents.

APPEAL by the defendant from *Bone, J.*, May Civil Term 1953. BEAUFORT.

Civil action to restrain the defendant permanently from engaging in unfair competition, in which a temporary restraining order was granted.

The plaintiff's complaint may be summarized as follows:

1. Both plaintiff and defendant are North Carolina corporations—the principal office and place of business of the plaintiff is at Washington, Beaufort County, and that of the defendant in New Bern, Craven County.

2. About 31 July 1944, Maola Ice Cream Co., a partnership composed of W. E. Ellington, Jr., W. E. Duncan and Geo. W. Currin, pursuant to Chap. 80, Art. 1 G.S. registered in the Secretary of State's office a trademark and design consisting of the word "Maola" and a distinctive label, a facsimile of which is hereto attached and made a part of the complaint. About 7 March 1947, the partnership for value assigned the trademark and design to plaintiff, which assignment has been filed in the Secretary of State's office, and plaintiff is now absolute owner thereof.

3. Plaintiff now and for many years has been manufacturing, distributing and selling ice cream products in various areas of Eastern North Carolina under its aforesaid name and trademark, to the exclusive use of which plaintiff is entitled.

4. Defendant now and for some time has been engaged in a similar business in various areas of Eastern North Carolina, and has wrongfully adopted as a part of its corporate name the trademark "Maola," and is

now, and has been for some time, selling and distributing its products in containers or cartons upon which is printed or affixed a label or design bearing such close similarity to plaintiff's registered trademark as to constitute an unlawful imitation and infringement of plaintiff's rights. In addition defendant is displaying such trademark on its delivery trucks, on its stationery and its manufacturing building.

5. Plaintiff has never authorized the use by defendant of its trademark, and has made demand in writing that defendant cease using it, which the defendant has refused to do.

Wherefore, plaintiff prays the Court for a permanent injunction pursuant to G.S. 80-10 and for the recovery of a penalty of $200.00 under G.S. 80-11.

After defendant filed its answer plaintiff by leave of court at May Term 1953, filed an amendment to its complaint, the essence of which follows. In the year 1922 F. E. Mayo began the manufacture and sale of ice cream under the trade-name or trademark "Maola" in Washington. In 1927 Mayo purchased an ice cream plant in New Bern, from which he likewise sold and distributed ice cream under the trademark "Maola." That during all the time Mayo operated the two plants, there existed between the two plants a well defined division of territory served by each. The territory served by the Washington plant consisted generally of that part of Eastern North Carolina north of Vanceboro, and that served by the New Bern plant the town of Vanceboro and southwardly. In 1935 F. E. Mayo & Co., Inc., successor to F. E. Mayo, sold to H. L. Barnes and wife, defendant's predecessors, the New Bern plant. It was clearly understood and the agreement of sale so provided that the use of the trade-name "Maola" was limited to the territory theretofore served by the New Bern plant and thereafter until March 1953, with one or two rare exceptions along the border of the respective territories, the territorial division theretofore existing was strictly observed by the defendant and its predecessor on the one hand and plaintiff and its predecessors on the other. In March 1953, in direct violation of the agreement, understanding and custom theretofore had and observed, the defendant purchased a dairy in the town of Williamston, North Carolina, in the territory theretofore continually and exclusively served by plaintiff and its predecessor, and from the dairy so purchased the defendant began the distribution and sale of ice cream products under the trade-name or trademark "Maola": that the cartons in which the defendant, since March 1953, has been selling and distributing its ice cream products in plaintiff's territory are so similar in makeup and design, and in particular carrying the identical trademark "Maola" enclosed within an elliptical circle, being an exact replica of that employed by plaintiff, that it has tended to create untold confusion and uncertainty on the part of the

buying public as to the identity of the manufacturer of the product, and constitutes unfair competition and an invasion of plaintiff's rights. That unless the defendant is enjoined and restrained from advertising, selling or distributing in plaintiff's territory its products under the trademark or name "Maola" and in cartons confusingly similar to those employed by plaintiff, the plaintiff will suffer irreparable damage for which no adequate remedy exists at law.

In the lower court the defendant demurred *ore tenus* to the amendment to the complaint. The demurrer was overruled, and the defendant excepted, assigning error.

The lower court heard evidence and issued a restraining order *pendente lite* against the defendant, to which order the defendant filed several exceptions assigning error.

The defendant appeals to the Supreme Court.

Rodman & Rodman for plaintiff, appellee.
R. E. Whitehurst for defendant, appellant.

PARKER, J. The plaintiff bases its action upon unfair competition. These facts are clearly stated in the complaint and amended complaint. 1. In 1935 F. E. Mayo & Co., Inc., owned an ice cream plant in Washington and another ice cream plant in New Bern: from both plants the company manufactured, distributed and sold ice cream under the trade-name or trademark "Maola." 2. During the time the company owned both plants there existed between the two plants a well defined division of territory. The territory served by the Washington plant consisting generally of that part of Eastern North Carolina north of Vanceboro, and that served by the New Bern plant the town of Vanceboro and southwardly. 3. In 1935 the company sold to H. L. Barnes and wife, the defendant's predecessors in title, the New Bern plant, and it was clearly understood, and the agreement of sale so provided, that the use of the trade-name "Maola" was limited to the territory theretofore served by the New Bern plant. 4. From then until March 1953, with one or two rare exceptions along the border of the respective territories, the territorial division theretofore existing was observed by the defendant and its predecessor and the plaintiff and its predecessors. 5. In March 1953, the defendant purchased a dairy in Williamston, North Carolina, in territory theretofore continually and exclusively served by the plaintiff and its predecessors, and from said dairy began the distribution and sale of ice cream products in cartons carrying an identical trademark "Maola," as those used by plaintiff. 6. That this has created untold confusion and uncertainty on the part of the buying public as to the identity of the manufacturer, is unfair competition, and unless the defendant is re-

strained from such acts in plaintiff's territory, plaintiff will suffer irreparable injury. 7. A predecessor in title of plaintiff in 1944 registered in the Secretary of State's office the trademark "Maola," and in 1947 the trademark was assigned to plaintiff, who is now the owner.

It is well established law that F. E. Mayo & Co., Inc., had the legal right to sell and assign its New Bern plant with the business of that plant and the right to use the trade-name or trademark "Maola" on ice cream there manufactured, distributed and sold, and Barnes and wife succeeded to all the rights of the transferor with respect to the use and enjoyment thereof, except as such use and enjoyment may have been restricted by a valid contract. *Cowan v. Fairbrother,* 118 N.C. 406, 24 S.E. 212; *Sea Food Co. v. Way,* 169 N.C. 679, 86 S.E. 603; *Lilly & Co. v. Saunders,* 216 N.C. 163, 4 S.E. 2d 528, 125 A.L.R. 1308; 52 Am. Jur. pp. 526 and 530; 38 C.J.S. p. 954; 63 C.J. p. 518. The rights of the parties with respect to the use of trade-names or trademarks involved in a transaction may be governed or restricted by contract between them. *Sea Food Co. v. Way, supra;* 52 AM. Jur. p. 530; 63 C.J. p. 518.

Goodwill exists as property merely as an incident to other property rights, and is not susceptible of being owned and disposed of separately from the property right to which it is incident. Goodwill may adhere to the reputation acquired by an established business, the right to use a particular name or trademark. 38 C.J.S. pp. 951 and 952, where the cases are cited.

A sale of a business and its goodwill carries with it the implied obligation that the seller will in good faith do nothing to impair the advantages and benefits which the purchaser has acquired by the purchase. While there is some authority apparently to the contrary, the weight of authority seems to be that, in the absence of agreement as to the right to compete, the vendor of a premises and its goodwill is not precluded from engaging in a similar business in the vicinity, provided he does not interfere with the purchaser's enjoyment of the premises sold, and provided that he does not engage in unfair competition. *Sea Food Co. v. Way, supra;* 38 C.J.S. p. 957.

The plaintiff alleges in its pleadings that F. E. Mayo & Co., Inc., owned the Washington and New Bern Plants, and used the trade-name or trademark "Maola," on products sold from both plants; that in 1935 Mayo & Co. sold the New Bern plant with the right to use the trademark "Maola" to a predecessor in title of the defendant. If that were the entire contract, it would seem that the defendant had a legal right to buy a dairy in Williamston and distribute and sell its products there under the trademark "Maola" in rivalry with the plaintiff without being guilty of unfair competition, as there is no allegation in the plaintiff's pleadings that the defendant has changed its cartons and the way "Maola" is placed on the

cartons from the manner it has customarily used them with intent to confuse the buying public.

However, the plaintiff alleges in its pleadings that there existed between the Washington and New Bern plants a well defined division of territory served by each: the territory served by the Washington plant consisting generally of that part of Eastern North Carolina north of Vanceboro, and that served by the New Bern plant the town of Vanceboro and southwardly, and that in the sale of the New Bern plant in 1935 to defendant's predecessor in title it was clearly understood and the agreement of sale so provided that the use of the trade-name "Maola" was limited to the territory theretofore served by the New Bern plant. There is no allegation in plaintiff's pleadings that the agreement of sale was in writing, and signed by H. L. Barnes and wife.

The plaintiff contends that when the defendant in March 1953 purchased a dairy in Williamston and began the distribution and sale of its products under the trade-name "Maola," it was guilty of unfair competition and that in its complaint and amended complaint it has alleged a good cause of action for unfair competition. That raises for our determination the question as to whether the restriction or more correctly the division of territory in the agreement declared upon in plaintiff's pleadings is valid and enforceable. It seems to be illegal on three grounds.

First. If the alleged agreement was a limitation upon Barnes and his wife, and their successors in title, to do business anywhere in the State of North Carolina, the agreement was not in writing signed by Barnes and his wife. P.L. N.C. 1913, Ch. 41, sec. 4, now G.S. Ch. 75, sec. 4, requires such an agreement to be in writing and signed by the party who agreed not to enter into any such business within such territory to be enforceable.

Second. It clearly appears from the alleged agreement that the division of territory was not merely for the purpose of conveying to Barnes and his wife, and their successors, the New Bern plant with the right to use the name "Maola" and to obtain all the patronage of that plant, but also for the purpose of shutting off competition by preventing Barnes and his wife and their successors from engaging in the ice cream business under the trade-name "Maola" within all that part of Eastern North Carolina north of Vanceboro. There is no allegation that the plaintiff is serving ice cream products in all Eastern North Carolina or was in 1935. Such a division of territory was not necessary to afford fair protection to Mayo & Co., and interfered with the interests of the public as it prevented, if enforceable, Barnes and his wife, and their successors, from selling its products under the name "Maola" anywhere in North Carolina north of Vanceboro. Such an agreement would suppress and stifle competition, and is void. *Culp v. Love,* 127 N.C. 457, 37 S.E. 476;

Shute v. Shute, 176 N.C. 462, 97 S.E. 392; 3 A.L.R. Anno. 250; *Hill v. Davenport,* 195 N.C. 271, 141 S.E. 752.

In *Shute v. Shute, supra,* this Court held that an agreement on the part of the vendee of a cotton gin plant that he would not engage or be interested in ginning cotton, or buying cottonseed or seed cotton, for a period of ten years, on the north side of a certain creek in the county, and would remove a gin plant which he was then operating within such territory, the vendor binding himself not to build or cause to be built any ginning plant in such county on the south side of such creek for a period of ten years, was void, because it appeared upon the face of the agreement that this division of the territory was not for the purpose of conveying to the vendee the right to obtain all the patronage of the establishment which the vendor sold to him, but for the purpose of shutting off competition, by preventing the vendee from putting up any other plant or being interested in the establishment of any other plant within all that part of the county north of the creek.

Third. If the agreement declared upon is considered as a restrictive agreement, and not an agreement for division of territory, is it reasonable in its terms and purposes? The answer is No. In the earlier cases there was a tendency to establish as the standard for determining the reasonableness of the contract, the duration of the contract as to time and the extent of the territory in which it was to operate. We have held in earlier cases that the limitation as to space must be set out with the same definiteness as would be required in a deed of conveyance. *Hauser v. Harding,* 126 N.C. 295, 35 S.E. 586; *Shute v. Heath,* 131 N.C. 281, 42 S.E. 704.

Under changed conditions and in the effort to make goodwill a valuable asset these tests have been abandoned, and the true test now is whether the restraint is such as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. *Sea Food Co. v. Way, supra; Hill v. Davenport, supra; Comfort Spring Corp. v. Burroughs,* 217 N.C. 658, 9 S.E. 2d 473; *Sonotone Corp. v. Baldwin,* 227 N.C. 387, 42 S.E. 2d 352. Contracts in partial restraint of trade are still contrary to public policy and void if nothing shows them to be reasonable. *Kadis v. Britt,* 224 N.C. 154, 29 S.E. 2d 543, 152 A.L.R. 405. Tested by this standard the agreement that the defendant and its predecessor in title should not engage in the ice cream business under the name "Maola" in Eastern North Carolina north of Vanceboro—and there is no allegation in plaintiff's pleadings that it is now or was in 1935 selling ice cream over all such territory—is greater than is required for the protection of the plaintiff, is detrimental to the public interest, and is unreasonable and void.

Cab Co. v. Creasman, 185 N.C. 551, 117 S.E. 787; *Extract Co. v. Ray,* 221 N.C. 269, 20 S.E. 2d 59; *Hanover Star Milling Co. v. Metcalf,* 240

U.S. 403, 60 L. Ed. 713; *United Drug Co. v. Rectanus,* 248 U.S. 90, 63 L. Ed. 141, cases relied upon by the plaintiff, have different factual situations. In none of those cases had one party bought from the other a business with the right to use a trade-name.

As to the alleged registration of the trademark "Maola" in the Secretary of State's office by the plaintiff in 1944, the plaintiff has alleged in his complaint that its predecessor in title sold the New Bern plant with the right to use the trademark "Maola" to Barnes and wife in 1935.

Construing the complaint and amended complaint liberally with a view to substantial justice between the parties, and making every intendment in favor of the pleader (G.S. 1-151; *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440), we are of opinion that the complaint and amended complaint fail to state a cause of action. "We have repeatedly held that where a complaint states no cause of action such a defect is not waived by answering. The defendant may demure *ore tenus,* and, furthermore, this Court may take notice *ex mero motu* of the insufficiency of the complaint in this respect. If the cause of action, as stated by the plaintiff, is inherently bad, why permit him to proceed further in the case, for if he proves everything that he alleges he must eventually fail in the action." *Garrison v. Williams,* 150 N.C. 674, 64 S.E. 783; *Watson v. Lee County,* 224 N.C. 508, 31 S.E. 2d 535; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911, where the cases are cited. The statute which requires liberal construction in favor of the pleader neither requires nor permits the court to construe into a pleading that which it does not contain. *Dillingham v. Kligerman,* 235 N.C. 298, 69 S.E. 2d 500.

The demurrer admits the facts pleaded in the complaint and amended complaint, but it does not admit the legal inferences or conclusions of law set out therein that the registration of the trademark "Maola" in the Secretary of State's office and its assignment to the plaintiff made it the true and absolute owner and holder thereof; that the facts alleged constitute unfair competition, etc. We have held repeatedly that a demurrer does not admit any legal inferences or conclusions of law asserted by the pleader. *McKinney v. High Point, supra; Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32; *McLaney v. Motor Freight, Inc., ibid.* 714; *Anderson v. Atkinson,* 234 N.C. 271, 66 S.E. 2d 886.

There was error in overruling the defendant's demurrer *ore tenus.* The order issuing a restraining order *pendente lite* will be vacated.

The judgment below is

Reversed.

JOHNSON, J., dissents.

STATE v. HUBERT GREER.

(Filed 14 October, 1953.)

1. Constitutional Law § 32—

Every person accused of crime has the right to be informed of the accusation against him by indictment, presentment or impeachment, except as otherwise provided by our Constitution, Art. I, secs. 11 and 12.

2. Indictment and Warrant § 9—

An indictment must charge the offense with certainty so as to identify the offense, protect the accused from being twice put in jeopardy for the same offense, enable the accused to prepare for trial, and support judgment upon conviction or plea.

3. Same—

The rule that an indictment will not be quashed for mere informality or refinement does not obviate the necessity that the indictment allege each essential element of the offense. G.S. 15-153.

4. Bribery § 1—

Bribery is the voluntary offering, giving, receiving, or soliciting of any sum of money or thing of value with corrupt intent to influence the recipient's action as a public officer or official in the discharge of a public legal duty.

5. Indictment and Warrant § 9—

While ordinarily an indictment for a statutory offense is sufficient if it charges the offense substantially in the words of the statute, where the statute does not define the offense, the statutory words must be supplemented by allegations which explicitly set forth every essential element of the crime.

6. Bribery § 2—

An indictment for offering a bribe or bribery must allege by definite and particular statement, and not as a mere conclusion, that the acts were done to influence the performance of some public legal duty, and it must further appear, at least as a reasonable inference, that defendant had knowledge of the official character of him to whom the bribe was offered.

7. Same—

Where an indictment for bribing or offering a bribe to a State Highway Patrolman fails to allege the official act the accused intended to influence, defendant's motion to quash should be allowed. G.S. 14-218.

8. Indictment and Warrant § 17—

The failure of the indictment to allege an essential element of the offense cannot be cured by a bill of particulars. G.S. 15-143.

9. Criminal Law § 23—

A prosecution under an indictment which is fatally defective because it fails to allege an essential element of the offense, will not bar a subsequent prosecution for such offense.

STATE *v.* GREER.

APPEAL by defendant from *Sink, J.*, at June Term 1953 of McDOWELL.

The defendant was indicted, and convicted of offering a bribe to D. C. Safriet, Jr., a State Highway Patrolman, with the corrupt intent to influence the patrolman in the performance of his official duties and with sending the patrolman $100.00 through the United States Mails as a bribe.

The bill of indictment reads as follows: "The Jurors for the State upon oath present, That Hubert Greer, late of the County of McDowell, on the 19th day of January, in the year of our Lord one thousand nine hundred and fifty-three, with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously offer a bribe to D. C. Safriet, Jr., he being a State Highway Patrolman, with the corrupt intent to influence the said officer in the performance of his official duties; and did unlawfully, wilfully and feloniously send to the said D. C. Safriet, Jr., he being a State Highway Patrolman, the sum of $100.00 through the United States Mail, as a bribe with the corrupt intent to influence said officer in the performance of his official duties against the form of the statute in such case made and provided and against the peace and dignity of the State.

CLARENCE O. RIDINGS,
Solicitor."

From the judgment pronounced the defendant appealed to the Supreme Court, assigning errors.

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

W. D. Lonon and W. E. Anglin for defendant, appellant.

PARKER, J. Before pleading to the bill of indictment the defendant made a motion to quash it upon two grounds: "(1) The bill of indictment fails to charge the defendant with a criminal offense; and (2) The bill of indictment fails to charge that the defendant made any offer to influence unlawfully a State Highway Patrolman in any public or official capacity."

The trial court overruled the motion, and the defendant excepted. This is the defendant's assignment of error No. 1, based on his exception No. 1.

The Constitution of North Carolina guarantees that in all criminal prosecutions every person has the right to be informed of the accusation against him, and not to be put to answer any criminal charge, except as otherwise provided by our Constitution, but by indictment, presentment or impeachment. Art. I, Sections 11 and 12.

Similar provisions in the U. S. Constitution (which are not a restriction on the states in this respect 42 C.J.S., Indictments, p. 957) and in the Constitutions of the various states, which are a substantial redeclaration of the common law rule, are one of the chief glories of the administration of criminal law in our courts, for they are in strict accord with our inherited and "traditional notions of fair play and substantial justice."

The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883.

For generations attempts have been made, with varying degrees of success, to simplify forms of indictment. Such attempts may not be thwarted by insistence upon the preservation of outworn legalistic formulas, which grew up when the punishment of crime was so severe as in many cases to shock the moral sense of lawyers, judges and the people generally. It was then to the credit of humanity that technicalities were invoked to prevent the cruelty of a literal enforcement of the law. To simplify forms of indictment G.S. 15-153 was enacted which in respect to quashing indictments provides in respect to indictments that every criminal proceeding by indictment is sufficient in form for all intents and purposes if it expresses the charge in a plain, intelligible, and explicit manner, and the same shall not be quashed, by reason of any informality or refinement, if in the bill sufficient matters appear to enable the court to proceed to judgment.

Quashing indictments is not favored. *S. v. Flowers,* 109 N.C. 841, 13 S.E. 718. This statute has received a very liberal construction. *S. v. Carpenter,* 173 N.C. 767, 92 S.E. 373.

In *S. v. Cole, supra,* the Court quotes with approval these words from *S. v. Hathcock,* 29 N.C. 52, "Every indictment is a compound of law and fact, and must be so drawn that the court can, upon its inspection, be able to see the alleged crime." In speaking of C.S. 4623, now G.S. 15-153, the Court farther on in this case said: "By the many adjudications construing this section it has been definitely settled that the section neither

supplies nor remedies the omission of any distinct averment of any fact or circumstance which is an essential constituent of the offense charged." To the same effect *S. v. Gibbs, supra.*

Our statute as to offering bribes is G.S. 14-218 "if any person shall offer a bribe, whether it be accepted or not, he shall be guilty of a felony." This statute neither defines bribery, nor sets forth its essential elements.

Bribery as defined by Blackstone and the older writers, was committed when a judge or other person concerned in the administration of justice took any undue reward to influence his behavior in his office. *S. v. Noland,* 204 N.C. 329, 168 S.E. 412. This limited the offense to officers identified with the administration of public justice. This definition is too narrow, unless the term justice is unduly extended, for they do not include soliciting a bribe, attempts to bribe, or acts of bribery involving officials in the many departments other than judicial—all of which are embraced by the common law crime of bribery. 8 Am. Jur., Bribery, Section 2.

The essence of bribery "is the prostitution of a public trust, the betrayal of public interests, the debauchment of the public conscience." *Ex parte Winters,* 10 Okla., Crim. Rep. 592, 140 P. 164, 51 L.R.A. (N.S.) 1087.

Bribery may be defined generally as the voluntary offering, giving, receiving or soliciting of any sum of money, present or thing of value with the corrupt intent to influence the recipient's action as a public officer or official, or a person whose ordinary profession or business relates to the administration of public affairs, whether in the legislative, executive or judicial departments of government in the performance of any official duty required of him. The bribe must be intended, however, to influence the recipient in the discharge of a legal duty, and not a mere moral duty. 8 Am. Jur., *ibid.;* 11 C.J.S., Bribery, p. 840. Both texts cite many authorities.

The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words. *S. v. Gregory, supra; S. v. Miller, supra; S. v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132. This rule does not apply where the words of the statute do not, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the offense sought to be charged in the indictment, so as to inform the defendant of the exact charge of which he is accused to enable him to prepare his defense, to plead his conviction or acquittal as a bar to further prosecution for the same offense, and upon conviction to enable the court to pronounce sentence. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the

accused and the court as to the specific offense intended to be charged. However, it is neither necessary to state particulars of the crime in the meticulous manner prescribed by common law, nor to allege matters in the nature of evidence. 27 Am. Jur., Ind. and Inf., Sec. 103; 42 C.J.S., Ind. and Inf., Sec. 90; *S. v. Watkins,* 101 N.C. 702, 8 S.E. 346; *S. v. Whedbee,* 152 N.C. 770, 67 S.E. 60; *S. v. Cole, supra; S. v. Raynor,* 235 N.C. 184, 69 S.E. 2d 155; *S. v. Loesch,* 237 N.C. 611, 75 S.E. 2d 654; *U. S. v. Cruikshank,* 92 U.S. 542, 23 L. Ed. 588, p. 593; *U. S. v. Simmons,* 96 U.S. 360, 24 L. Ed. 819; *U. S. v. Carll,* 105 U.S. 611, 26 L. Ed. 1135; *U. S. v. Hess,* 124 U.S. 483, 31 L. Ed. 516; *Evans v. U. S.,* 153 U.S. 584, 38 L. Ed. 830; *Keck v. U. S.,* 172 U.S. 434, 43 L. Ed. 505; *Armour Packing Co. v. U. S.,* 209 U.S. 56, 52 L. Ed. 681.

In *S. v. Cole, supra, Adams, J.,* speaking for the Court after analyzing a number of our cases, says: "These decisions exemplify the rule that an indictment may follow the language of the statute when the statute defines the offense and contains all that is essential to constitute the crime and to inform the accused of its nature; but if a particular clause in a statute does not set forth all the essential elements of the specified act intended to be punished, such elements must be charged in the bill," citing authorities.

In *Keck v. U. S., supra, White, J.* (later *C.J.*), speaking for the Court quotes from *U. S. v. Hess, supra:* "The statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury."

In *S. v. Wynne,* 118 N.C. 1206, 24 S.E. 216, the defendant was indicted under the Code, Sec. 991 (now G.S. 14-217 entitled Bribery of Officials) "For unlawfully receiving and consenting to receive money for an illegal purpose, to wit, to discharge a prisoner then in his custody for a crime committed, said Wynne being then a special constable, duly appointed under the law of the State." No error was found in the trial.

We have examined the original record in *S. v. Noland, supra.* The first count in the bill of indictment stated the purpose of offering the bribe as follows: "Did unlawfully, wilfully and feloniously offer a bribe to one Hurst Justice, a juror in the County aforesaid, who was then and there duly qualified and acting as a juror in a criminal action wherein the State of North Carolina was plaintiff and W. B. Davis, Luke Lea, Luke Lea, Jr., and E. P. Charlet, were defendants, which said case was then being tried in the Superior Court of Buncombe County at the July-August, 1931, Special Term of said Superior Court and did then and there offer a bribe to said juror, Hurst Justice, with the felonious purpose and intent to influence the verdict to be rendered by said juror in

said cause and to induce or procure said juror to acquit the said defendants in the said case then on trial; and the said Wylie B. Noland did hold out to the said juror a fee or award, to wit: the sum of $500.00 to influence his verdict as aforesaid." The second count in the indictment charged the offense as follows: "Did unlawfully, wilfully and feloniously offer a bribe, to wit: the sum of $500.00 to one Hurst Justice, a juror who was then and there duly qualified and acting in the case of State of North Carolina, plaintiff, v. W. B. Davis, Luke Lea, Luke Lea, Jr., and E. P. Charlet, defendants, and which said case was then being tried in the Superior Court of Buncombe County, at the July-August, 1931, Special Term of the said court." There was a verdict of guilty. The Court said: "Assuming, however, that the indictment must set out the evil intent, we observe in the first count an averment that the defendant unlawfully, wilfully, and feloniously offered a bribe to an acting juror with intent to influence the verdict and to procure the acquittal of the defendants. This is a sufficient charge of the corrupt purpose."

In *S. v. McLamb,* 208 N.C. 378, 180 S.E. 586, the first count in the indictment set forth the purpose of the bribe in these words, that the defendants "unlawfully, wilfully, fraudulently, feloniously, deceitfully, and corruptly did combine, conspire, confederate, and agree together to bribe the said L. A. Hodges and Derwood Hicks to falsely testify in the Superior Court of Scotland County in a certain case in which the State of North Carolina was plaintiff and I. B. McLamb was defendant, with the felonious and fraudulent intent thereby to hinder, obstruct, delay, and defeat the ends of justice, and the orderly administration of the laws of the State of North Carolina." The second count in the indictment charges the purpose of the bribe as follows: that the defendants "being persons of fraudulent minds and evil dispositions, and wickedly devising and intending to hinder, obstruct, delay, and defeat justice in the Superior Court of Scotland County, and in furtherance of an unlawful conspiracy among themselves to commit bribery and to defeat justice in the said county of Scotland, unlawfully, wilfully, feloniously, wickedly, fraudulently, and corruptly, the said James Raynor, acting for himself and as agent and attorney for the said I. B. McLamb, L. A. Hodges, and Derwood Hicks, did pay to the said L. A. Hodges and Derwood Hicks the sum of $500.00 in money, currency of the United States, the same being in denominations of twenty dollar bills, and the said L. A. Hodges and Derwood Hicks received the said $500.00 so delivered by the said James Raynor as a bribe, and the said money was delivered as aforesaid, and received as aforesaid for the purpose and in payment for false testimony by the said L. A. Hodges and Derwood Hicks on behalf of the said I. B. McLamb in a certain case pending in the Superior Court of Scotland

County, wherein the State of North Carolina was plaintiff and I. B. McLamb was defendant."

An indictment for offering a bribe or bribery must set forth the defendant's knowledge of the official character of him to whom the bribe was offered. However, it appears to be the general rule that an indictment is sufficient in this respect if the requisite knowledge can be reasonably inferred from other allegations stating the acts constituting the offense. 8 Am. Jur., Bribery, Sec. 26; 11 C.J.S., Bribery, p. 863.

Tested by the rule laid down by numerous cases and textwriters, the indictment in the present case is fatally defective. The statute upon which the indictment is based merely describes the offense in generic terms, and does not sufficiently describe the crime or set forth all of its essential elements. The indictment in repeating its language without averments disclosing the particulars of the alleged offense is not sufficient.

For the indictment to be good it must appear from the indictment that the offering of a bribe to D. C. Safriet, Jr., a State Highway Patrolman, was to influence Safriet in the performance of some act, which lay within the scope of his official authority, and was connected with the discharge of his legal and official duties, and allegations to that effect must be definite and particular in statement, and not mere conclusions. 11 C.J.S., Bribery, Sec. 9 (g); *Boykin v. U. S.*, C.C.A. Ala. 11 F. 2d 484; *Schraeder v. People*, 73 Colo. 400, 215 P. 869; *Taylor v. State*, 42 Ga. App. 443, 156 S.E. 623; *State v. Beliveau*, 114 Me. 477, 96 A. 779; *State v. Adams*, 308 Mo. 664, 274 S.W. 21; *Selvidge v. State*, 126 Tex. Cr. 489, 72 S.W. 2d 1079; *S. v. Hart*, 136 Wash. 278, 239 P. 834; *State v. King*, 103 W. Va. 662, 138 S.E. 330; Bishop's Practical Directions and Forms (1885), Sec. 247, pp. 121 and 122, General Formula for Bribery Indictment; Joyce on Indictments, 2d Ed. pp. 749-754—Forms of Indictment for Bribery; Wharton, Precedents of Indictments and Pleas (1871), Vol. II, pp. 526 *et seq.*; 8 Am. Jur., Bribery, Sec. 24.

A fatal defect in an indictment is not cured by G.S. 15-143, which enables the defendant to call for a bill of particulars. The "particulars" authorized are not a part of the indictment. A bill of particulars will not supply any matter which the indictment must contain. *S. v. Long*, 143 N.C. 670, 57 S.E. 349; *S. v. Cole, supra; S. v. Wilson*, 218 N.C. 769, 12 S.E. 2d 654; *S. v. Gibbs, supra.*

Though the bill of indictment under which the defendant was tried and convicted is fatally defective, it will not serve to bar further prosecution. *S. v. Miller, supra.*

Like every other citizen on trial in the criminal courts, the defendant is entitled to the full benefit of the constitutional provisions devised to promote the safety of all. And to quote the words of *Taylor, J.* (later *C.J.*), in *S. v. Owen*, 5 N.C. 452: "And we cannot too strongly impress

it on our minds that want of the requisite precision and certainty which may, at one time, postpone or ward off the punishment of guilt, may, at another, present itself as the last hope and only asylum of persecuted innocence."

The defendant's assignment of error No. 1, based on his exception No. 1, that the court erred in refusing to quash the bill of indictment is well taken.

The judgment below is

Reversed.

HARRY W. WHITLEY v. LETITIA H. JONES AND SAM EDWARDS.

(Filed 14 October, 1953.)

1. Appeal and Error § 39e—

The admission of testimony as to a certain fact cannot be prejudicial when the existence of such fact is admitted in the pleadings.

2. Trespass § 4—

Evidence tending to show that defendants or their agents went upon plaintiff's property, without authorization, removed plaintiff's boat, which was resting on one of defendants' trailers, from his premises to the river and launched it, *is held* sufficient to overrule defendants' motion to nonsuit plaintiff's cause of action for wrongful removal of the boat, since every unauthorized entry into the close of another is a trespass, entitling the party aggrieved to nominal damages at least.

3. Trial § 22a—

On motion to nonsuit, the court does not pass upon the credibility of the evidence but takes plaintiff's evidence as true and gives plaintiff the benefit of every fair inference which can be reasonably drawn therefrom.

4. Trial § 22c—

Contradictions even in plaintiff's own evidence do not justify nonsuit.

5. Trial § 22b—

Upon motion to nonsuit, defendant's evidence is not to be considered unless favorable to plaintiff or not in conflict with plaintiff's evidence, in which instance it may be considered so far as it explains or makes clear plaintiff's evidence.

6. Negligence § 19b (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 or the injury.

7. Same—

Plaintiff's evidence tending to show that his boat was in good condition when it was taken from his premises by defendants or their agents and launched in the river and towed some one and one-half miles to plaintiff's boathouse, that the boat took on water while it was being towed and that when plaintiff saw his boat it was partially submerged and had a hole punched in the bottom apparently caused by a blow from underneath, *is held* sufficient to be submitted to the jury on the issue of defendants' negligence.

8. Negligence § 9—

Foreseeability of injury is a requisite of proximate cause.

9. Negligence § 20—

An instruction on the issue of negligence which inadvertently omits any reference to foreseeability must be held for reversible error.

APPEAL by the defendants from *Williams, J.*, April Term 1953. HERTFORD.

Civil action to recover damages for the alleged wrongful removal of and negligent injury to a boat.

This is a summation of plaintiff's evidence. On 12 June 1951, the plaintiff, who was in a Veteran's Hospital in Richmond, Virginia, owned a boat, which was on a trailer in his back yard and had had repair work done on it. The trailer belonged to the defendant Mrs. Jones, and plaintiff had borrowed it from her. The plaintiff had a boathouse near Winton at the bridge over the Chowan River. Mrs. Jones' son used this boathouse for his boat. The plaintiff was in the hospital about two weeks. On return home he found his boat pulled up on the river's bank, partly in shallow water. The boat appeared to have been submerged a long time, and was ruined. The plaintiff testified as to the condition of the boat "there was a crack about 3 feet long that was cracked open and a right good sized hole punched up in it. When you break a piece of wood it makes a jagged break; it was a good sized hole." When plaintiff left for the hospital the hull of the boat was in perfect condition, when he saw it, after it had been painted.

The plaintiff finding his boat damaged went to Mrs. Jones' home, and told her he understood she sent men to his house, and removed his boat from his back yard. She replied that she had sent Sam Edwards, one of the defendants, and Lokie Sumner. He asked her did she realize they had damaged his boat. She replied she had heard something about it. He said I feel like you should pay for it, and she said I feel like we will have to, but I shall let my husband take it up with you. Her husband never contacted plaintiff, nor paid him anything.

While plaintiff was in the hospital Mrs. Jones came to his home, and had a conversation with his wife. The boat of Mrs. Jones' son was in

plaintiff's boathouse and had a little water in it. Mrs. Jones wanted to get it out, and inquired if plaintiff's boat was ready to go back in the river. Mrs. Whitley replied she did not know. Mrs. Jones said she had two men who would help; she wanted her trailer to get her son's boat out of the water. At that time Mrs. Jones' son had the key to the boathouse. Mrs. Whitley said she could not give her permission to move the boat. Two days later the defendant Edwards and one Sumner removed the boat and trailer from plaintiff's home.

The plaintiff's brother, Randolph, saw the boat in the boathouse at Winton. The boat was sunk, except about 2½ feet at the back. He got a block and tackle, and tried to pump the water out, but water came in as fast as he pumped it out. He saw a hole in the boat's bottom. The water in the boathouse was 5 or 6 feet deep. "There was a crack in the bottom and a hole big enough for me to stick two fingers in the crack, and about the center of the crack was a hole." "The hole was about 4 feet from the front in the bottom about the center of the boat. I could not say whether it was a new or old crack." "I would say the hole was pushed in from underneath." He took the boat across the river where he could dock it, pumped the water out, and pulled it up on the shore, and tied it.

In June 1951, Eugene Reid did repair work on the boat for plaintiff. He scraped and sanded the bottom of the boat, and put 3 or 4 coats of lead on its bottom, and 2 coats of green paint on top of that. He saw no rotten place in the wood, it was in good condition.

C. T. Whitley is plaintiff's father. A lady, who said she was Mrs. D. D. Jones—the defendant is Mrs. D. D. Jones—called him over the telephone, and said his son's boat was on her son's trailer, her son's boat was leaking, and she would like to get the trailer, and get his boat out. He replied to see his son's wife: he knew nothing about it. Mrs. Jones called again saying she had to get her son's boat out of the water, and she could send some good men to take his son's boat to the river. He replied it would be up to her: he "had rather she see his wife." Later Edwards and Sumner came to his house, and said they came for the boat. He told them he did not have it. He did not authorize them to go to his son's house, and get the boat. They carried the boat and trailer away from his son's house. When they raised the boat the front end was down and the rear up. Some water ran out. He said "Wait a minute, boys, is that boat leaking?" and told them he would get a rope to tie it up, if they found it was leaking. When he returned with a rope they were gone. He overtook them a mile and a half out of town, and gave them the rope, telling them if the boat leaked to tie it up, and not let it sink. On cross-examination he testified "the front end of the boat was down, and that was raised, and hitched to the automobile, and that was when the water ran out."

This is the defendant's evidence in brief. Lokie Sumner's testimony. Mrs. Jones sent her codefendant Edwards and Sumner in her car to get the boat and trailer, saying C. T. Whitley would tell them what to do. They were to get her son's boat at Winton. C. T. Whitley told them to get the boat, he had come to help them. There was a long split in the bottom of the boat, and water therein was leaking out. C. T. Whitley said it was all right to get the boat: he would get a rope and meet us, which he did. Edwards and Sumner put plaintiff's boat in his boathouse, "hooking the boat" and tied it up with all the rope they could find "to the rafters and to the stringers." In carrying the boat to the river, and in launching the boat in the river at Tuscarora Beach and in pulling it about 1½ miles with Bobby Jones' boat to the boathouse it was not struck or damaged. The defendant Edwards works regularly for Mrs. Jones and her husband.

Defendant Edwards' testimony was substantially the same as Sumner's with these additions. Mrs. Jones told him to see plaintiff's wife. The plaintiff's wife said "I guess you have come for the trailer," see his father, he will tell you what to do. In the bottom of the boat was a place 12 inches long about 3½ or 4 feet from the front end of the boat that water would run out of. He thought that the boat might sink, and suggested taking the boat off the trailer. Plaintiff's father said the boat was ready to go into the river, that his son wanted it put in and got sick. He insisted that it be put in. Mrs. Jones did not tell me to get the boat; to get the trailer. I would not have carried the boat off, if plaintiff's father had not told me. In pulling the boat in the river from Tuscarora Beach to the boathouse it took on about 8 inches of water. Plaintiff's wife gave us no permission to move the boat. Mrs. Jones told him the day he moved the boat, plaintiff's father had called her up, and told her to come and get the boat.

The defendant Mrs. Jones' testimony in brief. She loaned the trailer to plaintiff. Her son was at the University, and his boat in plaintiff's boathouse was leaking. She was afraid it would sink. She told plaintiff's wife she wanted the trailer to get her son's boat out of the water. Plaintiff's wife said she would call her later, which she did not do. Later she called plaintiff's father. He suggested to put his son's boat overboard: it was ready to be launched. Next day C. T. Whitley called her to hurry the boys over he was going to put the boat overboard. She sent the defendant Edwards and Sumner, telling them to get the trailer and bring her son's boat out of the water. She did not instruct them what to do with plaintiff's boat. She told plaintiff she had no responsibility for his boat: his father put it overboard. She denied telling plaintiff she felt like she would have to pay for his boat. Edwards told her he thought he would never get plaintiff's boat in the boathouse, it was in such bad shape.

The jury found that the defendants did not wrongfully remove plaintiff's boat and put it in the river, but the defendants by their negligence damaged the boat, and awarded damages of $745.00.

From judgment entered on the verdict the defendants appealed, assigning errors.

Jones, Jones & Jones for plaintiff, appellee.

J. Carlton Cherry and W. D. Boone for defendants, appellants.

CAUSE OF ACTION FOR UNLAWFUL REMOVAL OF BOAT.

PARKER, J. The jury answered the issue based on the allegations for unlawful removal of the boat: "No." The plaintiff did not appeal. The only assignments of error of the defendants as to this cause of action are Assignment of Error No. 1 as to the admission of evidence that the plaintiff remained in the hospital a little over two weeks and Assignment of Error No. 6 as to the overruling of their motion for nonsuit made at the close of all the evidence.

As to Assignment of Error No. 1. The defendants in their answer "admitted that the plaintiff at the time in question was confined in the *McGuire Veterans Hospital in Richmond, Va.*" This Assignment of Error is without merit.

As to Assignment of Error No. 6. The General Assembly at its session in 1951 rewrote G.S. 1-183, 1951 Session Laws, Ch. 1081. It is now the law under the 1951 statute that a motion for judgment of nonsuit may be made at the conclusion of all the evidence, irrespective of whether or not such a motion was made theretofore. If the motion is refused, and after the jury has rendered its verdict, the defendant on appeal can urge as ground for reversal the denial of his motion. The defendants in their brief on this Assignment of Error discuss almost entirely the cause of action based on negligence. A reading of the evidence leads us to the conclusion that this cause of action should not have been nonsuited. Every unauthorized, and therefore unlawful, entry into the close of another, is a trespass entitling the aggrieved party at least to nominal damages. *Lee v. Stewart,* 218 N.C. 287, 10 S.E. 2d 804.

In the trial of the cause of action for Unlawful Removal of the Boat, we find

No error.

CAUSE OF ACTION FOR NEGLIGENCE.

The defendants' Assignment of Error No. 6 is to the denial of their general motion for judgment of nonsuit. In passing upon this motion we must assume the evidence in behalf of the plaintiff to be true, and must extend to the plaintiff the benefit of every fair inference which can be

reasonably drawn therefrom by the jury in favor of the plaintiff. In ruling on such a motion we do not pass on the credibility of the witnesses or the weight of the testimony. Contradictions in the plaintiff's evidence do not justify a nonsuit. We must resolve all conflicts of testimony in his favor. The defendants' evidence will not be considered unless favorable to the plaintiff, or not in conflict therewith, when it may be used to explain or make clear the plaintiff's evidence. *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543; *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Bundy v. Powell, ibid.,* 707; *Maddox v. Brown,* 232 N.C. 244, 59 S.E. 2d 791; *Buckner v. Wheeldon,* 225 N.C. 62, 33 S.E. 2d 480.

"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." *Goodson v. Williams,* 237 N.C. 291, 74 S.E. 2d 762.

The sole allegation of negligence is this, the defendants "did negligently and carelessly and without any regard for the safety of the said property of the plaintiff break a large hole in the bottom of the said boat which caused it to sink after being launched in the said Chowan River, and did permit said boat to stay submerged in said river for two days before being raised from said water." That by reason of such unlawful acts the plaintiff has been damaged.

The evidence for the plaintiff shows these facts. The plaintiff in June 1951 had the bottom of his boat scraped and sanded, and 3 or 4 coats of lead put on its bottom, and 2 coats of green paint on top of that. There was no rotten place in the wood. Eugene Reid, who did the work, testified it was in good condition. On 12 June 1951 plaintiff was in a Veterans Hospital—he was there a little over two weeks. When he left for the hospital his boat was on the trailer in his back yard. It had been painted, and the hull of the boat was in perfect condition. Plaintiff saw Mrs. Jones after he found his boat damaged, and pulled up on the river bank, and told her that he understood she sent men to his house, and removed his boat from his back yard. She replied that she had sent the defendant Edwards and Sumner. Plaintiff told her I feel like you should pay for it. Mrs. Jones replied I feel like we will have to, but I shall let my husband take it up with you. Plaintiff's boat was on Mrs. Jones' trailer. Mrs. Jones' son had a boat in plaintiff's boathouse, which was leaking. The water in the boathouse was 5 or 6 feet deep. She wanted to take his boat out of the water on her trailer. Mrs. Jones called plaintiff's father saying she had to get her son's boat out of the water, and she could send some good men to take his son's boat to the river. He replied it would be up to her.

The defendant Edwards and Sumner got the trailer with plaintiff's boat on it from his back yard, carried it to Tuscarora Beach, and launched it in the Chowan River. They pulled it up the river about 1½ miles with the boat of Mrs. Jones' son, and put it in plaintiff's boathouse. The defendant Edwards testified that in pulling the boat up the river it took on about 8 inches of water. Edwards and Sumner hooked the boat up in the boathouse and tied it with all the rope they could find to the rafters and the stringers. Plaintiff's brother found the boat in the boathouse partially sunk. There was a crack in the bottom and a hole big enough to stick two fingers in. I would say the hole was pushed in from underneath. He carried the boat across the river, pulled it up on the shore, and tied it. There the plaintiff saw his boat. It had a crack about 3 feet long and "a right good sized hole punched up in it." Testing the plaintiff's evidence by the rules governing a motion for nonsuit, we think that the trial court was correct in submitting the case to the jury. The defendants' Assignment of Error No. 6 is overruled.

However, there is a fatal error in the charge of the court. The defendants' Assignment of Error No. 7 is to this part of the charge "if you find by the greater weight of the evidence that the plaintiff's boat was injured and damaged by the negligence of the defendants in the respects I have mentioned, it would be your duty to answer the second issue Yes." The second issue read, was the boat described in the complaint injured and damaged by the negligence of the defendants? This is the charge on proximate cause: "It is not sufficient to find the defendant negligent, but you must go further and find by the greater weight of the evidence that the negligence on their part was the proximate cause of the injury complained of; the dominant, efficient cause, the cause without which it would not have occurred; a cause which in continuous unbroken sequence brought about the injury complained of."

It is thoroughly established by our decisions that foreseeability of injury is a requisite of proximate cause. *Davis v. Light Co., ante,* 107, where the cases are cited.

"The law requires reasonable foresight and, when the result complained of is not reasonably foreseeable in the exercise of due care, the party whose conduct is under investigation is not answerable therefor." *Newell v. Darnell,* 209 N.C. 254, 183 S.E. 374, which excerpt is quoted with approval in *Roberson v. Taxi Service, Inc.,* 214 N.C. 624, 200 S.E. 363.

The court in its charge on proximate cause omitted to give the essential element of foreseeability of injury. This was "a casualty of the circuit" of the learned and experienced judge below, but nevertheless it requires a new trial. The defendants' Assignment of Error No. 7 is good, and on the cause of action for negligence a new trial must be ordered.

New trial.

WACHOVIA BANK AND TRUST COMPANY AND MARION GREEN JOHNSTON, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF GAY GREEN, DECEASED, AND MARION GREEN JOHNSTON, INDIVIDUALLY, v. OTTIS GREEN, JR., AILEEN MOREL JOHNSTON, JOHN DEVEREAUX JOHNSTON, JR., MINOR, REPRESENTED HEREIN BY HIS DULY APPOINTED GUARDIAN AD LITEM, JOHN DEVEREAUX JOHNSTON; LAURA ADELAIDE GREEN, MARY VIRGINIA GREEN AND MICHAEL JOSEPH GREEN, MINORS, REPRESENTED HEREIN BY THEIR DULY APPOINTED GUARDIAN AD LITEM, VIRGINIA F. GREEN; AND ALL PERSONS NOT NOW IN ESSE WHO MAY HEREAFTER ACQUIRE AN INTEREST IN THE ESTATE OF GAY GREEN, DECEASED, AND BE AFFECTED BY THIS PROCEEDING, REPRESENTED HEREIN BY THEIR DULY APPOINTED GUARDIAN AD LITEM, JOHN C. CHEESBOROUGH.

(Filed 14 October, 1953.)

1. Wills § 31—

The intent of testator is the polar star that must guide the courts in the interpretation of a will.

2. Same—

Ordinarily the intent of the testator must be ascertained from a consideration of the will from its four corners, and such intent must be given effect unless contrary to some rule of law or at variance with public policy.

3. Same—

Where the language of a will is ambiguous the court may take into consideration testator's circumstances, his relation to the objects of his bounty and what effect known forces may have had upon him at the time the will was executed in order to ascertain testator's intent.

4. Wills § 34b—Under provisions of will in suit, adopted children of testator's nephew were not entitled to share in income of trust.

The will in suit provided for the distribution of the income from a trust therein set up to testator's niece and nephew and the named children of testator's niece, with provision that if any child or children should thereafter be "born" to either of them, such child or children should participate in the distribution of the income. *Held:* Children adopted by testator's nephew are excluded from sharing in the income, even though adoption proceedings as to some of them were instituted prior to testator's death, since the language, considered with other portions of the will, shows the clear intent on the part of testator to limit the beneficiaries to those of his blood.

5. Wills § 31—

Where the language of the will clearly expresses testator's intent, there is no occasion for interpretation.

6. Wills § 39—

In this action to construe a will, the parties sought adjudication as to whether the three adopted children of testator's nephew would be entitled to share in the *corpus* of the trust. *Held:* Since the question is one of law and presently determinable, and since it is not moot unless all three

adopted children should die prior to the death of the survivor of the life beneficiaries, the parties are entitled to a determination of the question. G.S. 1-253.

APPEAL by defendants Ottis Green, Jr., and Virginia F. Green, guardian *ad litem* of Laura Adelaide Green, Mary Virginia Green and Michael Joseph Green, minors, from *Phillips, J.*, April Term, 1953, of BUNCOMBE.

Gay Green, a citizen and resident of Buncombe County, North Carolina, died on 8 June, 1951, leaving a last will and testament which has been duly filed and admitted to probate in the office of the Clerk of the Superior Court in the aforesaid county.

Mrs. Effie M. Green, the widow of the testator, dissented from her husband's will and was awarded her share of the estate as provided by law. See *Trust Co. v. Green,* 236 N.C. 654, 73 S.E. 2d 879.

The present action was instituted by the duly appointed and acting executors and trustees under the last will and testament of Gay Green, deceased, and Marion Green Johnston, individually, to obtain the advice and instruction of the court with respect to the following questions:

"(a) As to whether the defendants Laura Adelaide Green and Mary Virginia Green are, or either of them is, entitled to participate in the distribution of the income of the Trusts created by the will of Gay Green, deceased, and, if so, from what time and on what basis.

"(b) As to whether the defendant Michael Joseph Green, upon the completion of adoption as a child of the defendant Ottis Green, Jr., will be entitled to participate in the distribution of the income of the Trusts created by the will of Gay Green, deceased, and, if so, on what basis.

"(c) As to whether the defendants Laura Adelaide Green and Mary Virginia Green, and the defendant Michael Joseph Green, if his adoption as a son of Ottis Green, Jr., is then complete, will be entitled to share in the distribution of the assets of the Trusts created by the will of Gay Green, deceased, as children of the defendant Ottis Green, Jr., when said Trusts have terminated."

The clauses in the will under consideration and pertinent to this appeal are as follows:

"Sub-paragraph (c) of Section (4) of Item V:

"They shall pay the remaining net income in regular installments, not less frequently than quarterly, in equal shares, to my niece, Marion Green Johnston, my nephew, Ottis Green, Jr., and the children of said Marion Green Johnston, namely: Aileen Morel Johnston, and John Devereaux Johnston, Jr. In the event any child or children shall hereafter be born to either my said niece or my said nephew, such child or children shall participate equally with the others just named, in the distributions made under this sub-paragraph.

"Paragraph 3 of Item X:

"They shall collect all of the income from the Trust assets, and, after paying all taxes, insurance and other proper charges in connection with the administration of the Trust, and the management of the various properties and assets therein, including the compensation of the corporate Trustee, they shall pay the same in regular installments, not less frequently than quarterly, in equal shares, to my niece, Marion Green Johnston, my nephew, Ottis Green, Jr., and the children of said Marion Green Johnston, viz.: Aileen Morel Johnston, and John Devereaux Johnston, Jr. In the event any child or children shall hereafter be born to either my said niece or my said nephew, such child or children shall participate equally with the others just named in the distribution made under this sub-paragraph.

"In the event that, during the life of this Trust, any beneficiary thereunder, other than my said niece or my said nephew, shall die, leaving issue then surviving, such issue shall receive the income which their parent would have received, if living.

"Paragraph 4 of Item X:

"Upon the death of the last survivor of my said niece, Marion Green Johnston, and my said nephew, Ottis Green, Jr., the Trust created by this Item of my will shall terminate and the net assets of this Trust shall be paid and delivered, share and share alike, to the children of Marion Green Johnston, and the children of Ottis Green, Jr., then surviving, the issue of any deceased child to receive, *per stirpes,* the share which their parent would have received, if living."

At the time of the testator's death, initial adoption proceedings had been instituted by Ottis Green, Jr., and his wife, Virginia F. Green, for the adoption by them of Laura Adelaide Green and Mary Virginia Green, but the adoption of said children was not completed until more than a year after the death of the testator, to wit: 23 June, 1952. Thereafter, on 21 August, 1952, the defendants Ottis Green, Jr., and his wife, Virginia F. Green, through counsel, notified the petitioners that it was their contention and demand that their adopted children be included as beneficiaries in any and all benefits and rights accruing in the above mentioned provisions of said will, and that upon completion of the final adoption, a child, Michael Joseph Green, be also included.

The court below heard this matter upon the pleadings, and among the findings of fact are these: That all parties having an interest in the questions raised by the petition have been properly made parties, served with process, and are now before the court, and have filed answers; that all parties who are minors as well as those not *in esse* who may under any contingency have any interest in the subject matter of the proceeding were properly represented before the court by guardians *ad litem* duly

appointed by the court for that purpose; and that the court has jurisdiction of the parties to the proceeding and the subject matter of the controversy.

His Honor, after having considered the petition and the several answers filed by the defendants, and the respective arguments of counsel, concluded that no issue of fact was raised by the pleadings, and entered judgment to the following effect: (1) As to question (a), that Laura Adelaide Green and Mary Virginia Green are not entitled to participate in the distribution of the income of the trusts created by the will of Gay Green; (2) as to question (b), that Michael Joseph Green is not entitled to participate in the distribution of the income from the aforesaid trusts; (3) as to question (c), the court declined to grant the request therein on the ground that the determination of the inquiry presented may depend upon events which have not yet occurred and that there is no present need of such instruction in order to enable the executors and trustees to perform their duties.

The defendants Ottis Green, Jr., and Virginia F. Green, guardian *ad litem* of Laura Adelaide Green, Mary Virginia Green and Michael Joseph Green, minors, appeal, assigning error.

Williams & Williams for appellants Ottis Green, Jr., and Virginia F. Green, guardian ad litem of Laura Adelaide Green, Mary Virginia Green and Michael Joseph Green.

Hudgins & Adams and Ward & Bennett for appellees Aileen Morel Johnston and John Devereaux Johnston, guardian ad litem for John Devereaux Johnston, Jr.

John C. Cheesborough, attorney, and guardian ad litem for all persons not now in esse.

DENNY, J. The appellants present the following questions for our consideration: (1) In the interpretation of the testator's will, do the words "in the event any child or children shall hereafter be born to either my said niece or my said nephew" exclude the adopted children of Ottis Green, Jr., as a matter of law, or should the intent of the testator be ascertained through extrinsic evidence? (2) Under the facts and circumstances disclosed by this record, did the court err in declining to consider or interpret the residuary clause of the will with respect to the ultimate distribution of the net assets of the trusts?

It is axiomatic that the intent of the testator is the polar star that must guide the courts in the interpretation of a will. *Voncannon v. Hudson-Belk Co.*, 236 N.C. 709, 73 S.E. 2d 875; *Efird v. Efird*, 234 N.C. 607, 68 S.E. 2d 279; *Buffaloe v. Blalock*, 222 N.C. 105, 59 S.E. 2d 625; *Elmore v. Austin*, 232 N.C. 13, 59 S.E. 2d 205; *Cannon v. Cannon*, 225

N.C. 611, 36 S.E. 2d 17; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356. Ordinarily, this intent must be ascertained from a consideration of the will from its four corners, and effect given to such intent, unless contrary to some rule of law or at variance with public policy. *Efird v. Efird, supra; Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Heyer v. Bulluck, supra.*

It is equally true that where the language in a will is ambiguous, or of doubtful meaning, the court should place itself as near as practicable in the position of the testator in order that the language used may be interpreted from his viewpoint as an aid in arriving at his intent. In such instances, the court may properly take into consideration the testator's situation, how he was circumstanced, his relation to the objects of his bounty, and what effect known forces may have had upon him at the time the will was executed. *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151; *Trust Co. v. Bd. of National Missions,* 226 N.C. 546, 39 S.E. 2d 621; *Heyer v. Bulluck, supra; Raines v. Osborne,* 184 N.C. 599, 114 S.E. 849.

In the instant case, the testator executed his will on 10 December, 1947, and provided for the establishment of two trusts. The trust created pursuant to the provisions contained in Item V of the will was created primarily for the benefit of certain named beneficiaries for life. Until the death of the last survivor of these life beneficiaries, the beneficiaries named in sub-paragraph (c) of section (4) of Item V of the will are to receive only what is left of the income from the trust, after paying the designated sums to the life beneficiaries. On the other hand, the trust established under Item X of the will is for the sole and exclusive benefit of the testator's niece Marion Green Johnston, his nephew Ottis Green, Jr., and the children of his niece Marion Green Johnston, viz.: Aileen Morel Johnston and John Devereaux Johnston, Jr., together with any other children that might be born, after the execution of the will, to either his niece Marion Green Johnston and his nephew Ottis Green, Jr. Furthermore, upon the death of the last survivor of the life beneficiaries under the trust created in Item V of the will, the trust is to terminate, and the *corpus* thereof is to become a part of the trust established in Item X of the will. The latter trust is to continue until the death of the last survivor of the testator's niece Marion Green Johnston and his nephew Ottis Green, Jr., at which time the net assets of the trust "shall be paid and delivered, share and share alike, to the children of Marion Green Johnston, and the children of Ottis Green, Jr., then surviving, the issue of any deceased child to receive, *per stirpes,* the share which their parent would have received, if living."

As to the first question presented by the appellants, we concur in the ruling of the court below. There is no ambiguity in the language of the

will with respect to the beneficiaries of the trusts. It provides clearly and unequivocally that the beneficiaries of both trusts, exclusive of the sums to be paid to certain designated persons for life, shall be his niece Marion Green Johnston and his nephew Ottis Green, Jr., and Aileen Morel Johnston and John Devereaux Johnston, Jr., children of his niece, together with any child or children that may thereafter be born to either his niece Marion Green Johnston or his nephew Ottis Green, Jr. Moreover, he provided that in the event, during the life of the trust created under Item X of his will, *any beneficiary thereunder*, other than his niece Marion Green Johnston and his nephew Ottis Green, Jr., should die, leaving issue then surviving, such issue shall receive the income their parent would have received, if living.

The language of the testator's will in so far as it directs the distribution of the income from the respective trusts, except for the payment of the designated sums to the life beneficiaries, shows a clear intent to limit the beneficiaries to those of his blood. Therefore, the contention of the appellants that in the interpretation of this will we should give effect to our statutes governing the adoption of children, which provide that an adopted child may take by succession or inheritance from and through its adoptive parents on an equality with natural-born children, is without merit. *Bradford v. Johnson,* 237 N.C. 572, 75 S.E. 2d 632. The intent of a testator, if possible, must be ascertained from the language of his will and where the language clearly expresses his intention there is no occasion for interpretation. *Cannon v. Cannon, supra; Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888; *McDaniel v. King,* 90 N.C. 597.

As to the second question, we concede that the identity of the ultimate takers of the net assets of these trusts under the residuary clause of the will must await the call of the roll at the death of the last survivor of the testator's niece Marion Green Johnston and his nephew Ottis Green, Jr. However, as to whether the adopted children of Ottis Green, Jr., are beneficiaries within the meaning of the residuary clause of the will depends upon the interpretation given to the pertinent provisions thereof. It is purely a question of law, now determinable, and nothing except the death of all three of the adopted children of Ottis Green, Jr., prior to the death of the last survivor of the niece and nephew of the testator can obviate the necessity for its determination. This contingency, in our opinion, does not justify the postponement of a decision thereon until the death of the last survivor of the testator's niece and nephew. G.S. 1-253; *Williams v. Johnson,* 228 N.C. 732, 47 S.E. 2d 24. The adoptive parents are entitled to know whether or not these children will share in the distribution of the net assets of the trusts, if they are living when these trusts are terminated. Doubtless, plans for the future of the children will be governed somewhat by the answer to this question. The factual

situation here is different from that in the case of *Wachovia Bank & Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578, and similar cases cited by the appellees. Therefore, the judgment of the court below is affirmed as to the first question raised on the appeal, but the cause is remanded for further hearing and decision as to whether or not the adopted children of Ottis Green, Jr., or any of them, will be eligible to answer the roll call, if living, at the death of the last survivor of the testator's niece Marion Green Johnston and his nephew Ottis Green, Jr. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888.

Error and remanded.

W. B. CATHEY v. W. C. SHOPE AND WIFE, INA WILSON SHOPE.

(Filed 14 October, 1953.)

1. Brokers § 12—

All the evidence in this case tended to show that the defendants listed their property for sale by plaintiff broker, signed an option and a contract to pay plaintiff upon consummation of the sale a stipulated commission, and that plaintiff procured a purchaser who bought the property in accordance with the option as later modified and extended. *Held:* The court was justified in giving a peremptory instruction in favor of plaintiff in his action to recover the agreed commissions.

2. Same—

In a broker's action for commissions it is competent for the broker to introduce testimony as to his efforts to sell defendants' land after it had been listed with him in corroboration of his testimony that defendants listed the land with him, and as tending to establish the relationship between the parties.

3. Same—

In a broker's action to recover commissions it is competent for him to testify as to transactions with the defendants tending to show that he was acting as their agent in procuring a purchaser.

4. Same—

Where, in a broker's action for commissions, there is no evidence to support the owners' contention that the broker was acting in a dual capacity or that he was acting as agent for the optionee in procuring an option on defendants' land, it is not error for the court to refuse to submit an issue in respect thereto.

5. Trial § 36—

Only such issues as are raised by the pleadings and supported by competent evidence should be submitted to the jury.

6. Brokers § 12: Contracts § 12—

Where the owners executed an agreement to pay a broker a commission for selling their property, testimony of a statement thereafter made by the broker at a meeting with the optionee and others to the effect that the broker was not getting anything out of the sale, *is held* incompetent in the broker's action to recover his commissions, since the statements are insufficient to constitute a rescission or abrogation of the brokerage contract.

7. Trial § 14—

The statutory rule that where a party objects to the admission of evidence it shall be conclusively assumed that he duly excepted to its admission over his objection, does not obviate the necessity for an exception by the adverse party to the court's ruling in those instances in which objection to the admission of the evidence is sustained. Chap. 150, Session Laws of 1949. (G.S. 1-206.)

8. Brokers § 12: Evidence § 39—

Testimony by the *feme* owner that the broker stated that no commission would be charged if the owners reduced their asking price for the land is incompetent when the evidence further shows that thereafter the owners executed an agreement to sell at the reduced price solely for the purpose of inducing a sale to a specified corporate prospect, since such testimony is at variance with the written agreement thereafter executed.

9. Vendor and Purchaser § 5a—

An agreement which merely extends the time for performance under a prior option cannot otherwise affect the terms of the contract to sell, and therefore interrogations relating to the terms of sale upon the execution of the extension of time are improper.

APPEAL by defendants from *Phillips, J.*, April Term, 1953, BUNCOMBE. No error.

Civil action to recover commissions due on sale of real property.

Defendants owned a dairy farm near Asheville, N. C., containing about 428 acres. In 1946 they listed this property with plaintiff, a real estate broker in Asheville.

In 1951 citizens of Asheville organized a corporation known as the Asheville Industrial Promotion Council (hereinafter referred to as the Council) to seek new industries for Asheville. In August 1951 the Oerlikon Tool & Arms Company (hereinafter referred to as Oerlikon) was quietly seeking a site for a large new plant which would require about 400 acres. In the course of its survey of possible sites, its agents viewed defendants' farm. They then requested the Council to obtain an option on defendants' property.

The Council ascertained that the Shope property was probably listed for sale with plaintiff. Its officers contacted plaintiff and inquired whether he had any property containing approximately 400 acres listed for sale. They did not then give him the name of the prospective pur-

chaser. Plaintiff informed them he had the W. C. Shope property containing about 428 acres listed. An agent of the Council went with him to view the property. The next day, 25 August 1951, plaintiff went to the Shope home and told them he had a prospective purchaser who might buy the land alone. They executed an option and delivered it to plaintiff. At the same time, they delivered to plaintiff a letter addressed to him and containing the following:

"We the undersigned agree to pay you a 5% commission on our farm up to $50,000. and 2½% above $50,000. or when the sale is completed for $100,000, we will pay you $3750.00."

It was decided Oerlikon would require additional acreage, and the Council obtained a number of other options on tracts of land adjacent to or near defendants' property. Plaintiff assisted the Council in obtaining these options.

On 27 September 1951, defendants executed a supplemental contract in which they agreed to reduce the purchase price to $97,000 if the whole tract was purchased, or to $92,000, if 99 acres lying east of Bee Tree Road was excepted. The option of 25 August was attached thereto and made a part thereof.

On 9 November 1951, defendants executed an agreement extending the option executed 25 August, as modified by the contract of 27 September, for an additional sixty days. They were at the time paid an additional $500.

Thereafter the sale of the property was consummated and defendants were paid the sum of $97,000. Plaintiff demanded his commission. Defendants declined to pay, contending plaintiff had waived the same. Thereupon plaintiff instituted this action. At the trial, the court below submitted an issue of indebtedness and the jury answered the same "$3,675.00." The court entered judgment on the verdict and defendants appealed.

Don C. Young for plaintiff appellee.

Fisher & Fowler and Harold K. Bennett for defendant appellants.

BARNHILL, J. The court below gave a peremptory instruction in favor of the plaintiff. Exception thereto poses this question for decision: Does all the competent testimony in this cause, considered in the light most favorable to defendants, tend to show that defendants are indebted to plaintiff in the sum of $3,675? The court below, by its instruction, answered in the affirmative. We agree.

The defendants listed their property for sale with plaintiff. He advertised the same and contacted prospective purchasers. Defendants from

time to time went to his office to inquire as to the prospects of sale. Finally, the Council got in touch with him because it was known, or the Council was informed, that he had the property for sale. He reported to defendants he had a prospective purchaser. After conferring with him as to price, personal property to be excluded, and other matters, they signed an informal option prepared by plaintiff, more favorable to them than their original listing. Thereafter, on the same day, they executed a formal option, prepared by the attorney of the Council, in which they agreed to sell to Francis J. Heazel or his assigns the *locus in quo* at the price of $100,000. At the same time they signed a contract to pay plaintiff, upon the consummation of the sale, the commissions he now claims. The sale was consummated under the terms of the original option as modified by the contract of 27 September and the extension agreement of 9 November 1951.

There is only one inference that may be drawn from this evidence. The plaintiff has fully performed his part of the contract, and defendants must pay him for his services the compensation they agreed to pay. This was the substance of the charge of the court below to which defendants except. It meets our approval. Hence this exceptive assignment of error is overruled.

The evidence offered by plaintiff pertaining to his effort to sell defendants' farm after it was listed with him up to the time he was approached by the Council was admissible in corroboration of plaintiff's testimony that defendants' farm was listed with him for sale and for the purpose of showing the relationship that existed between him and defendants at the time they signed the option of 25 August 1951. He testified he approached them on 25 August as their agent to obtain an option that would in effect "hook the fish" that was "nibbling at the bait." The testimony to which defendants' exceptive assignments of error are directed tends to show that he was then acting as agent of defendants. It follows that defendants' exceptions thereto are without merit.

The record is devoid of any evidence tending to show that plaintiff, in procuring an option and effecting a sale of the property of defendants, was acting in a dual capacity or that he was acting as agent of the optionee in procuring the option of 25 August. Therefore, the court committed no error in declining to submit the tendered issue or in its charge in respect thereto. *Satterwhite v. Hicks,* 44 N.C. 105; *Brown's Heirs v. Patton's Heirs,* 35 N.C. 446; *Lee v. Williams,* 112 N.C. 510.

Only such issues as are raised by the pleadings and supported by competent evidence should be submitted to a jury. *Morrisett v. Cotton Mills,* 151 N.C. 31, 65 S.E. 514; *Braswell v. Johnston,* 103 N.C. 150; *Griffin v. Insurance Co.,* 225 N.C. 684, 36 S.E. 2d 225; *Stokes v. Edwards,* 230 N.C. 306, 52 S.E. 2d 797.

Those who had signed options to sell their property, at the instance of the Council, held a meeting to consider reducing the prices they were demanding so as to bring the total within the amount Oerlikon was willing to pay. Witnesses offered to testify that plaintiff at this meeting addressed the optionors and made the statement, "he wasn't getting a dime out of it," and other statements to like effect. This testimony was properly excluded. It does not appear just when this meeting was held. Certainly it was after the defendants executed the agreement to pay plaintiff a commission for making sale of their property, and the alleged statements were insufficient to constitute a rescission or abrogation of that contract. *Patton v. Lumber Co.*, 179 N.C. 103; *May v. Getty*, 140 N.C. 310; *Manufacturing Co. v. Lefkowitz*, 204 N.C. 449, 168 S.E. 517; *Lewis v. Gay*, 151 N.C. 168, 65 S.E. 907; *Adams v. Battle*, 125 N.C. 152; *Palmer v. Lowder*, 167 N.C. 331, 83 S.E. 464; *Bell v. Brown*, 227 N.C. 319.

Defendants rely heavily on what they term their Exceptions 11 and 12, directed to the exclusion of testimony of the *feme* defendant. No such exceptions were entered of record. Even so, they contend that exceptions are implied under the terms of Ch. 150, S.L. 1949.

The *feme* defendant testified that plaintiff went to the home of defendants 27 September and told them the prospective purchaser would not buy from the various optionors unless the purchase price of the several tracts desired was reduced. They replied: ". . . we were a community citizen people and would be glad to help the community and that we would reduce ours $3,000, (and he told us there would be absolutely no commission when we did that . . .)" Plaintiff moved to strike the testimony in parentheses. The motion was allowed. Defendants contend that under Ch. 150, S.L. 1949, an exception by them to this ruling is implied.

Mrs. Shope was then asked whether she signed another agreement reducing the price $3,000 on 9 November. She answered: "I did, but I did because I was told a story; now that is exactly why; and the paper was never offered me to read." Plaintiff moved to strike. "Motion allowed. That is not in response to the question."

Here again the defendants contend an exception on their part to the ruling of the court is implied.

The contention of the defendants that in law they entered Exceptions 11 and 12, although at the time they remained silent, is without merit.

Ch. 150, S.L. 1949, is short and to the point. It provides:

"Sec. 1. In any trial or hearing no exception need be taken to any ruling upon an objection to the admission of evidence. Such objection shall be deemed to imply an exception by the party against whom the ruling was made."

It simply provides that when a litigant objects to the admission of evidence and his objection is overruled, it shall be conclusively presumed that he duly excepted to the ruling. It makes no provision for the protection of the adversary party who sits by and fails to except when an objection to evidence is sustained. The Legislature wisely omitted any such provision, for a trial judge should be advised, at the time, that his ruling is challenged. The objection gives him notice on the one hand, but silence on the other does not. Instead, it indicates the ruling is accepted as being in accord with rules governing the admission of testimony.

In any event, the ruling of the court was correct. *Feme* defendant testified that after plaintiff stated that no commissions would be charged if defendants reduced their asking price by $3,000, he went to town and returned to their home that night with a contract which she and her husband executed. This is the contract of 27 September reducing the price and in which the inducement or consideration for the reduction is specifically stated as follows:

"Undersigned has been informed by said Francis J. Heazel that said option and options on other land in the same neighborhood have been obtained by him for the purpose of providing site for the construction and operation of a manufacturing plant and that said option given by the undersigned may not be exercised unless the said purchase price stated therein is reduced.

"Therefore, as an inducement to said Francis J. Heazel, Attorney, and also to Asheville Industrial Promotion Council, Inc., to continue thereafter to sell the said land of the undersigned to a corporation that shall use said land as a part of a site for a manufacturing plant and in consideration of said Francis J. Heazel, Attorney, agreeing that said option granted to him shall not be exercised for the benefit of or assigned or transferred to anyone other than a corporation that shall so use said land, it is agreed by undersigned that the purchase price for the land described in the attached agreement is reduced to Ninety Seven Thousand ($97,000) Dollars . . ."

The testimony stricken was at variance with this provision of a written contract thereafter executed and was properly excluded. *Pierce v. Bierman*, 202 N.C. 275.

The question involved in the purported Exception 12 was improper. It incorporated an erroneous conclusion of law. The contract of 9 November was not "an agreement reducing the price." The price was reduced by the contract of 27 September. The contract of 9 November was merely an agreement extending the option of 25 August, as modified by the contract of 27 September, an additional sixty days.

In this connection we may note that the assumption the agreement of 9 November reduced the defendants' asking price by $3,000 no doubt led

to the efforts on the part of defendants to prove statements made by plaintiff prior to the execution thereof, which produced many of the exceptions contained in the record.

We have examined the exceptive assignments of error not herein specifically noted, and we fail to find in them sufficient merit to require discussion.

In the trial below we find

No error.

WILLIAM J. BATCHELOR AND ETHEL BATCHELOR v. M. B. MITCHELL AND WIFE, EMMA H. MITCHELL; R. I. MITCHELL AND SONS, INC., W. J. MANNING.

(Filed 14 October, 1953.)

1. Pleadings § 19c—

A demurrer on the ground that the complaint fails to state a cause of action admits, for the purpose of the demurrer, the truth of every material fact properly alleged in the complaint.

2. Same—

A complaint must be fatally defective before it will be overthrown by demurrer, and if the complaint is good in any respect or to any extent, the demurrer should be overruled.

3. Trusts § 4c—Allegations held sufficient to establish cause of action to impress deed with trust ex maleficio.

Allegations to the effect that plaintiffs inherited a farm, subject to a deed of trust, from their father, that their mother qualified as administratrix and that she, at the instance of her mother and stepfather, who came to live on the premises, permitted default and foreclosure, although there were sufficient funds then on hand to pay the installment due, and thereafter repurchased the land from the *cestui que trust*, and transferred a part of the land to plaintiffs' grandmother, all pursuant to a design to deprive plaintiffs of their property, *is held* sufficient to state a cause of action to establish a trust *ex maleficio*, binding upon plaintiffs' grandmother who took with knowledge.

4. Cancellation and Rescission of Instruments §§ 2, 9—Allegations held sufficient to establish cause to rescind deed for presumptive fraud.

Allegations to the effect that after the death of plaintiffs' widowed mother during plaintiffs' minority, plaintiffs' grandmother and stepgrandfather continued to live on their farm, managing and controlling it until the youngest plaintiff attained her majority, and that upon the majority of each plaintiff the grandmother and stepgrandfather induced them to execute a deed for a portion of the land to the grandmother by the exercise of parental control and physical and mental domination and by representing that the deeds would not deprive plaintiffs of any rights, *is held* sufficient to state a cause of action to set aside the deeds on the ground of presump-

tive fraud and for an accounting against the grandfather and against the purchaser of timber rights with knowledge of the fraud.

5. Limitation of Actions § 15—

Except in those instances in which the limitation is annexed to the cause of action itself, the defense of the bar of a statute of limitations cannot be raised by demurrer.

6. Pleadings § 17a—

A demurrer on the ground that the complaint fails to state a cause of action does not present for decision whether the complaint is objectionable for prolixity or misjoinder of parties and causes.

BARNHILL, J., concurring in part and dissenting in part.

APPEAL by plaintiffs from *Parker, J.*, at February Civil Term, 1953, of NASH.

Civil action involving title to land, heard below on demurrer to the complaint.

The plaintiffs, William J. Batchelor and Ethel Batchelor, are the children and only heirs at law of M. J. Batchelor, who died intestate in 1931, leaving them a 348.75-acre farm in Nash County, valued on the tax books at $12,500. The plaintiffs were nine and eight years of age, respectively, when their father died. They bring this action to recover a 128.4-acre portion of the farm which passed from them first under foreclosure and then by *mesne* conveyances to the present claimants, who are joined as defendants.

From judgment sustaining the demurrer, the plaintiffs appealed.

L. L. Davenport and O. B. Moss for plaintiffs, appellants.

Hobart Brantley and Cooley & May for defendants, appellees.

JOHNSON, J. The single ground of the demurrer is that the complaint fails to set forth facts sufficient to constitute a cause of action. By so demurring to the complaint, the defendants, for the purpose of determining the demurrer, admit as true every material fact properly alleged in the complaint. *Gaines v. Mfg. Co.*, 234 N.C. 331, 67 S.E. 2d 355; *Bryant v. Ice Co.*, 233 N.C. 266, 63 S.E. 2d 547. The rule is that if the complaint is good in any respect, or to any extent, it may not be overthrown by demurrer for failure to state a cause of action. *Pharr v. Pharr*, 223 N.C. 115, 25 S.E. 2d 471; *Byers v. Byers*, 223 N.C. 85, bot. p. 92, 25 S.E. 2d 466. See also *Perry v. Doub, ante*, 233. The complaint must be fatally defective before it will be rejected as insufficient. *Hoke v. Glenn*, 167 N.C. 594, 83 S.E. 807; *S. v. Trust Co.*, 192 N.C. 246, 134 S.E. 656; G.S. 1-151.

The court below was of the opinion that the complaint is fatally defective and sustained the demurrer. In this we think the court erred. In announcing decision we deem it unnecessary to cumber the opinion with the entire complaint or even with a digest thereof. It comprises 39 paragraphs and covers approximately 20 pages of the printed record. It will suffice to summarize such of the essential ultimate facts as go to make up at least one cause of action against the defendants. Such summarization follows:

When the plaintiffs' father died in 1931, the 348.75-acre farm was subject to a deed of trust made by the father the year before, securing a loan of $2,400 made by Prudential Insurance Company of America. This loan was due and payable in $24 annual installments of principal, with added accumulations of interest at the rate of 5½%, on 1 December each year until 1 December, 1939, when the entire balance was to become due. Martha Batchelor, widow of M. J. Batchelor and mother of the plaintiffs, qualified as administratrix of the estate. She was the daughter of Mary S. Manning, who was the wife of the defendant W. J. Manning. Therefore, Mary S. Manning was the plaintiffs' grandmother, and W. J. Manning their step-grandfather. Soon after the death of plaintiffs' father, both Mannings moved into the home of Martha Batchelor and the plaintiffs, and Martha Batchelor turned over the responsibility of the farming operations to W. J. Manning, who also assisted her in the performance of her duties as administratrix. Martha Batchelor, being without previous business experience and easily influenced, became subservient and obedient to the will of W. J. Manning and that of Mary S. Manning and thenceforth was dominated and controlled by them in the conduct of her business affairs. Instead of managing the farm and advising Martha Batchelor in line with her best interest and that of the plaintiffs and the estate of their deceased father, the Mannings conceived and carried through a wrongful plan to procure title to a part of the plaintiffs' farm, and in furtherance of this plan they, knowing full well that the income from the farm would readily support Martha Batchelor and her two children and pay off the Prudential debt as it matured in small yearly installments, nevertheless fraudulently represented to her that the farm could not be managed so as to pay off the lien debt and support the family unless title to the property be transferred to her. And by means of such representations, relied upon by Martha Batchelor, she was induced to withhold payment of an installment of interest and principal due on the Prudential indebtedness for the purpose of precipitating foreclosure of the deed of trust and transfer of title to her, the ultimate objective of the Mannings being to acquire from her title to a portion of the farm without consideration. Default followed in the payment of the installment due on the Prudential debt. The deed of trust was foreclosed by the trustee.

This was in 1933. Prudential bought in the land. Following the trustee's conveyance to Prudential, Martha Batchelor paid Prudential $500, and it immediately reconveyed the land to her, taking a purchase money note and deed of trust for the balance of $2,199.41 due on the purchase price, payable in yearly installments running through 1 January, 1940. Martha Batchelor as administratrix had on hand sufficient funds of the estate of her deceased husband to have paid the installment due on the Prudential indebtedness, and it was her duty to have paid the installment and prevented foreclosure. When the farm was reconveyed by Prudential to Martha Batchelor, she paid thereon, as part of the purchase price, from funds on hand belonging to the estate, a sum in excess of the installment of principal and interest due at the time of the foreclosure, the nonpayment of which precipitated the foreclosure.

On the basis of the foregoing line of allegations, the plaintiffs aver that the deed from Prudential to their mother is impressed with a trust *ex maleficio* in their favor.

In 1937 Martha Batchelor conveyed to her mother, Mary S. Manning, 128.4 acres of the farm. As to this, it is alleged that the deed conveyed no beneficial title. This for the reason that Mary S. Manning took without consideration, with full knowledge of the trust in favor of the plaintiffs and, further, because her conduct was one of the active, procuring causes of the trust relation. Moreover, it is further alleged in substance that this deed, being a deed of gift not registered within two years from the making thereof as required by G.S. 47-26, was and is ineffectual to convey beneficial title to Mary S. Manning.

Martha Batchelor died intestate in February, 1940, survived by the plaintiffs as her only heirs at law. The Mannings remained on in the Batchelor home. W. J. Manning continued in charge of the plaintiffs' farm and farming operations, with both Mannings exercising complete domination and control over the plaintiffs until after Ethel Batchelor, the younger of the two, attained her majority in 1944. Meanwhile, when the plaintiff William J. Batchelor attained his majority in 1943, he executed a deed to Mary S. Manning embracing the 128.4 acres of land previously conveyed to her by Martha Batchelor. And when Ethel Batchelor came of age in 1944, she executed a similar deed to Mary S. Manning. As to these deeds, it is alleged in substance that the plaintiffs were carried by the Mannings in their automobile to Nashville and thence to an unfamiliar office where they were requested to sign the deeds. First the Mannings represented to the plaintiffs that the deeds would not deprive them "of any rights." And when each plaintiff hesitated to sign, both the Mannings "exercised their parental control and physical and mental domination" over them and "spoke in such threatening and dominating terms that they forced their will" upon the plaintiffs and thereby

wrongfully and fraudulently secured their signatures to the deeds. On the basis of this line of allegations, sufficient in factual detail to show undue influence practiced on the plaintiffs by the Mannings within the principles of presumptive fraud as explained in *Lee v. Pearce,* 68 N.C. 76, and *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615, the plaintiffs aver that the deeds made by them to Mary S. Manning were and are ineffectual to convey beneficial title to the land.

Mary S. Manning died in September, 1950, leaving a will, duly probated in common form before the Clerk of the Superior Court of Nash County, by which she devised the 128.4 acres of land to her surviving husband, W. J. Manning. The plaintiffs aver that no beneficial title passed under the will of Mary S. Manning to W. J. Manning. This, in substance, because he stands in the position of a volunteer, and also because he had full knowledge of the facts in respect to the trust relation between Martha Batchelor and the plaintiffs, he having counseled and directed the conduct of Martha Batchelor out of which the trust relation arose; and, further, that he participated in the alleged undue influence practiced in the procurement of the deeds made by the plaintiffs to Mary S. Manning, as well as the previous deed made by Martha Batchelor to Mary S. Manning. The plaintiffs further aver that they are entitled to recover $50,000 by way of accounting as against the defendant W. J. Manning for proceeds derived from the rents and profits from the land during the period of his control and management thereof.

By deed dated 23 December, 1950, W. J. Manning conveyed the 128.4-acre tract of land to the defendant M. B. Mitchell; and Mitchell and wife under date of 14 August, 1951, executed a timber deed to R. I. Mitchell & Sons, Inc. As to these transactions, it is alleged in substance (1) that the defendants M. B. Mitchell and R. I. Mitchell & Sons, Inc., purchased the land and timber with knowledge of the trust relation between Martha Batchelor and the plaintiffs which prevented Mary S. Manning from acquiring beneficial title under her conveyance from Martha Batchelor, (2) that M. B. Mitchell and R. I. Mitchell & Sons, Inc., had knowledge of the facts in respect to the duress, undue influence, and fraud practiced in the procurement of the deeds made by the plaintiffs to Mary S. Manning, and (3) by reason of such knowledge on the part of these defendants, the deeds made to them were and are ineffectual to convey title to the land and timber therein described. The plaintiffs further allege they are entitled to recover $30,000 against R. I. Mitchell & Sons, Inc., by way of accounting for timber recently cut from the 128.4-acre portion of the land.

Our analysis of the complaint leaves the impression that the allegations are sufficient to constitute a cause of action against the defendants. *Pearson v. Pearson,* 227 N.C. 31, 40 S.E. 2d 477; *Moore v. Jones,* 226

N.C. 149, 36 S.E. 2d 920; *Randle v. Grady,* 224 N.C. 651, 32 S.E. 2d 20; *Creech v. Wilder,* 212 N.C. 162, 193 S.E. 281; *Miller v. Miller,* 200 N.C. 458, 157 S.E. 604; *Tire Co. v. Lester,* 190 N.C. 411, 130 S.E. 45. See also *Myatt v. Myatt,* 149 N.C. 137, 62 S.E. 887; *Bellamy v. Andrews,* 151 N.C. 256, 65 S.E. 963; *Brown v. Brown,* 171 N.C. 649, 88 S.E. 870; *McNeill v. McNeill, supra* (223 N.C. 178, 25 S.E. 2d 615).

The defendants' contention that the plaintiffs cannot escape the bar of one or more of our statutes of limitation is unavailing on this record. The rule is that unless statutes of limitation are annexed to the cause of action itself, the bar of limitation must be specifically pleaded in order to be available as a defense and may not be raised by demurrer. *Motor Co. v. Credit Co.,* 219 N.C. 199, 13 S.E. 2d 230. See also *Ins. Co. v. Motor Lines,* 225 N.C. 588, 35 S.E. 2d 879.

Nor are we concerned on this record with the questions whether the complaint is objectionable for prolixity or violative of the statutes and rules respecting the joinder of parties and causes of action.

The judgment below is

Reversed.

BARNHILL, J., concurring in part and dissenting in part: I concur in the conclusion that the complaint states a cause of action sufficient to repel the demurrer. I am of the opinion, however, that the allegations contained in the complaint in respect to the circumstances under which the deeds from W. J. Batchelor to Mary S. Manning and from Ethel Batchelor to Mary S. Manning were executed are insufficient to constitute allegations of duress, undue influence, or fraud.

The facts which constitute the duress, undue influence, or fraud relied on must be alleged. McIntosh, P. & P., 359; *Development Co. v. Bearden,* 227 N.C. 124; *Weaver v. Hampton,* 201 N.C. 798; *Hoggard v. Brown,* 192 N.C. 494; *Nash v. Hospital Co.,* 180 N.C. 59; *Hunsucker v. Winborne,* 223 N.C. 650, and cases cited. This the plaintiffs have failed to do. As to these instruments, the complaint alleges nothing more than generalities which are mere conclusions. Therefore, to so much of the opinion as relates to those two instruments, I dissent.

SAM J. HUSKINS AND WIFE, MRS. SAM J. HUSKINS v. YANCEY HOSPITAL, INC.

(Filed 14 October, 1953.)

1. **Injunctions § 8—**

The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter of the suit until a trial can be had on the merits.

2. **Same—**

An interlocutory injunction will not ordinarily issue to remedy a wrong committed before suit is brought.

3. **Same—**

An interlocutory injunction will not lie to take land out of the possession of one party and place it in the possession of another, nor to prevent the party in possession from making a reasonable use of the land actually occupied by him under claim of right.

4. **Same—**

While, upon the hearing to determine whether an interlocutory injunction should issue, the court may not decide the cause upon its merits, plaintiff must make out an apparent case as the basis for the writ.

5. **Same—**

Even though plaintiff makes out an apparent case for the issuance of an interlocutory injunction by showing some recognized equity, the court must nevertheless exercise its sound discretion in determining whether the writ should issue, and to this end must weigh the conflicting affidavits and other evidence of the parties relative to the conveniences and inconveniences which would result from the issuance of the writ, and should refuse to grant the writ when it would cause great injury to defendant and confer little benefit in comparison upon plaintiff.

6. **Same—**

The findings of fact and other proceedings of the judge who hears an application for an interlocutory injunction are not binding on the parties at the trial on the merits, and are indeed incompetent to be considered by the court or the jury upon the final hearing.

7. **Appeal and Error § 40c—**

While the Supreme Court is not bound by the findings of the lower court upon the hearing of an application for an interlocutory injunction, and may review the evidence and findings of fact for itself, the presumption is that the findings of the hearing judge are correct and the burden is upon appellant to assign and show error in them.

8. **Injunctions § 8—Interlocutory injunction held properly denied upon facts of this case.**

Upon this hearing on an application for an interlocutory injunction, it appeared that there was a dispute between the parties as to the location of the dividing line between their lands, and that prior to the issuance of summons, defendant had excavated and partially paved a driveway which

plaintiffs contended was upon their land. It further appeared that plaintiffs' land contained no structure of any kind and that the construction of the driveway did not interfere with any present use of the land by plaintiffs but was necessary for convenient ingress to defendant's building. *Held:* Upon the court's finding that defendant was in the actual occupancy of the land under claim of right, the issuance of the interlocutory injunction was properly refused, since such writ will not lie to enjoin a person from making a reasonable use of land actually occupied by him under claim of right, and further, the writ would have been properly denied even if plaintiffs were in constructive possession, since any injury to plaintiffs incident to the completion of the driveway would be inconsequential and remedial by mandatory injunction upon a final determination of the cause in their favor, and the issuance of the writ would cause great hardship to defendants.

APPEAL by plaintiffs from *Clement, J.*, at August Term, 1953, of YANCEY.

Application for an interlocutory injunction.

The essential facts are stated in the numbered paragraphs set forth below.

1. The plaintiffs Sam J. Huskins and Mrs. Sam J. Huskins and the defendant Yancey Hospital, Inc., own adjoining parcels of land on West Main Street in the Town of Burnsville.

2. The land of the plaintiffs contains no structure of any kind.

3. The land of the defendant is occupied by a hospital in which medical and surgical care is furnished to sick and injured patients.

4. A driveway connects West Main Street with the east end of the hospital, where patients traveling in ambulances and other vehicles are admitted and discharged.

5. The driveway occupies a narrow strip of land near the dividing line between the properties of the plaintiffs and the defendant. The parties make adverse claims to the ownership of this narrow strip, the plaintiffs asserting that it is embraced by the boundaries of their land and the defendant insisting that it is included within the limits of its land.

6. The driveway was originally established and used by Dr. W. A. Laughrun, a predecessor in title of the defendant.

7. The defendant excavated the narrow strip of land in dispute to enable it to remodel and pave the driveway.

8. This action was brought after the excavation had been fully completed and the paving of the remodeled driveway had been largely finished.

9. The complaint reveals the matters set forth in paragraphs 1, 2, 5, 7, and 8. It alleges additionally that the plaintiffs own and possess the narrow strip of land mentioned in paragraph 5; that the defendant trespassed upon it, and made the excavation and driveway mentioned in paragraphs 7 and 8; that the excavation damaged the narrow strip in the

sum of at least $1,000.00; and that the defendant will commit continuous trespasses upon the narrow strip in the future unless it is enjoined from so doing. The complaint prays that the plaintiffs recover final judgment against the defendant for damages totaling $1,000.00; that a permanent injunction issue after trial on the merits perpetually enjoining the defendant from trespassing upon the narrow strip; and that the defendant be restrained from entering upon the narrow strip until trial on the merits is had.

10. On the date of the commencement of this action, to wit, 27 July, 1953, his Honor J. Will Pless, Jr., the Resident Judge of the judicial district embracing Yancey County, acting on the *ex parte* application of the plaintiffs, issued a restraining order prohibiting the defendant from entering upon the narrow strip until the propriety of the granting of an interlocutory injunction could be determined by his Honor John H. Clement, the Judge presiding at the August Term, 1953, of the Superior Court of Yancey County.

11. When the cause was heard by him, Judge Clement considered the complaint, which is verified, and supporting affidavits introduced by the plaintiffs; counter-affidavits offered by the defendant; and a supplemental affidavit submitted by plaintiffs in rebuttal of the defendant's counter-affidavits. The complaint and the supporting affidavits recite the matters stated in paragraphs 1, 2, 5, 7, 8, and 9. The counter-affidavits of the defendant set out the facts embodied in paragraphs 1, 2, 3, 4, 5, 6, 7, and 8. The counter-affidavits also declare that the defendant owns and possesses the narrow strip in dispute; that the defendant and its predecessors have enjoyed the exclusive possession of the narrow strip throughout the 40 years next preceding the hearing; that the continued use of the driveway by the defendant is essential to the operation of the hospital because it constitutes the only practical route by which patients traveling in ambulances and other vehicles can be admitted and discharged; and that the plaintiffs are not using their land on West Main Street in any way whatever. The supplemental affidavit submitted by the plaintiffs asserts that the defendant's predecessor in title, Dr. W. A. Laughrun, used the driveway by permission of the plaintiffs.

12. After considering the complaint and the affidavits, Judge Clement found as facts that the defendant is in the possession of the narrow strip in dispute; that "the defendant and its predecessors in title have been in possession thereof for many years"; and "that there is a dispute over the location of the boundary line between the plaintiffs and the defendant in this action." He concluded as a matter of law that the plaintiffs are not entitled to an interlocutory injunction, and entered an order accordingly. The plaintiffs excepted and appealed, assigning as errors the findings of fact, the conclusion of law, and the resultant order.

R. W. Wilson, Bill Atkins, and Charles Hutchins for plaintiffs, appellants.

C. P. Randolph, Fouts & Watson, and W. E. Anglin for defendant, appellee.

ERVIN, J. The appeal challenges the validity of the order of Judge Clement denying the application of the plaintiffs for an interlocutory injunction to enjoin the defendant from using the strip of land in dispute as a driveway until the conflicting claims of the parties to its ownership are determined by a trial on the merits. As a consequence, our decision must turn on the relevant rules which govern the granting or refusing of injunctions of this character. These rules are as follows:

1. The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter of the suit until a trial can be had on the merits. *Arey v. Lemons,* 232 N.C. 531, 61 S.E. 2d 596; *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383; *S. v. Scott,* 182 N.C. 865, 109 S.E. 789; *Harrison v. Bray,* 92 N.C. 488. For this reason, an interlocutory injunction will not ordinarily issue to remedy a wrong committed before suit is brought. *R. R. v. R. R.,* 237 N.C. 88, 74 S.E. 2d 430; *Fremont v. Baker,* 236 N.C. 253, 72 S.E. 2d 666; *Branch v. Board of Education,* 230 N.C. 505, 53 S.E. 2d 455; *Groves v. McDonald,* 223 N.C. 150, 25 S.E. 2d 387; *Jackson v. Jernigan,* 216 N.C. 401, 5 S.E. 2d 143; *Yount v. Setzer,* 155 N.C. 213, 71 S.E. 209; 28 Am. Jur., Injunctions, section 5.

2. Injunction is not a possessory remedy. 43 C.J.S., Injunctions, section 52. Hence, an interlocutory injunction does not lie to take land out of the possession of one party and place it in the possession of another. *Fremont v. Baker, supra; Arey v. Lemons, supra; Armstrong v. Armstrong,* 230 N.C. 201, 52 S.E. 2d 362; *Young v. Pittman,* 224 N.C. 175, 29 S.E. 2d 551; *Jackson v. Jernigan, supra; Spoor-Thompson Mach. Co. v. Bennett Film Laboratories,* 105 N. J. Eq. 108, 147 A. 202. Moreover, an interlocutory injunction will not issue to enjoin a party from making a reasonable use of land actually occupied by him under claim of right. *Arey v. Lemons, supra; Jackson v. Jernigan, supra;* 32 C.J., Injunctions, section 173.

3. The hearing judge does not issue an interlocutory injunction as a matter of course merely because the plaintiff avowedly bases his application for the writ on a recognized equitable ground. While equity does not permit the judge who hears the application to decide the cause on the merits, it does require him to exercise a sound discretion in determining whether an interlocutory injunction should be granted or refused. *Branch v. Board of Education, supra;* 28 Am. Jur., Injunctions, section 268. The hearing judge considers and weighs the affidavits or other evidence of the opposing parties for the purpose of ascertaining whether the plain-

tiff has made out an apparent case for the issuance of an interlocutory injunction and whether the granting of an interlocutory injunction would work greater injury to the defendant than is reasonably necessary for the protection of the plaintiff. *Tobacco Association v. Bland,* 187 N.C. 356, 121 S.E. 638; *Blackwell Mfg. Co. v. McElwee,* 94 N.C. 425.

4. The hearing judge necessarily refuses an interlocutory injunction if the plaintiff fails to make out an apparent case for the issuance of the writ. *Fremont v. Baker, supra; Comfort Spring Corp. v. Burroughs,* 217 N.C. 658, 9 S.E. 2d 473; *Reyburn v. Sawyer,* 128 N.C. 8, 37 S.E. 954.

5. In determining the propriety of issuing an interlocutory injunction, the hearing judge considers and weighs the relative conveniences and inconveniences which the parties will suffer by the granting or the refusing of the writ. *Boone v. Boone, supra;* 28 Am. Jur., Injunctions, section 54; 43 C.J.S., Injunctions, sections 30, 227. An injunction of this nature should be granted where the injury which the defendant would suffer from its issuance is slight as compared with the damage which the plaintiff would sustain from its refusal, if the plaintiff should finally prevail. *Banner v. Button Corporation,* 209 N.C. 697, 184 S.E. 508; *Little v. Trust Co.,* 208 N.C. 726, 182 S.E. 491; *Hare v. Hare,* 207 N.C. 849, 178 S.E. 545; *Porter v. Insurance Co.,* 207 N.C. 646, 178 S.E. 223; *Boushiar v. Willis,* 207 N.C. 511, 177 S.E. 632; *Troutman v. Shuford,* 206 N.C. 909, 174 S.E. 230; *Teeter v. Teeter,* 205 N.C. 438, 171 S.E. 620; *Ferebee v. Thomason,* 205 N.C. 263, 171 S.E. 64; *Holder v. Mortgage Co.,* 205 N.C. 207, 170 S.E. 630; *Castle v. Threadgill,* 203 N.C. 441, 166 S.E. 313; *Parker Co. v. Bank,* 200 N.C. 441, 157 S.E. 419; *Cullins v. State College,* 198 N.C. 337, 151 S.E. 646; *R. R. v. Transit Co.,* 195 N.C. 305, 141 S.E. 882; *Brown v. Aydlett,* 193 N.C. 832, 136 S.E. 721; *Wentz v. Land Co.,* 193 N.C. 32, 135 S.E. 480; *Brinkley v. Norman,* 190 N.C. 851, 129 S.E. 145; *Johnson v. Jones,* 186 N.C. 235, 119 S.E. 231; *Seip v. Wright,* 173 N.C. 14, 91 S.E. 359; *Blackwell Mfg. Co. v. McElwee, supra; McBrayer v. Hardin,* 42 N.C. 1, 53 Am. D. 389. But an interlocutory injunction should be refused when its issuance would cause great injury to the defendant and confer little benefit in comparison upon the plaintiff. *Tobacco Association v. Bland, supra; Hurwitz v. Sand Co.,* 189 N.C. 1, 126 S.E. 171; *Railway Co. v. Mining Co.,* 112 N.C. 661, 17 S.E. 77; *Railroad Co. v. Railroad Co.,* 88 N.C. 79.

6. The hearing judge may issue an interlocutory injunction upon the application of the plaintiff in actual or constructive possession to enjoin a trespass on land when the trespass would be continuous in nature and produce injury to the plaintiff during the litigation. General Statutes, sections 1-485, 1-486; *R. R. v. Transit Co., supra; Sutton v. Sutton,* 161 N.C. 665, 77 S.E. 838; *Stewart v. Munger,* 174 N.C. 402, 93 S.E. 927. The rule that the judge will consider and weigh the relative conveniences

and inconveniences to the parties in determining the propriety of the injunction is operative here. In consequence, an interlocutory injunction against a trespass should be refused where its issuance would confer little benefit on the plaintiff and cause great inconvenience to the defendant. 28 Am. Jur., Injunctions, section 141.

7. The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing. *Branch v. Board of Education, supra; Grantham v. Nunn,* 188 N.C. 239, 124 S.E. 309; *Hudnell v. Lumber Co.,* 180 N.C. 48, 103 S.E. 893.

8. On an appeal from an order granting or refusing an interlocutory injunction, the Supreme Court is not bound by the findings of fact of the judge hearing the application for the writ. It may review and weigh the evidence submitted to the hearing judge and find the facts for itself. The Supreme Court nevertheless indulges the presumption that the findings of the hearing judge are correct, and requires the appellant to assign and show error in them. *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452; *Sineath v. Katzis,* 219 N.C. 434, 14 S.E. 2d 418; *Castle v. Threadgill, supra; Plott v. Comrs.,* 187 N.C. 125, 121 S.E. 190; *Hyatt v. DeHart,* 140 N.C. 270, 52 S.E. 781.

When the transcript of the record on appeal is laid alongside these rules, it is obvious that Judge Clement rightly refused the injunction sought by the plaintiffs.

In reaching this conclusion, we neither overlook nor ignore the allegations of the complaint and the supporting affidavits relating to the excavating of the strip of land and the paving of the remodeled driveway. These allegations do not warrant the award of injunctive relief during the litigation. The excavation was made before the issuance of the summons, and any resultant injury to the plaintiffs falls within the general rule that an interlocutory injunction will not issue to remedy a wrong committed before suit is brought. The paving of the remodeled driveway was almost finished at the time of the issuance of the summons. Any injury to the soil incident to completing the remodeled driveway subsequent to that event will be rather inconsequential in nature and can be readily remedied by incorporating a mandatory injunction for its removal in the final judgment in case the plaintiffs prevail at the trial on the merits.

The plaintiffs really base their demand for injunctive relief pending the litigation on the theory that they are in the actual or constructive possession of the land in controversy, and its use as a driveway by the defendant constitutes a trespass of a continuous nature. After hearing

the proofs of the parties, however, Judge Clement found, in substance, that the plaintiffs are not in either the actual or the constructive possession of the *locus in quo,* but that, on the contrary, the defendant actually occupies and uses it under a claim of right. He concluded as a matter of law on the basis of these findings of fact that the plaintiffs are not entitled to an interlocutory injunction and entered an order accordingly. His legal conclusion and his resultant refusal of injunctive relief pending the litigation find full sanction in the rules that the hearing judge refuses an interlocutory injunction when the applicant fails to make out an apparent case for its issuance, and that an interlocutory injunction does not lie to enjoin a party from making a reasonable use of land actually occupied by him under claim of right.

The arguments of the plaintiffs and our own investigation of the proofs of the parties do not reveal any reason justifying a disturbance of Judge Clement's findings of fact. We deem it not amiss to observe, however, that the demand of the plaintiffs for injunctive relief pending the litigation would not be substantially strengthened on the present record even if the proofs of the parties did compel us to accept as valid the thesis of the plaintiffs that they are in the actual or constructive possession of the strip of land and its use as a driveway by the defendant constitutes a trespass of a continuous nature. The proofs of the parties indicate rather clearly that the plaintiffs have no present use for the land in controversy, and that its continued employment as a driveway by the defendant at this time is essential to the operation of the hospital because it is the only practical route by which patients traveling by ambulances and other vehicles can be admitted and discharged. The issuance of an interlocutory injunction against the continued use of the land by the defendant under these circumstances would result in no benefit to the plaintiff and cause great hardship to the defendant.

The decision on the application for injunctive relief pending the litigation will have no bearing whatever on the rights of the parties when the action is tried on the merits.

For the reasons given, the order refusing an interlocutory injunction is Affirmed.

SUSIE MITCHELL JUSTICE v. JAMES R. MITCHELL, DEFENDANT, AND JOHN MITCHELL, ADDITIONAL DEFENDANT.

(Filed 14 October, 1953.)

1. Appeal and Error § 39c—

Where appellant is not entitled to the relief sought on any aspect of the case, any error in the trial is perforce harmless.

2. Deeds § 6—

A deed of gift is valid as of the time of its execution without registration, but if not recorded within two years it becomes void *ab initio* and title to the premises revests in the grantor. G.S. 47-26.

3. Adverse Possession § 9a—

An instrument that passes title is not color of title.

4. Adverse Possession § 8—

Adverse possession, even under color of title, must be such as to subject claimant to an action in ejectment.

5. Adverse Possession § 13c—

Claimant went into possession under an unregistered deed of gift immediately upon its execution. The grantor died less than nine years thereafter. *Held:* The deed of gift was valid and was not color of title until the expiration of two years from its execution, and therefore claimant could not have acquired title by adverse possession under color as against his grantor.

6. Adverse Possession § 9a—

Ordinarily, an unregistered deed is not color of title except as between the original parties.

7. Adverse Possession § 4g—

Claimant went into possession under an unregistered deed of gift. The grantor died before the expiration of a sufficient length of time to ripen title in claimant by adverse possession, and left a will devising the land to claimant for life with remainder to claimant's sister. *Held:* Upon the grantor's death claimant's possession was, as a matter of law, as a life tenant pursuant to the will, and he could not renounce his rights thereunder and become a trespasser in order to ripen title under the deed of gift, even after its registration.

APPEAL by defendant James R. Mitchell from *Williams, J.*, April Term, 1953, of HERTFORD.

This is an action to cancel a deed and thereby remove a cloud upon plaintiff's title to the remainder in the lands in controversy.

The facts pertinent to this appeal are as follows:

1. The plaintiff and the defendants James R. Mitchell and John Mitchell are children of Mollie J. Mitchell, deceased, who died testate

5 July, 1949. The lands in controversy were owned and possessed by Mollie J. Mitchell at the time of the death of her husband on 5 July, 1931. On 1 July, 1940, the testatrix executed her last will and testament in which she devised the premises in question to the defendant James R. Mitchell for life, and at his death in fee simple to the plaintiff.

2. On 15 July, 1949, the day the last will and testament of Mollie J. Mitchell was offered for probate, the defendant James R. Mitchell offered for registration a purported deed of gift bearing date of 31 December, 1940, appearing to have been signed by Mollie J. Mitchell but not acknowledged. This instrument was proven by the oath and examination of two witnesses as to the handwriting of the grantor, and duly recorded.

3. The defendant John Mitchell filed a disclaimer.

4. The defendant James R. Mitchell answered and alleged that immediately upon the execution of the deed of gift to him he entered into possession of the premises described therein and was in the open, notorious and adverse possession thereof under color of title for nine years and two months next prior to the commencement of the action.

In the trial below, on the issue of adverse possession, which was the third issue, the judge instructed the jury to the effect that the defendant had offered no evidence that the acts of adverse possession claimed by him were inconsistent with the life estate which he held under the will, and that such acts were not sufficient to constitute notice to all persons that he was claiming the lands, independently of the provisions of the will, as owner. Whereupon, the court charged the jury that "if you find the facts to be as all the evidence tends to show, it will be your duty to answer the third issue 'no,' otherwise 'yes.' " The jury answered the issue "no," and judgment was accordingly entered to the effect that the deed of gift was null and void and that the plaintiff Susie Mitchell Justice and the defendant James R. Mitchell own the lands in controversy as devisees under the last will and testament of Mollie J. Mitchell as set forth therein. The defendant James R. Mitchell appeals, assigning error.

J. Carlton Cherry and Pritchett & Cooke for plaintiff, appellee.
Jones, Jones & Jones and Albion Dunn for defendant, appellant.

DENNY, J. The appellant excepts to and assigns as error the instruction given to the jury on the third issue. We concede there is some merit to the exception, since the defendant James R. Mitchell could not have been in possession of the premises in question as a life tenant under the provisions of his mother's will prior to her death on 5 July, 1949. Even so, the facts disclosed on this record require an affirmance of the judgment entered below. An appellant will not be granted a new trial when the error complained of is harmless and another hearing could be of no

benefit to him. *Booth v. Hairston,* 193 N.C. 278, 136 S.E. 879; *Cauble v. Express Co.,* 182 N.C. 448, 109 S.E. 267.

Conceding that Mollie J. Mitchell signed the deed of gift to James R. Mitchell on 31 December, 1940, and delivered it to him on that date and that he immediately went into possession of the premises described therein, this unregistered deed could not in any event constitute color of title until after the expiration of two years from its date. The deed of gift was valid at the time of its execution and conveyed to the grantee the title to the lands described therein. However, after he failed to register it within two years from the making thereof, as required by G.S. 47-26, it became void *ab initio* and title to the premises revested in the grantor. *Winstead v. Woolard,* 223 N.C. 814, 28 S.E. 2d 507; *Cutts v. McGhee,* 221 N.C. 465, 20 S.E. 2d 376; *Allen v. Allen,* 209 N.C. 744, 184 S.E. 485; *Reeves v. Miller,* 209 N.C. 362, 183 S.E. 294; *Booth v. Hairston,* 195 N.C. 8, 141 S.E. 480; *s. c., supra.*

The contention of the appellant that he was in the adverse possession of the premises conveyed to him under color of title for more than seven years next prior to the institution of this suit, within the meaning of G.S. 1-38, is untenable.

Color of title is defined in *Smith v. Proctor,* 139 N.C. 314, 51 S.E. 889, as "a paper-writing (usually a deed) which professes and appears to pass the title, but fails to do so." *Seals v. Seals,* 165 N.C. 409, 81 S.E. 613; *Crocker v. Vann,* 192 N.C. 422, 135 S.E. 127; *Ennis v. Ennis,* 195 N.C. 320, 142 S.E. 8; *Glass v. Shoe Co.,* 212 N.C. 70, 192 S.E. 899; 1 Am. Jur., Adverse Possession, section 190, page 898.

In support of the view that a valid deed is not color of title, *Hoke, J.,* in speaking for this Court in the case of *Janney v. Robbins,* 141 N.C. 400, 53 S.E. 863, said: "It might well be suggested that in *Austin v. Staten* (126 N.C. 783), the unregistered deed relied on as color could not avail for any such purpose, because, until a second deed was executed and registered, the first passed the title, and a deed never operates as color which conveys the real title." An instrument that passes title is not color of title. 1 Am. Jur., Adverse Possession, section 190, page 898; *Collins v. Davis,* 132 N.C. 106, 43 S.E. 579. In the last cited case this Court said: "When one gives a deed for lands for a valuable consideration, and grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title."

Adverse possession to ripen into title within seven years must be under color, G.S. 1-38, otherwise, a period of twenty years is required, G.S. 1-40. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463. Even so, in order "to ripen a colorable title into a good title, there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action

of ejectment. *This is said to be the test." Lewis v. Covington,* 130 N.C. 541, 41 S.E. 677; *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56. Certainly at no time from 1 January, 1941, until 1 January, 1943, if the defendant James R. Mitchell entered into possession of the premises pursuant to the terms of the deed of gift as he testified he did in the court below, could he have been ejected as a trespasser. However, "a person originally entering without color of title may on subsequent acquisition of color be deemed to have held adversely under color from the latter date, still his color of title does not relate back to the time of his entry." 2 C.J.S., Adverse Possession, section 68, page 585.

Ordinarily an unregistered deed is not color of title, except as between the original parties. *Johnson v. Fry,* 195 N.C. 832, 143 S.E. 857. *Cf. Eaton v. Doub,* 190 N.C. 14, 128 S.E. 494. Therefore, conceding, but not deciding, that the unregistered deed of gift after it became void was color of title as between the grantor and the grantee from 1 January, 1943, until the death of the grantor on 5 July, 1949, the period of time was insufficient to ripen title in the defendant James R. Mitchell. *Battle v. Battle,* 235 N.C. 499, 70 S.E. 2d 492. The title to the premises being in Mollie J. Mitchell at the time of her death, passed to her devisees in accord with the provisions of her last will and testament. *Battle v. Battle, supra; Brite v. Lynch,* 235 N.C. 182, 69 S.E. 2d 169; *Winstead v. Woolard, supra.* Consequently, after the death of Mollie J. Mitchell the possession of the defendant was, as a matter of law, as a life tenant pursuant to the provisions of the will. Being a life tenant under his mother's will, he could not renounce his rights thereunder and agree to become a trespasser in order to ripen title under the deed of gift even after its registration. *Winstead v. Woolard, supra; Nixon v. Williams,* 95 N.C. 103; *Gaylord v. Respass,* 92 N.C. 553; *Gadsby v. Dyer,* 91 N.C. 311. Moreover, if he could do so, the deed of gift in no event could be color of title against the plaintiff, except from and after its registration.

In the trial below we find no prejudicial error.

No error.

IN THE MATTER OF CUSTODY OF EVERETT RICHARD ALLEN, JR., MINOR.

(Filed 14 October, 1953.)

1. Habeas Corpus § 3—

Upon granting a continuance of a hearing upon a writ of *habeas corpus* to determine the custody of a child as between its parents living in a state of separation, the court, without hearing evidence, awarded the custody of the child to its resident mother pending the hearing. The mother had the child present at the hearing and the record fails to disclose any harm

to the child as a result of the temporary order. *Held:* The issuance of the order will not be held for error.

2. Same: Infants § 9—

Upon this hearing of a writ of *habeas corpus* for the custody of a minor child as between its parents living in a state of separation, respondent moved to dismiss on the ground that the petitioner herself was a minor. *Held:* Even conceding that G.S. 1-64 is applicable, failure of respondent to plead the infancy of petitioner as a defense constitutes a waiver.

3. Habeas Corpus § 8—

Where, upon the hearing of a writ of *habeas corpus* to determine the custody of a minor child as between its parents living in a state of separation, the court recites certain matters "appearing to the court" as the basis for the court's adjudication, the recitals are tantamount to saying that such matters were found by the court to be facts.

4. Appeal and Error § 6c (2)—

An appeal from the judgment is insufficient to bring up for review the findings of fact.

5. Appeal and Error § 6c (3)—

Where respondent fails to request the court to make any particular findings, respondent may not complain on appeal of the failure of the court to make such findings.

APPEAL by respondent Everett Richard Allen from *McLean, S. J.*, at May Term, 1953, of MADISON.

Habeas corpus to determine the custody of Everett Richard Allen, Jr., infant child of petitioner, Ava Etta Cook Allen, and Everett Richard Allen, husband and wife, living in a state of separation without being divorced. G.S. 17-39.

The record on this appeal shows these uncontroverted facts:

(1). On 30 January, 1953, Ava Etta Cook Allen, petitioning a judge of the Superior Court of North Carolina for a writ of *habeas corpus* for the purpose above stated, set forth in her petition (a) that she is a citizen and resident of Madison County, North Carolina; (b) that she and Everett Richard Allen were married 21 August, 1950, and lived together as husband and wife for a time, as a result of which there was born to them a child, Everett Richard Allen, Jr., age 19 months, the subject of the petition; (c) that she and her husband have since separated and are now living apart, but are not divorced; (d) that their said child is in the constructive possession of his father, Everett Richard Allen,—although he is in the actual physical custody of his paternal grandmother, Mrs. C. J. Allen, as agent, servant or employee of his father, who has spent the greater part of the time for more than two years in the State of Michigan, and is now employed there, and, as she is informed and believes, claims that State as his home and place of residence; (e) that Mrs.

C. J. Allen has refused to permit petitioner to see her child,—having had the sheriff serve a notice on petitioner and all members of her family forbidding them to trespass on her lands; and (f) that she, the petitioner, is a fit and suitable person to have the custody of her child.

Upon these allegations petitioner prays that the matter of the custody and control of her said child be determined, and that, in the meantime the judge make such order as will prevent the father and maternal grandmother of the child, or either of them, from removing the child from the State of North Carolina, and beyond the jurisdiction of the court.

(2). Pursuant thereto writ of *habeas corpus,* directed to Mrs. C. J. Allen and Everett Richard Allen, and E. Y. Ponder, Sheriff, was issued on 30 January, 1953, for the production of the child, Everett Richard Allen, Jr., before one of the judges of Superior Court of North Carolina, at the courthouse of Buncombe County in the city of Asheville, at 12 o'clock noon, on 31 January, 1953, etc. The writ was served on Mrs. C. J. Allen on 31 January, 1953.

(3). When the matter came on for hearing at the time and place just stated Mrs. C. J. Allen was present in person, and represented by attorney.

Upon her request therefor, the judge ordered a continuance of the hearing to 4 o'clock p.m., on Wednesday, 11 February, 1953, at the courthouse in Marshall, North Carolina. And the judge further ordered that pending the continuance petitioner, mother of the child, should have the custody and control of him, and should have him in court at the time and place to which the matter was continued. (Note: The record fails to show that any exception was taken to this order.)

(4). Thereafter Mrs. C. J. Allen filed an answer to the petition of petitioner in which she admits (a) that she has been advised and believes that Everett R. Allen and Ava Etta Allen were married as alleged; (b) that they had a son born to them; (c) that he is approximately 19 months old; (d) that the applicant (petitioner) is a resident of the County of Madison, North Carolina; (d) that she, this respondent, had a notice served upon some of the family who were trespassing on her property (setting forth her reasons); (e) that Everett R. Allen has spent about two years in the State of Michigan where he is at work; and (f) that the child was in the custody of this answering respondent, but is now in the custody of his mother.

And for a further answer and defense Mrs. C. J. Allen denies that she has at any time acted as agent, servant or employee of Everett R. Allen, and avers that petitioner surrendered the child to her, and that her custody of him has been at the request, and with the full consent of petitioner,—for reasons stated (not material here).

Thereupon Mrs. C. J. Allen prays the court to dismiss the writ of *habeas corpus,* etc.

The record further shows that when the matter came on for hearing at the time and place to which it was continued, it was heard upon the petition, and the answer, and affidavits, including those of petitioner and of Everett Richard Allen, mother and father of the child. The court then entered an order in which it is recited that: "It further appearing to the court" that the father of the child is "now a resident of the city of Detroit and State of Michigan," and "has filed an action for divorce" there,—"a copy of the petition and complaint in said cause being filed as a part of the record in this case," and in which custody of the child is sought; that the mother, petitioner, is now a resident of Madison County, N. C., and said minor child is a resident of the Nineteenth Judicial District of N. C.; that certain affidavits have been filed in the cause with reference to the character and reputation of the petitioner which raise the question of her suitability to have the care and custody of the child; that Mrs. C. J. Allen has heretofore for some time had the custody of the child; that the mother of the child is now residing in the home of Mr. and Mrs. Frank Ramsey in the town of Walnut, Madison County, N. C., and the child is in her custody there; and that the Superintendent of Public Welfare of Madison County should make an investigation (a) as to the mother's character and reputation and suitability for having the care and custody of her child, and (b) as to the condition and suitability of the home of Mrs. C. J. Allen; and (c) as to the home and suitability of Mr. and Mrs. Frank Ramsey for having the custody of the child. The court thereupon ordered that the custody of the child shall be and remain in the mother temporarily, pending further orders of the court; that the cause be continued for hearing at the May Term of Madison County Superior Court, at 4 o'clock p.m. on Wednesday, 27 May, 1953; and that the Superintendent of Public Welfare shall make investigation, and report then to the presiding judge as to her findings as to the suitability of the petitioner to have the care and custody of the child, and as to the home of Mr. and Mrs. Frank Ramsey and as to the home of Mrs. C. J. Allen.

To this order "respondent Mrs. C. J. Allen objects and excepts, and in open court gives notice of appeal to the Supreme Court."

The record further shows that under date 22 May, 1953, the Superintendent of Madison County Welfare Department made report to the court.

Thereafter when the matter came on to be heard, and being heard by the judge presiding at the May Term, 1953, of Madison County Superior Court, upon the petition, and the answer, and the affidavits filed in the cause, and upon report of the Superintendent of Public Welfare for Madison County, all as shown in the record on this appeal, the court,

after reciting that "it appearing to the court": (1) "That the mother of said infant . . . is a fit and proper person to have the custody and control of said infant"; . . . (2) "that she is a resident of Madison County, North Carolina" and "that the father of said child is a resident of the State of Michigan," ordered that the custody and control of the infant be awarded to the mother, Ava Etta Cook Allen, pending further orders of the court; (2) that the father be permitted to visit the infant and to have him in his custody at certain hours of the day; (3) that the mother give a bond in the sum of $500, with sufficient sureties, made payable to the State of North Carolina, conditioned that she will not remove the infant, or cause him to be removed from the jurisdiction of the court, and that she will produce him at any time the court may direct her to do so; (4) that the father of the infant, prior to being granted temporary custody of the infant, shall execute a like bond, conditioned that he will not remove the infant from the jurisdiction of the court or attempt to deprive the mother of the custody of the child, as there stated; and (5) the judgment shall be in full force and effect at all times until the same shall be modified by the court.

The record shows that "from the foregoing order and the signing of the same, the respondent Everett Richard Allen, in open court, gives notice of appeal to the Supreme Court, further notice waived . . ."

Carl R. Stuart for respondent, appellant.

A. E. Leake for petitioner, appellee.

WINBORNE, J. Four assignments of error are presented by appellant on this appeal. Neither of them, however, is well taken.

First: It is contended that the court erred in signing the first order, that of 31 January, 1953, "before any evidence was offered as to who was a fit and proper person to have the custody of the child, and forcing the respondent to deliver the child into the hands of petitioner." As to this, the record fails to show that exception was taken to the order at the time it was made. But be that as it may, the order was temporary, pending the continuance of the hearing. And too it was a direct and effectual means of preventing the removal of the child from the State, of which the petition indicates the petitioner was apprehensive. Moreover, the record fails to show that any harm came to the child as a result of this order. He was with his mother, and she had him at the next hearing.

Second: It is contended that the court erred "in not dismissing the petition, upon motion of the respondent, when it was shown that the applicant (petitioner) was a minor herself, and that she was without authority to bring an action except through her guardian or next friend."

It is true that petitioner stated both in her petition and in her affidavit filed on the hearing before the judge below that she was not twenty-one years old. Hence, in support of the above contention appellant invokes the provisions of a section of our statute on civil procedure, G.S. 1-64, to the effect that "in actions and special proceedings when any of the plaintiffs are infants," they must appear by guardian or next friend.

While this Court does not consider that *habeas corpus* under G.S. 17-39, pertaining to the determination of a contest between husband and wife over the custody and control of their child is any part of the civil procedure pertaining to "actions and special proceedings" within the purview of G.S. 1-64, it is deemed to be unnecessary, on the record in the present case, to enter into a discussion of the differentiating factors. For even if it were conceded that the provisions of G.S. 1-64 applied, applicant is confronted, at the very threshold of his contention, with the fact that the record on this appeal fails to show that he pleaded the infancy of petitioner as a defense. And, not being pleaded, it must be considered as waived. *Hicks v. Beam,* 112 N.C. 642, 17 S.E. 490; *Carroll v. Montgomery,* 128 N.C. 278, 38 S.E. 874; *Cole v. Wagner,* 197 N.C. 692, 150 S.E. 339; *Acceptance Corp. v. Edwards,* 213 N.C. 736, 197 S.E. 613.

Third: The third contention is similar to the second, just above considered, and is so treated in brief of appellant.

Four: Lastly, it is contended by appellant that the court below erred in failing to find facts, on which to base the judgment signed. As to this, it may be fairly determined that the recitals of matters "appearing to the court" in the connection, and as stated in the orders and judgment, are tantamount to saying that those matters are found by the court to be facts. Moreover, the appeal from the judgment signed is insufficient to bring up for review the findings of fact. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

Indeed, the record fails to show that appellant requested the court to make any findings of facts, or that the appellant excepted to the finding of, or the failure to find any specific fact. As stated by *Johnson, J.,* in *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133, it is too late for the appellant "on appeal to complain of failure of the court to find specific facts, when no specific request therefor was made at the hearing," citing *Mfg. Co. v. Lumber Co.,* 177 N.C. 404, 99 S.E. 104.

This case is similar in factual situation to the case of *In re Ten Hoopen,* 202 N.C. 223, 162 S.E. 619.

The judgment below will be, and is hereby

Affirmed.

STATE v. WILLIE CHAMBERS.

(Filed 14 October, 1953.)

1. Bastards § 1—

The offense proscribed by G.S. 49-2 is the willful neglect or refusal of a parent to support his illegitimate child, the mere begetting of the child not being the offense and the question of paternity being incidental to the prosecution.

2. Same—

The willful failure and refusal to support an illegitimate child is a continuing offense.

3. Bastards § 6—

In a prosecution under G.S. 49-2, the burden is upon the State to show not only that defendant is the father of the child and that he has neglected or refused to support and maintain it after notice and request for such support, but further that such neglect or refusal is intentional, without just cause, excuse or justification, and such facts must be established as of the time the warrant or indictment was drawn.

4. Same—

In a prosecution under G.S. 49-2, testimony of prosecutrix that she wrote defendant after the baby was born demanding support for the child is sufficient upon that question without the introduction of the letter in evidence, since the testimony is sufficient to support the inference that the letter was written before the bill of indictment was laid.

5. Bastards § 5: Criminal Law § 42c—

Trial of defendant for willful failure or refusal to support his illegitimate child was continued in order that blood tests might be made. The blood test was not made. *Held:* It was competent upon the trial for the solicitor to ask defendant upon cross-examination if the reason the blood test was not made was because defendant knew the baby was his, the matter being within the bounds of a fair cross-examination. The legal principles relating to the purpose and value of a blood test are not relevant upon objection to the cross-examination.

6. Criminal Law § 81c (2)—

Where the charge of the court is without prejudicial error when construed as a whole, exceptions thereto cannot be sustained.

APPEAL by defendant from *Moore, J.*, at August Term, 1953, of WILKES.

Criminal prosecution upon a bill of indictment charging, in brief, that on 27 January, 1953, Willie Chambers, the defendant, did unlawfully and willfully refuse and neglect to support and maintain his bastard child begotten upon the body of Agnes Bishop.

A true bill of indictment was found by the grand jury at the March Term, 1953, of Wilkes County Superior Court, but the case was not tried until the August Term, 1953, which convened 10 August, 1953.

Defendant pleaded not guilty.

And, on the trial in Superior Court, the State offered Agnes Bishop, the prosecutrix, as a witness. She testified in pertinent part, as follows: ". . . I had known him (the defendant) for about three or four months before March 1952 . . . I went out with him. Yes, he did have intercourse with me. The first time . . . was about the last of March, 1952 . . . I was not going with anybody else at that time. During the time I was going with him, he had intercourse with me not over ten times . . . I did not at any time have intercourse with anybody other than this defendant during that time. About two weeks after I thought I was pregnant, I learned that I was . . . I gave birth to a child on January 27, 1953."

Then the witness was asked this question to which she answered as shown: "Q. Who is the father of your child?" Objection. Exception 4. "A. Willie Chambers."

And the witness continued: "The defendant told me after I became pregnant that he knew it was his, but that he wasn't going to support it. He said he would pay the doctor bills if I would leave it for adoption, but he wouldn't if I wouldn't do that . . . One night he said if he knew it would make me lose it, he would knock me through the ground . . . No, sir, he has paid nothing for the support of the child since it was born . . ."

Then, under cross-examination by Mr. Trivette, the witness testified: ". . . that she became pregnant as result of intercourse with defendant . . . April 28. Yes, I wrote that." Here the court interposed the question, "Have you ever asked him to support this child?", to which she answered, "Yes. I wrote him a letter and asked him to support it." Then continuing under cross-examination, the witness further testified: "I wrote him two letters . . . I mailed them. I wrote him this one after the baby was born, and those two before she was born . . ."

And, on re-direct examination, over objection and exception by defendant, the witness was asked this question: "Was either of the letters Mr. Trivette showed to you the letter you wrote and asked him to support the child?", to which she answered, "Yes, sir."

Then after offering testimony of the father of the prosecuting witness the State introduced the baby in evidence, and rested its case.

Thereupon, defendant, reserving exception to the denial of his motion for nonsuit or directed verdict, offered testimony tending to controvert that offered by the State. And, under cross-examination by the Solicitor, defendant testified that at the last term of court he made a motion for a blood test in this case; that the case was continued; and that he "never

had the blood test." Then defendant was asked this question, "And the reason you didn't have the blood test, Willie, was because you knew this baby was your baby?" (Objection and exception.) He answered, "No, sir." Then, continuing, ". . . I went with this girl from somewhere along in there in March 1952 up until June or July. During that time I was having intercourse with her whenever I wanted to . . . I have never paid anything . . . She said she was going to have a baby . . . When she told me I was the daddy of the baby, I denied it; I still do . . ." Then defendant was asked this question: "There is no question but that you got a letter from her, is there, in which she demanded that you support her and the baby?", to which he answered, "Sure. She wrote in a letter that I was the father of her child. And notwithstanding she made a request on me for support for her and the child, I still refused and failed to support it."

Defendant offered the testimony of other witnesses tending to contradict the prosecuting witness and to controvert the evidence offered by the State.

At the close of all the evidence defendant renewed his motion for judgment as of nonsuit. The motion was denied and he excepted.

Verdict: Guilty. Defendant moved in arrest of judgment. Motion is denied, and defendant excepted.

Judgment: Confinement in common jail of Wilkes County for a term of six months and assigned to work on the roads under the supervision of State Highway and Public Works Commission.

Defendant excepts thereto, and appeals to Supreme Court and assigns error.

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

Whicker & Whicker and Trivette, Holshouser & Mitchell for defendant, appellant.

WINBORNE, J. On this appeal three questions for decision are presented as to (1) denial of motions for judgment as of nonsuit, (2) alleged improper cross-examination, and (3) alleged error in the charge. However, prejudicial error is not shown.

(1) As to denial of motions, aptly made, for judgment as of nonsuit: G.S. 49-2 declares that "Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor . . ."

The only prosecution contemplated under this statute is grounded on the willful neglect or refusal of a parent to support his or her illegitimate child,—the mere begetting of the child not being denominated a crime.

S. v. Dill, 224 N.C. 57, 29 S.E. 2d 145; *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728; *S. v. Bowser,* 230 N.C. 330, 53 S.E. 2d 282; *S. v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157; *S. v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857.

The question of paternity is incidental to the prosecution for the crime of nonsupport. *S. v. Summerlin,* 224 N.C. 178, 29 S.E. 2d 462; *S. v. Bowser, supra; S. v. Stiles, supra; S. v. Thompson, supra; S. v. Robinson, supra.*

Moreover, this statute, as interpreted by this Court, creates a continuing offense. *S. v. Johnson,* 212 N.C. 566, 194 S.E. 319; *S. v. Bradshaw,* 214 N.C. 5, 197 S.E. 564; *S. v. Davis,* 223 N.C. 54, 25 S.E. 2d 164; *S. v. Robinson, supra.*

(For full discussion of continuing offense, special reference is made to opinion by *Barnhill, J.,* in *S. v. Johnson, supra.*) And in order to convict a defendant father under this statute, G.S. 49-2, it is held by the Court that the burden is on the State to show not only that he is the father of the child, and that he has neglected or refused to support and maintain it, but further that his neglect or refusal is willful, that is, intentionally done "without just cause, excuse or justification" after notice and request for support. *S. v. Sharpe,* 234 N.C. 154, 66 S.E. 2d 655; *S. v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333, and cases cited. See also *S. v. Stiles, supra; S. v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9; *S. v. Thompson, supra.*

The charge in the warrant or bill of indictment, as stated in *S. v. Summerlin, supra,* opinion by *Seawell, J.,* "must be supported by the facts as they existed at the time it was formally laid in the court, and cannot be supported by evidence of willful failure supervening between the time the charge was made and the time of trial,—at least when the trial is had . . . upon the original warrant." See also *S. v. Thompson, supra.*

In the light of these principles, the evidence offered by the State, as shown in the case on appeal, is sufficient to take the case to the jury on the issue of paternity, and to support a finding by the jury, beyond a reasonable doubt, that defendant is the father of the child as charged.

And taking the evidence in the light most favorable to the State, it is sufficient to take the case to the jury and to support a finding by the jury, beyond a reasonable doubt, that defendant has failed to support the child between the date of its birth, 27 January, 1953, and the date the bill of indictment was found by the grand jury, March Term, 1953. See *S. v. Love, ante,* 283.

The State's evidence tends to show, and defendant admits that he has not supported the child at any time. But defendant contends that the only evidence of a demand on him for support for the child is the letter written by the prosecutrix after the birth of the child, and that there is

no evidence that this letter was written before or after the bill of indictment was found.

However, the circumstances shown in the evidence in respect to this letter are sufficient to support an inference by the jury that it was written before the bill of indictment was laid. The charge relates to previous conduct of defendant and that was what the trial was about. And the case on appeal shows that prosecutrix, under cross-examination by one of the attorneys for defendant, was shown three letters, one of which she testified was the letter she wrote defendant after the birth of her child asking support for it. And it appears that defendant admitted that he received the letter. But the letter was not offered in evidence. These circumstances support a plain inference that the letter was written before the finding of the bill of indictment.

(2) The matter of the cross-examination relates to the question the solicitor asked defendant, if the reason he did not have the blood test was because he knew the baby was his. Under the circumstances shown, the question was within the bounds of fair cross-examination. Defendant had made a motion for a blood test, and none was made. So, why not?—is a reasonable and natural reaction. No question is raised as to the result of a blood test. Therefore, the legal principles relating to the purpose and value of a blood test are not relevant. Hence, in this question error is not made to appear.

(3) Now as to the charge: Numerous exceptions are taken to the charge. But a reading of the entire charge seems to present the case fairly and squarely to the jury in the light of the evidence and the applicable principles of law.

While the court did not submit written issues as in *S. v. Love, ante,* 283, the charge gave to the jury clear instructions in this respect.

In the judgment below, we find

No error.

R. N. COFIELD, JR., AND WIFE, ELSIE A. COFIELD; W. G. COFIELD AND WIFE, BLANCHE T. COFIELD; AND DOROTHY C. QUILLIAN AND HUSBAND, DOUGLASS C. QUILLIAN, v. J. W. GRIFFIN AND WIFE, NORA W. GRIFFIN.

(Filed 14 October, 1953.)

1. Fraud § 1—

Fraud is a material representation relating to a past or existing fact, which is false, made with knowledge of its falsity or in reckless disregard of the truth, with intention that the other party should act thereon, and which is reasonably relied and acted upon by the other party to his damage.

2. Same—

A false representation is material when it deceives a person and induces him to act.

3. Cancellation and Rescission of Instruments § 12—

Evidence tending to show that the male defendant went to parties owning an undivided interest in property as tenants in common and procured them to execute a deed to him for their interest for a stipulated sum by falsely representing that other tenants in common had agreed to sell to defendant at a like price, when as a matter of fact such other tenants had advised the male defendant that they would not sell at all, *is held* sufficient to be submitted to the jury in this action to cancel the deed for fraud.

4. Fraud § 3—

The state of any person's mind at a given moment is as much a fact as the existence of any other thing, and therefore a knowing misrepresentation of the present intention of a third person to do a future act is a misrepresentation of a past or subsisting fact within the law of fraud.

5. Fraud § 5—

The fact that plaintiffs rely upon a positive misrepresentation made by defendant when they could have ascertained the falsity of the statement by inquiry of third persons is not fatal to an action for fraud when there is nothing which should have put plaintiffs upon inquiry.

APPEAL by defendants from *Bone, J.*, and a jury, at April Term, 1953, of CHOWAN.

Civil action to cancel deed for fraud in its procurement.

These are the facts:

1. R. N. Cofield died intestate seized of a parcel of land in Edenton Township, Chowan County, North Carolina, which thereupon descended to his five children, R. N. Cofield, Jr., W. G. Cofield, Mrs. Dorothy C. Quillian, Mrs. Martha C. Forehand, and Mrs. Tom S. Owens, in equal shares as tenants in common, subject to the dower right of his widow, Mrs. Agnes Heath Cofield. Mrs. Tom S. Owens died thereafter, and her undivided interest in the land thereupon devolved on her three children, subject to the curtesy right of their father, Tom S. Owens.

2. R. N. Cofield, Jr., W. G. Cofield, and Mrs. Dorothy C. Quillian and their spouses, who are hereafter called the plaintiffs, dwell in or near Norfolk, Virginia. Mrs. Agnes Heath Cofield, Mrs. Martha C. Forehand, and Tom S. Owens live at Elizabeth City, North Carolina. The children of Tom S. Owens are nonresidents of North Carolina and Virginia.

3. On 3 January, 1952, J. W. Griffin visited the plaintiffs at their homes in Virginia and procured from them a deed sufficient in form to vest their interests in the Chowan County land in him and his wife, Nora W. Griffin, in fee simple.

4. Thereafter, to wit, on 21 May, 1952, the plaintiffs brought this action against the defendants J. W. Griffin and Nora W. Griffin to cancel the deed mentioned in the preceding paragraph. Their complaint alleges as the basis for cancellation that they were induced to execute the deed by the fraud of the male defendant. The defendants answered, denying this charge.

5. Both sides offered testimony at the trial. The evidence of the plaintiffs is epitomized in the opinion which follows this statement of facts. The evidence of the defendants would have exonerated the male defendant of wrongdoing had it been accepted by the jury.

6. This issue was submitted to the jury: "Did the defendant J. W. Griffin procure the execution of the deed in question by plaintiffs by means of false and fraudulent representations, as alleged in the complaint?" The jury answered the issue "Yes," and Judge Bone entered judgment providing for the cancellation of the deed. The defendants appealed, assigning errors.

W. C. Morse, Jr., and Weldon A. Hollowell for plaintiffs, appellees.
J. N. Pruden and LeRoy & Goodwin for defendants, appellants.

ERVIN, J. The only assignments of error requiring elaboration are those which challenge the sufficiency of the evidence of the plaintiffs to carry the case to the jury and support the verdict on the issue of fraud.

The essential elements of fraud are these: (1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation, and acted upon it; and (6) that plaintiff thereby suffered injury. *Parker v. White,* 235 N.C. 680, 71 S.E. 2d 122; *Foster v. Snead,* 235 N.C. 338, 69 S.E. 2d 604; *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202. A false representation is material when it deceives a person and induces him to act. *Starnes v. R. R.,* 170 N.C. 222, 87 S.E. 43; *Machine Co. v. Bullock,* 161 N.C. 1, 76 S.E. 634.

When the evidence of the plaintiffs is interpreted in the light favorable to them, it makes out this case:

1. The male defendant desired to acquire as many of the outstanding interests in the Chowan County land as possible on the basis of a total outlay not to exceed $600.00 for the entire property. He sought out the plaintiffs at their homes in Virginia, and offered them $300.00 for their shares in the land. He represented to the plaintiffs that he had just

talked to Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand at Elizabeth City concerning his desire to acquire the entire property for $600.00, and that Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand would sell him their interests in the property for their proportionate part of that sum as soon as he obtained a deed from the plaintiffs for their shares.

2. As a matter of fact, Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand, acting through the instrumentality of an agent, had just informed the male defendant that they would not sell him their interests in the land at all. Consequently, his representation to the plaintiffs as to what Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand would do was not only false, but was known to him to be false at the time he made it.

3. The male defendant made the representation as to what Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand would do to the plaintiffs with intent that the plaintiffs should believe it and be induced by it to sell their interests in the land to him for $300.00.

4. The plaintiffs accepted the representation of the male defendant as truth without making any inquiry of Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand, and were induced by it to execute the deed of 1 January, 1952, for a consideration of $300.00, which was less than the market value of their interests in the land.

6. Shortly thereafter the plaintiffs discovered the falsity of the representation which had been made to them by the male defendant. They forthwith tendered to defendants the check for $300.00 issued to them by the male defendant in payment of the consideration for their deed, and demanded a rescission of the conveyance. The defendants refused the tender and demand, and the plaintiffs brought this action against them.

The defendants insist initially that the evidence of the plaintiffs is insufficient to establish fraud on the part of the male defendant because it fails to show that he misrepresented any past or existing fact to them. The defendants take the position on this aspect of the litigation that the statement of the male defendant that Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand would sell him their interests in the land for their proportionate part of $600.00 as soon as he obtained a deed from the plaintiffs for their shares constituted at most an expression of an erroneous opinion on his part as to what the future conduct of Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand would be in respect to the particular matter under discussion. Their brief sums up their arguments on this score in this succinct manner: "We recognize that fraud may be predicated upon a promise made with a present intention not to perform, but that intention is a matter of the promisor's own mind, not the mind

of another. Necessarily, a statement as to what another person intends to do is but a statement of opinion."

We are unable to accept the views of the defendants with respect to either the facts or the law on this phase of the case.

The state of any person's mind at a given moment is as much a fact as the existence of any other thing. *Williams v. Williams,* 220 N.C. 806, 18 S.E. 2d 364; 37 C.J.S., Fraud, section 12. As a consequence, it may be fraudulent to misrepresent the present intention of a third person to do a future act. *City Deposit Bank v. Green,* 138 Iowa 156, 115 N.W. 893; *Hinchey v. Starrett,* 91 Kan. 181, 137 P. 81, 92 Kan. 661, 141 P. 173; *McElrath v. Electric Inv. Co.,* 114 Minn. 358, 131 N.W. 380; *Fox v. Duffy,* 95 App. Div. 202, 88 N.Y.S. 401; Am. Law Inst., Restatement, Torts, Vol. 3, section 530; 23 Am. Jur., Fraud and Deceit, section 37; 37 C.J.S., Fraud, section 12. One who fraudulently makes a misrepresentation to another that a third person intends to do or not to do a particular thing for the purpose of inducing the other to act or refrain from acting in reliance thereon in a business transaction is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation. Am. Law Inst., Restatement, Torts, Vol. 3, sections 525, 530.

When the evidence is interpreted in a light favorable to them, it clearly appears that the plaintiffs were justified in accepting the statement under present scrutiny as a representation by the male defendant that at the time of his colloquy with the plaintiffs Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand actually entertained the intention of selling the male defendant their interests in the land for their proportionate part of $600.00 as soon as the male defendant obtained a deed from the plaintiffs for their shares. (See, in this connection, the interpretation placed upon similar language in these cases: *Starnes v. R. R., supra; City Deposit Bank v. Green, supra; McElrath v. Electric Inv. Co., supra; Fox v. Duffy, supra.*) This being true, the evidence of the plaintiffs suffices to show that the male defendant misrepresented an existing fact, *i.e.,* the intention of Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand, to them.

The defendants assert finally that the evidence of the plaintiffs is legally insufficient to warrant the relief sought by them because it affirmatively discloses that they acted unreasonably in relying upon the alleged misrepresentation. The defendants base this contention on the testimony indicating that the plaintiffs accepted the unsupported statement of the male defendant as truth when they could have ascertained its falsity without difficulty by making inquiries of Mrs. Agnes Heath Cofield and Mrs. Martha C. Forehand. A similar contention was rejected in this wise in *Machine Co. v. Bullock,* 161 N.C. 1, 76 S.E. 634: "We are not inclined to encourage falsehood and dishonesty, by protecting one

who is guilty of such fraud, on the ground that his victim had faith in his word, and for that reason did not pursue inquiries which would have disclosed the falsehood."

The judgment of the superior court will be upheld, for there is in law No error.

J. ARTHUR BLANTON v. CAROLINA DAIRY, INC.

(Filed 14 October, 1953.)

1. Automobiles § 8i—

A motorist turning to the left on the highway is required to give the statutory signal of his intention to turn only in those instances in which the surrounding circumstances afford him reasonable grounds for apprehending that his action may affect the operation of another vehicle. G.S. 20-154.

2. Automobiles § 18i—

Where there is testimony on the part of defendant supporting his contention that before turning to his left across the highway he ascertained that there was no vehicle in sight to his rear for a distance of some 200 or 300 yards, and no vehicle in front of him so that he had no reasonable ground for apprehending that his intended left turn might affect the operation of any other vehicle, an unqualified instruction to the effect that his failure to give the statutory signal during the last hundred feet traveled constituted negligence *per se*, must be held for reversible error even though given in stating the contentions of plaintiff.

3. Trial § 31b—

It is the duty of the trial court to explain and apply the law to all the substantive phases of the evidence adduced.

4. Same: Trial § 31f—

An instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is error.

5. Appeal and Error § 6c (6)—

While ordinarily a misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contentions presents an erroneous view of the law or an incorrect application of it.

APPEAL by defendant from *Sink, J.*, and a jury, at April Term, 1953, of RUTHERFORD.

Civil action to recover for personal injuries and property damage resulting from a collision between the plaintiff's automobile and the defendant's milk truck, which occurred on U. S. Highway 74 between Shelby

and Forest City. Both vehicles were proceeding in the same direction. The plaintiff was in the act of overtaking and passing the milk truck, which was turning left from the highway and entering a private driveway leading to the home of a customer.

Issues of negligence, contributory negligence, and damages were answered by the jury in favor of the plaintiff.

From judgment on the verdict awarding the plaintiff damages of $5,500, the defendant appeals, assigning errors which relate to the charge of the court.

Oscar J. Mooneyham for plaintiff, appellee.
Meekins, Packer & Roberts for defendant, appellant.

JOHNSON, J. The plaintiff testified in substance that, traveling west on the highway out of Shelby, he overtook the defendant's truck going around "a small curve"; that after nearing the truck and getting in the clear where he could see ahead and "down the hill around three-tenths of a mile," he gave a signal of his intention to pass by blowing his horn; that as the front end of his car came about opposite the rear end of the defendant's truck, the defendant's driver, without giving any signal of any kind of his intention to turn, suddenly turned to his left and crossed the south half of the highway immediately in front of plaintiff, and that the collision then ensued.

On the other hand, the defendant offered evidence tending to show that defendant's milk delivery truck, having rounded a slight right-hand curve, proceeded on along a straight stretch of road, slightly down hill. The truck was being operated by its employee, Ray Mock, on a clear day, with visibility good. Mock intended to turn into a driveway on the left side of the highway to make a delivery of milk at a customer's house. He testified he looked in his side mirror and could see some 200 or 300 yards to his rear, to the crest of the hill; that there was no traffic behind him to the top of the hill, and that he looked forward and saw none in the straight stretch ahead; that having slowed from 20 to not more than 5 to 10 miles per hour, he angled his truck from his right to his left hand side of the highway, giving a hand signal for a left turn during the last 50 feet traveled before reaching the driveway on his left; that he had completed his turn into the driveway, with all but the bare rear end of his truck clear of the highway, when the plaintiff's car, coming from the rear, without audible signal by horn until the moment of impact, struck the truck at its left rear wheel and body on the extreme south edge of the pavement. The pavement is about 20 feet wide.

The trial court in charging as to the provisions of G.S. 20-154 told the jury in part:

". . . that any car before stopping, starting or turning from a direct course on the highway was required, first, to ascertain whether any other motor vehicle or pedestrian was likely to be endangered, . . . if another motor vehicle were involved he was required to give his signal by hand indicating what his movement was to be by signalling with his hand, except where the rear view was blocked, and in that case by some mechanical device approved by the State Highway & Public Works Commission, and the signalling of the hand as set forth in the statute, indicating . . . a left turn by (extending the left arm and) pointing outward with forefinger, . . . The law requires that that signal be given for at least 100 feet before the course of the driver was changed. The law requires not only that the hand must be extended indicating a turn, but that it must remain during the last 100 feet before the turn was made. *A failure to give such signal was negligence per se, that is, negligence as a matter of law.* (Italics added)

". . . The plaintiff in the instant case contends that there was no hand signal given indicating a turn by Mr. Mock, the defendant contends that there was. . . . *And the plaintiff contends that under Mr. Mock's own testimony, that if you are satisfied with what he says, that he signaled fifty feet before he made his turn he would be guilty of negligence, and the court so charges you.*" (Italics added)

The defendant's exceptions to the foregoing instructions would seem to be well taken.

As pointed out by *Ervin, J.*, in *Cooley v. Baker,* 231 N.C. 533, p. 536, 58 S.E. 2d 115, the provisions of G.S. 20-154 do not require the driver of a motor vehicle intending to make a left turn upon a highway to signal his purpose to turn in every case: "The duty to give a statutory signal of an intended left turn does not arise in any event unless the operation of some 'other vehicle may be affected by such movement.' And even then the law does not require infallibility of the motorist. It imposes upon him the duty of giving a statutory signal of his intended left turn only in case the surrounding circumstances afford him reasonable grounds for apprehending that his making the left turn upon the highway might affect the operation of another vehicle." Citing authorities.

In the instant case it is noted that the trial court gave the jury the unqualified instruction that a failure to give the hand signal during the last 100 feet before the turn was made "was negligence *per se.*" The court inadvertently failed to qualify the instruction so as to bring it within the purview of the rule announced in *Cooley v. Baker, supra.*

Nor did the court at any other time during the charge submit to the jury the defendant's contention that taking the testimony of truck driver Mock as true, it was susceptible of the inference that he was under no obligation to give the hand signal. This on the hypothesis that he, before

angling the truck to the left across the highway into the driveway, first ascertained that there was no vehicle in sight from the rear back to the curve and crest of the hill, a distance of some 200 or 300 yards, and that he, in the exercise of due care and reasonable foresight, had no reasonable ground for apprehending that his intended left turn might affect the operation of another vehicle.

Instead, the court closed this phase of the case by giving the following erroneous contention of the plaintiff: "And the plaintiff contends that under Mr. Mock's own testimony, that if you are satisfied with what he says, that he signaled fifty feet before he made his turn he would be guilty of negligence, and the court so charges you."

This contention of the plaintiff presented to the jury a view of the law clearly at variance with the foregoing rule laid down in *Cooley v. Baker, supra.* See also *Stovall v. Ragland,* 211 N.C. 536, 190 S.E. 899.

It is the duty of the trial court to explain and apply the law to the substantive phases of the evidence adduced (G.S. 1-180), and an instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is error, the rule being that while ordinarily the misstatement of a contention must be brought to the trial 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,* 237 N.C. 122, 74 S.E. 2d 320; *S. v. Pillow,* 234 N.C. 146, 66 S.E. 2d 657; *S. v. Hedgepeth,* 230 N.C. 33, 51 S.E. 2d 914; *S. v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685; *S. v. Gause,* 227 N.C. 26, 40 S.E. 2d 463.

Here the contention of the plaintiff as given the jury by the trial court was not only erroneous, but the court seems to have adopted it unequivocably as the law of the case. Clearly, this was error entitling the defendant to a new trial, and it is so ordered.

Since the questions raised by other assignments of error, including the challenge to the charge for failure to comply with the mandatory requirements of G.S. 1-180, may not arise on retrial, we deem it appropriate to refrain from discussing them.

New trial.

STANLEY HOLLOMAN AND WIFE, ROSA HOLLOMAN, v. JOE BLUNT DAVIS AND WIFE, G. VERNELL DAVIS; BURGESS FUTRELL AND WIFE, JANICE M. FUTRELL; JOSEPH H. HOLLOMAN AND WIFE, BEULAH HOLLOMAN; RICHARD MILLS AND WIFE, JEANETTE G. MILLS, AND JIMMIE K. HOLLOMAN, A MINOR, AND ELSIE MAE HOLLOMAN, A WIDOW OF A. C. HOLLOMAN, AND ADDIE HOLLOMAN (DAVIS), WIDOW OF VERNON R. HOLLOMAN; T. D. NORTHCOTT, GUARDIAN AD LITEM FOR JIMMIE K. HOLLOMAN, A MINOR.

(Filed 14 October, 1953.)

1. Boundaries § 5a—

A tenant in common, having an undivided interest in two tracts of land lying more than a quarter of a mile apart and separated by a public road and the lands of others, executed a mortgage on his interest describing the land as lying in a certain township, known as the "Evans" tract and adjoining the lands of named persons. *Held:* Upon the facts of this case the description was insufficient to identify the land and the mortgage was ineffectual.

2. Same—

A deed or mortgage must contain a description of the land which is either certain in itself or capable of being reduced to certainty by reference to matters *aliunde* to which the description refers, and when the description is insufficient under this rule to identify the land so that it may be fitted to the description, the instrument must fail, since title to land may not be passed by parol, and in such instances G.S. 8-39 and G.S. 39-2 do not apply.

APPEAL by defendant Elsie Mae Holloman from *Williams, J.*, April Term, 1953, of HERTFORD. Affirmed.

Petition for sale of land for partition.

The land was described in the petition as follows:

"Tract No. 1, known as the homeplace on the south side of the Evans Road and bounded by the land of J. P. Mitchell heirs, John H. Thompson, W. B. Byrum, Mrs. C. C. Evans and the Evans public road, containing 30 acres, more or less.

"Tract No. 2, known as the Smith tract, and bounded by the lands of J. P. Mitchell heirs, K. R. Evans, J. P. Mitchell heirs and Mrs. C. C. Evans, containing 50 acres, more or less."

This land was formerly owned by Sallie Holloman, wife of Aubrey Holloman. She died intestate in 1918 leaving her surviving her husband and two children, Stanley Holloman, the petitioner, and Vernon Holloman, to whom the land descended as her only heirs at law, subject to the life estate of Aubrey Holloman as tenant by the curtesy.

After the death of his wife Aubrey Holloman married Elsie Mae Byrd now Holloman. In 1927 Vernon Holloman executed to Elsie Mae Holloman a mortgage on his interest in certain described land which Elsie Mae

Holloman claims to be that described in the petition. In 1932 Vernon Holloman died intestate leaving five children as his only heirs at law. These children are parties to this proceeding and claim they own the one-half undivided interest of their father Vernon Holloman in the lands now sought to be sold for partition. In 1935 Elsie Mae Holloman, mortgagee, pursuant to sale under foreclosure of the mortgage referred to, conveyed the land to Aubrey Holloman. In 1937 Aubrey Holloman died leaving a last will and testament wherein he devised all his real property to Elsie Mae Holloman. Under these instruments Elsie Mae Holloman claims title to a one-half undivided interest in the lands described in the petition, being the interest which descended from Sallie Holloman to Vernon Holloman.

The mortgage from Vernon Holloman and wife to Elsie Mae Holloman described the land conveyed as follows: "Lying and being in the Harrellsville Town Ship, Hertford County, North Carolina, and known and designated as follows, viz.: Known as The Evans Tract of land adjoining the lands of J. R. Odom heirs on the north and the East K. R. Evans. On the South by the lands of W. B. ..... On the west by the lands of J. P. Mitchell, eighty acres more or less." The deed from Elsie Mae Holloman, Mortgagee, to Aubrey Holloman described the land conveyed as follows: "Lying and being in Harrellsville Township, Hertford County, and known as a part of the Evans tract of land, the same being the one-half undivided interest of Vernon R. Holloman in said tract of land, adjoining the lands of J. R. Odom heirs on the north; on the east by the lands of K. R. Evans; on the west by the lands of J. P. Mitchell, containing 80 acres, in the whole tract, more or less, together with all appurtenances thereto belonging."

Stanley Holloman, the petitioner, whose title to a one-half undivided interest in the land is admitted, and the children of Vernon Holloman resisted the claim of Elsie Mae Holloman on the ground that the mortgage from Vernon Holloman to Elsie Mae Holloman and the latter's deed as mortgagee to Aubrey Holloman were and are insufficient to convey the land described in the petition, and that the land attempted to be described in the instruments under which she claims are incapable of location and are ineffectual and void in law.

The court was of opinion that Elsie Mae Holloman had failed to show any interest in the land described in the petition, and that petitioner Stanley Holloman owning a one-half interest and the five children of Vernon Holloman (naming them), owning the other half interest, were tenants in common in the land and entitled to a sale for partition. The cause was remanded to the Clerk to enter the proper and necessary orders for sale of the land for this purpose.

Elsie Mae Holloman excepted and appealed.

John R. Jenkins, Jr., and Pritchett & Cooke for codefendants, appellees.

W. D. Boone for Elsie M. Holloman, appellant.

DEVIN, C. J. The ruling of Judge Williams that the mortgage and deed which Elsie Mae Holloman offered as evidence of her title to a one-half undivided interest in the lands described in the petition for partition were insufficient for this purpose, we think, should be upheld. The description in these instruments is insufficient to identify and make certain the land intended to be conveyed, nor is it sufficient to be aided by parol testimony to fit it to the two separate tracts of land described in the petition. The land is described in the deed to Sallie Holloman and in the petition as two separate and distinct tracts of land more than a quarter of a mile apart, separated by a public road, and between these two tracts lie tracts of land belonging to other landowners. The designation of the land in the mortgage under which appellant claims as "the Evans tract," under the evidence in this case, was uncertain and insufficient to identify the land.

"It is essential in order that a deed may be operative as a legal conveyance that the land intended to be conveyed be described with sufficient definiteness and certainty to locate and distinguish it from other lands of the same kind. If the land intended to be conveyed is not identifiable from the words of the deed, aided by extrinsic evidence explanatory of the terms used, or by reference to another instrument, the deed is inoperative." 16 A.J. 584.

For the purpose of identifying land described in a deed the statute G.S. 8-39 permits the introduction of parol testimony to identify the land and to "fit it to the description" contained in the deed, and by G.S. 39-2 certain elements of vagueness in the description are declared insufficient to render the deed void.

But these statutes apply only when there is a description which can be aided by parol, and cannot be held to validate a deed where the description is too vague and indefinite to identify the land claimed and to fit it to the description. *Katz v. Daughtrey,* 198 N.C. 393, 151 S.E. 879. In the language of *Justice Barnhill* in *Peel v. Calais,* 224 N.C. 421, 31 S.E. 2d 440: "At all events, the description as it may be explained by oral testimony must identify and make certain the land intended to be conveyed. Failing in this, the deed is void."

The statutory rule permitting the use of parol testimony to fit the description in the deed to the land intended to be conveyed does not relieve the invalidity due to vagueness, indefiniteness and uncertainty unless there be elements of description which are either certain in themselves or are capable of being reduced to certainty by reference to something

extrinsic to which the deed refers. The liberal rule of construction does not permit the passing of title to land by parol. As stated by *Justice Winborne,* in *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759, "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 also *Self-Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889, and *Peel v. Calais, supra,* where the authorities in support of this principle are collected.

Judgment affirmed.

JAMES N. QUEEN AND WIFE, OLETA QUEEN, v. MARY SISK.

(Filed 14 October, 1953.)

1. Specific Performance § 1: Reformation of Instruments § 3—

Where the contract between the parties is for the sale of a certain number of acres out of a tract of land, and the deed conveys a number of acres less than that agreed upon, the purchaser is not entitled to compel conveyance of additional acres out of the tract to make up the deficiency, or to reformation of the deed, since the identity of the additional land is too uncertain to support specific performance or reformation.

2. Vendor and Purchaser § 26—

Where a specific tract of land is purchased in gross for a lump sum or stipulated amount the doctrine of *caveat emptor* applies in regard to the acreage in the absence of actual fraud or gross deficiency, and a clause in the deed specifying the number of acres will be considered simply as a part of the description controlled by the definite boundaries, monuments or courses and distances contained therein.

3. Same—

Where the contract for the sale of land is for an agreed number of acres at a stipulated price per acre, so that the purchase price can be ascertained only by multiplying the number of acres by the agreed price per acre, quantity is of the essence, and where there is a deficiency in the quantity actually conveyed, the purchaser may recover the value of the deficiency at the agreed price per acre, as in *assumpsit* for money had and received, under the doctrine of unjust enrichment, irrespective of fraud.

4. Equity § 3—

Laches is an affirmative defense which must be pleaded and may not be taken advantage of by demurrer.

APPEAL by plaintiffs from *Sink, J.,* May Term, 1953, RUTHERFORD. Reversed.

Civil action to recover excess amount paid for land purchased on a per-acre basis.

Plaintiffs filed a complaint in which they alleged they purchased 23.1 acres of land from defendant at the price of $108.17 per acre. There were other allegations not material here. Defendant demurred. Thereupon plaintiffs, by leave of court, filed an amended complaint which is in effect a substitute complaint.

The allegations in the substitute complaint material to decision on this appeal are in substance as follows: On 5 October 1945, the defendant owned 45.24 acres of land in Rutherford County; the defendant agreed to sell and plaintiffs agreed to buy 23.1 acres thereof to be surveyed and cut off from the larger tract; the land was purchased on an acreage basis at $100 per acre; the defendant had the land surveyed and submitted to plaintiffs a plat or map showing that the land to be conveyed contained 23.1 acres; a deed was executed in which the description followed the calls and distances shown on the map and called for 23.1 acres; upon delivery of said deed, plaintiffs paid defendant the agreed purchase price figured at $100 per acre. A more recent survey discloses that the land actually conveyed contains only 13.7 acres and that by reason of the shortage in the agreed acreage, plaintiffs erroneously and by mistake of fact paid defendant an excess of $1,016.80. They pray judgment that defendant be required to cut off from the remaining land and convey to them sufficient additional land to make up the shortage or "if for any reason the defendant does not own sufficient land to permit complete reformation of the aforesaid deed that the plaintiffs recover of the defendant the sum of $1016.80 with interest . . ."

The defendant again appeared and demurred for that (1) the complaint fails to state a cause of action in that it is not alleged defendant knew the correct number of acres or practiced any fraud, (2) the complaint does not allege a breach of warranty, and (3) the doctrine of *caveat emptor* applies, and (4) plaintiffs have been guilty of laches in waiting six years after they received their deed before instituting action.

The demurrer was sustained and plaintiffs appealed.

Charles C. Dalton and J. S. Dockery for plaintiff appellants.
M. Leonard Lowe for defendant appellee.

BARNHILL, J. The specific land to be conveyed other than that which was actually described in the deed executed by defendant and delivered to plaintiffs is entirely too uncertain to entitle plaintiffs to a decree of reformation or specific performance. They are relegated to their right, if any, to recover the amount erroneously paid defendant at the time the deed was delivered.

What are the rights of a purchaser of real property when it is discovered that his deed does not convey the number of acres recited in the description contained in his deed? On this question there are two distinct lines of decisions. Defendant relies on one line, plaintiffs on the other.

There is no conflict of decision. The distinction is factual. The courts merely apply one principle of law to one state of facts and a different principle to another and clearly distinguishable factual situation. Which line controls decision on this appeal? That is the real question presented.

Where a specific tract of land is purchased in gross for a lump sum or stipulated amount, the doctrine of *caveat emptor* applies. *Foy v. Haughton,* 85 N.C. 168; *Peacock v. Barnes,* 139 N.C. 196; *Rickets v. Dickens,* 5 N.C. 343; *Zimmerman v. Lynch,* 130 N.C. 61; *Guy v. Bank,* 205 N.C. 357, 171 S.E. 341; *Turpin v. Jackson County,* 225 N.C. 389, 35 S.E. 2d 180.

When the description of the land conveyed contains a clause specifying the number of acres conveyed, this clause is considered simply as a part of the description. If the acreage actually conveyed is either more or less than the recited acreage, and the land the grantors intended to convey and the grantees intended to purchase is capable of being ascertained from the definite boundaries, monuments or courses and distances contained in the description, the clause reciting the number of acres in the tract will be rejected. Devlin, Law of Real Property (Deeds), Vol. 2, 3rd Ed., p. 2027.

"Where the land is sold in bulk for a lump sum, then quantity is not generally of the essence of the contract and the parties take the risk of deficiency or excess, except in cases where there is actual fraud" or gross deficiency. 8 Thompson, Real Property, Perm. Ed., sec. 4580; *Guy v. Bank, supra; Turner v. Vann,* 171 N.C. 127, 87 S.E. 985; *Smith v. Grizzard,* 259 S.W. 537; *Ross v. Brewer,* 251 S.W. 307.

If the purchaser desires to protect himself in respect to the quantity of the land conveyed, he must either (1) calculate the acreage by the definite boundaries, courses and distances contained in the description, or (2) have the land surveyed, or (3) require proper covenants in his deed for his protection. *Smathers v. Gilmer,* 126 N.C. 757; *Huntley v. Waddell,* 34 N.C. 32; *Foy v. Haughton, supra; Guy v. Bank, supra.*

Conversely, when the contract of purchase and sale is for an agreed number of acres at a stipulated price per acre and the purchase price can only be ascertained by multiplying the number of acres purchased by the agreed price per acre, quantity is of the essence of the contract. *Patrick v. Worthington,* 201 N.C. 483, 160 S.E. 483; Anno. 153 A.L.R. 4.

When a sale is consummated upon an acreage basis and there is a deficiency in the quantity actually conveyed, a court of equity will abate the

value of the deficiency at the agreed price per acre. *Duffy v. Phipps,* 180 N.C. 313, 104 S.E. 655; *Patrick v. Worthington, supra;* 8 Thompson, Perm. Ed., sec. 4580; Devlin, Law of Real Property (Deeds), Vol. 2, 3rd Ed., 2029; Anno. 153 A.L.R. 34.

Where the purchase and sale is upon an acreage basis and the purchaser sues to recover on account of an alleged deficiency in the acreage and a consequent overpayment, he is not required to allege or prove fraud. The action to recover the excess payment is an action in *assumpsit* for money had and received to the use of the plaintiff, under the doctrine of unjust enrichment. *Sparrow v. Morrell,* 215 N.C. 452, 2 S.E. 2d 365; *Morgan v. Spruill,* 214 N.C. 255, 199 S.E. 17; *Simms v. Vick,* 151 N.C. 78, 65 S.E. 621.

Laches is an affirmative defense which must be pleaded. It may not be taken advantage of by demurrer.

Plaintiffs sue to recover an alleged overpayment made in the consummation of a contract of purchase and sale of real property upon an acreage basis. The line of decisions relied on by them is controlling and they have sufficiently stated a cause of action in *assumpsit.* Hence the judgment entered in the court below must be

Reversed.

STATE v. EVELLA THORNE.

(Filed 14 October, 1953.)

1. Indictment and Warrant § 9—

An indictment or other accusation must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed.

2. Criminal Law § 52a (2): Assault § 13: Arrest § 3—

Evidence that defendant, who had been arrested by a police officer, intentionally struck the officer while on the way to the police station with the sole purpose of venting her spleen upon him, is sufficient to support a conviction of simple assault, and therefore when this is one of the offenses charged in the warrant, defendant's general motion for a compulsory nonsuit is properly denied.

3. Assault § 10—

A warrant charging that the defendant on a certain day in a named city did unlawfully and willfully violate the laws of North Carolina by an assault on a named person is sufficient to charge the offense of a simple assault.

4. Disorderly Conduct § 2—

A warrant charging that defendant unlawfully and willfully violated the laws of North Carolina "by disorderly conduct by using profane and indecent language" is insufficient to charge the statutory crime proscribed by G.S. 14-197, since it fails to charge that defendant used the profane language (1) on a public road or highway, (2) in the hearing of two or more persons, or (3) in a loud and boisterous manner.

5. Arrest § 3—

A warrant charging that defendant unlawfully and willfully violated the laws of North Carolina by resisting arrest is insufficient to charge the offense proscribed by G.S. 14-223.

6. Indictment and Warrant § 16—

An order granting a motion to amend the warrant so as to charge the violations in the words of designated statutes cannot cure fatal defects in the warrant in failing to charge the offenses when the amendments are not actually made, since neither the motion nor the order sets out the contemplated wording of the proposed amendments and therefore could not be self-executing.

7. Criminal Law §§ 56, 78c—

Where the warrant fails to charge essential elements of some of the offenses for which defendant was prosecuted, the Supreme Court will arrest the judgment on such offenses *ex mero motu* notwithstanding the want of a motion in arrest of judgment in the Superior Court or the Supreme Court.

APPEAL by defendant from *Joseph W. Parker, Judge,* and a jury, at March Term, 1953, of EDGECOMBE.

Criminal prosecution upon a warrant tried *de novo* in the Superior Court on the appeal of the defendant from a recorder's court.

The pertinent facts are stated in the numbered paragraphs set out below.

1. The warrant charges "that . . . in . . . (Edgecombe) County and in . . . the City of Rocky Mount on . . . the 14 day of September, 1952, the . . . defendant (Evella Thorne) unlawfully, wilfully violated the laws of North Carolina or ordinances of said City by disorderly conduct by using profane and indecent language, resisting arrest and assault on an officer, one Harvey Thomas, with a deadly weapon, to-wit, a lead pencil, . . . contrary to the statutes in such cases made and provided, contrary to law, and against the peace and dignity of said City and State."

2. No effort was made by the State at the trial to show that the warrant charges a violation of any of the ordinances of the City of Rocky Mount.

3. The only evidence presented to the court and jury was that of the State. It tended to show these things: Harvey Thomas, a policeman,

entered the dwelling of the defendant in the City of Rocky Mount at her invitation to investigate a crime committed by a third person. The defendant became angry and imprecated divine vengeance upon Thomas in a somewhat loud and boisterous tone of voice. Thomas advised the defendant that "she was under arrest for disorderly conduct," and removed her from her dwelling to the police station by force. The defendant resisted such removal by striking Thomas several blows. Sometime after they reached the police station, the defendant intentionally struck Thomas again for the sole purpose of venting her spleen upon him.

4. After the close of the evidence and before the charge, the solicitor moved the court for authority to amend the warrant so as "to charge the violation in the words of the statute, to-wit, . . . G.S. 14-197 and G.S. 14-223." The court allowed the motion, but the amendments were not actually made.

5. The jury returned a general verdict of guilty. The court construed the verdict to mean that the defendant was guilty of simple assault, disorderly conduct, and resisting arrest, and pronounced a separate sentence against the defendant for each of these things.

6. The defendant excepted and appealed. She asserts by her assignments of error that the court erred in denying her motion for a compulsory nonsuit, in allowing the solicitor's motion to amend the warrant, and in pronouncing the sentences.

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

W. O. Rosser for defendant, appellant.

ERVIN, J. The testimony indicating that the defendant intentionally struck Thomas sometime after they reached the police station and that her sole object in so doing was to vent her spleen upon him suffices to overcome the general motion for a compulsory nonsuit and to support a conviction for simple assault. For this reason, we by-pass without discussion or decision the question debated by counsel whether or not the State's evidence compels the single conclusion that Thomas arrested the defendant without authority of law and that consequently the blows she struck in resistance to her arrest were justified.

We made this observation in the recent case of *S. v. Albarty, ante,* 130, 76 S.E. 2d 381: "There can be no valid trial, conviction, or punishment for a crime without a formal and sufficient accusation. As a consequence, it is impossible to overmagnify the necessity of observing the rules of pleading in criminal cases. The first rule of pleading in criminal cases is that the indictment or other accusation must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed."

Scant heed was paid to the rules of pleading in criminal cases in the preparation of the warrant in the instant action. To be sure, the allegation "that . . . the . . . defendant (Evella Thorne) unlawfully, willfully violated the laws of North Carolina . . . by . . . assault on . . . one Harvey Thomas" is sufficient to charge a simple assault. This is so because it charges that offense "with such a degree of certainty and in such a manner as to enable a person of common understanding to comprehend the charge, and the court to pronounce judgment on the conviction according to the law of the case, and the accused to plead an acquittal or conviction on it in bar of another prosecution for the same offense." 6 C.J.S., Assault and Battery, section 104.

The warrant is fatally defective in all other respects.

The allegation "that . . . the . . . defendant unlawfully, willfully violated the laws of North Carolina . . . by disorderly conduct by using profane and indecent language" imputes no crime to the accused. The phrase "disorderly conduct," standing alone, does not denote an offense known to the general law of the State. *S. v. Myrick,* 203 N.C. 8, 164 S.E. 328; *S. v. Sherrard,* 117 N.C. 716, 23 S.E. 157. The allegation cannot be construed to charge the statutory crime denounced by G.S. 14-197 in these words: "If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days." It omits at least three elements of the statutory offense. It fails to state that the defendant used indecent or profane language (1) on a public road or highway, or (2) in the hearing of two or more persons, or (3) in a loud and boisterous manner. *S. v. Shands,* 88 Miss. 410, 40 So. 1005; 72 C.J.S., Profanity, section 4.

This brings us to the allegation "that . . . the . . . defendant unlawfully, willfully violated the laws of North Carolina . . . by . . . resisting arrest." There is no validity in the contention of the State that this allegation imputes to the accused a violation of G.S. 14-223, which specifies that "if any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor." A similar contention was expressly rejected in the recent case of *S. v. Raynor,* 235 N.C. 184, 69 S.E. 2d 155, where a similar allegation was adjudged "wholly insufficient to support the verdict and judgment rendered."

In reaching the conclusion that the warrant does not charge any criminal offense except simple assault, we do not overlook the circumstances that the solicitor moved the court for authority to amend the warrant so as "to charge the violations in the words of the statutes, to-wit, . . . G.S. 14-197 and G.S. 14-223," and that the court allowed the motion. These

events added nothing whatever to the warrant. The amendments were not actually made. *S. v. Moore,* 220 N.C. 535, 17 S.E. 2d 660; *Sovine v. State,* 85 Ind. 576. Since neither the motion nor the order set out the contemplated wording of the proposed amendments, the order allowing the motion to amend was not self-executing. See in this connection: *S. v. Yellowday,* 152 N.C. 793, 67 S.E. 480, and 42 C.J.S., Indictments and Informations, section 237. The warrant would not be bettered if the words of the motion were inserted in it. *S. v. Ballangee,* 191 N.C. 700, 132 S.E. 795.

The defendant did not move in arrest of judgment in the Superior Court or in this Court upon the supposed counts for disorderly conduct and resisting arrest on the ground that the allegations of the warrant relating to these matters do not charge criminal offenses. The respective duties of the Superior Court and this Court under such circumstances are thus stated in *S. v. Watkins,* 101 N.C. 702, 8 S.E. 346: "It seems that no motion in arrest of judgment was made in the court below, but that court should, in the absence of such motion, have refused to give judgment upon the ground that the offense was not sufficiently charged in the indictment. The court cannot properly give judgment unless it appears in the record that an offense is sufficiently charged. It is the duty of this Court to look through and scrutinize the whole record, and if it sees that the judgment should have been arrested it will, *ex mero motu,* direct it to be done."

On the charge of simple assault: No error.

On all other charges: Judgment arrested.

STATE v. ROMAINE JENKINS.

(Filed 14 October, 1953.)

1. Constitutional Law § 32: Indictment and Warrant § 9—

The constitutional right of a defendant to be informed of the accusation against him requires that the indictment or warrant set out the offense with sufficient certainty to identify it and protect defendant from being twice put in jeopardy for the same offense, to enable him to prepare for trial, and to enable the court to proceed to judgment according to law in case of conviction. Constitution of North Carolina, Art. I, sec. 11.

2. Arrest § 3—

A warrant charging that defendant unlawfully and willfully violated the laws of North Carolina by resisting arrest is insufficient to charge the offense proscribed by G.S. 14-223.

3. Obstructing Justice § 2—

A warrant charging that defendant interfered "with an officer while legally performing the duties of his office" is insufficient to charge a violation of G.S. 14-223 since it does not describe the official character of the person alleged to have been resisted with sufficient certainty to show that he was a public officer within the purview of the statute.

4. Indictment and Warrant § 16—

An order granting a motion to amend the warrant so as to charge the violations in the words of designated statutes cannot cure fatal defects in the warrant in failing to charge the offenses when the amendments are not actually made, since neither the motion nor the order sets out the contemplated wording of the proposed amendments and therefore could not be self-executing.

APPEAL by defendant from *Joseph W. Parker, Judge,* and a jury, at March Term, 1953, of EDGECOMBE.

Criminal prosecution upon a warrant tried *de novo* in the Superior Court on the appeal of the defendant from a recorder's court.

These are the facts:

1. The warrant charges that on a specified day in Edgecombe County the defendant Romaine Jenkins "unlawfully, willfully violated the laws of North Carolina . . . by resisting arrest and interfering with an officer while legally performing the duties of his office . . . contrary to the statute . . . in such case . . . made and provided . . . and against the peace and dignity of . . . (the) State."

2. The only evidence presented to the court and the jury at the trial was that of the State. After the State rested, the solicitor moved the court for permission to amend the warrant so as "to charge the violation in the words of the statute, to-wit, G.S. 14-223." The court allowed the motion, but the amendment was not actually made.

3. The jury returned a verdict of guilty, and the court sentenced the defendant to imprisonment as a misdemeanant. The defendant excepted and appealed, assigning errors.

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

W. O. Rosser for defendant, appellant.

ERVIN, J. The Constitution of North Carolina guarantees to the accused in all criminal prosecutions the right to be informed of the accusation against him. N. C. Const., Art. I, Sec. 11.

This constitutional guaranty is, in essence, an embodiment of the common law rule requiring the charge against the accused to be set out in the indictment or warrant with sufficient certainty to identify the

offense with which he is sought to be charged, protect him from being twice put in jeopardy for the same offense, enable him to prepare for trial, and enable the court to proceed to judgment according to law in case of conviction. *S. v. Green,* 151 N.C. 729, 66 S.E. 564; *S. v. Lunsford,* 150 N.C. 862, 64 S.E. 765; *S. v. Harris,* 145 N.C. 456, 59 S.E. 115; 42 C.J.S., Indictments and Informations, section 90.

The warrant in the instant case falls short of these requirements. The allegation that the defendant resisted arrest, standing alone, does not charge an offense known to the law. *S. v. Raynor,* 235 N.C. 184, 69 S.E. 2d 155. There is no validity in the contention of the State that this allegation and the additional allegation that the defendant interfered "with an officer while legally performing the duties of his office" suffice to impute to defendant a violation of G.S. 14-223, which provides that "if any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor." These allegations do not describe the official character of the person alleged to have been resisted with sufficient certainty to show that he was a public officer within the purview of the statute. *S. v. Pickett,* 118 N.C. 1231, 24 S.E. 350; 67 C.J.S., Obstructing Justice, Section 13. We refrain from deciding whether the warrant is fatally defective in other respects.

The legal standing of the State is not improved an iota by the order granting the solicitor permission to amend the warrant so as "to charge the violation in the words of the statute, to-wit, G.S. 14-223." The amendment was not actually made. *S. v. Moore,* 220 N.C. 535, 17 S.E. 2d 660. Inasmuch as neither the motion nor the order stated the contemplated language of the proposed amendment, the order allowing the motion to amend was not self-executing. See in this connection: *S. v. Yellowday,* 152 N.C. 793, 67 S.E. 480, and 42 C.J.S., Indictments and Informations, section 237.

Since the warrant does not charge a criminal offense, the judgment must be arrested.

Judgment arrested.

G. A. RICHARDSON AND WIFE, IDA C. RICHARDSON; JESSE B. RICHARDSON AND WIFE, DAPHINE G. RICHARDSON, v. MAGDALENE R. BARNES AND HUSBAND, E. H. BARNES; AND SARA E. WARMACK AND HUSBAND, A. J. WARMACK.

(Filed 14 October, 1953.)

1. Partition § 4a—

The right to partition is a remedy provided exclusively for tenants in common.

2. Same—

Remaindermen may maintain a proceeding for partition, since for the purpose of partition they are by statutory provision deemed seized and possessed of the land as if no life estate existed. G.S. 46-23.

3. Same—

Life tenants are not tenants in common with remaindermen, and may not maintain partition proceedings against the tenants in common in the remainder.

4. Same—

Life tenants and tenants in common in the remainder instituted this partition proceeding against the other tenants in common in remainder. *Held:* The joinder of the life tenants as petitioners does not invalidate the proceeding, G.S. 46-24, and since the tenants in common in the remainder are entitled to appropriate relief, G.S. 46-23, the dismissal of the petition upon demurrer on the ground that the petitioners are without legal right at law to demand the relief, is error.

5. Actions § 3c—

Where a person is exercising a legal right in a lawful manner, the reasons which prompt him to act are, ordinarily, immaterial.

6. Partition § 4a—

Where petitioners for partition are entitled to the relief as a matter of law, allegations of respondents as to the reasons which prompted petitioners to act are mere surplusage and may be disregarded.

APPEAL by petitioners from *Burgwyn, Special J.*, April Term 1953, JOHNSTON. Reversed.

Special proceeding for the partition of real property. On 19 November 1937, petitioner G. A. Richardson owned the four tracts of land described in the petition. On that date he and his wife, petitioner Ida C. Richardson, conveyed said land to their three children, petitioner Jesse B. Richardson and respondents Magdalene R. Barnes and Sara E. Richardson (now Warmack), subject to an estate for the lives of the grantors therein reserved.

On 26 January 1953, G. A. Richardson and Ida C. Richardson, life tenants, and Jesse B. Richardson, remainderman, instituted this proceeding against the other two remaindermen, Magdalene R. Barnes and Sara E. Warmack, and their husbands for an actual partition of said land.

The respondents appeared before the clerk of the Superior Court of Johnston County and demurred to the petition for that (1) two of the petitioners are tenants for life and therefore "may not directly or indirectly affect the title of those in remainder by joining them in their proceeding for a division of the lands," and (2) the petition does not state facts sufficient in law to constitute a cause of action.

The clerk sustained the demurrer "for that the parties petitioners are without right at law to demand the relief sought in this proceedings." He thereupon dismissed the proceeding and petitioners appealed to the Superior Court.

When the appeal came on for hearing in the court below, the presiding judge entered judgment affirming the order of the clerk and dismissing the action. Petitioners excepted and appealed.

F. H. Brooks and Hooks & Britt for petitioner appellants.

V. D. Strickland for respondent appellees.

BARNHILL, J. When two or more persons own land as tenants in common, any one or more of the cotenants may institute a proceeding before the clerk of the Superior Court of the county in which the land is situate for the division of the land to the end the unity of ownership and possession may be severed and the tenants in common may own their respective shares in severalty. It is a remedy provided exclusively for tenants in common, though a person owning an estate for life may join in the proceeding. G.S. 46-24. Therefore, the proceeding, if adversary, must be instituted by a tenant in common against his cotenants.

At common law the proceeding could be maintained only by one in possession. *Gillespie v. Allison,* 115 N.C. 542; *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341. Under our statute, however, for the purpose of partition, remaindermen "shall be deemed seized and possessed as if no life estate existed." G.S. 46-23; *Baggett v. Jackson,* 160 N.C. 26, 76 S.E. 86; *Moore v. Baker,* 222 N.C. 736, 24 S.E. 2d 749; *Bunting v. Cobb,* 234 N.C. 132, 66 S.E. 2d 661.

But a tenant for life and a remainderman are not tenants in common, and the interest of a life tenant may not be affected in a partition proceeding against his will. *Priddy & Co. v. Sanderford, supra.* Hence G. A. Richardson and his wife, acting alone, have no right to institute and prosecute this proceeding. *Ray v. Poole,* 187 N.C. 749, 123 S.E. 5. Moreover, they possess an estate for life in all the land, and there is no way provided for its partition except, perhaps, between the life tenants themselves, which they do not seek. It is apparent the court below had these facts in mind when it entered its judgment.

However this may be, the joinder of the life tenants as petitioners does not invalidate the proceeding. G.S. 46-24; *Priddy & Co. v. Sanderford, supra.* The remainderman petitioner is entitled to partition as a matter of right, G.S. 46-23, *Chadwick v. Blades,* 210 N.C. 609, 188 S.E. 198; *Tayloe v. Carrow,* 156 N.C. 6, 72 S.E. 76; *Trust Co. v. Watkins,* 215 N.C. 292, 1 S.E. 2d 853, unless actual partition cannot be made without

injury to some or all of the parties interested. In that case, he is entitled to sale for partition. G.S. 46-23.

Strike the names of the life tenants from the caption and eliminate all the allegations in the petition pertaining to them, and the reasons why it is deemed necessary by petitioners that said land be partitioned, and we still have a maintainable petition for partition. This, for the reason the petitioner Jesse B. Richardson is a remainderman entitled to partition of the land subject to the outstanding life estate. *Trust Co. v. Watkins, supra.*

When a person is exercising a legal right in a lawful manner, the reasons which prompt him to act are, ordinarily, immaterial. Therefore the allegations in respect to the reasons which prompted the son and his copetitioners to institute this proceeding are mere surplusage and may be disregarded.

Jesse B. Richardson, a cotenant in remainder of the lands described in the petition, is entitled to a compulsory partition of the land. The life tenants have the right to join in the petition. Therefore the judgment entered in the court below is

Reversed.

MAE WILSON, MINNIE WILSON AND RENA WILSON v. G. W. CHANDLER AND WIFE, BETSY CHANDLER, THELMA CHANDLER, PIERCE CHANDLER, LEONARD CHANDLER AND JAY CHANDLER.

(Filed 14 October, 1953.)

1. Appeal and Error §§ 10a, 31b—

Where the error relied upon by appellant is presented by the record proper, the record constitutes the case to be filed in the Supreme Court, and appellant is not required to serve it on appellee or his counsel. Therefore, appellee's motion to dismiss on the ground that appellants failed to make up and serve the case on appeal is without merit.

2. Trespass § 2: Ejectment § 14—

In an action to recover damages resulting from trespass upon plaintiffs' lands, when there is no allegation to the effect that the defendants are in actual possession of any part of the lands, defendants are not required to post bond before answering. G.S. 1-111, G.S. 1-211.

3. Judgments § 11: Trespass § 6—

In an action to recover damages for trespass, in which there is no allegation in the complaint that defendants or any of them claimed title to plaintiffs' lands or any part thereof, a judgment by default against one of defendants establishes plaintiffs' cause of action for trespass against such defendant, entitling plaintiffs to such damages as may be ascertained by a

jury upon the inquiry, G.S. 1-212, but recitals in the judgment that plaintiffs are owners of the lands in fee simple and entitled to possession thereof do not have any effect except in so far as they relate to the cause of action as alleged.

4. Judgments § 27a—

A default judgment may not be set aside in the absence of a finding by the court that defendant's neglect was excusable and that he has a meritorious defense, and order setting aside such judgment solely for error of law must be reversed.

APPEAL by plaintiffs from *Sink, J.*, March Term, 1953, of YANCEY.

This was an action to recover damages resulting from trespass upon the lands of the plaintiffs by the defendants in cutting and removing timber therefrom, destroying fences thereon, and to obtain a permanent injunction enjoining the defendants from further trespassing upon the lands of the plaintiffs.

The summons was issued on 11 August, 1952, and the verified complaint was filed the same day in the office of the Clerk of the Superior Court. The summons, together with a copy of the complaint, was duly served on the defendant G. W. Chandler on 18 August, 1952. It appears from the record that no answer was filed by the defendant G. W. Chandler within the time allowed by law and no extension of time in which to file answer was requested by him, and the time for answering was not extended by the court. The other defendants filed answer.

Judgment by default and inquiry was entered against the defendant G. W. Chandler by the Clerk of the Superior Court of Yancey County on 3 October, 1952.

The default judgment purports to rest upon two grounds, to wit: (1) failure to file an undertaking as required by law, and (2) failure to file an answer. The judgment purports to adjudicate and declare the plaintiffs to be the owners and entitled to the possession of the lands described in the complaint; to grant judgment by default and inquiry as to the damages sustained by reason of the wrongful trespass, and taxed the costs against the defendant G. W. Chandler.

Motion was made at the March Term, 1953, of the Superior Court in Yancey County by the appellee's counsel to set aside the default judgment. Whereupon the court found as a fact "that the judgment by default as against G. W. Chandler arose out of an error, and that the same did not, and does not constitute inexcusable error," and allowed the motion. The court also allowed a motion that the defendant G. W. Chandler be permitted to adopt the answer previously filed by the other defendants. The plaintiffs appeal, assigning error.

R. W. Wilson, Bill Atkins, and W. E. Anglin for plaintiffs, appellants.
No counsel contra.

DENNY, J. The appellee filed no brief in this Court but lodged a motion to dismiss the appeal on the ground that the appellants failed to make up and serve the case on appeal on the appellee or his counsel.

If an error relied on by an appellant is presented by the record proper, as it is on the present record, no case on appeal is required. The record constitutes the case to be filed in this Court and the appellant is not required to serve it on the appellee or his counsel. The motion is without merit and is denied. *Bishop v. Black,* 233 N.C. 333, 64 S.E. 2d 167; *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641; *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22; *Privette v. Allen,* 227 N.C. 164, 41 S.E. 2d 364; *Bessemer Co. v. Hardware Co.,* 171 N.C. 728, 88 S.E. 867; *Commissioners v. Scales,* 171 N.C. 523, 88 S.E. 868.

In an action for damages for trespass upon realty in which there is no allegation to the effect that the defendant is in actual possession of the property or any part thereof, the defendant is not required to post bond before answering, as required by G.S. 1-111 and G.S. 1-211, subsection 4. *Hodges v. Hodges,* 227 N.C. 334, 42 S.E. 2d 82. Furthermore, there is no allegation in the complaint that the defendants or any of them claim title to plaintiffs' lands, as described in the complaint, or any part thereof. Hence, that portion of the judgment declaring the plaintiffs to be the owners in fee simple and entitled to the possession of the lands described in the complaint, in fact constitutes no more than a finding as to matters alleged in the complaint as a basis for plaintiffs' right of recovery.

The judgment by default and inquiry established plaintiffs' cause of action as alleged in their complaint and their right to recover of the defendant G. W. Chandler at least nominal damages. Consequently, the plaintiffs are entitled to such damages as flow from or arise out of said cause of action. Only the amount of these damages, to be ascertained by a jury, is left open for inquiry. G.S. 1-212; *DeHoff v. Black,* 206 N.C. 687, 175 S.E. 179; *Mitchell v. Ahoskie,* 190 N.C. 235, 129 S.E. 626; *Armstrong v. Asbury,* 170 N.C. 160, 86 S.E. 1038; *Plumbing Co. v. Hotel Co.,* 168 N.C. 577, 84 S.E. 1008; *Junge v. MacKnight,* 137 N.C. 285, 49 S.E. 474; *McLeod v. Nimocks,* 122 N.C. 437, 29 S.E. 577. Therefore, the movant was not entitled to have the judgment set aside in the absence of a showing by him and a finding by the court that his neglect was excusable and that he has a meritorious defense to plaintiffs' cause of action. *Stephens v. Childers,* 236 N.C. 348, 72 S.E. 2d 849; *Perkins v. Sykes,* 233 N.C. 147, 63 S.E. 2d 133; *Hanford v. McSwain,* 230 N.C. 229, 53 S.E. 2d 84; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67.

Since there is no showing or finding in the court below that the appellee's failure to answer was due to excusable neglect and that he has a meritorious defense, it was error to strike out the default judgment, and the order to that effect is set aside and the cause remanded for further proceedings as provided by law. *Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835.

Reversed.

STATE v. DOUG BRADY.

(Filed 14 October, 1953.)

1. Searches and Seizures § 2—

A warrant issued by a justice of the peace upon affidavit of an officer charged with the execution of the law, authorizing the search of the premises at a specified locality and the seizure of all intoxicating liquors, is governed by G.S. 18-13 and not G.S. 15-27, and the warrant is a sufficient compliance with the apposite statute to render competent evidence discovered by an officer at the premises designated.

2. Intoxicating Liquor § 9b—

The possession of one gallon or less of tax-paid liquor in possessor's private dwelling in a county in which sale of intoxicating liquor is not authorized under the Alcoholic Beverage Control Act raises no presumption, nothing else appearing, of possession for the purpose of sale.

3. Intoxicating Liquor § 9c: Criminal Law § 29b—

In a prosecution for the unlawful possession of liquor for the purpose of sale, based upon the possession by defendant of more than one gallon of tax-paid liquor, testimony that on other occasions tax-paid liquor in quantities less than one gallon had been found on defendant's premises is incompetent, since defendant's possession on other occasions of whiskey within the pale of the law has no relevancy to his possession of whiskey beyond the pale of the law at another time.

4. Criminal Law § 81c (2)—

An inadvertent error in stating the *quantum* of proof resting upon the State must be held prejudicial even though in other portions of the charge the burden of proof is properly stated, since the jury may have acted upon the incorrect statement.

APPEAL by defendant from *Frizzelle, J.,* at March Term, 1953, of LEE.

Criminal prosecution, No. 6685, upon a warrant issued by a justice of the peace of Lee County on affidavit charging defendant with unlawful possession of twenty-four and one-half pints of tax-paid whiskey for the purpose of sale, returnable to the County Criminal Court of said county and tried *de novo* in Superior Court of said county on appeal thereto from conviction and judgment of the said county court.

Plea of not guilty of the crime charged was entered in the county court, and renewed in Superior Court.

The record on this appeal discloses that upon an affidavit of an officer charged with the execution of the law, a search warrant was issued on 10 November, 1951, by a justice of the peace of Lee County "to the sheriff or any lawful officer" of Lee County, authorizing and commanding that he enter upon the premises of Doug Brady, described in the affidavit, and make search of same, seizing all intoxicating liquors, etc.

Upon the trial in Superior Court the State offered evidence tending to show that in the daytime on 10 November, 1951, two deputies sheriff, armed with the search warrant above described, entered the home of defendant, and searched for whiskey, finding in a pasteboard box in the kitchen sixteen pints of whiskey, and in the cabinet beside the bed in the front section of the house, eight pints of whiskey.

And, over objection by defendant, the officers were permitted to testify that on several other occasions, when defendant's home was searched, within two years, "there has always been whiskey in that cabinet." And one of the officers testified: "I have never, except on this occasion, found more than 4 or 5 pints."

The State offered other evidence tending to support the charge set forth in the warrant.

At the close of the State's evidence, and again at the close of all the evidence, defendant offering none, defendant moved for judgment as of nonsuit. The motions were overruled and he excepted.

Verdict: Guilty of possession of whiskey for the purpose of sale.

Judgment: Confinement in the common jail of Lee County for a period of two years to be assigned to work the roads under the supervision of the State Highway and Public Works Commission.

Defendant appeals therefrom and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Robert L. Emanuel, Member of Staff, for the State.

Pittman & Staton and McLean & Stacy for defendant, appellant.

WINBORNE, J. Defendant brings to this Court numerous assignments of error on which he states, in his brief, three questions relating: (1) To exceptions to the admission of testimony as to other offenses. (2) To exception to admission of evidence obtained under search warrant. (3) To exceptions to the charge of the court.

I. The second question as stated relates to denial of defendant's motion to strike the testimony that the State's witness Deputy Sheriff Quidley obtained under the search warrant. This exception is without merit. See *S. v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537. There the

search warrant was obtained under circumstances almost identical to the circumstances under which the search warrant was obtained in the case in hand. There exceptions, as here, were taken to the admission of evidence secured by officers under the search warrant. It was contended that the search warrant was defective for that the justice of the peace, who issued it, failed to comply with the requisites of G.S. 15-27, and amendments thereto, in that the procuring officer was not required to furnish sufficient facts to show probable cause for the issuance of such warrant. In connection therewith this Court held that the provisions of G.S. 18-13 are applicable rather than those of G.S. 15-27, saying that G.S. 18-13 provides that "upon . . . information furnished under oath by an officer charged with the execution of the law, before a justice of the peace . . . that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such . . . information; and if such liquor be found in any such place or places, to seize and take into his custody all such liquor . . . and to keep the same subject to the order of the court." And the court concluded the subject in these words: "Testing the affidavit of the officer here in question by the provisions of this statute, G.S. 18-13, it appears that the matters contained in the affidavit are sufficient to justify the justice of the peace to issue the search warrant" and "here in the admission of the evidence to which such exceptions relate, error is not made to appear." What is said there is pertinent, and applicable here.

II. The first question is based upon exceptions which challenge the competency of evidence that on several other occasions, within two years, when defendant's home was searched, whiskey was found therein,—but never more than 4 or 5 pints. This does not make a *prima facie* case of unlawful possession of intoxicating liquor for the purpose of sale on those occasions.

Indeed, under the law as enacted by the General Assembly of North Carolina, where a person has in his possession tax-paid intoxicating liquors in quantity not in excess of one gallon, in his private dwelling, in a county in which the sale of such intoxicating liquor is not authorized under the Alcoholic Beverage Control Act, P.L. 1937, Chap. 49, nothing else appearing, such possession is not now *prima facie* evidence that such intoxicants are so possessed for the purpose of sale. See *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449; *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. Brady,* 236 N.C. 295, 72 S.E. 2d 675; *S. v. Hill,* 236 N.C. 704, 73 S.E. 2d 894.

Hence evidence that defendant on other occasions possessed whiskey within the pale of the law has no relevancy to his possession of whiskey beyond the pale of the law at another time. Therefore such evidence is nothing more than an intimation by the State that his lawful possession of whiskey on those other occasions was unlawful. That just cannot be! But the court added to it the weight of its authority, by admitting the evidence, *S. v. Alson,* 94 N.C. 930, and by charging the jury that "the State has offered evidence which it contends tends to show that his premises had been visited many times during the period of two years next preceding November 10, 1951, and that witnesses said that they had never been to his premises when they did not find whiskey there." The testimony was irrelevant, and highly prejudicial, and should have been excluded. Failure to do so, was error. *S. v. Freeman,* 49 N.C. 5; *S. v. Alson, supra.* See also *S. v. Brown,* 202 N.C. 221, 162 S.E. 216.

III. The third question challenges portions of the charge, particularly the concluding instruction in respect to the possession of whiskey at the time here charged, that "if the State has satisfied you upon all the evidence in this case that he had it there for the purpose of sale, then, gentlemen, you should return a verdict of guilty."

The vice pointed out in the instruction is the degree of proof, that the jury be "satisfied," instead of the correct degree "satisfied beyond a reasonable doubt."

In this connection it is true that in some other portions of the charge the correct rule is given. Nevertheless, where the court charges correctly in one part of the charge, and incorrectly in another, it will be held for error, since the jury may have acted upon that which is incorrect. This holding is in accordance with uniform decisions of this Court. *S. v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685. See also *Templeton v. Kelley,* 217 N.C. 164, 7 S.E. 2d 380, and numerous other cases there cited.

For reasons stated, let there be a

New trial.

STATE v. DOUG BRADY.

(Filed 14 October, 1953.)

1. Searches and Seizures § 2—

A warrant for the search of designated premises for intoxicating liquor, issued upon the sworn affidavit of the sheriff of the county by the clerk of the Superior Court acting as *ex officio* clerk of the county criminal court, G.S. 7-395, is valid under the provisions of G.S. 18-13.

2. Public Officers § 9—

In the absence of evidence to the contrary, it will be presumed that the acts of a public officer are in all respects regular.

3. Criminal Law § 53b—

An instruction that the burden is upon the State to satisfy the jury of defendant's guilt must be held for reversible error.

4. Criminal Law § 83—

Where judgment rendered in the trial upon one bill of indictment is upheld, but the sentence thereon provides that it should begin at the expiration of sentences imposed upon convictions under two other bills of indictment in each of which a new trial has been awarded, sentence in the judgment upheld becomes uncertain and indefinite, and the case will be remanded for proper sentence thereon.

APPEAL by defendant from *Frizzelle, J.*, at March Term, 1953, of LEE.

Two criminal prosecutions Nos. 6908 and 6909 upon two bills of indictment charging defendant, in the former, with unlawful possession of five pints of intoxicating whiskey for the purpose of sale and, in the latter, with unlawful possession of one pint of intoxicating liquor for the purpose of sale, both on 3 February, 1953—consolidated for purpose of trial.

Plea of defendant: Not guilty.

Upon the trial in Superior Court the case on appeal discloses that the State offered evidence tending to show that on 3 February, 1953, at 1:45 p.m., an ABC officer of Durham County, at the instance of the Sheriff of Lee County, went to the home of defendant and, without identifying himself, or being requested to do so, purchased from defendant one pint of whiskey, Charter Oak, and paid defendant therefor the sum of $3.75; that defendant opened the door to a cabinet sitting right at the head of his bed, picked up a pint of Charter Oak and gave it to the officer; that at that time there looked to be 12 or 15 pints in there; that the officer took the pint of whiskey to the courthouse and delivered it to the sheriff, and reported to him what he had found out there that day; that the sheriff, upon written affidavit, applied to the clerk of Superior Court, who is *ex officio* clerk of the County Criminal Court of Lee County, for a search warrant to search the home place of defendant, and obtained such warrant directed to the sheriff of Lee County; that acting under this search warrant deputies sheriff went to the home of defendant, who was absent, and after exhibiting the search warrant to his wife, searched the house, and found and seized five pints of Charter Oak brand of whiskey in the cabinet beside the bed; and that all this whiskey, the one pint, and the five pints, had on them Federal Tax stamps, and District of Columbia tax stamp.

The case on appeal also shows that on cross-examination of the sheriff, who testified as a witness for the State, he stated that he did not tell the

clerk the source of his information and only stated to him that he had information that defendant had some more liquor, and signed the affidavit, and swore to it with a Bible in his left hand, and his right uplifted.

When the State rested its case, defendant moved to strike the testimony of the officers on the ground that the search warrant "(1) was not procured properly under the terms of the statute, and (2) it is invalid." The motions were each overruled and defendant excepted to each ruling.

Thereupon defendant offered no evidence, and renewed motion for judgment as of nonsuit. Motion overruled. Exception.

The case was submitted to the jury under the charge of the court.

Verdict: Guilty in Nos. 6908 and 6909 in manner and form as charged.

Judgment: In No. 6908: Confinement in the common jail of Lee County and assigned to work the roads under the direction of State Highway and Public Works Commission, sentence to begin at expiration of sentence in No. 6685. In No. 6909: Like sentence to that in No. 6908. Sentence to begin at expiration of sentence in No. 6908.

Defendant appeals therefrom to Supreme Court and assigns error.

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

Pittman & Staton and McLean & Stacy for defendant, appellant.

WINBORNE, J. The assignments of error brought up on this appeal raise two questions:

1. Is the search warrant, issued under the circumstances shown, valid?

2. Is there error in the charge of the court to the jury?

I. The subject of the requirements of law in issuance of a search warrant for searching for intoxicating liquors has been treated by this Court cotemporaneously herewith in the case of *S. v. Brady, ante,* 404, numbered 6685 in the Superior Court. It is there held that the provisions of G.S. 18-13 rather than G.S. 15-27 control. See also *S. v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537.

And it is provided in G.S. 18-13 that upon information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places, specified, liquor for the purpose of sale, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such information. A sheriff is such an officer charged with the execution of the law. Then the question arises: Is the clerk of Superior Court such "other officer authorized by law to issue warrants?" We so hold. G.S. 7-395.

This statute, G.S. 7-395, empowers and authorizes the clerks of the Superior Court as *ex officio* clerks of County Criminal Courts, upon application and the making of proper affidavit, as provided by law "to issue any criminal warrant, peace warrants, subpoenas and/or other processes of law in said court," etc.

The search warrant here purports to be signed in name of "E. M. Underwood, Clerk of Superior Court and *ex officio* Clerk County Criminal Court of Lee County." And, as stated by *Johnson, J.*, in *S. v. Honeycutt,* 237 N.C. 595, 75 S.E. 2d 525, "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," citing *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311; *S. v. Rhodes,* 233 N.C. 453, 64 S.E. 2d 287; *S. v. Wood,* 175 N.C. 809, 95 S.E. 1050.

II. Do the assignments of error based on exceptions to the charge show prejudicial error?

A careful consideration of it leads to the conclusion that in so far as the charge relates to the indictment in case No. 6909 for having in possession "one pint of intoxicating whiskey, for the purpose of sale" error is not shown. But it seems that the charge relating to the indictment in case No. 6908 for having in possession "five pints of intoxicating whiskey for the purpose of sale" is vulnerable to the challenge in respect to burden of proof. It is pointed out that the charge concludes with this instruction: "If the State has satisfied you upon the evidence of the defendant's guilt, in this case dealing with five pints of intoxicating whiskey, then it is your duty to so find. If the State has failed to so satisfy you, then it is your duty to render a verdict of not guilty." Exception thereto is well taken. See *S. v. Brady, ante,* 404 (Superior Court No. 6685).

Hence for reasons stated there must be a new trial in No. 6908. And in No. 6909 the verdict of the jury will stand, but since the sentence imposed in the judgment of the court below is made to begin on the expiration of the sentence in No. 6908, and the sentence in No. 6908 is made to begin on the expiration of the sentence in No. 6685, in each of which, Nos. 6685 and 6908, a new trial is ordered, the judgment becomes uncertain and indefinite. Hence the judgment in No. 6909 is set aside, and the case remanded for proper sentence on the verdict rendered.

In No. 6908—New trial.

In No. 6909—Remanded for judgment.

STATE v. JASPER TURNER.

(Filed 14 October, 1953.)

1. Larceny § 1—

The cutting and removing of growing timber from the land of another with felonious intent constitutes larceny by virtue of G.S. 14-80, notwithstanding that the growing timber is realty.

2. Larceny § 7—

Testimony that defendant was paid for dogwood delivered to a woodyard, without evidence that defendant actually delivered the wood, with further evidence that dogwood taken from the yard fitted stumps on prosecuting witness' land from which the wood had been wrongfully taken, *is held* insufficient to be submitted to the jury in a prosecution under G.S. 14-80, the evidence being insufficient to invoke the doctrine of recent possession against defendant, since the evidence does not disclose that defendant had been in possession of the wood.

APPEAL by defendant from *Sink, J.*, March Term, 1953, of HENDERSON. Reversed.

The defendant was convicted of larceny of wood. G.S. 14-80.

The bill of indictment charged that the defendant "did wilfully, unlawfully and feloniously enter upon the lands of B. H. Youngblood and did unlawfully, wilfully and feloniously take and carry off wood and timber of value of $200, commonly known as dogwood, growing and being on the property of B. H. Youngblood."

The State offered evidence tending to show that B. H. Youngblood missed some dogwood from his land in January, 1953, and again during the month of February. E. C. Blackwell testified he paid defendant for some dogwood in January. Four loads were delivered. "I paid him for 150 feet of dogwood down at the barn—I paid him by check in the evening. I was not at home when the dogwood was brought. I do not know of my own knowledge who brought the dogwood. I did not see him or anyone else unload the dogwood. I buy dogwood and it is a general business with me. At the time I paid the defendant I had 15 or 20 cords (on the yard) and paid the defendant for one cord. . . . I take raw dogwood and manufacture it there in the yard. . . . About 100 feet was brought when I was not there. This is nearly a cord. This was delivered when I was away from home. When I measure it I throw it in the general pile of 15 or 20 cords." This witness further testified that defendant did not say he delivered the dogwood, that he did not mention it; that witness simply paid him for 100 feet as result of what he had been told. The amount was less than $100. Defendant said he had been hauling some pulpwood. Some pieces of the dogwood taken from the dogwood at Blackwell's yard were compared with the stumps and wood

on Youngblood's land, and evidence was offered tending to show they were identical.

At the close of the State's evidence defendant moved for judgment of nonsuit. The motion was overruled, and the defendant excepted.

There was verdict of guilty and from judgment thereon defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Paul K. Barnwell and W. R. Sheppard for defendant, appellant.

DEVIN, C. J. An examination of the record in this case leads us to the conclusion that the evidence offered by the State was insufficient to warrant conviction, and that the motion for nonsuit should have been allowed.

Trees and growth standing and being on land are real property and at common law were not the subject of larceny. *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149. To prevent the wrongful and unlawful cutting and carrying away of wood from the lands of another by one not the owner or *bona fide* claimant thereof the statute now codified as G.S. 14-80 was enacted. This statute makes it a criminal offense unlawfully to enter upon the lands of another and carry off wood growing and being thereon, and provides that if this be done with felonious intent the offender shall be guilty of larceny and punished accordingly, and if not done with such intent he shall be guilty of a misdemeanor.

There was here no evidence that the defendant Jasper Turner had been upon the lands of Mr. Youngblood or cut and removed any dogwood therefrom. However, the State relies for conviction upon the application to the facts here of the doctrine of recent possession as stated in *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725, and *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920. But if it be conceded that there was evidence tending to show that some of the dogwood on Blackwell's yard had been cut from Youngblood's land, the evidence does not fix the defendant with possession thereof. According to Blackwell's testimony the only connection of the defendant therewith was that this witness gave him a check for 100 feet of dogwood as result of what somebody told him. The record does not disclose that the defendant said anything as to the delivery of the dogwood from which the samples were taken for comparison, or that he admitted he had delivered any dogwood. Apparently there was no conversation about the check Blackwell gave him. The witness recalled that the defendant made some reference to hauling pulpwood, but this did not relate to the charge of stealing dogwood. We think the evidence was inconclusive, and that the motion for judgment as of nonsuit should have been allowed.

Judgment reversed.

IN THE MATTER OF: BRENDA CARROLL SUGGS, A MINOR.

(Filed 14 October, 1953.)

Appeal and Error § 16—

A cause tried prior to the convening of the Spring Term of the Supreme Court must be docketed in the Supreme Court at that term twenty-one days prior to the call of the docket for the District to which it belongs, and failure to docket it at the proper term compels dismissal notwithstanding any agreement of the parties or allowance of time by the trial judge for perfecting the appeal. Rule of Practice in the Supreme Court No. 5.

APPEAL by respondent from *Williams, J.*, in Chambers, at Sanford, N. C., 11 October 1952.

Petition to determine the custody of an infant.

Summons herein was issued and the petition was filed 16 September 1952. The cause was heard 11 October 1952, and judgment was entered 21 January 1953, awarding custody of the infant to its paternal grandparents. The respondent excepted and appealed. She was allowed until 15 April 1953 to serve case on appeal, and petitioner was allowed sixty days thereafter in which to file exceptions or serve countercase.

Hooks & Britt for respondent appellant.

Wilson & Johnson for petitioner appellee.

PER CURIAM. This cause was tried prior to the convening of the Spring Term 1953 of this Court. It was the duty of the appellant to docket her appeal in this Court at that term, twenty-one days prior to the call of the docket of the Fourth Judicial District, to which this case belongs. It was actually docketed 4 September 1953, after the Fall Term had convened.

Neither an agreement of the parties nor the allowance of time by the judge for perfecting the appeal will excuse the delay. Rule 5, Rules of Practice in the Supreme Court, 221 N.C. 546, is mandatory and cannot be abrogated by consent or otherwise. Failure to docket as thus required results in the loss of the right of appeal and necessitates dismissal. *Jones v. Jones,* 232 N.C. 518, 61 S.E. 2d 335; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *S. v. Presnell,* 226 N.C. 160, 36 S.E. 2d 927.

Here the cause was heard on affidavits. If the affidavits were filed with the clerk as a part of the record, as they should have been, then a case on appeal was not required. *Privette v. Allen,* 227 N.C. 164, 41 S.E. 2d 364; *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22; *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641; *Wilson v. Chandler, ante,* p. 401. In any event, a case on appeal which would be composed exclusively of affidavits could have been prepared and served in the course of a day or

so. Allowance of a total of more than 120 days extending the time beyond the date for docketing in this Court was unnecessary. Had it been necessary to protect her right of appeal, appellant had an adequate remedy by a writ of *certiorari*.

Perhaps it will occur to appellant that this disposition of her appeal does not close the door to a further hearing.

Appeal dismissed.

EMMA M. WINBORNE, ADMINISTRATRIX OF THE ESTATE OF WORTH M. WINBORNE, v. WILLIAM A. STOKES AND HAZEL C. MUNN, TRADING AND DOING BUSINESS AS S & M SALES COMPANY, AND W. POWELL BLAND, ADMINISTRATOR OF THE ESTATE OF WILLIAM C. DAIL, DECEASED.

(Filed 21 October, 1953.)

1. Appeal and Error § 6c (3)—

An assignment of error for that the findings of the court are not supported by evidence is ineffectual unless the specific findings objected to are pointed out.

2. Appeal and Error § 6c (2)—

An exception that the findings of fact are not sufficient to support the judgment presents for review whether the court's conclusions of law from the findings of fact are unwarranted and erroneous.

3. Process § 10—

G.S. 1-105 authorizes constructive service of process on a nonresident whose automobile is involved in a collision causing injury to persons or property in this State when the automobile is being operated by the nonresident, or for the nonresident, or under his control or direction, express or implied.

4. Same—Findings held sufficient to support service of process upon nonresident auto owner under G.S. 1-105.

Findings of fact to the effect that the collision in suit occurred during a regular business day during business hours, that the automobile in question was registered in another state in the name of defendants and was being driven at the time by defendants' employee, that at the time of the collision the automobile contained journeymen salesmen sample cases containing merchandise used by defendants' employee as selling agent, together with order blanks, etc., and that the accident occurred at a point on a highway in this State lying between the salesman's territory in another state and the home office of defendants, and that the salesman was authorized to drive the automobile of defendants across this State to and from his territory, *are held* sufficient to support an order of the court denying motion to vacate service of process had upon defendants pursuant to the provisions of G.S. 1-105. The findings of the court relative to service of process under G.S. 1-105 relate solely thereto, and can have no bearing upon the trial of the cause upon the merits.

WINBORNE *v.* STOKES.

APPEAL by defendants from *Frizzelle, J.*, June Term, 1953, of WAYNE. Affirmed.

This is an action to recover damages for alleged wrongful death of plaintiff's intestate resulting from a collision of automobiles on the highway in Wayne County.

The only question presented by the appeal is the validity of the service of process on defendants Stokes and Munn, who are residents of South Carolina, by service of Summons on the North Carolina Commissioner of Motor Vehicles pursuant to G.S. 1-105. These defendants were the owners of one of the automobiles involved in the collision which resulted in the death of plaintiff's intestate. The driver of their automobile, Wm. C. Dail, was also killed in the collision, and his administrator, W. Powell Bland, was personally served with summons and is a party to the action.

In apt time the defendants Stokes and Munn through counsel entered special appearance and moved to vacate the attempted service of process on them by service of summons on the Commissioner of Motor Vehicles and to dismiss the action as to them, for that the automobile alleged to have been negligently driven by Wm. C. Dail was not being driven at the time for these defendants or under their control or direction, express or implied.

After hearing and considering the affidavits offered in support of defendants' motion, and the affidavits *contra* offered by plaintiff the court made the following findings of fact, and thereupon denied the motion.

"1. That the 1952 Chevrolet automobile involved in the accident giving rise to this controversy bore South Carolina Registration No. D-296-937 and was registered in the State of South Carolina in the name of William A. Stokes and Hazel C. Munn, trading and doing business as S & M Sales Company, and further that the said 1952 Chevrolet was being operated by William C. Dail at the time of said collision.

"2. That the said William C. Dail was an employee and agent of William A. Stokes and Hazel C. Munn, trading and doing business as S & M Sales Company, and that the collision giving rise to this cause of action occurred at approximately 4:30 p.m. on Friday, August 1, 1952, which was a regular business day, during business hours, on a public highway route leading generally from Suffolk, Virginia, to Columbia, South Carolina.

"3. That the said 1952 Chevrolet automobile of the defendants, William A. Stokes and Hazel C. Munn, contained at the time of the said collision a substantial quantity of the goods, wares, and merchandise of the defendants, Wm. A. Stokes and Hazel C. Munn, trading and doing business as S & M Sales Company, which their agent and employee, William C. Dail, used in selling as agent for the said defendants in the

regular and usual course of his employment, and that included in such quantity of goods, wares, and merchandise were the following: watches, cigarette lighters, fountain pens, notions and sundries, which articles were contained in three journeymen salesmen sample cases, and in addition to those articles there were numerous pieces of paper, order blanks, letter heads, sales slips and other business papers, all of which had printed upon them S & M Sales Company and the address of that Company in Columbia, South Carolina.

"4. That on the morning of August 1, 1952, William C. Dail was working as agent, servant or employee of the defendants Stokes and Munn, trading as S & M Sales Company, in the Suffolk area of Virginia and that the defendants Stokes and Munn had not authorized the deceased William C. Dail to return to Columbia, South Carolina, on August 1, 1952, and did not know he was returning from Suffolk, Virginia, to Columbia, South Carolina, on that date.

"5. That the mother of the deceased William C. Dail was expecting the said William C. Dail for dinner at Calypso, North Carolina, on the evening of August 1, 1952, and that Calypso lies generally south of the place at which the accident giving rise to this controversy occurred, and further that Calypso lies generally between such point and Columbia, South Carolina.

"6. That the wife of William C. Dail did not know on August 1, 1952, where her husband was, what he was doing, or what his plans were.

"7. That the deceased William C. Dail was not authorized by the defendants Stokes and Munn, trading as S & M Sales Company, to represent them in North Carolina in any way by selling for them or taking orders for them, but that William C. Dail was authorized to drive the 1952 Chevrolet automobile of the defendants, which automobile had been assigned to said Dail, through North Carolina on his trips between his Columbia, South Carolina headquarters and his assigned territory in Virginia and West Virginia.

"8. That the said William C. Dail was operating the car of the defendants William A. Stokes and Hazel C. Munn, at the time and place of the collision giving rise to this action, for the said William A. Stokes and Hazel C. Munn, trading and doing business as S & M Sales Company, or under the control or direction, express or implied, of the defendants, William A. Stokes and Hazel C. Munn, trading and doing business as S & M Sales Company.

"9. That the plaintiff, as a part of her response to the motion of the said non-resident defendants to vacate service and dismiss the action, specifically pleaded the provisions of the General Statutes of North Carolina of 1943, as amended, Section 20-71.1.

"10. That the non-resident defendants Stokes and Munn, trading as S & M Sales Company, were served with process in this cause under and pursuant to the provisions of N. C. General Statutes, Chapter 1, Section 105, as amended, and that the plaintiff has wholly complied with the provisions of said chapter and section of the General Statutes of North Carolina.

"It is now, therefore, ordered and decreed that the motion of the defendants, William A. Stokes and Hazel C. Munn, trading and doing business as S & M Sales Company, to vacate service upon them and to dismiss this action as to them be, and it is hereby disallowed and denied."

The defendants excepted to the order and appealed to this Court, assigning error in the signing and entry of the order, and that "the court erred in setting forth the findings of fact contained in the order dated June 25, 1953, in that said findings are not supported by the evidence presented in the case, and said findings are not sufficient to support the order signed."

W. G. Smith and Poisson, Campbell & Marshall for plaintiff, appellee.
Taylor & Allen and Lindsay C. Warren, Jr., for defendants, appellants.

DEVIN, C. J. The appellants excepted to the order denying their motion to vacate the service of process and in their appeal to this Court assign error in that the court's findings of fact upon which the order was based were not supported by the evidence, but they fail to point out what specific findings are without support in the evidence. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351. However, by their assignment of error that the facts found are insufficient to sustain the court's order they present that question for our consideration and determination. They urge the view that the court's conclusions from the findings of fact set out at length in the order are unwarranted and erroneous.

The statute authorizing constructive service of process on nonresidents whose automobiles are involved in collisions causing injury to person or property in this State applies when the automobile is being operated by the nonresident, or for the nonresident, or under his control or direction express or implied. G.S. 1-105; *Davis v. Martini,* 233 N.C. 351, 64 S.E. 2d 1; *Wynn v. Robinson,* 216 N.C. 347, 4 S.E. 2d 884.

The court below from the evidence offered found that the facts shown were sufficient to entitle the plaintiff to call to her aid the enabling provisions of G.S. 1-105 to secure service of process on the nonresident defendants in the manner therein prescribed. It was found that the statute had been in all respects complied with.

From an examination of the record we reach the conclusion that the evidence offered was sufficient to invoke the provisions of the statute, and that the court's findings are in accord with the facts shown.

The findings of the trial judge from the evidence and his conclusions thereon from which the defendants have appealed were made and entered only for the purpose of ruling on defendants' motion and to determine the preliminary question of service of process, and hence do not preclude the defendants on the hearing from alleging as a defense to the action that Wm. C. Dail who was driving defendants' automobile at the time of the fatal collision was not acting within the scope of his agency or employment by the defendants at the time of the collision.

Without undertaking at this time to determine the several questions debated in defendants' brief which may arise in the trial of the action after the pleadings are in and the evidence offered, we deem it necessary only to hold that on the record the order denying defendants' motion to vacate the service of process should be, and it is

Affirmed.

J. HOMER BEAMAN v. SOUTHERN RAILWAY COMPANY AND G. W. MORRIS.

(Filed 21 October, 1953.)

1. Appeal and Error § 38—

The presumption is in favor of the correctness of the judgment of the lower court, and the burden is upon appellant to show error amounting to a denial of some substantial right.

2. Railroads § 4—Nonsuit on ground of contributory negligence upheld in this case.

The evidence in this case tended to show that plaintiff was thoroughly familiar with the crossing in question, that he stopped some thirteen feet before reaching the crossing, looked and listened and, seeing and hearing no train, proceeded forward and did not see defendant's train until his right front wheel crossed the first track, at which time the train was some 125 to 175 feet away, although from such place a train could have been seen approaching from that direction for a distance of some 300 feet, and that the train struck the left rear of his car before he could clear the crossing. The judgment of nonsuit entered by the trial court upon the issue of contributory negligence is upheld under the presumption in favor of the correctness of the trial court's decision.

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

DEVIN, C. J., dissenting.

JOHNSON, J., concurs in dissent.

APPEAL by plaintiff from *Clement, J.*, July Term, 1953, McDOWELL. Affirmed.

Civil action to recover compensation for personal injuries and property damage resulting from auto-train crossing collision.

The defendant's single-track line about two miles east of Marion, N. C., runs in an east-west direction. An unpaved public road crosses the tracks at grade at about a 50-degree angle so that a motorist traveling in a northerly direction would approach the crossing at an angle of approximately 140 degrees. He would, for practical purposes, be in a position to look directly down the track in a westerly direction to a point where his vision was obstructed or would extend.

Plaintiff lives on the south side of and 250 to 300 feet from the railroad. His driveway enters the public road about 25 feet south of the railroad. His place of business is on the north side so that for many years he has traveled back and forth over this grade crossing, and he was, at the time complained of, familiar with all the surrounding conditions.

The tracks west of the crossing are straight for a distance of 158 feet. They then, for some distance, curve gradually to the south so that a person at the crossing can see the switch stand, 220 or 225 feet away. Looking along the north rail, he can see 100 feet farther, that is, for a distance of 300 or 325 feet. On the defendant's right of way, on the south side, there are large and small trees, bushes, and vegetation. A large oak with overhanging branches, one of which is within seven feet of the south rail, stands within 68 feet of the crossing.

On the morning of 13 September 1950, plaintiff approached the crossing from the south. He stopped with his left front wheel approximately thirteen feet from the south rail and the right wheel within six to eight feet thereof. He was in the driver's seat on the left, about twenty-one or twenty-two feet from the south rail. He looked and listened. He saw no train and heard no whistle or other signal. He then started forward. When his right wheel got across the first track, but before the left wheel had reached it, he saw a train coming from the west, 125 to 175 feet away. The speed of the train was estimated to be 20 to 50 m.p.h. About the time plaintiff saw the train, "it blew two or three jerky blows on their whistle or horn." "When I saw that train coming, I accelerated my car but I was not successful in clearing the crossing." The Diesel engine struck the left rear side of the automobile and plaintiff suffered certain personal injuries. His automobile was practically demolished.

There is a sidetrack west of the crossing and on the south side of the main line. The switch stand is on the south side about 220 feet from the crossing. One near the crossing can see down the track to this switch stand or a short distance beyond.

While plaintiff makes certain allegations respecting the roughness of the crossing, there is no evidence it stalled his car or impeded him when he undertook to drive across ahead of the train.

At the conclusion of plaintiff's evidence in chief, the court, on motion of defendant, entered a judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Paul J. Story and Edwin S. Hartshorn for plaintiff appellant.
W. T. Joyner and Proctor & Dameron for defendant appellees.

BARNHILL, J. That the testimony offered by plaintiff, considered in the light most favorable to him, discloses negligence on the part of defendant may be conceded. If the judgment of nonsuit is to be sustained, it must be sustained for the reason plaintiff was guilty of contributory negligence as a matter of law.

On this phase of the case we must admit that this appeal presents a close question. It is a borderline case in which the presumption the trial judge ruled correctly must be considered in determining whether the appellant has shown prejudicial error.

"Every decision of a competent court must be deemed to be according to the law and the truth of the case until the contrary is shown." *Gaston, J., Wade v. Dick,* 36 N.C. 313.

On an appeal, error will not be presumed. *Hayes v. Lancaster,* 200 N.C. 293, 156 S.E. 530; *Cole v. R. R.,* 211 N.C. 591, 191 S.E. 353; *Manufacturing Co. v. Call,* 211 N.C. 730, 192 S.E. 105. Instead, "the ruling of the court below in the consideration of an appeal therefrom is presumed to be correct." *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789; *Warren v. Land Bank,* 214 N.C. 206, 198 S.E. 624.

The burden is on the appellant, *Cole v. R. R., supra; Gold v. Kiker,* 218 N.C. 204, 10 S.E. 2d 650; *Gibson v. Dudley,* 233 N.C. 255, 63 S.E. 2d 630. He must show error, *Manufacturing Co. v. Call, supra; White v. Price,* 237 N.C. 347, 75 S.E. 2d 244; *McCune v. Manufacturing Co.,* 217 N.C. 351, 8 S.E. 2d 219; *Freeman v. Preddy,* 237 N.C. 734, 76 S.E. 2d 159, and "he must make it appear plainly . . ." *Scott v. Swift & Co.,* 214 N.C. 580, 200 S.E. 21; *Quelch v. Futch,* 175 N.C. 694, 94 S.E. 713. (For other cases relating to the burden on appeal, see 2 N. C. Digest, Appeal and Error, Key 901.)

Here the plaintiff was thoroughly familiar with the crossing and the surrounding area. He knew that the tracks to his left curved in a southerly direction. He saw the trees and bushes along the track almost daily. He knew it was a dangerous crossing. It was a clear day and the windows to his automobile were open. He looked to the right and then to the left and there was nothing that he could see coming from the west. He then looked forward and proceeded to cross the track. When he traveled only from seven to nine feet and his right wheel was across the first rail, he saw a train to his left, from 125 to 175 feet from the crossing. Why did

he not see the train almost directly in front of him before it had traveled from 125 to 175 feet beyond all obstructions? Was it for the reason he looked once and then looked no more as his evidence seems to indicate?

He was asked: "At the time you stopped and looked you did not look any more until you got your wheels on the track, did you look to the left or west any more?" To this he replied: "I looked to the left and then I looked forward because you had to look where your car was going."

"Q. You looked straight ahead?

"A. Yes."

In explaining why he did not see the train until it was within about 125 feet of him when he could have seen it along the north rail for 300 or 325 feet, he testified: "I got the right front wheel across the south rail of that track which took some little time from where I was stopped back here."

The record is not such as to permit us to say that the court below was in error in concluding that if plaintiff had looked slightly to his left as he put his vehicle in motion, he would have seen the approaching train in ample time to avoid the collision. Instead, his evidence supports the conclusion that he looked once and then looked no more. The distance the train had traveled between the time he looked and the time he actually saw it indicates strongly that it must have been in full view before he actually reached the zone of danger, and, as he was traveling at a speed of only three or four miles per hour, he could have stopped instantly. It would seem, therefore, that the line of decisions represented by *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370, and the cases there cited, is controlling.

As stated by *Stacy, C. J.*, in *Gold v. Kiker, supra:*

"It may be conceded that the record is such as to leave the matter in some doubt. This alone would seem to defeat the one assignment of error on appeal, as the party alleging error has the laboring oar and must overcome the presumption against him . . . Verdicts and judgments are not to be disturbed except upon a showing of prejudicial error, *i.e.*, error which amounts to a denial of some substantial right. (cases cited.)"

As the conclusion plaintiff has failed to overcome the presumption against him prevails, the judgment entered must be

Affirmed.

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

DEVIN, C. J., dissenting: I am unable to agree with the majority opinion in this case. The testimony of the plaintiff does not, in my opinion, afford evidence of contributory negligence sufficient to justify a compulsory nonsuit. The well-established rule in this jurisdiction is that the defendant's motion for judgment of nonsuit on the ground of contributory negli-

gence may be allowed only when "the plaintiff's evidence establishes such negligence so clearly that no other conclusion may be reasonably drawn therefrom." *Edwards v. Vaughn,* 238 N.C. 89, and cases cited.

I think the plaintiff was entitled to have his case submitted to the jury.

JOHNSON, J., concurs in dissent.

ATLANTIC COAST LINE RAILROAD COMPANY v. McLEAN TRUCKING COMPANY.

(Filed 21 October, 1953.)

1. Railroads § 4—Conflicting evidence held for jury in this action to recover for collision at grade crossing.

In this action by a railroad company to recover damages resulting from a collision at a grade crossing, plaintiff's evidence to the effect that the driver of defendant's truck drove upon the crossing in front of plaintiff's oncoming train notwithstanding flashing automatic signals and warnings from the whistle, bell and lights of the locomotive, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence, and defendant's evidence in conflict therewith to the effect that one of the automatic signal lights was not working, that the view was partially obstructed, that no warning signals were given by the train in time to be of service, and that the train was being operated at excessive speed through a town, does not warrant nonsuit on the ground of contributory negligence.

2. Negligence § 19c—

It is only when the evidence of contributory negligence is so clear that no other conclusion may reasonably be drawn therefrom that nonsuit on the ground of contributory negligence may be entered.

3. Railroads § 4: Negligence § 18—

Evidence to the effect that after a collision at a grade crossing the defendant railroad company installed gates at the crossing, *held* properly excluded under the general rule that evidence of subsequent repairs or changes is not competent as tending to show negligence or a *quasi* admission of previous insufficiency.

4. Negligence § 20: Appeal and Error § 39f—Inadvertence in charge held not prejudicial under facts of this case.

The court correctly stated defendant's contentions that the first issue, relating to defendant's negligence, should be answered "no," and the second issue, as to plaintiff's contributory negligence should be answered "yes," and on defendant's cross-action, that the fourth issue, relating to defendant's contributory negligence, should be answered "no" and relied upon the identical evidence relied upon to support its contention that the first issue should be answered in the negative and the second issue should be answered "no." *Held:* The inadvertence in charging that defendant

contended the second issue should be answered "no" was contained in a portion of the charge referring primarily to the fourth issue and only incidentally to the second issue, and the court having previously given a correct charge on that issue, the inadvertence could not have misled the jury and does not constitute reversible error.

5. Appeal and Error § 39f: Negligence §§ 14½, 20—

An instruction to the effect that if the conduct of defendant's driver brought about or created the peril, the doctrine of sudden emergency as theretofore explained would not be available to defendant, *held* not prejudicial error when immediately thereafter the court correctly charged to the effect that the conduct of defendant in placing himself in danger must have been negligent conduct in order to preclude the application of the doctrine, nor was the court under duty to repeat its previous instruction that if the sudden emergency was not created by defendant's negligent conduct the principle would be available to defendant.

6. Appeal and Error § 6c (5)—

An assignment of error that the charge of the court failed to comply with G.S. 1-180 cannot be sustained.

APPEAL by defendant from *Frizzelle, J.*, June Term, 1953, of HARNETT. No error.

This was an action to recover damages for injury to plaintiff's engine and cars as result of collision with defendant's truck which was alleged to have been negligently driven by defendant's employee.

The defendant denied the allegations of negligence, and alleged contributory negligence on the part of the plaintiff, and further set up a counterclaim for damages for injury to its truck alleged to have been caused by the negligence of the plaintiff.

Upon these pleadings and the evidence offered, issues were submitted to the jury and answered as follows:

"1. Was the property of the plaintiff Railroad Company damaged by the negligence of the defendant Trucking Company, as alleged in the complaint?

"Answer: YES.

"2. Did the plaintiff Railroad Company by its own negligence contribute to such damage, as alleged in the answer?

"Answer: No.

"3. Was the property of the defendant Trucking Company damaged by the negligence of the plaintiff Railroad Company as alleged in the further answer?

"Answer:

"4. If so, did the defendant Trucking Company by its own negligence contribute to such damage, as alleged in the reply?

"Answer":

The amount of damages in case of recovery by either party was fixed by stipulation.

From judgment on the verdict, the defendant appealed.

Shepard & Wood for plaintiff, appellee.

W. Dennie Spry and Ingle, Rucker & Ingle for defendant, appellant.

DEVIN, C. J. This action grew out of the collision between plaintiff's northbound passenger train and the defendant's truck at a street crossing in the town of Dunn. The collision occurred about midnight 15 September, 1952. The defendant's truck was being driven by its employee, John W. Kent, eastward along Cumberland Street and across plaintiff's tracks, and when the truck was on the easternmost or northbound track it was struck by plaintiff's train. Damage to plaintiff's train and to defendant's truck resulted from the collision.

One crossing the plaintiff's tracks at this point, moving from west to east, would cross first the warehouse track, next the southbound track, and then the northbound track.

The plaintiff's evidence tended to show that the driver of defendant's truck, without heeding the signals giving warning of the approach of the train, drove on the track in front of the approaching train without stopping or reducing his speed; that the engineer of plaintiff's train had given timely warning of the approach of the train by blowing the whistle; that the bell was ringing; that the automatic light signals installed on the east side of the crossing were flashing; that there was no obstruction to the view which would have prevented the driver of defendant's truck from seeing the train if he had looked in time; that a truck proceeding in front of defendant's truck and in same direction, gave a warning signal to defendant's truck following.

The defendant's evidence tended to show that one of the crossing signal lights was not working; that the view was partially obstructed; that no warning signals were given by the train in time to be of service, and that plaintiff's train was being operated across a busy street in the town of Dunn, a town of some 6,000 inhabitants, at the rate of 70 or 75 miles per hour; that no signal was sounded from plaintiff's engine until immediately before the collision; that the signal given the driver of defendant's truck by the driver of the truck in front was not such as to be understood by defendant's driver. Defendant's truck was being operated at speed of 15 or 20 miles per hour.

There was other evidence tending to show measurements of distances, the location of structures, the description of the train lights, the location and character of signal lights, and other attendant circumstances which it is unnecessary to state in detail. But it is apparent from the brief

statement we have here incorporated that the evidence presented controverted issues of fact for the determination of the jury.

The plaintiff's evidence considered in the light most favorable for the plaintiff was sufficient to carry the case to the jury and the evidence of contributory negligence of plaintiff offered by defendant was not of such character as to warrant judgment of nonsuit on that ground. It is only when the evidence of contributory negligence is so clear that no other conclusion may reasonably be drawn therefrom that nonsuit on that issue, on which the defendant has the burden of proof, may be justified. *Edwards v. Vaughn, ante,* 89, 76 S.E. 2d 359; *Carruthers v. R. R. Co.,* 232 N.C. 183, 59 S.E. 2d 782; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

The case, then, being one properly to be submitted to the jury, the next question for decision is whether there was error in the trial that should require a new trial.

The appellant assigns error in the ruling of the trial judge in withdrawing from the consideration of the jury evidence that subsequent to the collision the plaintiff Railroad Company installed gates at the Cumberland Street crossing. It has been generally held that testimony of subsequent repairs and changes as evidence of negligence, or as *quasi* admissions of previous insufficiency, should be excluded, and it has been said that this rule is founded on the policy "that men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers." *Fanelty v. Jewelers, Inc.,* 230 N.C. 694, 55 S.E. 2d 493; *Shelton v. R. R.,* 193 N.C. 670, 139 S.E. 232; *McMillan v. R. R.,* 172 N.C. 853, 90 S.E. 683; *Terre Haute and I. R. Co. v. Clem,* 123 Ind. 15. There are exceptions to this rule not here pertinent. Stansbury on Evidence, sec. 180. The ruling of the court on this matter, under the evidence in this case, may not be held for error.

The appellant assigns error in the court's charge to the jury in stating defendant's contention on the fourth issue as follows: "The defendant, on the other hand, contends that you ought not to answer the fourth issue 'YES,' but on the contrary that you should answer it 'No,' and it likewise, in support of that contention, relies upon the same evidence, the identical evidence, that it relies upon in support of its contention that you ought not to answer the first issue 'YES,' and in support of its contention that you should answer the second issue 'No.' "

It is urged that the jury was told that the defendant contended the jury should answer the second issue "No" (the issue as to plaintiff's contributory negligence). This was an inadvertence on the part of the learned judge who presided over the trial of this case, but we are unable to perceive that any prejudicial effect could have resulted. The court had

instructed the jury that if they answered the first issue "YES" and the second issue "No" they need not answer the third and fourth issues which were addressed to defendant's counterclaim. The quoted portion of the charge specifically referred to the fourth issue and only incidentally referred to the second issue. The court had charged the jury at length as to the second issue and correctly stated the contentions of the defendant thereon, and there is no reason to conclude that the jury was misled.

The appellant assigned as error the court's instructions to the jury as to the doctrine of sudden emergency. The court correctly stated the rule, and submitted the defendant's contention that its driver was confronted with a sudden emergency and that under this rule the law did not apply to him under those circumstances the degree of care of a prudent man under ordinary conditions, but only required the exercise of the same sort of care in a sudden emergency that an ordinarily prudent man would have exercised similarly situated. Subsequently the court again referred to this rule and added the instruction in relation thereto, in substance, that if the conduct of defendant's driver prior to the arising of the sudden emergency, brought about or created the sudden emergency, or helped to do so, he could not avail himself of that principle. That is, if he negligently put himself in a place of danger, or he found himself in a place of danger that was a result of his own negligence, he could not avail himself of the rule as to sudden emergency.

The appellant argues that in the subsequent instruction of the court on the subject of sudden emergency the jury was told that if the sudden emergency was created by the conduct of the defendant, the principle previously stated would not be available to the defendant, whereas the correct rule is that the conduct of the defendant to render this principle unavailing must have been negligent conduct. However, the court immediately following and in the same connection correctly charged that if the sudden emergency was the result of defendant's driver's own negligence, he could not avail himself of the stated principle of sudden emergency. We think the jury understood that the benefit of the doctrine of sudden emergency was available to the defendant, unless the sudden emergency was created or contributed to by the negligence of defendant's driver. *Ingle v. Cassady*, 208 N.C. 497, 181 S.E. 562; *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593; *Sparks v. Willis*, 228 N.C. 25, 44 S.E. 2d 343.

Appellant further argues that after having thus instructed the jury as to the negative side of the rule as to sudden emergency, the court should have again stated the affirmative side and told the jury if the sudden emergency was not created by defendant's negligence the principle would be available. But the court had already correctly stated the rule of which the defendant had the benefit and was not required again to state it to the jury.

The appellant's assignment of error that the court in charging the jury failed to comply with G.S. 1-180 cannot be sustained.

We have examined all the exceptions brought forward in appellant's assignments of error and find none of them of sufficient substance to overthrow the verdict and judgment below. Controverted issues of fact were resolved by the jury in favor of the plaintiff, and we conclude that in the trial there was

No error.

MAXWELL POLANSKY v. MILLERS' MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS.

(Filed 21 October, 1953.)

1. Trial § 22a—

Upon motion to nonsuit, plaintiff's evidence is to be taken as true, and plaintiff given every reasonable inference in his favor therefrom.

2. Trial § 22b—

Upon motion to nonsuit, defendant's evidence is not to be considered unless favorable to plaintiff, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff.

3. Insurance § 50—

The policy in suit covered direct and accidental damage to insured's automobile caused by explosion, with later provision excluding liability for damage caused by mechanical or electrical breakdown or failure unless the result of other loss covered by the policy. *Held:* The burden of proof was upon insurer to show that the damages claimed fell within the exclusion and an instruction to this effect is not error.

4. Insurance § 45¾—Evidence held for jury on question of whether damage to car resulted from accidental explosion within coverage of policy.

The policy in suit covered direct and accidental damage to insured's car caused by explosion, with an exclusion of liability if the damage were due to mechanical or electrical breakdown or failure. Plaintiff's evidence was to the effect that after the car had been serviced with gas and oil, he stepped on the starter and there was an explosion with smoke and fire, and that thereafter a hole was found in the motor near one of the cylinders. Insurer offered evidence to the effect that the hole was caused by the connecting rod of the cylinder breaking loose and being driven through the block by the other cylinders. *Held:* The evidence was properly submitted to the jury upon the question of whether the damage was the "accidental" result of an "explosion."

5. Insurance § 50: Trial § 31g—

In this action to recover under a policy of insurance for damage to a car accidentally resulting from explosion, the court's instruction to the effect that the dealer who had sold the car to plaintiff insured and the

dealer's mechanic who had worked on the car, were interested witnesses and that their testimony should be scrutinized by the jury, *is held* for prejudicial error, there being no evidence in the record that the witnesses were related to plaintiff or were in any legal respect interested.

APPEAL by the defendant from *Sink, J.*, July Civil Term, 1953. Buncombe.

This is a civil action wherein plaintiff seeks to recover for damage to his automobile allegedly caused by fire or explosion under a contract of insurance issued by the defendant.

On 17 November 1949, the plaintiff, a citizen and resident of this State, was the owner of a 1947 Model Packard Sedan. The defendant, in consideration of the sum of $122.00, paid to it as a premium by the plaintiff, issued to the plaintiff on 5 May 1949 its policy of insurance No. 9 A-91126, by which it duly insured plaintiff among other things, against loss of or damage to his Packard automobile as follows:

"I. COVERAGE A—Comprehensive loss of or Damage to Automobile, Except by Collision or Upset. To pay for any direct and accidental loss of or damage to the automobile, . . . except loss caused by . . . fire . . . explosion . . . shall not be deemed loss caused by collision or upset."

"COVERAGE C—Fire, Lightning and Transportation. To pay for direct and accidental loss of or damage to the automobile . . . caused (a) by fire or lightning . . ."

"COVERAGE E—Windstorm, Earthquake, Explosion, Hail or Water. To pay for direct and accidental loss of or damage to the automobile . . . caused by . . . explosion . . ."

"COVERAGE F—Combined Additional Coverage. To pay for direct and accidental loss of or damage to the automobile . . . caused by . . . explosion . . ."

This insurance policy was in full force and effect at the time of the alleged fire and explosion.

The defendant alleges and contends that if the plaintiff sustained any damage to his automobile as a result of fire or explosion, which is denied, then said damage resulted from wear and tear or mechanical or electrical breakdown or failure, and is excluded under the following provision of the insurance policy, reading as follows:

"EXCLUSIONS

"This policy does not apply: (d) under any of the coverages, to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy."

On 17 November 1949, a very cold day, the plaintiff drove his car to a filling station in Asheville, and had gas put in his car. The attendant

checked the oil, and put a quart of oil in the engine. After the car was serviced, plaintiff stepped on the starter two or three times, and saw fire coming from under the hood. Very quickly there was an explosion and fire. The explosion caused a terrific noise. It seemed to be burning underneath the hood—there was a red glow. After the explosion there was oil all over the driveway under the car—2 or 3 quarts. Plaintiff noticed some of the wires which seemed to be burned or scorched. The following morning the plaintiff looked at the engine of his car. There was a hole in the engine by cylinder #2 on the left side.

C. C. Hudgins owned the filling station where Hugh M. Carson worked. He checked the oil and added a quart. After he lowered the hood plaintiff stepped on the starter; a terrific explosion occurred and fire came from underneath, fire and smoke. I stepped inside the station to get the fire extinguisher. When I returned nothing was burning. Nothing had been done as far as I know to put any fire out. 2 or 3 quarts of oil were underneath the car on the pavement. The oil was not burning. When he checked the oil it was about one quart low.

Hugh M. Carson put the gas in the car. At the time of the explosion he was cleaning the rear glass of the car. Immediately after the explosion he saw light underneath the car, and noticed quite a bit of smoke. The glare was like you flash a light on and cut it off quickly. The next morning he looked at the motor, and saw a hole in the motor between the place where the oil is put in and the #2 cylinder. He testified on cross-examination the spark ignites the gas, there is an explosion which drives the motor. I did not see any fire. "There was a noise and a flash, and that was all there was to it."

The plaintiff introduced the insurance policy in evidence. The defendant denied liability.

The plaintiff testified in rebuttal that on 15 November 1949, he took his automobile to the Packard Company in Asheville to have the timing checked. It "discharged it (the automobile) as nothing wrong with it."

This is a summation of the defendant's evidence. C. Fred Brown, who was held by the court to be an expert in the field of automobile motors, sold this car to plaintiff in 1947. According to the repair bill, it had been driven 15,897 miles. A Packard Motor will last varying times—some have been operated 315,000 miles; however, there would be breakdown of the engines and replacements. He saw this car 18 November 1949, and saw a hole in the cylinder wall. He recalls no wiring being burned. Plaintiff's car had 8 cylinders. It operated by gas going through the carburetor, being discharged to the chamber where the cylinders operate and as the gas is ignited by the spark it forces the pistons down, turns the crankshaft directly connected with the universal and driveshafts, and into the rear axle of the car, which causes the car to move. Cylinder oil

in the engine lubricates the bearings, and the working parts of the engine. #2 cylinder has a connecting rod coming from the crankshaft which is attached to the piston, which moves up and down. The connecting rod had broken, coming through the cylinder wall, which caused the hole in the wall or motor block. The connecting rod was disconnected from the bearing, which, in his opinion, caused the hole. There are many reasons why a connecting rod could get loose.

Jennings G. Featherstone, held by the court to be an expert witness on Packard Motors, gave substantially the same testimony as Brown, with these additions. In his opinion, the hole in the block of the motor was caused from oil not getting to the journal, and the bearing became heated and jerked loose, and the other 7 cylinders drove the broken connecting rod through the block. The wiring of the motor was all right. He saw no evidence of burning. He saw this car about a week before 18 November, and the car was not in good running condition.

Another witness for the defendant saw the "mangled" rod, but saw no evidence of fire.

Upon issues submitted the jury found that the automobile of plaintiff was damaged by fire or explosion as alleged; that the fire or explosion was not a result of wear and tear, or mechanical or electrical breakdown or failure as alleged by the defendant; and awarded damages of $400.00 plus interest.

From judgment signed in accord with the verdict, the defendant appeals.

Uzzell & DuMont for plaintiff, appellee.
Gudger, Elmore & Martin for defendant, appellant.

PARKER, J. The defendant assigns as Errors Nos. 4 and 5 the trial court's denying its motion for judgment of nonsuit made at the close of the plaintiff's evidence, and renewed at the close of all the evidence. G.S. 1-183.

In passing upon such a motion it is well settled law that the plaintiff's evidence is taken as true, and given every reasonable inference in favor of the plaintiff; the defendant's evidence, unless favorable to the plaintiff, is not considered, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff. *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543; *Whitley v. Jones, ante*, 332, 78 S.E. 2d 147.

The plaintiff's evidence, taken as true, establishes fire, smoke and an explosion causing damage to the automobile. The defendant's evidence tended to show that no fire or explosion occurred, and that the damage to the car resulted from mechanical breakdown or failure.

The defendant contends that to avoid a nonsuit the plaintiff must offer evidence that his loss comes within the provisions of the insurance policy *and is not excluded by any of the exceptions in the policy.* The defendant alleges in its answer as an affirmative defense that plaintiff's loss was caused by wear and tear or mechanical or electrical breakdown or failure, and is excluded under the provisions of the insurance policy.

It is generally held that the burden is on the insurer to show that damages claimed fall within an exception of loss by explosion. 29 Am. Jur., Insurance, p. 1086; *German American Ins. Co. v. Hyman,* 42 Colo. 156, 94 P. 27, 16 L.R.A. (N.S.) 77.

In *MacClure v. Casualty Co.,* 229 N.C. 305, 49 S.E. 2d 742, the lower court nonsuited the plaintiff based upon an affirmative defense set up by the defendant. In reversing the lower court, we said "the general rule is that the party who seeks to avoid liability by interposing an affirmative plea assumes the burden of proving his allegation by competent evidence before the jury" (citing authorities). To the same effect *Williams v. Ins. Co.,* 212 N.C. 516, 193 S.E. 728, and *Wilson v. Casualty Co.,* 210 N.C. 585, 188 S.E. 102. See also *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16.

The defendant relies upon *General Exchange Ins. Corp. v. Bolles* (Court of Civil Appeals of Texas), 143 S.W. 2d 635, and other Texas cases. Whatever may be the law in Texas, our cases hold otherwise. It also relies on *Trust Co. v. Casualty Co.,* 231 N.C. 510, 57 S.E. 2d 809. On the facts that case is not in point.

The defendant further contends on his motion for nonsuit "standing alone, the plaintiff's evidence creates a mystery. No cause for the light, smoke and loud noise is given or can be inferred from plaintiff's testimony. The evidence of the defendant explains and clarifies the evidence of the plaintiff to this effect." The insurance policy insures the plaintiff against direct and accidental loss to his automobile caused by fire or explosion. In making this contention the defendant does not heed the definition of the word "accidental." In *Kirkley v. Ins. Co.,* 232 N.C. 292, 59 S.E. 2d 629, there was an insurance policy containing the exact words of the policy in this case as to comprehensive loss or damage except by collision or upset, as set forth in "1 Coverage A." In that case this Court said "accidental" is defined in Black's Law Dictionary, 3rd, Ed., p. 23, as "an unforeseen event, occurring without the will or design of the person whose mere act caused it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty."

The trial court would not have been justified in nonsuiting the plaintiff upon the evidence of the defendant who has made an affirmative defense with respect to which the burden of proof rests upon him. The

court was correct in submitting the case to the jury, and assignments of errors Nos. 4 and 5 are without merit.

The only other assignments of errors discussed in defendant's brief are as to the court's charge. Assignments of errors Nos. 13 and 15 are to the court's placing the burden of proof of the second issue reading "If so, was said fire or explosion a result of wear and tear or mechanical or electrical breakdown or failure, as alleged in the defendant's further answer and defense?" on the defendant. For the reasons stated above those assignments of errors are not tenable.

The defendant's assignment of error No. 18 is to this part of the charge "Mr. and Mrs. Polansky have testified in behalf of the plaintiff; Brown Motor Company, the insurer's adjuster and one of the employees of Brown Motor Company, have testified on behalf of the defendant. These witnesses, the court charges you, are interested in the outcome of your verdict, and because of the interest that they have in the outcome of your verdict the court charges you to scrutinize their testimony and that of each of them. The law says that the court shall do so." The defendant had three witnesses: C. Fred Brown, Jennings G. Featherstone and Merlin Adcock. C. Fred Brown sold this car to plaintiff in 1947. He has sold Packard cars for 20 years. Featherstone, a mechanic, works for the Brown Motor Company. Adcock was an insurance adjuster. Conceding, but not deciding, that Adcock was interested in the outcome of the verdict, the record is bare of any evidence that Brown Motor Company, or Brown or Featherstone was related to the plaintiff or in any legal respect interested. The statement that Brown and Featherstone were interested in the verdict likely proved hurtful to the defendant's defense, though not so intended by the able and experienced trial judge. It is one of the casualties of the circuit which happen at times to all trial judges.

Under our decision in *S. v. Dooley,* 232 N.C. 311, 59 S.E. 2d 808, and under the facts, we think that this assignment of error is good, and there should be another hearing. It is so ordered.

New trial.

SADIE BINGHAM GRINNAN, TRUSTEE, *v.* SOUTHERN RAILWAY COMPANY.

(Filed 21 October, 1953.)

1. Railroads § 7—Evidence held insufficient to show that fire adjacent to right of way resulted from act of defendant.

Plaintiff's evidence tended to show that when her caretaker reached the scene woods on a hill adjacent to the right of way were burning and that fire was still burning at a fusee upon defendant's tracks. Plaintiff also

offered evidence tending to show that employees of defendant customarily put out fusees at or near the place in question whenever trains stopped there, as signals to operators of other trains. *Held:* In the absence of evidence that defendant's employees put out a fusee within the burned area at or near the time the fire was discovered or that a train of defendant stopped there at any time on the morning prior to the fire, defendant's motion to nonsuit plaintiff's action to recover the damages to her lands from the fire was properly sustained.

2. Same—

In an action against a railroad company to recover for damages to plaintiff's lands from a fire, plaintiff must show by reasonably affirmative evidence that the fire started on a foul right of way by act of defendant, and that the fire spread to plaintiff's lands.

APPEAL by plaintiff from *Sink, J.*, July Term, 1953, BUNCOMBE. Affirmed.

Civil action in tort to recover compensation for damage to real property caused by fire.

Plaintiff, as trustee of an active trust, owns a large tract of land adjoining the city limits of Asheville, north of the railroad bridge across the French Broad River, adjacent to the western boundary of defendant's right of way and known as the Bingham School property.

The defendant operates trains over its lines from Asheville to Marshall and from Asheville to Knoxville. The Asheville-Knoxville line runs through plaintiff's property, and the junction of the two lines is a short distance to the south thereof. Trains from Knoxville customarily stop at the junction and put out lighted fusees before entering the railroad yards as signals to operators of other trains. Some fusees put out prior to the fire complained of had started small fires on defendant's right of way which had not spread to adjacent property. The remains of used fusees were scattered along defendant's tracks where lighted fusees were customarily placed. Some had not burned.

On 6 November 1952, one Hagan, plaintiff's caretaker, was notified between 7:00 and 9:00 a.m. there was a fire on the property. After trying to get help and telephoning to the Asheville Fire Department and the forester, which consumed about one-half hour, he went down to the railroad where he found a freshly burned fusee about three feet from the railroad track. "The fire was still burning close around the fusee when I arrived . . . The burned space widened out as it left from the fusee, it spread out from it leading away from it and there was still plenty of grass at different places around the track, but it spread away from the fusee and hit the hill." At that time the fire had "hit the hill" some distance away and "was going west up the hill." It was so far to the west it could not be controlled. "The biggest part . . . was going west . . . pretty

far up the hill." "It was just a huge fire, went halfway to the tops and burned them almost up. The flames went 40 feet from the ground in some sections . . ." It had burned over about one-half acre when Hagan reached the scene. "When I got there, it was bounding up pretty high . . . It widened from the tracks."

When Hagan arrived fire was burning "pretty close" to the fusee, and some was "a pretty good distance" up the hill. The burned area at the fusee was not very wide. The fire was still burning and there was "a lot of dead grass all the way to the tracks." "It was burning two ways. It was burning like it was going across the hollow to the right . . . and spreading up the hill."

Plaintiff offered evidence tending to show there was "plenty" of high, dead grass, weeds, bushes, and other combustible matter on defendant's right of way. The grass and brush that had not burned was "growed all the way to the chat at the end of the track . . ." ". . . it was grown up into the chat, 6 to 12 inches high. It was very thick."

Plaintiff likewise offered evidence tending to show that employees of defendant put fusees out near the burned area and tendered testimony tending to show that it was customary for trainmen to put out a fusee whenever a train stopped there.

At the conclusion of plaintiff's evidence in chief, the court, on motion of defendant, entered judgment of involuntary nonsuit and plaintiff appealed.

Williams & Williams for plaintiff appellant.
W. T. Joyner and Ward & Bennett for defendant appellee.

BARNHILL, J. In view of plaintiff's evidence tending to show that the fire had burned over a half acre of plaintiff's land when her caretaker arrived, "and was bounding up pretty high," and yet it had not burned through the three feet of thick, high grass and weeds between the freshly burned fusee and the "chat" at the end of the railroad crossties, and the burned area was very narrow at the fusee, the defendant contends the evidence will not support the conclusion the fire originated at the freshly burned fusee; that there was evidence that fusees which had not burned were found along the track and the freshly burned fusee found by Hagan was one of these, burned by the fire which spread from the hill, where it originated, to the railroad right of way.

We may concede there is considerable force in this argument. Yet we need not rest decision on this testimony, for there is a fatal defect in plaintiff's evidence in another respect. There is no evidence tending to show that any employee of defendant put out a fusee within the burned area on defendant's right of way at or near the time the fire was discov-

ered. Nor is there any evidence a train of defendant stopped at or near the burned area on the right of way at any time on the morning prior to the fire.

Proof that a train stopped at the scene just prior to the fire coupled with the testimony tending to show that trains customarily stopped there and put out fusees as a warning to the crews of other trains before proceeding into the railroad yards might—as in case of a train discharging live sparks onto a foul right of way—make out a *prima facie* case for plaintiff. This we need not now decide. Certainly in the absence of such proof, the plaintiff has failed to make out a case for the jury. *Kerner v. R. R.*, 170 N.C. 94, 86 S.E. 998; *Ice Co. v. R. R.*, 126 N.C. 797.

"The burden rested upon the plaintiff to establish by competent evidence two facts alleged in her complaint: first, that the defendant negligently permitted combustible matter to accumulate on its right of way, and, second, that the defendant communicated fire from its engine to its foul right of way, which fire was thence communicated to the lands of the plaintiff." *Maguire v. R. R.*, 154 N.C. 384, 70 S.E. 737. It is not sufficient for the plaintiff to prove that the fire might have started from a fusee thrown out by an employee of defendant, starting a fire on a foul right of way which spread to her land; she must show these facts by reasonable affirmative evidence. *Wilson v. Lumber Co.*, 194 N.C. 374, 139 S.E. 760; *McBee v. R. R.*, 171 N.C. 111, 87 S.E. 985; 22 A.J. 653; Anno. 42 A.L.R. 795 (N. C. cases p. 796); *ibid.*, pp. 799, 820.

How was the fire started and by whom? Where did it originate? These are questions raised by the pleadings and the testimony offered. The answers are left to speculation or surmise. *Moore v. R. R.*, 173 N.C. 311, 92 S.E. 1; *Fleming v. R. R.*, 236 N.C. 568, 73 S.E. 2d 544. For that reason the judgment entered must be

Affirmed.

MRS. DAVID DILLS v. T. S. CORNWELL, JR., AND BARBARA COOKE CORNWELL, EXECUTORS OF THE ESTATE OF ALVIN A. NICHOLS, DECEASED.

(Filed 21 October, 1953.)

1. Executors and Administrators § 15d—

In an action against executors to recover on *quantum meruit* for services rendered their testate prior to his death, a check, not paid because of death of the maker prior to presentation, drawn payable to plaintiff's order, with notation in the corner "for home" is competent when plaintiff properly identifies the signature as that of testate, since the check tends to show that the services were rendered and received with mutual understanding that they were to be paid for.

2. Same—

Evidence of plaintiff to the effect that she was no kin to testate and that she lived in testate's house, with members of her own family, during the last three years of testate's life, and during that time looked after his house and nursed and took care of testate, and that several months before his death testate required constant attention, together with evidence that testate had executed a check to her in payment "for home," *is held* sufficient to be submitted to the jury in an action by plaintiff to recover upon *quantum meruit* for her services under the presumption that, in the absence of some express or implied gratuity, services rendered another which are knowingly and voluntarily accepted, are given and accepted in the expectation of payment.

APPEAL by defendants from *Gwyn, J.*, at May Term, 1953, of JACKSON.

Civil action to recover on implied contract for services rendered by plaintiff to testate of defendants.

These facts appear from the record in case on appeal to be uncontroverted:

(1) Plaintiff is a resident of Jackson County, North Carolina, and defendants, residents of Sampson County, are the qualified and acting executors of the will of Dr. Alvin A. Nichols, which was probated in said Jackson County on 15 August, 1952, he having resided in that county. Plaintiff is of no kin to Dr. Nichols.

(2) In July 1947 plaintiff and her family moved into an apartment located next to the residence of Dr. Nichols, and owned by him, in the town of Sylva, Jackson County, North Carolina. He, then 71 years of age and alone, boarded, that is, took his meals with plaintiff, and she cared for his residence. However, she moved with her husband to Raleigh.

(3) But in May, 1948, plaintiff moved back to Sylva and into the residence of Dr. Nichols, and became his housekeeper, and nurse to him in his sickness, and so rendered services to and for him, cooking, washing, buying groceries, etc., until his death on 9 August, 1951. During the last year and a half he was in declining health and for several months before his death required constant attention and nursing, which plaintiff rendered to him.

(4) A part of the time plaintiff's minor son lived in the home and was provided for by plaintiff, and, too, from time to time members of plaintiff's family visited him. Plaintiff's child and her husband, when off duty, and another member of her family from time to time were with her.

After the death of Dr. Nichols a check dated 27 July, 1951, for $10,000, drawn on the Jackson County Bank, Sylva, N. C., payable to the order of plaintiff, and purporting to be signed in his name, bearing on the left-hand corner the notation "For home," was presented to the bank for payment, but was not paid because the maker was dead.

Upon the trial in the Superior Court plaintiff offered evidence tending to show and amplifying the above uncontroverted matters. She also offered evidence identifying the signature to the check, and then offered the check in evidence.

On the other hand, defendant offered evidence from which they contend plaintiff had been fully compensated for services rendered.

The case was submitted to the jury upon these issues:

1. Did the plaintiff Mrs. David Dills, during the last three years of the life of Dr. A. A. Nichols, under an implied contract, perform services for Dr. A. A. Nichols, which he knowingly accepted and did not pay or settle for, as alleged in the complaint?

2. If so, what amount, if any, is the plaintiff entitled to recover for such services?

The jury answered the first issue "Yes," and the second "$8,000."

And from judgment signed in accordance therewith, defendants appeal to the Supreme Court and assign error.

David M. Hall and Orville D. Coward for plaintiff, appellee.

Stillwell & Stillwell and Howard H. Hubbard for defendants, appellants.

WINBORNE, J. Decisions of this Court hold that "in the absence of some express or implied gratuity, usually arising out of family relationship or mutual interdependence, services rendered by one person to or for another, which are knowingly and voluntarily received, are presumed to be given and accepted in expectation of being paid for, and the law will imply a promise to pay what they are reasonably worth." See *Ray v. Robinson,* 216 N.C. 430, 5 S.E. 2d 127, citing *Winkler v. Killian,* 141 N.C. 575, 54 S.E. 540, and *Callahan v. Wood,* 118 N.C. 752, 24 S.E. 542.

Here, as in the *Ray case,* "there is no presumption of gratuity, but facts and circumstances from which the inference may be drawn that payment was intended on the one hand and expected on the other." Indeed, the principle has been extended to a case where services were rendered by a daughter-in-law to and for her father-in-law. See *Lindley v. Frazier,* 231 N.C. 44, 55 S.E. 2d 815. There this Court, in opinion by *Seawell, J.,* declares: "The relationship of daughter-in-law has been held not to raise the presumption that services performed while living with the family are gratuitous . . . But, although the plaintiff may not have been confronted with this presumption to hurdle, the burden still rested upon her to show circumstances from which it might be inferred that the services were rendered and received with the mutual understanding that they were to be paid for. The *quantum meruit* must rest upon an implied contract. Nothing else appearing, such an inference is permissible when

a person knowingly accepts from another services of value, or, as it is sometimes put, under circumstances calculated to put a reasonable person on notice that the services are not gratuitous."

Hence the check for $10,000, the signature being properly identified as that of Dr. Nichols, in accordance with the burden of proof, was relevant, and competent as tending to show a circumstance from which it might be inferred that the services were rendered and received with the mutual understanding that they were to be paid for. *Lindley v. Frazier, supra.*

Now, appellants bring to this Court numerous assignments of error directed to specific portions of the charge, as well as to things left unsaid which they contend ought to have been said. However, in the light of the principles above stated, applied to the evidence shown in the case on appeal, error, in the respects defendants point out, is not shown.

Moreover, the assignment of error based upon exception to the denial of defendants' motions for judgment as of nonsuit is without merit. Here, as stated by *Stacy, C. J.*, in *Ray v. Robinson, supra,* "Upon issues of fact, determinable alone by the jury, the plaintiff has been allowed to recover accordant with settled principles of law."

We find

No error.

LESSIE P. SUMMERLIN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 October, 1953.)

1. Railroads § 4—

Plaintiff's evidence tending to show that defendant's train approached a much used grade crossing in a municipality where no barricades, alarm system or flagmen were maintained, that the engineer did not ring the bell or blow the whistle and that the train struck plaintiff's car on the crossing, *is held* sufficient to be submitted to the jury on the question of negligence on the part of the railroad company.

2. Negligence § 11—

Contributory negligence need not be the sole proximate cause in order to bar recovery, but is sufficient for this purpose if it constitutes a concurring cause proximately contributing to the injury.

3. Negligence § 19c—

When plaintiff's own evidence establishes contributory negligence on her part, nonsuit is proper.

4. Railroads § 4—

The failure of the employees of a railroad company to ring the bell or sound the whistle of the locomotive in warning in approaching a grade crossing, or to have the engine's headlight burning, if dark, does not relieve

a motorist of the duty of exercising due care for his own safety in traversing the crossing or warrant the assumption by him that no train is approaching, the crossing itself being notice of danger.

5. Same—

Plaintiff's own evidence tending to show that she stopped some forty-eight feet before a grade crossing, did not see or hear a train, and then traversed the forty-eight feet onto the track without again looking, although at any time before reaching the crossing she could have seen defendant's approaching train had she looked, *is held* to disclose contributory negligence on her part barring recovery as a matter of law for injuries sustained when her car was struck by the train on the crossing.

APPEAL by plaintiff from *Burgwyn, Special J.*, April Civil Term 1953 of WAYNE. Affirmed.

This is a civil action to recover damages for personal injuries and damage to an automobile arising out of a collision at a railroad crossing.

This is a summation of plaintiff's evidence. In the town of Mount Olive the defendant's main railroad track—a single line—runs north and south. Parallel with the track on each side are two streets, both called Center Street. College Street in Mount Olive runs west and east, crossing the railroad track at right angles to Center Street. Plaintiff's home is on College Street, east of Center Street. About 5:30 or 6:00 p.m. on 3 November 1949, the plaintiff was driving her automobile east on West College Street toward Center Street on her way home. The plaintiff testified "it was not dark, yes, it was approaching darkness; dusk." The plaintiff had been living in Mount Olive since 1917, except for a period in 1934. She had passed over this railroad crossing on numerous occasions.

There is a little brick building on the southwest corner of Center and College Streets "opposite from the depot." When the plaintiff approached Center Street she drove ahead of this building, and stopped. There is nothing from this building to the railroad track but a sidewalk, street and a parking strip. She drove to the edge of the sidewalk in front of this building. There was nothing to keep her from seeing, if she had looked to the south. There was nothing to obstruct her view. She had driven her car as far out from the sidewalk as to be safe from approaching cars so that she could see north and south. She saw an automobile coming on her side of Center Street going north. At the crossing this car turned east on College Street, and crossed the railroad track. Where plaintiff stopped her car, there was nothing to mar her view south as far as John, James or even Main Streets. She could see over a block any way. She looked south to see if a train was coming. She saw nothing, and started to cross Center Street and the tracks on her way home. On the railroad track she was hit by a train of the defendant going north, and was injured, and her car damaged.

The bell of the train was not ringing, nor the whistle blowing, nor was a train light showing. There were no barricades or gates at the crossing, no flagman there, no alarm system. Many automobiles use this crossing—some 35 or 36 per hour on week days.

West College Street approaching the track is almost level—at the track is a slight dip.

By tape measure there is a distance of 6½ feet between the railroad track and the east curb of West Center Street; West Center Street is 35½ feet wide, and the parking strip 6½ feet wide. The sidewalk is 14½ feet wide. By tape measure it is 56 feet from the western rail of the tracks to the door of the little brick building on the southwest corner of College and Center Streets. In this 56 feet area there is nothing to obstruct one's view southwardly from College Street.

The plaintiff introduced in evidence from the Code of Mount Olive an ordinance making it unlawful for trains to operate at a speed in excess of 25 miles per hour between 6:00 a.m. and 10:00 p.m. in the town limits.

At the close of plaintiff's evidence the defendant moved for judgment of nonsuit, which was overruled, and the defendant excepted. The defendant put on evidence. At the close of all the evidence, the defendant renewed its motion for judgment of nonsuit, which was allowed, and the plaintiff excepted. From judgment signed in accord therewith, plaintiff appeals, assigning error.

Paul B. Edmundson, J. Roderick Robertson, and J. T. Flythe for plaintiff, appellant.

Bland & Bland and W. B. R. Guion for defendant, appellee.

PARKER, J. The plaintiff has offered plenary evidence of actionable negligence on the part of the defendant. *Edwards v. R. R.*, 129 N.C. 78, 39 S.E. 730; *Goff v. R. R.*, 179 N.C. 216, 102 S.E. 320; *Earwood v. R. R.*, 192 N.C. 27, 133 S.E. 180; *Quinn v. R. R.*, 213 N.C. 48, 195 S.E. 85; *Miller, Admr. v. Union Pac. R. R. Co.*, 290 U.S. 227, 78 L. Ed. 285.

However, the plaintiff according to her own evidence is guilty of contributory negligence, which bars her recovery. Her negligence need not be the sole proximate cause of her injury. It is enough if it, concurring with the negligence of the defendant, proximately contributes to her injury. It is the prevailing rule of practice to enter judgment of nonsuit when it appears from the evidence offered on behalf of the plaintiff that she has been guilty of contributory negligence. *Bailey v. R. R.*, 223 N.C. 244, 25 S.E. 2d 833, where the cases are cited; *Stevens v. R. R.*, 237 N.C. 412, 75 S.E. 2d 232. In *Stevens v. R. R., supra,* this Court said in March last "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."

The plaintiff had the right to expect timely warning by bell or whistle, or, if dark, to expect a headlight on the engine, but the failure to give such signal or warning, or to have a headlight on would not justify her in relying upon such failure, or in assuming that no train was approaching. It is still her duty to keep a proper lookout. *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137; *Stevens v. R. R., supra; Dowdy v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639.

When the plaintiff stopped on West College Street near its intersection with West Center Street, it was not dark; it was approaching darkness. She stopped ahead of a little brick building on the southwest corner of Center and College Streets. From the western rail of the railroad track to the door of this building is 56 feet. Where she stopped, there was nothing to obstruct her view to the south, from which the train was approaching. She looked north and south, and saw no train. She put her automobile in motion, and without looking again she crossed West Center Street 35½ feet wide, the parking strip 6½ feet wide, 6½ feet between the east curb of West Center Street and the track, and onto the track where she was hit by the train. If, during the time she was crossing this 48½ feet, she had looked to the south, she could have seen the approaching train, stopped her car, and avoided her serious injuries. She was thoroughly familiar with the crossing. Her failure to exercise proper care and prudence under such circumstances constitutes contributory negligence. *Godwin v. R. R.*, 202 N.C. 1, 161 S.E. 541; *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370; *Dowdy v. R. R., supra,* p. 524, where cases are cited showing how far the plaintiff stopped from the track before entering upon it, and then drove on the track without looking again.

The plaintiff relies heavily upon *Osborne v. R. R.*, 160 N.C. 309, 76 S.E. 16; *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690; *Goff v. R. R., supra.* The facts are distinguishable, for in those cases the view of the traveler going upon the railroad track was obstructed. The plaintiff also relies upon *Meacham v. R. R.*, 213 N.C. 609, 197 S.E. 189; and *Caldwell v. R. R.*, 218 N.C. 63, 10 S.E. 2d 680. Those cases are not in point for in each one there was evidence to show low visibility from fog or mist.

The judgment of nonsuit entered in the lower court was correct, and is Affirmed.

G. V. HOWELL, JR., v. COMMERCIAL CREDIT CORPORATION.

(Filed 21 October, 1953.)

1. Pleadings § 19c—

A demurrer admits the factual averments of the complaint but not legal conclusions set out therein.

2. Master and Servant § 6f—When contract of employment is for indefinite period, the employment is terminable at will.

The complaint alleged that plaintiff was employed by defendant, given repeated promotions over a period of time, that plaintiff was asked if he meant to make a career of his employment and, upon an affirmative answer, was sent to a three week training school, but that five days thereafter defendant ordered plaintiff's return and summarily discharged him without cause. *Held:* Demurrer was properly entered in plaintiff's action for wrongful discharge, since upon the facts alleged the contract was not for any definite time and was terminable at the will of either party without cause. Plaintiff's position would not be aided if the employment had been "upon a permanent basis" since the contract would still be for an indefinite period, terminable at will.

APPEAL by defendant from *Godwin, Special Judge,* at May Term, 1953, of PITT.

Civil action for damages for breach of an employment contract by wrongful discharge.

The allegations of the complaint are summarized in the numbered paragraphs set forth below.

1. The defendant Commercial Credit Company is a corporation which is engaged in the business of lending money at Greenville and other places in North Carolina and elsewhere.

2. The plaintiff G. V. Howell, Jr., was employed by the defendant in various capacities at Greenville from 19 September, 1950, until 24 January, 1953. As a consequence of his diligence in the performance of the tasks assigned to him by the defendant during this period, the plaintiff was repeatedly promoted to positions carrying greater responsibility and increased compensation.

3. On 24 January, 1953, the plaintiff and the divisional manager of the defendant in the territory embracing Greenville held this telephonic colloquy at the instance of the latter: "The plaintiff was asked by said divisional manager if he intended to make a career with the defendant and if he did said divisional manager wanted the plaintiff to leave next morning for Baltimore and there attend the three-week training school which the defendant . . . was holding for the purpose of training its employees . . .; and the plaintiff, giving an affirmative reply to the inquiry, was instructed to draw sufficient funds from the defendant's local

manager to cover his traveling expenses to and from Baltimore and maintenance while in attendance upon said school."

4. The action of the divisional manager of the defendant set out in the preceding paragraph gave the plaintiff "the implied assurance from the defendant that his employment with defendant corporation was upon a permanent basis and that a position with the corporation was fixed and assured."

5. Pursuant to the directions of the divisional manager of the defendant set out in paragraph 3 of this statement, the plaintiff attended the school at Baltimore until 29 January, 1953, when the defendant ordered him to return to Greenville.

6. On his return to Greenville, the plaintiff was forthwith discharged from his employment by the defendant without cause.

7. The plaintiff claims damages totaling $2,800.00 "for loss in salary" subsequent to his discharge, and "on account of the humiliation . . . caused by the summary discharge from the employment of the defendant."

The defendant demurred in writing to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The presiding judge overruled the demurrer, and the defendant appealed, assigning that ruling as error.

Albion Dunn for plaintiff, appellee.
Louis W. Gaylord, Jr., for defendant, appellant.

ERVIN, J. The demurrer admits the factual averments of the complaint relating to the colloquy between the plaintiff and the divisional manager of the defendant, but it does not admit the legal conclusion of the complaint that such colloquy operated as an implied assurance from the defendant to the plaintiff that his employment by it was to be permanent. *Clinard v. Lambeth*, 234 N.C. 410, 67 S.E. 2d 452; *Anderson v. Atkinson*, 234 N.C. 271, 66 S.E. 2d 886.

When the plaintiff is accorded the full benefit of all its factual averments, the complaint merely alleges a hiring under a contract which does not specify any definite time for the duration of the employment. Since an employment for an indefinite term is terminable at the will of either party without cause, the complaint does not state facts sufficient to constitute a cause of action for breach of an employment contract by wrongful discharge. *May v. Power Co.*, 216 N.C. 439, 5 S.E. 2d 308; *Elmore v. R. R.*, 191 N.C. 182, 131 S.E. 633, 43 A.L.R. 1072.

We deem it not amiss to observe, in closing, that the legal standing of the plaintiff would not be bettered a single whit if the legal conclusion of the complaint could be construed to be a factual averment that the defendant actually contracted to employ plaintiff "upon a permanent basis."

A mere agreement to give another permanent employment, in and of itself, implies nothing more than a general or indefinite hiring terminable at the will of either party. *Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436.

The judgment overruling the demurrer is

Reversed.

ALDER MAE JERNIGAN v. COLONEL JERNIGAN.

(Filed 21 October, 1953.)

1. Appeal and Error § 51a—

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

2. Trial § 22b—

Upon motion to nonsuit, evidence of defendant in contradiction to that offered by plaintiff is properly disregarded.

3. Evidence §§ 42c, 45: Automobiles § 18g (4)—

Testimony of declarations made by defendant driver shortly after the accident in suit that he could have avoided the accident in several ways, *is held* a shorthand statement of fact based on personal knowledge, and competent as an admission against interest.

APPEAL by defendant from *Frizzelle, J.*, and a jury, at February Term, 1953, of JOHNSTON.

Civil action by wife against husband for personal injuries allegedly caused by the actionable negligence of the husband in the operation of an automobile in which the wife was a guest.

The defendant Colonel Jernigan and the plaintiff Alder Mae Jernigan are husband and wife. The accident culminating in this litigation occurred on the afternoon of 25 June, 1950, at the juncture of State Highway No. 40 and an unpaved road four miles west of the Town of Benson when an automobile driven by the defendant and an automobile operated by one Rufus Capps collided. The plaintiff, who was a guest in her husband's car, suffered personal injuries in the collision.

This case was before this Court at the Fall Term, 1952, upon the appeal of the plaintiff from a compulsory nonsuit entered at the close of her evidence on the first trial of the cause. This Court held at that time that the plaintiff's evidence made the liability of the defendant to the plaintiff a question for the jury, and reversed the compulsory nonsuit on

that ground. The opinion of this Court on the former appeal is reported in 236 N.C. 430, 72 S.E. 2d 38, where the plaintiff's evidence at the first trial is stated.

The cause was tried anew at the February Term, 1953, of the Superior Court of Johnston County. Both parties offered evidence at that time. The plaintiff's evidence was substantially the same as that presented by her at the original trial. The defendant's evidence tended to show that the sole proximate cause of the collision and the resultant injuries to the plaintiff was the negligence of Capps in the management of his automobile. These issues were submitted to the jury: (1) Was the plaintiff injured and damaged by the actionable negligence of the defendant, as alleged in the complaint? (2) If so, what amount of damages, if any, is the plaintiff entitled to recover of the defendant?

The jury answered the first issue "Yes," and the second issue "$5,000.00." The trial judge entered judgment for plaintiff in accordance with the verdict, and the defendant appealed.

J. R. Barefoot and E. R. Temple for plaintiff, appellee.
A. M. Noble for defendant, appellant.

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

1. The court erred in refusing to dismiss the action upon a compulsory nonsuit at the close of all the evidence.

2. The court erred in permitting the plaintiff to testify that subsequent to the accident the defendant admitted he could have avoided the collision with the Capps car in several ways.

Counsel for the defendant lays great stress on his contention that the action ought to have been involuntarily nonsuited in the Superior Court. We are compelled to hold, however, that this question is foreclosed against the defendant by the decision on the former appeal adjudging the plaintiff's evidence sufficient to carry the case to the jury and to support a verdict in her favor. This is true for the very simple reason that the evidence adduced by the plaintiff at the second trial is substantially the same as that presented by her at the first trial and considered by us on the former appeal. *Mintz v. R. R.*, 236 N.C. 109, 72 S.E. 2d 38; *Maddox v. Brown*, 233 N.C. 519, 64 S.E. 2d 864; *Randle v. Grady*, 228 N.C. 159, 45 S.E. 2d 35; *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366; 141 A.L.R. 1164; *Wall v. Asheville*, 220 N.C. 38, 16 S.E. 2d 397; *Simpson v. Oil Co.*, 219 N.C. 595, 14 S.E. 2d 638; *McGraw v. R. R.*, 209 N.C. 432, 184 S.E. 31; *Dixson v. Realty Co.*, 209 N.C. 354, 183 S.E. 382; *Groome v. Statesville*, 208 N.C. 815, 182 S.E. 657; *Masten v. Texas Co.*, 204 N.C. 569, 169 S.E. 158; *Madrin v. R. R.*, 203 N.C. 245, 165 S.E. 711; *Newbern*

v. Telegraph Co., 196 N.C. 14, 144 S.E. 375; *McCall v. Institute*, 189 N.C. 775, 128 S.E. 349; *Soles v. R. R.*, 188 N.C. 825, 125 S.E. 24; *Clark v. Sweaney*, 176 N.C. 529, 97 S.E. 474. In ruling on the motion to nonsuit, the trial judge properly disregarded the evidence of the defendant contradictory to that supporting the plaintiff's contention. *Hansley v. Tilton*, 234 N.C. 3, 65 S.E. 2d 300.

The defendant objects to the receipt of his extrajudicial declaration that he could have avoided striking the Capps car in several ways on the theory that such declaration expresses a mere opinion or conclusion, and for that reason falls within the condemnation of the general rule excluding opinions or conclusions. *Insurance Co. v. R. R.*, 195 N.C. 693, 143 S.E. 516. This position is untenable. The declaration can be reasonably interpreted to be a short-hand statement of fact based on the personal knowledge of the defendant. This being so, the trial judge rightly received the declaration in evidence as an admission against the interest of the defendant on the issue of liability. *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211; *Brown v. Wood*, 201 N.C. 309, 160 S.E. 281; Stansbury: North Carolina Evidence, section 167; Michie: The Law of Automobiles in North Carolina, section 253; 31 C.J.S., Evidence, section 272.

Since no error is shown, the judgment entered in the Superior Court will be sustained.

No error.

JOHN HORTON v. CARLOS PETERSON.

(Filed 21 October, 1953.)

1. Automobiles §§ 8i, 18h (2) (3)—Evidence held for jury in this action for collision at intersection of highway and driveway.

Evidence tending to show that plaintiff, preparing to enter the highway, stopped his truck in a driveway on the west side of the highway, with the front of the truck extending about three feet into the western edge of the highway, and that defendant's truck, which was traveling north, struck plaintiff's truck, although nine feet of the hard surface was clear to defendant's right of plaintiff's truck, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence, G.S. 20-146, G.S. 20-164, and not to require dismissal as a matter of law for plaintiff's contributory negligence.

2. Negligence § 19c—

Nonsuit on the ground of contributory negligence should not be granted unless plaintiff's evidence, taken in the light most favorable to him, so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom.

HORTON *v.* PETERSON.

APPEAL by plaintiff from *Moore, J.*, July-August Term, 1953, of MITCHELL.

Civil action to recover damages resulting from the alleged negligence of the defendant.

Plaintiff's evidence shows that a collision occurred on 21 April, 1953, about 7:00 a.m., between a Chevrolet truck driven by the defendant and a Ford truck driven by the plaintiff, on the twelve-foot black top highway leading from Relief in Yancey County, North Carolina, to Green Mountain; that the highway, which runs north and south, was straight at the place of the collision; that no other traffic was on the road; that there was no obstruction to prevent the defendant from seeing the plaintiff's truck for a distance of about 125 to 150 feet as he approached from the south.

The plaintiff's evidence further tends to show that his truck was parked on the western side of the highway headed south; that he backed into the private entrance to the sawmill of H. H. Lewis, located on the west side of the highway, and when he started to enter the highway for the purpose of proceeding northward thereon, Mr. Lewis, who was standing near-by watching him, called to him to stop; that he stopped with the front of his truck extending about three feet into the western edge of the highway; that in response to Mr. Lewis' call, the plaintiff looked back to see what he wanted and immediately the defendant's truck ran into plaintiff's truck. The plaintiff did not see the defendant's truck before the collision. The defendant's truck was going north and, according to the evidence, nine feet of the hard surfaced portion of the highway was clear together with a two-foot shoulder to the east of plaintiff's truck, leaving open on the defendant's right-hand side of the highway a total of eleven feet for him to pass the plaintiff's truck; that the defendant's truck struck and damaged the right front fender, bumper, grill and frame of the plaintiff's truck. The only damage to the defendant's truck was to the left rear wheel and the driveshaft.

At the close of plaintiff's evidence, the defendant demurred thereto and moved for judgment as of nonsuit. The court granted the motion and entered judgment accordingly. The plaintiff appeals, assigning error.

W. C. Berry and W. E. Anglin for appellant.
Fouts & Watson for appellee.

DENNY, J. The plaintiff's evidence when considered in the light most favorable to him, as it must be on motion for judgment as of nonsuit, is sufficient in our opinion to require its submission to the jury on the issues of negligence, contributory negligence, and damages. *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*, 229 N.C. 707, 51 S.E. 2d 307;

Hobbs v. Drewer, 226 N.C. 146, 37 S.E. 2d 121; *Killough v. Williams,* 224 N.C. 254, 29 S.E. 2d 697; *Stevens v. Rostan,* 196 N.C. 314, 145 S.E. 555.

A nonsuit on the ground of contributory negligence should not be granted unless the plaintiff's evidence, taken in the light most favorable to him, so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom. *Mikeal v. Pendleton,* 237 N.C. 690, 75 S.E. 2d 756; *Levy v. Aluminum Co., supra; Dawson v. Transportation Co., supra; Bundy v. Powell, supra; Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209.

According to the plaintiff's evidence adduced in the trial below, the defendant was operating his truck on the left-hand side of the highway at the time of the collision in violation of G.S. 20-146 and G.S. 20-164.

The judgment of the court below is

Reversed.

REBECCA SIMPSON HART (FORMERLY REBECCA SIMPSON), ADMR'X. OF G. B. SIMPSON, v. FRANCIS H. CURRY.

(Filed 21 October, 1953.)

Negligence § 9—

It is not required that defendant should have been able to anticipate the precise injury which occurred in order for his negligent act or omission to be the proximate cause of the injury, but it is sufficient for this purpose if defendant, in the exercise of reasonable care, might have foreseen that some injury would probably result therefrom.

APPEAL by plaintiff from *Bone, J.,* June Term, 1953, 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.

The facts with respect to the manner in which the plaintiff's intestate met his death are fully stated in the opinion on a former appeal, reported in 237 N.C. 260, 74 S.E. 2d 649, and will not be restated herein.

In the trial below the jury answered the issue of negligence against the plaintiff and judgment was entered on the verdict. The plaintiff appeals, assigning error.

Robert B. Lowry and John H. Hall for appellant.

LeRoy & Goodwin for appellee.

DENNY, J. The plaintiff assigns as error the following portion of the charge to the jury: "For it to be said that the defendant's negligence was

the proximate cause of the death of plaintiff's intestate, it must be shown that the death of plaintiff's intestate was the natural and probable result of the defendant's negligence, and that it ought to have been foreseen, in the light of all of the surrounding facts and circumstances."

This instruction is not in accord with our decisions on the question of foreseeability. The test of foreseeability does not require that the negligent person should have been able to foresee the injury in the precise form in which it actually occurred, or to anticipate the particular consequences which actually flowed from his act or omission. 38 Am. Jur., Negligence, section 62, page 713.

All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in "the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." 21 A. & E. Ency. of Law (2nd Ed.), page 487, quoted with approval in *Drum v. Miller,* 135 N.C. 204 (p. 215), 47 S.E. 421, 65 L.R.A. 890, 102 Am. St. Rep. 528; *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63; *McIntyre v. Elevator Co.,* 230 N.C. 539, 54 S.E. 2d 45; *Lee v. Upholstery Co.,* 227 N.C. 88, 40 S.E. 2d 688.

In *Drum v. Miller, supra,* the court instructed the jury that before they could find for the plaintiff they "were required to find that the defendant was at the time able to foresee, by the exercise of ordinary care, not only that injury would result but that the particular injury which was received by the plaintiff would be the natural and probable consequence of his act." This instruction was held to be erroneous and prejudicial to the plaintiff.

Likewise, in the instant case, the assignment of error must be sustained. The plaintiff is entitled to a new trial and it is so ordered.

New trial.

D. C. RICHARDSON, PLAINTIFF, v. NELLIE RICHARDSON COOKE, DEFENDANT.

(Filed 21 October, 1953.)

APPEAL by defendant from *Stevens, J.,* at June Term, 1953, of CARTERET.

From papers filed in this Court by defendant, as appellant, it would seem that this is a special proceeding instituted for the purpose of selling land for partition; that there is in the Clerk's office a fund, the proceeds

of the sale of the land, for distribution; that at June Term, 1952, Judge Burney entered an order for distribution of the fund, from which order defendant attempted to appeal, but did not perfect the appeal; that at March Term, 1953, Judge Stevens entered an order purporting to grant defendant a continuance until June Term, 1953, to employ counsel and perfect her appeal, which he could not do under rules of practice; and that at June Term, 1953, Judge Stevens, after finding as facts that defendant had failed to produce bond as per the order of Judge Burney, or to employ counsel, or to file a case on appeal as ordered at March Term, 1953, entered an order dismissing the appeal of defendant, and ordering that the funds in custody of the Clerk be immediately distributed in accordance with the order of Judge Burney. By what authority this order was made does not appear. But it is from this order of Judge Stevens that this appeal is attempted.

However, the rules of the Supreme Court, governing appeals, have not been complied with: (1) The record proper, consisting of summons, pleadings, judgment, and orders, other than the Stevens order of June, 1953, are not contained in the papers filed in this Court as required by Rule 19 of Rules of Supreme Court—221 N.C. 553; (2) No appeal bond has been filed, as required by statute G.S. 1-270, G.S. 1-285, nor, in lieu thereof, provision for pauper appeal has been filed as permitted by statute G.S. 1-288; (3) No proper case on appeal has been settled and filed as required by G.S. 1-282 and G.S. 1-283; (4) The record has not been printed, or, in lieu thereof, typewritten copies furnished as required and permitted by Rule 22 of Rules of Supreme Court, 221 N.C. 559; and (5) Brief of defendant, as appellant, has not been printed, or, in lieu thereof, typewritten copies furnished, as required and permitted by the rules 27 and 28 of Rules of Supreme Court, 221 N.C. 562.

For defendant, appellant, in propria personam.
For plaintiff, appellee, no counsel.

PER CURIAM. In spite of, and disregarding an utter failure to present a record or case on appeal in compliance with the rules of the Court, and practice prescribed by statute in such cases, which merits a dismissal of the appeal, this Court has carefully reviewed the papers filed, and listened patiently to personal appeal of defendant, in her appearance before the Court, that she have an actual partition of the "Richardson Family Homeplace," the subject of the proceeding. And if there were merit in her desire for an actual partition, the record fails to show that defendant has preserved her right to present the question to this Court.

Therefore let the appeal be dismissed.

Appeal dismissed.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. THE MEAD CORPORATION.

(Filed 4 November, 1953.)

1. Utilities Commission § 5—

An appeal from the Utilities Commission must be determined upon the record as certified by the Commission, and the trial court has no authority to make additional findings of fact but may review the record only for error of law, and the findings of the Commission are conclusive unless they are not supported by competent, material and substantial evidence in view of the entire record. G.S. 62-26.10.

2. Electricity § 3—

A public service corporation must serve impartially customers receiving the same kind and degree of service regardless of whether they be competitors or not, and any difference in rates must be based upon substantial differences in service or conditions.

3. Same: Utilities Commission § 5—

The Utilities Commission concluded upon undisputed facts that there was no unlawful discrimination by a power company in the rates charged its commercial customers. *Held:* Whether the conclusion is supported by competent, material and substantial evidence in view of the entire record, presents a question of law for the decision of the court.

4. Electricity § 3—

A power company which is a subsidiary of one of its commercial customers may not give a preference to its parent corporation, but must give equal treatment to all its customers similarly situated, since having received the benefit of its charter privileges, including the power of eminent domain, it is chargeable with corresponding responsibilities in carrying on a business affected with a public interest.

5. Same—

A power company is not entitled to make differentials in rates between its customers based upon categories of service which have no substantial basis in fact, but may do so only upon classifications based on substantial difference in type or conditions of service.

6. Same—Conclusion that difference in rates was based on real difference in type of service held not supported by evidence in this case.

The undisputed facts were to the effect that a power company sold electricity to its parent corporation at approximately half the rate it charged its other commercial customers. It sought to justify the differential by asserting that the electricity sold its parent corporation was secondary power, while its other commercial customers were supplied primary or dependable power. The evidence further disclosed that the parent corporation purchased more than 80% of the electricity produced by the power company each year, and that the power company had constantly increased its plant capacity to furnish its parent corporation the power needed by it. *Held:* There was no evidence legally sufficient to support the conclusion

of the Utilities Commission that there was no unjust discrimination between the commercial customers of the power company, or justifying its order authorizing an increase in rates charged all commercial customers of the power company except its parent corporation, it being apparent that the designation of the electricity as primary and secondary power was a mere label applied to essentially the same service.

BARNHILL, J., concurring.

APPEAL by Nantahala Power & Light Co. from *Gwyn, J.*, JACKSON Superior Court, 29 June, 1953. Modified and affirmed.

This proceeding was instituted before the North Carolina Utilities Commission by the Nantahala Power & Light Co. by filing application for authority to cancel stated obsolete schedules to make certain service charges, and to increase the rates for electric power to industrial customers, alleging that rates now on file do not afford applicant adequate return on its investment.

To this application for authority to increase rates for electric current furnished industrial customers the Mead Corporation filed protest.

The Nantahala Power & Light Co. (hereinafter referred to as Nantahala) is a North Carolina public service corporation engaged in the business of generating, transmitting, distributing and selling electric power and energy in Western North Carolina. Its electric power is obtained from a number of dams located on mountain streams in the extreme western part of the State and has a rated installed capacity of 80,000 KW. It furnishes electric service to the people of six or seven counties and electric power for industrial purposes.

The Mead Corporation (hereinafter referred to as Mead) is an Ohio corporation domesticated in North Carolina and is engaged in the business of manufacturing pulp and paper at Sylva, North Carolina. It obtains its electric power for its industry from Nantahala.

The rate increase applied for by Nantahala would affect 16 industrial customers, and would increase the electric charge for Mead by the sum of $24,131.95 a year.

The stock of the Nantahala corporation is wholly owned by the Aluminum Corporation of America (hereinafter referred to as Alcoa) which is engaged in the production of aluminum, using electric power with plants in Tennessee. During the twelve months ended 30 June, 1952, Alcoa received from Nantahala 309,194,761 KWH, which constituted 81.65% of the total KWH sales made by Nantahala for which Alcoa paid at the rate of 2.3 mills per KWH, amounting to $711,147.95. This amount was 47.3% of Nantahala's total revenue from sales of electric energy for that period. So that 52.7% of Nantahala's revenue was paid for by those using 18.35% of its electric power. The rate charged Alcoa would not be affected by the proposed increase.

The Utilities Commission heard the evidence of the witnesses offered by applicant and protestant, and considered the exhibits filed. The Commission, through Commissioner Hunter, stated the question presented as follows: "Whether such an arrangement between Alcoa and its subsidiary, the applicant herein, amounts to a preference and an unlawful discrimination in favor of said parent company and to the prejudice of the other customers of the applicant is the principal question presented in this case."

The Commission summarized the facts shown by the testimony as follows:

"1. The Nantahala Power & Light Company, applicant herein, is a wholly-owned subsidiary of the Aluminum Company of America. Said applicant is a North Carolina corporation which was organized and began business in 1929 and has increased its generating plants, all of which are hydroelectric, from one plant in 1929 with a capacity of 1,400 KW to eight plants at present with a total capacity of 79,435 KW, and has increased its customers from 238 when it began business to 10,000 at present. All of its customers other than Alcoa are located in the extreme western portion of North Carolina in the counties of Cherokee, Clay, Graham, Jackson, Macon, and Swain. Alcoa is located in Tennessee.

"2. Approximately 8,000 of the 10,000 customers served by applicant are in the rural areas. It now serves 95% of the population in its service area and is extending its rural distribution lines at the rate of approximately 135 miles annually. The territory it serves is not only predominantly rural and sparsely populated with no large towns and with few industries, but is a very rugged mountain area in which construction and operating costs are high. It has in this area an interconnected transmission system of approximately 151 miles, a distribution system of 1,160 miles of lines, and for the twelve months ending June 30, 1952, had an average net investment of $17,002,764.46, which includes the usual allowance for working capital. Its income for return on said investment is now negative to the extent of $41,701, and with the proposed increase in rates its rate of return on said investment will still be negative, or in the red, to the extent of $26,856. It has reduced its rates many times since it began business in 1929, but has never requested or received an increase in rates and has never paid a dividend on its common stock. It has no preferred stock and no bonded indebtedness.

"3. Said sum of $17,002,764.46 has been advanced by Alcoa from time to time as the applicant's needs require, but Alcoa receives no consideration for its said investment in the applicant's electric plant other than the privilege and obligation of purchasing such power as the applicant has left over after serving its other customers. Under the present arrangement between said parties Alcoa pays for such left over or secondary

power two mills per KWH at the bus bar and pays the applicant an additional transmission rental charge of .3 of one mill per KWH, or a total of 2.3 mills per KWH. All line losses are borne by Alcoa.

"4. The price paid by Alcoa is just about cost. Applicant's production cost per KWH, including production plant depreciation, all operating expenses of the production plant, and the *ad valorem* taxes on the production plant, is 1.56 mills per KWH. Other expenses which may be fairly and properly allocated to Alcoa bring the cost of power purchased by it during the twelve months' period ending June 30, 1952, to 2.2 mills per KWH, or 1/10 of one mill per KWH less than the price paid by Alcoa.

"5. During World War II, applicant was required by the Federal Government to deliver all available power to Alcoa to the exclusion of some of its other customers. This was considered to be primary power and the price to Alcoa was 6.46 mills, or about 1.4 mills higher than the present price to The Mead Corporation. Since the war, applicant has sold to Alcoa only secondary power, or only such power as it has left after serving its other customers. The availability of such power in any desired quantity is uncertain and for that reason its price is low as compared with primary power. During the past year T.V.A. has sold secondary power to Alcoa as low as one mill per KWH.

"6. Should Alcoa receive credit on its power purchases from the applicant, an amount equal to 6% on its investment of $17,002,764.46 in said applicant company, Alcoa would have paid for secondary power the equivalent of 5.599 mills per KWH for the 309,194,760 KWH purchased during the twelve months' period ending June 30, 1952, as compared with 5.09 mills per KWH by The Mead Corporation for primary power and 5.98 mills per KWH which said corporation would have paid if the proposed rates had been in effect during said twelve months' period. It is also in evidence that Alcoa through the years has furnished and continues to furnish to the applicant engineering service and other technical services at less than cost at which the same may be obtained elsewhere and at much less than its value to applicant."

From the facts so found the Commission entered its conclusions and order as follows:

"A public utility is under a legal duty to serve all its customers alike without favor, preference or discrimination. A parent company which is also a customer stands in the same position as any other customer. It is entitled to no preferential treatment in either rates or service. Regulatory commissions and the courts have uniformly so held. *Re Aptos Water Co.* (Col.), P. U. R. 1929 C. 557; *Public Utilities Commission v. East Providence Water Co.* (R. I.), 136 Atl. 447; *City of Charleston v. Public Service Commission* (W. Va.), 120 S.E. 398; *Re Derby Gas & Electric*

Co. (Conn.), 75 P. U. R. (NS) 114. But a parent company is entitled to every consideration in rates and services given to other customers. That Alcoa is a large corporation with far-reaching connections and interests that enable it to take all the surplus power generated by the applicant, regardless of quantity and whenever available, should not operate to its prejudice or disadvantage. It is most improbable that any industrial customer other than Alcoa would be willing to obligate itself to purchase secondary power only at any price.

"Applying the well established and well recognized principle of equity and impartiality between customers to the facts in this case, we find no reason to condemn the arrangement between the applicant and Alcoa by which Alcoa obligates itself to purchase at 2.3 mills per KWH all power generated by the applicant in excess of the requirements of its other customers. Such an arrangement inures to the benefit of other customers for the reason that it obviates the necessity and expense of stand-by plants to meet the requirements during years or periods of water deficiency.

"The testimony does not disclose any discrimination in favor of Alcoa or that the other customers of the applicant are adversely affected by the relationship or course of dealing between Alcoa and the applicant. Their public utility operations do not follow conventional lines in that said public utility business is operated on a cost or no return basis, but to the advantage of all utility customers. Perhaps the purpose of requesting an increase in rates which will still produce insufficient revenue to yield a return on the investment is to effect a saving in taxes, but whatever the purpose, the effect is lower rates to all customers and the development of that part of Western North Carolina in which said public utility operates. No other section of the State is so favored with cheap dependable power available to such a large portion of the rural population.

"The Mead Corporation is in no position to complain about its power rates. It is understandable that it does not welcome a proposal to increase its power bill to the extent of approximately $2,000 per month, but its rates when measured by any accepted standard are low and with the proposed increase its rates will still be low. In its brief it makes certain comparisons between applicant's rates and the rates of other electric power companies. Companies operate under such different conditions that comparisons have very little value for rate-making purposes, but in comparing rates for such information as such a study reveals we find no industrial plant in North Carolina which now purchases as many kilowatt-hours of primary power for as little money as does The Mead Corporation. With the proposed increase in rates it will still be in a position to purchase more power from the applicant for less money than it could under any existing schedule from any other power company operating in North Carolina.

"It is in no position to complain about its rates as compared with the rates to Alcoa. It purchases primary power; Alcoa purchases only secondary power. It does not pay for line losses; Alcoa does. It does not have any investment in the applicant company; Alcoa has an investment in said company of approximately $17,000,000 on which it receives no return, in dividends, or otherwise. Considering its investment on which it has a right to earn a fair and reasonable return, it is paying indirectly but paying nonetheless a higher price for secondary power than The Mead Corporation pays for primary power, and with the proposed increase in rates it will still pay about the same price for secondary power that The Mead Corporation will pay for primary power.

"There is some question as to whether this Commission or the Federal Power Commission has jurisdiction over rates for power transmitted to Alcoa in Tennessee, but in any view of the facts of this case we are unable to find any unlawful discrimination against the North Carolina customers of the applicant or any just reason for denying the application for the proposed increase in rates.

"IT IS, THEREFORE, ORDERED that the Nantahala Power and Light Company be, and it is hereby authorized (a) to cancel Schedules A and F, (b) to make a charge of $2.00 plus 15c per mile traveled in reconnecting meters which have been removed and reinstalled within a period of twelve months, and (c) to publish and put into effect Schedule "PL" as set out in Exhibit A hereto attached, said rates and charges to apply on all bills rendered by the applicant from and after the 15th day of December 1952."

To the findings and order of the Utilities Commission The Mead Corporation filed petition to rehear. This was denied and Mead Corporation appealed to the Superior Court.

In the Superior Court Judge Gwyn, after considering the entire record and analyzing the evidence and the findings of the Commission, entered judgment as follows:

"The Nantahala Power and Light Company applied for authority to raise its rates on primary power on the ground that it is being required to sell its output of electrical energy at less than cost of production.

"Mr. John M. Archer, President of the petitioner, isolated the trouble in this case when he pointed out the necessity of holding in mind the difference between primary power and secondary power, the difference in the rate and the reason for the difference.

"During the year ending June 30, 1952, the petitioner generated and sold 378,557,840 kilowatt hours of electrical energy. Of the total output, 81.65%, or 309,194,760 kilowatt hours was purchased by the parent corporation, the Aluminum Company of America. The remaining 18.35% was purchased by other users. The Utilities Commission finds that the

Aluminum Company of America purchased only secondary power, whereas other users purchased primary power. The price received for secondary power was 2.3 mills per kilowatt-hour; the price for primary power was higher, The Mead Company paying 5.09 per kilowatt-hour.

"The crucial question is: What is primary power and what is secondary power? President Archer gave a clear-cut distinction between the two, which seems to be altogether reasonable. He testified that primary power is dependable power, and conversely, that secondary power is undependable. To use his language, 'Secondary power, yes, sir, that's something you can't depend on to operate a manufacturing plant.' Again, he testified: 'The parent corporation gets only secondary power and the industrial users are using prime power. That should be kept in mind. That is the difference in the rate, the reason for it.'

"It is therefore clear that secondary power must be sold at a lower rate than primary power. It is less valuable than primary power. It is available when the rivers are full, but it is uncertain. It is a surplus, a fluctuating excess. It is not certain to the extent that the producer is warranted in guaranteeing its delivery. In short, as President Archer puts it, it is 'undependable.' Primary power, on the other hand, is constant and regular. Its certainty is such that the producer is warranted in guaranteeing its delivery. It is 'dependable.' Because of its certainty and dependability it is more valuable than secondary power. It is sold at a higher price. The next question is: What part of the petitioner's output of electrical energy is primary power and what part secondary; what part is dependable and what part undependable? It is not given to any person to know in advance the exact line of division. However, experience over cycles of years affords a reasonable approach to what may be regarded as dependable and what undependable. President Archer gave a sort of 'rule of thumb,' which appears to have been a safe guide. Talking about regular production 'around the clock,' he testified: 'You install 100,000 kilowatts of hydro, you may expect to get 50,000 kilowatts capacity.' He testified further: 'We have a capacity, installed capacity, in generating stations today, something in excess of 80,000 kilowatts, based on the amount of generation to the twelve-month period ending June 30, 1952. That capacity amounts to slightly over 40,000 kilowatts; that is controlled, of course, by the amount of water we have in the rivers.' It would seem to be proper to correct a slight inaccuracy as to total capacity by quoting the President's earlier testimony when he said: 'At the moment, we have eight hydroelectric plants, in contrast to the application which said seven; we've put one plant in service in the last two weeks; total capacity of 79,435 kilowatts.' So, it appears that the production of 'slightly over 40,000 kilowatts' for the year ending June 30, 1952, was accomplished not with eight plants having a total capacity of 79,435

kilowatt-hours, but with seven plants. That year, it must be noted, was one of the very dry years. If, therefore, during one of the severest years in modern times the petitioner was able to produce hydroelectric power in excess of fifty per cent of its capacity, the validity of the rule of fifty per cent, as given by President Archer, would seem to be established. By all the rules and reason by which people in this field seek to ascertain reasonable certainty, it would seem that 50% of normal capacity could be safely counted upon. If that is true, and if we follow the rule suggested by the petitioner, through its President, 50% is primary power. The experience of the past is the proof. There is no evidence of record in this cause which is inconsistent with this conclusion.

"If, for the purpose of production, a rule may be adduced to determine the amount of dependable power which may be generated, it would seem that the same rule should be considered in selling the power produced. This the petitioner has not done. According to the label given it, the petitioner sells to the parent company, the Aluminum Company of America, only secondary or undependable power. The Utilities Commission seems to have accepted the label as importing verity without exploring the evidence to ascertain whether the label is true or false. It is the opinion of this Court that the label is false.

"For the purpose of selling its electrical output, the petitioner appears to have disregarded the rule of dependability in determining its value. The nearest approach to a 'selling rule' which the petitioner seems to have followed is that all power sold to the parent company must be regarded as secondary or undependable power and that only power sold to other users may be regarded as primary or dependable power. Until 1946 the petitioner sold primary power to the parent company. Since 1946 it has sold to the parent company only secondary power. For the year ending June 30, 1951, the parent company purchased 84% of the petitioner's total output as secondary power. Only the remainder, 16%, was sold as primary power. For the year ending June 30, 1950, the parent company purchased 89% as secondary power. The remainder, 11%, was sold as primary power. For the year ending June 30, 1949, the parent company purchased 90% as secondary power. The remainder, 10%, was sold as primary power. For the year ending June 30, 1948, the parent company purchased 89% as secondary power. The remainder, 11%, was sold as primary power. For the year ending June 30, 1947, the parent company purchased 92% of the petitioner's total production as secondary or undependable power. The remainder, 8%, was sold to other users as dependable or primary power. Thus, for the purpose of sale, the rule of dependability was disregarded and an altogether arbitrary rule followed. That rule seems to be that secondary or undependable power shall be co-extensive with the demands and purchases of the parent

company. By disregarding the rule of dependability, and by following the rule which the petitioner apparently has invoked, a much higher percentage of the petitioner's production could be regarded as secondary or undependable power, 95% or 96%, or 98%, or 99% plus could be so regarded, as was freely admitted by counsel representing the State on the oral argument. Thus the fallacy is manifest. The rule, if any, reduces itself to an absurdity.

"The rule to determine dependability must fix the point of dependability somewhere between Zero and 100% of normal capacity of production. That point, for practical purposes, would seem to be where the President placed it—50% of normal capacity production. If in one of the worst years for hydroelectric production only 18.35% was regarded as dependable power, then the petitioner has not had the right regard for the power it produced. By no known rule or stretch of the imagination could 81.65% of its production in such a year be considered or rightly called secondary or undependable. There is at least 31.65%, or the difference between 50% and 81.65%, which has been falsely named and falsely dealt with. Calling it secondary does not make it so. Giving it the wrong label does not conjure away the reality, and no amount of judicial legerdemain can change its true character and make undependable that which is in fact dependable. To raise the rates for those who use only 18.35% labeled as primary power and to allow the bulk, 81.65%, to be taken by the parent corporation at cost, or less, is like requiring too small a tail to wag too big a dog.

"This Court would join with the Utilities Commission and all others in their appreciation of the part the petitioner has taken in the development of Western North Carolina. The fact that its rates for primary power are lower than those of some other power companies is an advantage to the users. But that is not the test to determine whether there is discrimination. As stated in the order of the Commission, a public utility is under a legal duty to serve all its customers alike without favor, preference or discrimination. A parent company which is also a customer stands in the same position as any other customer. It is entitled to every consideration in rates and services given to other customers, but it is entitled to no preferential treatment in either rates or services.

"It is difficult to see how the relationship between the petitioner and its parent company squares with the law which governs that relationship. For 24 years the petitioner has engaged in the production of hydroelectric power. The President states that the Company is engaged in such business for profit. It has never earned a profit. Each fiscal year finds it consistently in the red. The Commission finds that the parent company owns all the stock in the petitioner; that its investment in the petitioner is approximately $17,000,000, on which it receives no returns, in divi-

dends or otherwise. Furthermore, the parent company furnishes valuable services annually to the petitioner for only nominal charges. The petitioner does not ask for an increase in rates sufficient to make a profit; in fact, it asks for such an increase as will insure a calculated loss. That loss, according to the petitioner, will be $26,856.00. The mystery deepens when it is considered that the petitioner regards 81.65% of its production (during a dry year) surplus or 'left over' power, and at the same time the parent company prepares to increase production by the construction of other plants.

"The petitioner is entitled to earn profits and the parent company is entitled to receive a fair return upon its investment. Public welfare demands it. Without profits private capital would cease to find its way into public utilities and the government would have to take over. The profit notion is the central idea of our free, competitive system. Therein lies the secret of efficiency, good business, the maximum flow of physical and intellectual energy, and our abundant life.

"It is embarrassingly obvious, upon this record, that the petitioner is operating not at a loss but at a profit which it has been able to conceal. Its service to the public is a valuable service and warrants the issuance of the State's Certificate of Convenience and Necessity and the exercise of the power of Eminent Domain, but its primary purpose seems to be to serve its parent company with primary power labeled as secondary. It has sold tremendous amounts of such power to the parent Company in the past. The prices charged the parent company have been consistently reduced from year to year, notwithstanding a consistent rise in cost of production. When the amount of power which the petitioner transmits to the parent company is threatened to be decreased by an increase of public users, the threat is promptly met by the establishment of other plants. The dry-year surplus of 81.65% was produced by seven plants. Within less than a year the eighth plant went into operation. Two other plants are on their way. For what purpose? Could it be to make the 18.35 dependable? . . .

"To allow the order of the Utilities Commission would be to allow discrimination. This Court is of the opinion that the record in its entirety is susceptible to no other interpretation. For the reasons set forth,

"IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the order of the Utilities Commission allowing the increase in rates be reversed. It is further ordered that the petitioner, Nantahala Power & Light Company, pay the costs of this appeal."

To this judgment the court later added the following sentence which had been omitted: "The record contains no evidence legally sufficient to support the interpretation given it by the Utilities Commission."

From the judgment reversing the order of the Utilities Commission the Nantahala Power & Light Co. appealed. The Utilities Commission did not appeal.

Jones & Jones and Joyner & Howison for Nantahala Power & Light Company, appellant.

John R. Jordan, Jr., Blanchard & Jordan, David M. Hall, Boyd Compton, and Smith, Schnacke & Compton for Mead Corporation, appellee.

DEVIN, C. J. This proceeding was instituted by the application of the Nantahala Power & Light Company to the Utilities Commission for authority to increase its rates for electric power distributed to customers for industrial purposes. Consequent upon an order by the Commission authorizing the increase and later denying the petition of Mead Corporation to rehear, the matter came on to be heard, on appeal, by the Judge of the Superior Court. From an adverse judgment in the Superior Court the appellant, the Nantahala Power & Light Company, brings the case here for review.

The statute governing procedure before the Utilities Commission prescribes the rules and extent of review on appeal from an order of the Commission. G.S. 62-26.10. This statute provides that on such appeal to the Superior Court the review shall be on the record certified by the Commission, and the cause heard by the judge without a jury who may reverse or modify the decision of the Commission if substantial rights have been prejudiced because of findings and conclusions which are "unsupported by competent, material and substantial evidence in view of the entire record submitted." *Utilities Com. v. R. R.*, 235 N.C. 273, 69 S.E. 2d 502; *Utilities Com. v. Fox*, 236 N.C. 553, 73 S.E. 2d 464. The statute further provides that upon appeal to the Superior Court the finding, determination or order of the Commission shall be *"prima facie* just and reasonable." G.S. 62-26.10. Appeals from the Utilities Commission are confined to questions of law, and on appeal the appellant may not rely upon grounds for relief which were not set forth in his petition for rehearing by the Commission. *Utilities Com. v. Coach Co.*, 233 N.C. 119, 63 S.E. 2d 113. There is no provision for additional findings of fact by the judge for the purpose of determining the validity of the order of the Commission brought in question. *Utilities Com. v. Fox, supra.*

At the outset in the statement of findings and conclusions by the Utilities Commission it was stated that the principal question presented was "whether the arrangement between Alcoa and its subsidiary, Nantahala Power Company, amounts to a preference and an unlawful discrimination in favor of the parent company and to the prejudice of the other customers of the applicant."

The statute G.S. 62-70 prohibits discrimination by a public service corporation in the following language: "No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this section."

The obligation of a public service corporation to serve impartially and without unjust discrimination is fundamental. *Lumber Co. v. R. R.*, 136 N.C. 479, 48 S.E. 813; *Garrison v. R. R.*, 150 N.C. 575, 64 S.E. 578; *Public Service Co. v. Power Co.*, 179 N.C. 18, 101 S.E. 593; *R. R. v. Power Co.*, 180 N.C. 422, 105 S.E. 28. It is not essential that consumers who are charged different rates for service should be competitors in order to invoke this principle. *Texas Power & Light Co. v. Doering Hotel Co.*, 147 S.W. 2d 879. There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. *Horner v. Electric Co.*, 153 N.C. 535, 69 S.E. 607; *Postal Tel-Cable Co. v. Associated Press*, 228 N.Y. 370.

The protestant, the Mead Corporation, does not directly attack the action of the Commission in authorizing the rate increase applied for as being in itself arbitrary, unreasonable or unjust, but it does contend that the whole question of rates is bound up in the basic and determinative question of the admitted substantial difference in the rates proposed to be charged the Mead Corporation, an industrial customer, and those for which Alcoa, also an industrial customer, is now and will continue to be charged, and that the order of the Commission would result in unreasonable discrimination and subject the Mead Corporation to an unreasonable disadvantage.

The position of the Nantahala Company is that the proposed increase in rates would still leave Mead in the position of paying a less rate than that charged by other power companies in other sections; that the difference in rates does not under the facts of this case constitute an unreasonable preference or discrimination, and that the Mead Corporation is not subjected to any unreasonable prejudice or disadvantage. It is contended that the difference in rates is reasonably based upon the distinction between primary and secondary power, the protestant having primary or dependable power, and Alcoa taking only what is left over or "dumped" upon it; and that there is a difference in the service afforded users of primary power and that received by users of secondary power; that line losses are borne by Alcoa and not by Mead; that Nantahala is entitled to a reasonable return on its investment of some seventeen million dollars,

and that with the increase in rates it would still be unable to earn a profit; that Nantahala and Alcoa were not competitors, and that the rates proposed apply to different classes of service.

Judge Gwyn studied the evidence and the findings of the Commission, and set out his conclusions thereon and the reasons therefor at length. He concluded that "the record contained no evidence legally sufficient to support the interpretation given it by the Utilities Commission"; that the record was susceptible to no other interpretation but that the order of the Commission would allow discrimination. He held that the record evidence did not support the finding that the difference in rates to two industrial users of electric power could be attributable to an arbitrary designation of one as primary and the other as secondary.

The facts are not in dispute. Upon them the Utilities Commission decided that "in any view of the facts of this case we are unable to find any unlawful discrimination against the North Carolina customers of the applicant (Nantahala), or any just reason for denying the application for the proposed increase in rates."

The judge held, however, that the record contained no evidence legally sufficient to support this interpretation, and upon that ground reversed the order of the Commission. Whether the findings and conclusions of the Utilities Commission were "unsupported by competent, material and substantial evidence in view of the entire record" presented a question of law for the decision of the Court. 42 A.J. 635. In that view Judge Gwyn held as a matter of law that the record was susceptible of no other interpretation but that the order of the Commission would allow an unreasonable discrimination, and that the rate increase based upon and concomitant with such discrimination was improvidently authorized. From an examination of the record we are inclined to the view that the ruling of the court below in principle should be upheld.

Here, according to the record, Alcoa owns all the capital stock of Nantahala which represents an investment of seventeen million dollars in hydroelectric plants in Western North Carolina. Presumably Alcoa furnished the capital for this enterprise. Alcoa uses electric power in enormous volume for the production of aluminum. It takes 81.65% of Nantahala's total generation of electric power for which it pays less than the cost of producing and distributing it. It derives no dividend or income from its ownership of Nantahala stock. Nantahala has other customers, including Mead, who are charged a higher rate and from whom it derives the major portion of its income. Nantahala has continued to expand its production through the years by adding to the number of its hydroelectric plants, but the percentage of resultant electric energy devoted to Alcoa has remained fairly constant. The more Nantahala expands the greater the volume of electric current Alcoa obtains at 2.3

mills per kilowatt hour. And Nantahala continues to derive the greater part of its revenue from customers other than Alcoa who consume only 18.35% of its power and are charged approximately twice as much per kilowatt hour as Alcoa pays.

The increase in rates applied for by Nantahala applies only to the industrial customers other than Alcoa. No increase in Alcoa's rate is contemplated. Among the reasons for presently asking authority to increase rates is that it will provide more revenue and enable Nantahala to put to use additional hydroelectric plants. The burden of rate increase is placed upon one particular group of customers.

Since Alcoa owns the entire stock of Nantahala ordinarily their dealings between themselves would be a matter of bookkeeping. But Nantahala is a separate legal entity, a corporation created under the laws of North Carolina and endowed with the powers, duties and obligations set forth in its charter, and as a corporation engaged in the production and distribution to the public of an essential utility it must be amenable to and required to observe all the laws and regulations prescribed for public service corporations, including the statutory prohibition against unreasonable discrimination among users of its service. Notwithstanding Alcoa is the parent corporation and Nantahala the subsidiary, when the dealings between them affect the rights of others, it cannot by unreasonable discrimination differentiate between customers entitled to the same kind and degree of service. *Public Service Co. v. Power Co., supra.* Having received the benefit of its chartered privileges, including the power of eminent domain, Nantahala must be chargeable with corresponding responsibilities in a business affected with a public interest. *Griffin v. Water Co.,* 122 N.C. 206, 30 S.E. 319. It was also in evidence from the director of accounting of the Utilities Commission that considering only the revenue afforded by customers using 18.35% of total energy, in relation to that proportion of capitalization and expense, it would show a return of 6.52%, whereas the service to all customers, including Alcoa at the rate paid, would show receipts less than operating expense. So it would seem the rate increase applied for would also increase the discriminations between Mead and Alcoa.

While the investment of Alcoa in hydroelectric plants and in the generation of electric energy from the flowing streams of Western North Carolina is to be commended, we do not think it is entitled to a return on its investment in Nantahala in the form of a preferential rate to the extent it would work to the disadvantage of other users of its electric service. 73 C.J.S. 1049. Nor is a parent corporation entitled to preference from its subsidiary. *Utilities Com. v. Water Co.,* 136 Atl. 447. There must be equal treatment of all customers of utilities similarly situated. *Columbia Baking Co. v. Atlanta Gas Light Co.,* 78 Ga. App. 241,

50 S.E. 2d 382. Both Alcoa and Mead are users of electric power for industrial purposes, the one to produce aluminum, the other, paper. But the rates proposed to be charged for this power as to Mead is double that charged to Alcoa.

Notwithstanding the evidence and the findings of the Utilities Commission showed that Alcoa was charged a rate for electric power less than half that charged Mead, the Commission concluded it was unable to find any unreasonable discrimination, and based this conclusion upon acceptance of the theory of primary and secondary power as contended by Nantahala. We agree with the judge below that the question of whether the power distributed to Alcoa was secondary power, and that to Mead primary, was to a large extent the mere application of different labels to that which is essentially the same. True, there was some difference in the service and in the expense of transmission, and to some extent the electric power received by Alcoa was what was denominated undependable, but these were in no way comparable to the difference in rates which was so glaring as to compel the inference that it was unreasonable and therefore unlawful. Rates may be fixed in view of dissimilarities in conditions of service, but there must be some reasonable proportion between the variance in the conditions and the variances in the charges. *Postal Tel-Cable Co. v. Associated Press,* 228 N.Y. 370. Classification must be based on substantial difference. *Laundry, Inc., v. Pub. Serv. Com.,* 327 Mo. 93.

The judgment of Judge Gwyn determined from the entire record including the findings and conclusions of the Utilities Commission that there was no substantial evidence to support the finding of the Commission that the applicant, the Nantahala Power & Light Company, sold to its parent corporation, Alcoa, only "secondary power"; that there was no evidence legally sufficient to support the finding "that the Utilities Commission was unable to find therefrom (the entire record) any unjust discrimination," and that the order of the Utilities Commission, based on findings without support in the evidence, authorizing an increase in rates by Nantahala for all users of electric power for industrial purposes except Alcoa, would be to allow unreasonable discrimination, and was erroneously entered.

To this extent the judgment below is affirmed, and the cause is remanded to the Superior Court of Macon County, to the end that it be remanded to the Utilities Commission for such findings and orders in the premises as may be proper, not inconsistent with this opinion.

Modified and affirmed.

BARNHILL, J., concurring: While I concur fully in the majority opinion, there are certain facts appearing of record to which I wish to

direct particular attention. The petitioner, a wholly owned subsidiary of Alcoa, began business as a public utility or *quasi*-public corporation in 1929. It then had one plant with a capacity of 1400 KWH. When the petition herein was filed it had increased its plants to seven with a capacity of 79,435 KWH—56.7 times greater than at the beginning. One plant has been put in operation since this proceeding was instituted. Two other plants are now in process of construction. This has been accomplished without increasing its capital stock or incurring any bonded indebtedness. The parent company has furnished the necessary funds.

Petitioner's fiscal year ends on June 30. During the fiscal year 1947 it delivered 92% of its total output to Alcoa, in 1948, 89%, in 1949, 90%, in 1950, 89%, in 1951, 84%, and in 1952, 81.35%. Mead paid 5.09 mills per KWH for the power it consumed, and Alcoa paid 2.3 mills which was approximately the cost of production. "The price paid by Alcoa is just about cost."

In 1952 Alcoa, which received 81.35% of petitioner's total production of power, paid only 47.3% of petitioner's total revenue while those who purchased only 18.65% paid 52.7% thereof.

Thus it appears that petitioner has sold to local consumers a minimum of 8% and a maximum of 18.65% of its total production during the past seven years. Why then this constant increase in productive capacity? The answer is self-evident.

In view of these and other facts appearing in the record, to assert that the electric power retailed to North Carolina customers constitutes all the primary power produced by petitioner and the total amount delivered to Alcoa is secondary power so as to justify the present and proposed discriminations in rates in favor of Alcoa, or to contend that this is a proper basis for the decided differential in rates serves only to challenge the intelligence of the Court.

But Alcoa is under contract to purchase all the secondary power produced by petitioner. By reason thereof, Alcoa is compelled at times to accept and pay for electric current it cannot use. So it is argued. I have no doubt the contract between petitioner and Alcoa, upon its face, is wholly sufficient to make it appear that it is a contract between a public service corporation and a customer for the purchase and sale of secondary power. No doubt every wherefore and whereas to that end is included, and not a jot or tittle is omitted. Even so, the fact remains that this record will not sustain the contention that more than 81% of the petitioner's production is secondary power.

"Giving it the wrong label does not conjure away the reality, and no amount of judicial legerdemain can change its true character and make undependable that which is in fact dependable . . . Calling it secondary power does not make it so."

Corporations must operate on a profit motive basis. Not so with petitioner. Financed as it is, it can afford—indeed it proposes—to operate at an apparent loss. By so doing it can evade the payment of its fair portion of State and Federal taxes.

Unquestionably local customers of petitioner enjoy special benefits from the arrangement now in existence between it and Alcoa, and the arrangement has contributed to the development of the extreme western section of North Carolina. Local customers are entitled to these benefits in exchange for the special advantages and privileges acquired and enjoyed by petitioner and its parent corporation. It could well afford to retail the minor percentage of its total product which it sells to local customers in exchange for these privileges. Certainly the mere fact its rates are lower than those of other companies who are not financed and controlled by a giant parent-customer does not justify increasing the cost to Mead by $2,000 per month so as to further protect Alcoa and assure the continued delivery to it, at cost, of more than 80% of petitioner's total output of electric power.

Judge Gwyn's judgment reversing the order of the Utilities Commission appears in full in the statement of facts which accompanies the majority opinion. I therefore refrain from quoting some of the more striking and thought-provoking comments and observations therein contained. (See p. 456 *et seq.* of majority opinion.) Suffice it to say at this time that they should command the careful attention of all the right-thinking citizens of the State.

Judge Gwyn possesses a fine judicial temperament and sound judgment. His fairness to all litigants is generally recognized. He is painstakingly deliberate in the discharge of his judicial duties. He has never posed as the guardian and protector of "the people" against the "predatory aims of entrenched wealth." I am therefore confident that he incorporated these pertinent comments in his judgment only after long and prayerful consideration. In my opinion, the facts disclosed by this record fully justify what he has to say.

Neither this Court nor his can give relief against the conditions he so graphically points out. Yet his comments should serve to give notice to the public officials or agencies, having the power to act, that the time is at hand when these conditions should receive prompt and careful attention. If they will only cut through the form to the substance, they will find just another hydroelectric power producing agency of Alcoa, retailing just enough of its production—less than 20%—to permit it to pose as a *quasi*-public corporation with the right to use the water power resources of this State, exercise the power of eminent domain, and enjoy the other monopolistic privileges accorded a public utility while it was, in fact,

created and exists primarily to serve its master which seeks and must have low-cost hydroelectric power.

Fortunately, the corporations of North Carolina, both large and small, have diligently sought to exercise their corporate powers under the law in accord with the free enterprise concept of our form of government. Seldom indeed is a situation such as the one disclosed by this record brought to light in the course of litigation or otherwise. I am certain its parallel does not exist elsewhere in this State.

Perhaps some may think the question it poses is no concern of this Court or any of its members. Certainly this Court cannot remedy the condition in this proceeding. We may only decide the legal questions presented by the appeal. Even so, I would not surrender or forego the right to direct attention to the note of warning contained in Judge Gwyn's judgment in exchange for any office within the purview of our system of government.

It must be distinctly understood that nothing I have said is intended or should be construed as a criticism of attorneys who represent petitioner. It was entitled to counsel, and the attorneys selected are men of recognized ability and standing in the legal profession. They presented the cause of petitioner in a concise, logical, and forceful manner, in accord with the best traditions of the legal profession. In so doing, their conduct at all times has been above reproach.

I join the other members of the Court in voting to affirm the judgment entered in the court below.

HANDLEY MOTOR COMPANY, INC., v. E. A. WOOD AND W. W. WINSTEAD, TRADING AS W & W MOTOR COMPANY.

(Filed 4 November, 1953.)

1. Appeal and Error § 51a—

Where the decision upon appeal points out the crucial facts upon which the rights of the parties depend, the decision is the law of the case in respect to the issues, and in a subsequent trial upon substantially the same evidence the cause is properly submitted upon issues presenting to the jury in an ample manner the crucial facts as pointed out in the former decision, and appellant may not contend on a subsequent appeal that the trial court erred in refusing to submit another issue tendered.

2. Courts § 14—

Where, in an action instituted in this State, the rights of the parties depend upon the legal effect of a sale made in another state, the law of such other state controls the question.

3. Evidence § 3—

G.S. 8-4 requires the courts of this State to take judicial notice of the applicable law of another state.

4. Sales § 12: Automobiles § 5: Payment § 2—Where check given in payment of cash sale is dishonored, owner does not part with title and in absence of estoppel may claim chattel from bona fide purchaser.

The automobile in question was purchased in Pennsylvania from plaintiff. The purchaser gave a check in payment of the purchase price, which check was dishonored upon presentation. The purchaser sold the car to another dealer, and defendants acquired possession through *mesne* purchases from such dealer. The verdict of the jury established that the original purchase of the car was a cash sale. *Held:* Under the law of Pennsylvania title did not pass from plaintiff, and in the absence of estoppel, plaintiff is entitled to reclaim the chattel from defendants notwithstanding that defendants are *bona fide* purchasers for value or claim from or under *bona fide* purchasers. The distinction obtaining when the owner is induced to part with title through fraud is pointed out.

5. Pleadings § 22c—

A motion to amend after time for answering has expired is addressed to the discretion of the trial court, and the court's ruling thereon will not be reviewed on appeal unless a prejudicial abuse of discretion is clearly shown.

APPEAL by defendants from *Judge Joseph W. Parker,* and a jury, at June Term, 1953, of WILSON.

Civil action for the recovery of an automobile.

The facts are narrated in the numbered paragraphs which follow.

1. The plaintiff Handley Motor Company, Inc., deals in automobiles in the District of Columbia; Adolph Mozes, trading as Mozes Autos, wholesales second-hand automobiles in Pennsylvania; and the defendants E. A. Wood and W. W. Winstead, trading as W & W Motor Company, retail second-hand automobiles in North Carolina.

2. On 6 January, 1951, the plaintiff had the following transaction with James P. Junghans, Jr., who was allegedly a stranger to it, in the District of Columbia: Plaintiff and Junghans made a contract whereby plaintiff agreed to sell Junghans one of its new Ford cars for a cash price of $1,897.50. Junghans paid plaintiff $50.00 in cash thereon, and gave plaintiff his check for $1,847.50 on a District of Columbia bank for the remainder. Plaintiff believed the check to be good, and accepted it as the means of payment of the remainder of the sale price. As a consequence, plaintiff delivered the Ford car to Junghans. But plaintiff did not furnish Junghans any muniment of title. The check was found to be worthless on its due presentation to the bank.

3. These transactions occurred within the 24 hours next succeeding the delivery of the Ford car to Junghans: Junghans undertook to sell

the car to Leonard Goldberg for $1,835.00; Leonard Goldberg undertook to sell it to Lee Motors for $1,885.00; Lee Motors undertook to sell it to Adolph Mozes, trading as Mozes Autos, for $1,910.00; and Adolph Mozes, trading as Mozes Autos, undertook to sell it to the defendants for $2,000.00. Each transaction was sufficient *in form* to effect a transfer of the title to the Ford car. The transaction between Junghans and Goldberg took place either in the District of Columbia or Maryland. All the other transactions mentioned in this paragraph transpired in Pennsylvania.

4. Adolph Mozes, trading as Mozes Autos, delivered the Ford car to the defendants in Pennsylvania. They forthwith removed it to their place of business in Wilson County, North Carolina, where they offered it for sale.

5. Shortly thereafter the plaintiff discovered the whereabouts of the Ford car, and brought this action against the defendants for its recovery. The plaintiff sued out ancillary claim and delivery process in the action, but the defendants retained the car under an undertaking for replevy.

6. The pleadings of the parties, which consisted of a complaint, answer, and reply, placed in issue the title of the Ford car, and the right to its possession. They also sufficed to put in issue the allegation of the answer that the defendants "purchased said automobile for a valuable consideration without notice from . . . James P. Junghans, Jr., through *mesne* conveyances." The defendants did not allege, however, that the plaintiff was precluded by its conduct from denying the authority of Junghans to sell the car. The defendants were subsequently permitted to amend their answer so as to plead in express terms that their immediate predecessor, Adolph Mozes, trading as Mozes Autos, was a *bona fide* purchaser.

7. This action has been tried twice. The first trial was conducted before Judge Clawson L. Williams and a jury at the September Term, 1952, of the Superior Court of Wilson County. Both sides presented evidence at that time. Judge Williams submitted this issue to the jury: "Is the plaintiff the owner and entitled to the possession of the Ford automobile described and referred to in the complaint?" He charged the jury . . . as follows: "If you find the facts to be as all the evidence tends to show, you will answer the . . . issue No." The jury answered the issue "No," and Judge Williams adjudged that the defendants owned the Ford car and were entitled to its immediate possession. The plaintiff excepted to this judgment and appealed, assigning errors.

8. The case came before this Court on the plaintiff's appeal at the Spring Term, 1953, and is reported in *Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312, where the pleadings are analyzed and the evidence at the first trial is stated in an able and thorough opinion which *Justice R. Hunt Parker* wrote for the Court.

9. This Court awarded the plaintiff a new trial on the grounds that Judge Williams had erred in his peremptory instruction to the jury and that issues determinative of the entire controversy between the parties had not been submitted to the jury.

10. This Court held on the plaintiff's appeal that the peremptory instruction in favor of the defendants was erroneous for these reasons: "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. . . . 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."

11. This Court also held, in essence, that the pleadings raised these issues of fact: Whether the transaction between the plaintiff and Junghans in respect to the Ford car was a cash sale: whether Junghans paid the purchase price for the car with a worthless check; and whether the defendants, or Adolph Mozes, trading as Mozes Autos, or Lee Motors, or Leonard Goldberg acquired the car under a *bona fide* purchase. Since the question was not before it for decision on the plaintiff's appeal, this Court refrained from expressing any opinion as to what the legal rights of the parties would be if the jury on the retrial of the action should answer an issue of *bona fide* purchase in favor of the defendants and the other issues in favor of the plaintiff. It did point out, however, that the weight of authority in the country as a whole would require a judgment for the plaintiff if such findings should be made by the jury.

12. The second trial of the action was had before Judge Joseph W. Parker and a jury at the June Term, 1953, of the Superior Court of Wilson County. The parties offered substantially the same evidence at that time as that presented by them at the first trial. The defendants did not contend at the second trial that either Leonard Goldberg or Lee Motors took the Ford car as a *bona fide* purchaser. Issues were submitted to and answered by the jury as follows: (1) Was the sale of the Ford automobile described in the complaint by Handley Motor Company, Inc., to J. P. Junghans, Jr., a cash transaction, as alleged in the complaint? Answer: Yes. (2) Was the check given by J. P. Junghans, Jr., to Handley Motor Company, Inc., for $1,847.50, as payment for the balance

of the purchase price of said Ford automobile worthless as alleged in the complaint? Answer: Yes. (3) Was Mozes Autos an innocent purchaser of said Ford automobile for value without notice? Answer: Yes. (4) Are the defendants innocent purchasers of said Ford automobile for value without notice? Answer: Yes. (5) Is the plaintiff the owner and entitled to the possession of the Ford automobile described in the complaint? Answer: Yes. (6) What was the value of said Ford automobile at the time it was taken under the writ of claim and delivery in this action? Answer: $1,847.50.

13. The trial judge concluded as a matter of law on the verdict that the plaintiff owned the Ford car and was entitled to its immediate possession. He thereupon adjudged that the plaintiff should recover the car, if delivery could be had, and that the plaintiff should recover the value of the car, *i.e.*, $1,847.50, from defendants and the surety on their undertaking for replevy, with appropriate interest, if delivery could not be had.

14. The defendants appealed from this judgment. They assign as error the action of the trial judge in denying their motion for leave to amend their answer so as to plead the affirmative defense of estoppel; in refusing to submit to the jury the issue tendered by them; in instructing the jury that "it would have to answer the fifth issue Yes . . . if it answered the first and second issues Yes"; in refusing to set aside the verdict on the fifth issue on the ground that it was "contrary to the evidence and the law"; and in entering the judgment.

Gardner, Connor & Lee for plaintiff, appellee.
Carr & Gibbons for defendants, appellants.

ERVIN, J. The defendants tendered this issue: "Was it the intent of Handley Motor Company and James P. Junghans, Jr., that legal title to the Ford automobile should pass to Junghans at the time Junghans' check was given in payment?" They asked the trial judge to submit such issue to the jury instead of the first and second issues or in addition to them, and saved an exception to his refusal to pursue either of these courses.

The defendants stressfully contend that the submission of this issue to the jury was essential to the determination of the crucial factual question whether or not the legal title of the Ford car passed from the plaintiff to Junghans. We are precluded from considering this contention as an original proposition by this rule: Where the evidence on a second or succeeding appeal is substantially the same as that on the first or preceding appeal, the matters adjudicated on the first or preceding appeal constitute the law of the case and will not be reconsidered or readjudicated on the second or succeeding appeal. *Bruce v. Flying Service,* 234 N.C. 79, 66

S.E. 2d 312; *Cannon v. Cannon,* 226 N.C. 634, 39 S.E. 2d 821; *Cheshire v. First Presbyterian Church,* 222 N.C. 280, 22 S.E. 2d 566; *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366.

The evidence on the first trial and the former appeal is substantially the same as that on the second trial and this appeal. This Court held in express terms on the former appeal that "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." *Motor Co. v. Wood, supra.* It thus appears that under the law of the case the first and second issues presented to the jury in an ample manner the crucial factual question whether or not the legal title to the Ford car passed from the plaintiff to Junghans. As a consequence, there was no need for the trial judge to submit to the jury the issue tendered by the defendants.

The trial judge utilized the fifth issue as a mere vehicle for the conveyance of his legal conclusion that the affirmative answers of the jury to the first and second issues entitled the plaintiff to recover the automobile from the defendants despite the facts that the defendants and their immediate predecessor, Adolph Mozes, trading as Mozes Autos, were *bona fide* purchasers. For this reason, we attribute no factual significance whatever to the answer of the jury to the fifth issue, and deem it wholly unnecessary to discuss the exceptions relating to that issue.

The exception to the entry of the judgment raises the legal question whether the findings of the jury on the other issues support the decision of the court in respect to the rights of the parties.

This legal question becomes more intelligible when it is stated in this fashion: Where the seller contracts to sell a chattel to the buyer for cash, and the seller accepts a check from the buyer as a means of payment of the cash and delivers the chattel to the buyer in the belief that the check is good and will be paid on presentation, and the check proves to be worthless or is dishonored on due presentation, can the seller reclaim the chattel from a *bona fide* purchaser from or under the buyer, or from the vendee of a *bona fide* purchaser from or under the buyer, if the seller has not been guilty of such conduct as will create an estoppel against him?

The trial judge answered this question in the affirmative when he entered the judgment. Counsel for the defendants assert with much earnestness and eloquence that he erred in so doing.

Since the transaction between the defendants and Adolph Mozes, trading as Mozes Autos, and the transaction between Adolph Mozes, trading as Mozes Autos, and Lee Motors occurred in Pennsylvania, we must look to the law of that State for the answer to the question. *Ellison v. Hunsinger,* 237 N.C. 619, 75 S.E. 2d 884; *Motor Co. v. Wood, supra; Price*

v. Goodman, 226 N.C. 223, 37 S.E. 2d 592. The statute now codified as G.S. 8-4 requires us to take judicial notice of the law of Pennsylvania governing the matter under consideration. *Suskin v. Hodges,* 216 N.C. 333, 4 S.E. 2d 891.

Diligent search fails to uncover a Pennsylvania decision passing squarely upon the question under present consideration. A conflict of authority exists in the other jurisdictions whose courts have had occasion to make direct pronouncement on the subject. Williston on Contracts (Rev. Ed.), sections 730-733; Williston on Sales (Rev. Ed.), section 346a; 46 Am. Jur., Sales, section 478; 77 C.J.S., Sales, sections 266, 294c. We take note of certain related rules of law which obtain in Pennsylvania before considering the conflict of authority on the specific question now before us. These related rules are as follows:

1. A cash sale is one in which the title to the property and the purchase price pass simultaneously, and the title remains in the seller until the purchase price is paid, even though possession of the property is delivered to the buyer. *United States v. Lutz,* 142 F. 2d 985; *Frech v. Lewis,* 218 Pa. 141, 67 A. 45, 11 L.R.A. (N.S.) 948, 120 Am. S. R. 864, 11 Ann. Cas. 545; *Werley v. Dunn,* 56 Pa. Super. 254; *Frech v. Lewis,* 32 Pa. Super. 279; *Windle v. Moore* (Pa.), 1 Chest. Co. Rep. 409; *Refining & Storage Co. v. Miller* (Pa.), 7 Phila. 97; Williston on Contracts (Rev. Ed.), sections 730-733; 77 C.J.S., Sales, section 262.

2. Even a *bona fide* purchaser of a chattel acquires no property right in it at common law or in equity as against the true owner, if it is sold by a third person who, although in possession, has no title to it, unless the true owner authorizes or ratifies the sale, or is precluded by his own conduct from denying the third person's authority to make it. *Kendall Produce Co. v. Terminal Warehouse & Transfer Co.,* 295 Pa. 450, 145 A. 511; *Mackay v. Benjamin Franklin Realty & Holding Co.,* 288 Pa. 207, 135 A. 613, 50 A.L.R. 1164; *Loitch v. Sanford Motor Truck Co.,* 279 Pa. 160, 123 A. 658; *McQuade v. North American Smelting Co.,* 208 Pa. 504, 57 A. 984; *Quinn v. Davis,* 78 Pa. 15; *O'Connor v. Clark,* 170 Pa. 318, 32 A. 1029, 29 L.R.A. 607; *Miller Piano Co. v. Parker,* 155 Pa. 208, 26 A. 303, 35 Am. S. R. 873; *McMahon v. Sloan,* 12 Pa. 229, 51 Am. D. 303; *Werley v. Dunn, supra;* 46 Am. Jur., Sales, section 464; 77 C.J.S., Sales, section 295.

3. The rule stated in the preceding paragraph is embodied in the provision of the Uniform Sales Act and the statutory law of Pennsylvania that "subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." Uni-

form Sales Act, section 23 (1); Purdon's Pennsylvania Statutes (1936 Compact Edition), title 69, section 201.

4. "In determining what protection is afforded to a *bona fide* purchaser of goods obtained by fraud, the nature and effect of the fraud practiced, rather than the mere presence or existence of fraud, is controlling." 77 C.J.S., Sales, section 294. This is true because in the absence of an estoppel, one is not entitled to protection as a *bona fide* purchaser unless he holds the legal title to the property in dispute. *Jones v. Zollicoffer,* 4 N.C. 645, 7 Am. D. 708; 46 Am. Jur., Sales, section 464; 77 C.J.S., Sales, section 288. As a consequence, an owner who is induced by the fraud of the buyer to part with the possession of his chattel, and no more, can reclaim it from a *bona fide* purchaser from or under the fraudulent buyer, unless the *bona fide* purchaser can bring himself within the protection of some principle of estoppel. *Levy v. Cooke,* 143 Pa. 607, 22 A. 857; *Neff v. Landis,* 110 Pa. 204, 1 A. 177; *Barker v. Dinsmore,* 72 Pa. 427, 13 Am. S. R. 697; *Werley v. Dunn, supra;* 46 Am. Jur., Sales, section 470; 77 C.J.S., Sales, section 294. But an owner who is induced by the fraud of the buyer to part with the legal title to his chattel cannot recover it from a *bona fide* purchaser from or under the fraudulent buyer. *Levy v. Cooke, supra; Neff v. Landis, supra; Sinclair v. Healy,* 40 Pa. 417, 80 Am. D. 589; *Smith v. Smith,* 21 Pa. 367, 60 Am. D. 51; *McKinley v. McGregor,* 3 Whart. (Pa.), 369, 31 Am. D. 522; *G. I. Motors v. Broadway Motors,* 172 Pa. Super. 492, 94 A. 2d 201.

5. The rule stated in the preceding paragraph is incorporated in the provision of the Uniform Sales Act and the statutory law of Pennsylvania that "when the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title." Uniform Sales Act, section 24; Purdon's Pennsylvania Statutes (1936 Compact Edition), title 69, section 202.

6. "After property has passed into the hands of a *bona fide* purchaser, every subsequent purchaser stands in the shoes of such *bona fide* purchaser and is entitled to the same protection as the *bona fide* purchaser, irrespective of notice, unless such purchaser was a former purchaser, with notice, of the same property prior to its sale to the *bona fide* purchaser." 77 C.J.S., Sales, section 296d. See, also, in this connection: *Seeley v. Garey,* 109 Pa. 301, 5 A. 666.

We return at this juncture to the conflict of authority outside Pennsylvania on the precise point under consideration. The first line of authority declares that, nothing else appearing, where a chattel is sold for cash, and a check is tendered as the cash payment, and the seller delivers the chattel to the buyer, no title whatever passes from the seller to the buyer until

the check is paid or honored; and that in the absence of some estoppel on his part, the seller can reclaim the chattel from a *bona fide* purchaser from or under the buyer, or from a subsequent purchaser from or under such *bona fide* purchaser, in case the check is not paid or honored on due presentation. *Motor Co. v. Wood, supra; De Vries v. Sig Ellington & Co.*, 100 F. Supp. 781; *Davidson v. Conner*, 254 Ala. 38, 46 So. 2d 832; *Moore v. Long*, 250 Ala. 47, 33 So. 2d 6; *Barksdale v. Banks*, 206 Ala. 567, 90 So. 913; *McClure Motor Co. v. McClain*, 34 Ala. App. 614, 42 So. 2d 266; *Dobbins v. Martin Buick Co.*, 216 Ark. 861, 227 S.W. 2d 620; *Pugh v. Camp*, 213 Ark. 282, 210 S.W. 2d 120; *Sykes v. Carmack*, 211 Ark. 288, 202 S.W. 2d 765; *Clark v. Hamilton Diamond Co.*, 209 Cal. 1, 284 P. 915; *Gustafson v. Equitable Loan Assoc.*, 186 Minn. 236, 243 N.W. 106; *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N.W. 342, 9 L.R.A. 263, 20 Am. S. R. 566; *Brotchener v. Ullman*, 141 Misc. 102, 252 N.Y.S. 244; *Plummer v. Kingsley*, 190 Or. 378, 226 P. 2d 297; *Johnson v. IanKovetz*, 57 Or. 24, 102 P. 799, 110 P. 398; *Ohio Motors, Inc., v. Russell, Inc.*, 193 Tenn. 524, 246 S.W. 2d 962; *Hale Co. v. Beley Cotton Co.*, 154 Tenn. 689, 290 S.W. 994; *Young v. Harris-Costner Co.*, 152 Tenn. 15, 268 S.W. 125, 54 A.L.R. 516; *Cowan v. Thompson*, 25 Tenn. App. 130, 152 S.W. 2d 1036; *Goze v. Brooks* (Tex. Civ. App.), 279 S.W. 979; *Richardson v. Seattle First Nat. Bk.*, 38 Wash. 2d 314, 229 P. 2d 341; *Frye v. Boltman*, 182 Wash. 447, 47 P. 2d 839; *Quality Shingle Co. v. Old Oregon Lumber & Shingle Co.*, 110 Wash. 60, 187 P. 705; Williston on Contracts (Rev. Ed.), sections 730-733; Williston on Sales (Rev. Ed.), section 346a; 46 Am. Jur., Sales, section 478; 77 C.J.S., Sales, sections 266, 294c. The second line of authority holds that, nothing else appearing, where the parties bargain for the cash sale of a chattel which the seller delivers to the buyer, and payment of the purchase price is made by a check which afterwards proves to be worthless, a voidable legal title passes from the seller to the buyer; and that in consequence a *bona fide* purchaser acquires an indefeasible title to the chattel if he purchases it from or under the buyer before his voidable title is avoided by the seller. Williston on Contracts (Rev. Ed.), sections 730-733; Williston on Sales (Rev. Ed.), section 346a; 46 Am. Jur., Sales, section 478; 77 C.J.S., Sales, sections 266, 294c, 296b.

The courts of Pennsylvania have adhered without variableness or shadow of turning to the rule that on a cash sale of personal property the legal title remains in the seller until the purchase price is paid, even though possession of the property is delivered to the buyer. For this reason, we are constrained to conclude that when it accepted the worthless check tendered by Junghans and delivered its Ford automobile to him, the plaintiff parted with the possession of the automobile, and nothing more. This conclusion assigns Pennsylvania to a place among the juris-

dictions where the first line of authority obtains, and enables the plaintiff to reclaim the automobile from the defendants, notwithstanding the facts that the defendants are *bona fide* purchasers and vendees of a *bona fide* purchaser. Our conclusion on this phase of the controversy harmonizes with the *obiter dicta* supporting the first of the headnotes which precede the opinion of the Superior Court of Pennsylvania in *Werley v. Dunn, supra.* This headnote is couched in these words: "Where on a sale of goods the price is to be paid partly by notes and partly in cash, and the seller delivers the goods, accepts a note and a check, and the check is not paid because there are no funds in bank, title to the goods does not pass, and the seller may pursue them in the hands of an innocent purchaser for value."

The exception to the denial of the motion of the defendants for permission to amend their answer so as to allege that the plaintiff was estopped by its conduct from denying the authority of Junghans to sell the Ford automobile is untenable.

The action pended for 28 months before the motion to amend was made. It is settled procedural law in this State that a motion to amend an answer in an action pending in the Superior Court after the time for answering has expired is addressed to the discretion of the Superior Court, and that the ruling of the Superior Court on the motion to amend will not be reviewed by the Supreme Court on appeal, unless a prejudicial abuse of its discretion by the Superior Court is clearly shown. *Hardy v. Mayo,* 224 N.C. 558, 31 S.E. 2d 748.

There is no basis for any contention that the Superior Court abused its discretion in disallowing the motion to amend the answer. Indeed, it affirmatively appears that it would have profited the defendants nothing had their motion to amend their answer been granted. Since the evidence offered by the parties at the second trial was substantially the same as that presented by them at the first, the observation of this Court on the former appeal that "there is no . . . evidence to support . . . (a) . . . plea of estoppel" still applies to this case with undiminished vigor. *Motor Co. v. Wood, supra.*

The judgment of the Superior Court must be upheld, for there is in law No error.

STATE TRUST COMPANY v. M & J FINANCE CORPORATION AND J. W. CASE.

(Filed 4 November, 1953.)

1. Automobiles § 5: Chattel Mortgages § 10e: Estoppel § 6d—

Where the mortgagor is left in possession of goods to be disposed of by him in the ordinary course of trade pursuant to an understanding between the parties, the mortgagor is the agent of the mortgagee to the extent that he may pass title to the goods, free of the mortgage lien, to a purchaser in the usual course of trade.

2. Same—

Where the evidence is conflicting as to whether the mortgagor in possession had authority or permission, in the course of dealings between the parties, to sell the chattels unless the mortgage debt was first paid off, or authority to collect any money for the mortgagee, an issue of fact is raised, and upon the determination of the issue as to estoppel by conduct in favor of the mortgagee, such mortgagee under his duly registered mortgage has priority of lien over a subsequent mortgagee or purchaser.

3. Trial § 55—

Where the parties agree that the court should find the facts, findings by the court have the force and effect of a verdict by a jury and are conclusive on appeal if they are supported by evidence. G.S. 1-184.

APPEAL by defendant M & J Finance Corporation from *Sink, J.*, at April-May Mixed Term, 1953, of HENDERSON.

Civil action for the recovery of personal property, to wit, a certain automobile under chattel mortgage,—resort being had to the ancillary remedy of claim and delivery. Article 36 of Chapter One of General Statutes.

Plaintiff in its complaint alleges, and on trial in Superior Court offered evidence tending to show:

1. That on 8 December, 1949, defendant J. W. Case, for purpose of securing payment of his promissory note of even date to plaintiff in the sum of $2,357.00, payable on demand, and bearing interest after date at the rate of six per centum per annum, executed and delivered to plaintiff a certain chattel mortgage covering a certain 1947 Buick automobile which at the time was located in the County of Henderson, and State of North Carolina, of which county and State he was then a resident; that this chattel mortgage was duly filed in the office of Register of Deeds of Henderson County on 9 December, 1949, and duly registered in Chattel Mortgage Book 114 at page 168; that the note so secured is past due, and there is now due and owing thereon the sum of $1,107.00, with interest; that plaintiff is the owner and holder of the note and mortgage, and the conditions of the mortgage have been broken; that since the execution of

the note and chattel mortgage, and after the latter was duly and properly registered, as aforesaid, said J. W. Case, as plaintiff is informed and believes, disposed of said Buick automobile, and same is now in possession of defendant M & J Finance Corporation in the county of Buncombe, State of North Carolina, who refuses, upon demand, to deliver it to plaintiff, who is entitled to immediate possession of same; that the automobile has not been taken for a tax, assessment, or fine, pursuant to statute, or seized by virtue of an execution or attachment against the property of plaintiff; that the value of the automobile is $1,250.00; and that writ of claim and delivery has been issued in this cause, for immediate possession of it. all parts thereof being declared to be a part of this complaint.

Defendant M & J Finance Company, in its answer, does not deny the allegations of the complaint in respect to the execution and registration of the chattel mortgage, but does deny that as against it, plaintiff is entitled to the possession of the automobile for any purpose.

And for further answer and defense, the defendant M & J Finance Company avers (1) That on 8 December, 1949, and prior thereto, and at all other times herein mentioned material to its defense, J. W. Case was engaged in the used automobile business in Henderson County, a fact well known to plaintiff, who from time to time financed said Case therein, and accepted chattel mortgages on trucks and automobiles either in single units, or in blanket, or on floor plan method, commonly used by dealers selling and trading in new and used automobiles;

(2 and 3) That plaintiff accepted the chattel mortgage here involved on a floor plan basis,—it covering also a 1947 Chevrolet and a 1947 Ford,—and Case had possession of all three automobiles described therein, and same were left in his possession, to be disposed of by him "in the ordinary course of his trade, in buying, exchanging and selling used cars, and the plaintiff . . . made . . . Case its agent to the extent that he could pass the title to the said cars so sold in the usual way to a purchaser or purchasers, freed of the lien of the chattel mortgage";

(4) "That . . . Case, in the ordinary course of his business and in the usual way and manner of doing business, sold and disposed of the Chevrolet automobile together with the Ford described in said chattel mortgage, and the plaintiff waived or released the said cars from the lien of said chattel mortgage";

(5) "That on or about May 4, 1950, the defendant J. W. Case, in the ordinary course of his trade, while trading and selling used automobiles, and in the usual way of doing business, sold and delivered the 1947 Buick automobile described in plaintiff's complaint to one W. E. Huggins, who was then a citizen and resident of Henderson County, North Carolina, and to secure the balance of purchase price of said automobile the said W. E. Huggins did, on May 4, 1950, make, execute and deliver to the

defendant J. W. Case a note and chattel mortgage in the sum of $888.75, which chattel mortgage is duly recorded in the office of the Register of Deeds for Henderson County in Book 117, page 179";

(6) That thereafter and on 4 May, 1950, the defendant Case, for valuable considerations, sold, transferred and delivered said note and chattel mortgage to this answering defendant, and it is at this time the owner thereof, and there is past due, unpaid and owing to it the sum of $770.25; that, as against plaintiff and Case, this chattel mortgage is a valid and subsisting first lien on said Buick automobile, freed and discharged from the purported lien of the chattel mortgage herein asserted by plaintiff;

(7) That the plaintiff, by its usual course of dealings with defendant Case, prior to and on 8 December, 1950, and at all other times material to this further answer and defense, in leaving said mortgaged cars in Case's possession to be disposed of in the ordinary course of trade, "is estopped, and should be estopped from claiming a lien on the Buick automobile" superior to the lien claimed by this answering defendant, as evidenced by the chattel mortgage made, executed and delivered to secure the balance of purchase on 4 May, 1950.

Wherefore defendant M & J Finance Company prays judgment, among other things, (1) that the chattel mortgage, dated 4 May, 1950, signed by W. E. Huggins, recorded as averred, be declared, as against plaintiff, a first and prior lien on the Buick automobile in question; (2) that it recover the possession of same; and (3) that it have such other and further relief as on the facts it may be entitled.

When the cause was called for hearing in Superior Court both the plaintiff and the defendant M & J Finance Corporation agreed in open court to waive trial by jury, "and that the court answer the issues arising in the same manner and form as would a jury." And immediately upon entering this stipulation, the trial court made the following ruling: "It appearing to the court that J. W. Case, named in the pleadings, has not been served with process, the court directs that the record show that this proceeding in no wise affects the said Case, even though his name appears in the original pleadings."

And upon the trial in Superior Court, plaintiff offered in evidence the entire record in claim and delivery, issued 16 February, 1951, including

(1) The affidavit in which the property is valued at $1,300;

(2) The plaintiff's undertaking, binding it to defendant in sum of $2,600 for the return of the property to defendant, with damages for its deterioration and detention, if the return be adjudged and can be had, and, if for any cause return cannot be had, for the payment to defendant of such sum as may be recovered against plaintiff for the value of the

property at the time of the seizure, with interest thereon as damages for such seizure and detention; and

(3) The return of the sheriff, dated 22 February, 1951, showing execution "by taking from the defendant the following personal property, described in the annexed affidavit: And after holding said property for three days, no defendant's undertaking being filed with me, I delivered the said property to the plaintiff on his undertaking."

Plaintiff, through the witness B. B. Massagee, its Vice-President and Cashier, identified the note and chattel mortgage executed to it by J. W. Case, and offered same in evidence. Then counsel for defendant admitted the chattel mortgage records in office of Register of Deeds, and later the record of this mortgage was offered in evidence.

Then this witness, under cross-examination, testified in pertinent part: " . . . We have done business with Case further back than 1949, taking mortgages on automobiles. Even prior to June 1, 1949, we financed single units for him. We were financing automobiles in a group for him. I knew that he was dealing in used cars at that time. I knew he was selling those cars in the usual course of his business. He had no permission to sell an automobile until after it was paid off. I knew all during 1949 he was selling these automobiles to his customers. I did not know he sold some of them and after he sold them would come and pay me off. This particular chattel mortgage I hold had three automobiles described in it, two, other than the Buick that is in dispute; he sold the Ford and Chevrolet. I do not know what day he sold the Ford,—it is not dated here. The first payment that I received on that chattel mortgage and note was January 30, 1950 . . . I have marked on the back of the note $750.00 on January 30, 1950 . . . The next check was received on April 26, 1950 . . . I have a notation there for $500.00 . . . it was "B.P.J." on it. I imagine that was B. P. Justice . . . I am of opinion Justice sold him the automobile . . . I cannot tell his Honor how many chattel mortgages I accepted from Case from July 1949 to June 1, 1950. I had all of them recorded."

Then the witness was interrogated as to transactions covered by certain recorded chattel mortgages, and as to those his testimony in the main tends to show that in respect to these matters his bank knew Case was a used car dealer, and that it dealt with him in the usual course of business.

Then the witness was asked the question: "And after he was selling them you were refinancing them for purchasers on his endorsement?" to which he replied: "As I stated a minute ago he brought the individual in the bank practically every time."

And the witness continued: "I did not know at the time and I do not know now that he sold the car before he actually brought the paper to me, or brought the purchaser to me . . . I would not swear either way."

At this point counsel for defendant M & J Finance Company undertook to examine the witness about the mortgage records of other transactions, and objection by plaintiff was sustained, to which defendant excepted.

Then the witness stated again: "I do not think there was another transaction after December 9, 1949, except renewals . . ."

And this colloquy between the witness and attorney followed:

"Q. Do you have any other security for balance due on this note you testified to other than the chattel mortgage? I mean did any other person endorse it or did you have a side guarantee or side agreement to stand for the balance of this note? A. Yes. Q. Whose? A. Mr. Justice. Q. B. P. Justice? A. Yes." The witness further testified: "The only agreement we had with Justice was that he will be responsible for any that we handle for Case, provided we cannot get it out of the collateral. He was part of the transaction. He has not paid this obligation . . . Mr. Justice got the automobile. We are holding the receipts from that automobile for him until this is decided . . . I have never had the automobile in my possession . . . ."

Q. "The sheriff never turned it over to you? A. No." Q. "Then B. P. Justice has possession and you have known that? A. Yes. . . . Mr. Justice sold the automobile . . . Q. You allowed him to sell it? A. Yes . . ." Q. (By the court) "Under what authority did Mr. Justice get the car at all? A. I do not know . . . Q. It was your bank that sued out claim and delivery, wasn't it? A. Yes."

Then the witness concluded his testimony with this statement: "I never at any time gave Mr. Case authority to sell any car I had a mortgage on. I never at any time gave Mr. Case any authority to collect any money for me."

But, upon being recalled for further cross-examination, the witness testified: That he received from Mr. Justice the sum of $800; but that he did not give Justice permission to dispose of the car, or to do anything with it; that if he were allowed to keep the $800, there would be only $307 still owing; that, in regard to the sheriff's return showing the car was turned over to the State Trust Company, plaintiff, the sheriff did not turn it over "to me" or "to the bank." "I never saw the car . . . I am handling the whole transaction . . . I do not have the car now. I have not had it since February 16, 1951 . . . I still do not know who has it."

Here plaintiff rested its case, and defendant M & J Finance Company, reserving exception to denial of its motion for judgment as of nonsuit, introduced evidence tending to show:

1. The transactions between J. W. Case and W. E. Huggins, and between Case and this defendant, as set forth in the further answer and defense of this defendant, as hereinabove related.

2. That W. E. Huggins, having failed to comply with the conditions of the chattel mortgage executed by him on 4 May, 1950, released to defendant the possession of the Buick automobile on 15 August, 1950, and that same was kept in its possession until it was seized by the sheriff under the order in claim and delivery issued in this action.

3. That this defendant did not make any effort to examine the public records of Henderson County, of which W. E. Huggins was a resident, to determine if Case or Huggins owed any money on this Buick automobile.

Defendant then rested its case.

And plaintiff, in reply, over objections and exceptions by defendant M & J Finance Company offered testimony of B. P. Justice tending to show that when the sheriff of Buncombe County took possession of the car, he, Justice, was instructed by attorney for plaintiff to go get it, which he did; and that he gave Mr. Massagee $800 for purchase of the 1947 Buick automobile, bought at the courthouse door, supposed to be sold at public auction.

And the witness Justice testified on cross-examination that he sold the Buick three weeks later for $1,000 to a man Jackson, who does not now have it.

Plaintiff also offered in evidence portions of the further answer and defense of the answering defendant, and rested its case.

Thereupon defendant M & J Finance Company renewed its motion for judgment as of nonsuit, and again it was overruled, and again it excepted.

Then, pursuant to the stipulation of parties, these five issues were tendered to the court, and by the court answered as indicated:

"1. Is the plaintiff the owner and entitled to the immediate possession of the Buick automobile, bearing Serial No. 14592978, described in the plaintiff's complaint? Answer: Yes.

"2. What was the reasonable market value of the Buick automobile on the 16th day of February, 1951, at the time it was taken into possession for and on behalf of the plaintiff by the High Sheriff of Buncombe County? A. $1100.00.

"3. Is the said Buick automobile now available for delivery in accordance with the orders of this court? A. No.

"4. What was the reasonable value of the Buick automobile at the time it was disposed of at the instance of the plaintiff and before the adjudication of its ownership by the court? A. $1100.00.

"5. Is the plaintiff estopped by its conduct from denying the priority of the M & J Finance Corporation chattel mortgage recorded in Chattel Mortgage Book 117 at page 179, of Henderson County Deed records? A. No."

Thereupon the court adjudged that plaintiff is entitled to the possession of the Buick automobile.

Defendant M & J Finance Company excepts, and appeals therefrom to Supreme Court and assigns error.

M. F. Toms for plaintiff, appellee.
E. L. Loftin for defendant, appellant.

WINBORNE, J. Basically the appellant, M & J Finance Company, challenges the judgment from which appeal is taken, on the ground that the court erred in answering the first and fifth issues as indicated. It invokes, and undertakes to bring its case within the well settled principle of law stated and applied in *Discount Corp. v. Young,* 224 N.C. 89, 29 S.E. 2d 29, that a mortgagor left in possession of goods, which, in contemplation of the parties, are to be disposed of by him in the ordinary course of trade, is the agent of the mortgagee to the extent that he may pass title to the goods, sold in the usual way to a purchaser, freed of the mortgage lien, *R. R. v. Simpkins,* 178 N.C. 273, 100 S.E. 48, and recently restated in *Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312, in opinion by *Parker, J.,* in this manner: "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," citing authorities, including *Discount Corp. v. Young, supra.*

However, applying this principle, this Court is of opinion, and holds that the evidence shown in the case on appeal is too susceptible of different interpretations and inferences to require a ruling, as a matter of law, that plaintiff, by its conduct, is estopped to deny the priority of the chattel mortgage asserted by defendant M & J Finance Company,—the issue to which the fifth is directed.

The evidence, taken in the light most favorable to plaintiff, seems to make a case for a jury. While it is true that there is evidence tending to show that plaintiff had left the mortgaged automobiles in possession of Case, the mortgagor, to be disposed of in the ordinary course of trade, there is also evidence tending to show that, in the dealings between plaintiff and Case, the latter had no permission or authority to sell any automobile on which the plaintiff had a mortgage until it was paid off, nor did he have authority to collect any money for plaintiff. This raises question for fact finding.

And when the parties to a civil action waive trial by jury, as they may do, and agree that the presiding judge may find the facts in respect to the issues of fact raised by the pleadings, G.S. 1-184, his findings of fact have the force and effect of a verdict by a jury upon the issues involved. N. C. Constitution, Art. IV, Sec. 13. And his findings of fact are conclusive on appeal, if there be evidence to support them. See *Burnsville*

v. Boone, 231 N.C. 577, 58 S.E. 2d 351, where authorities are assembled. See also *Briggs v. Briggs,* 234 N.C. 450, 67 S.E. 2d 349; *Thompson v. Thompson,* 235 N.C. 416, 70 S.E. 2d 495; *Ryan v. Trust Co.,* 235 N.C. 585, 70 S.E. 2d 853; *Coach Co. v. Coach Co.,* 237 N.C. 697, 76 S.E. 2d 47.

Applying this rule of practice the negative answer to the fifth issue is necessarily predicated upon a finding that Case was not vested with unrestricted power to sell the Buick automobile in question. Hence plaintiff had not waived the lien of its prior chattel mortgage. And the affirmative answer to the first issue follows as a matter of law.

Moreover, other assignments of error have been given due consideration, and, in view of the holding above, and the verdict on other issues, the matters to which such assignments of error relate become harmless.

No error.

STATE v. GRACE HAYES WINGLER AND CALVIN MILLER.

(Filed 4 November, 1953.)

1. Homicide § 25—Evidence of defendants' guilt of murder in the second degree held sufficient for jury.

The State's evidence tending to show that there had been previous trouble between deceased and the male defendant, that after an altercation they were approaching each other on the highway, the male defendant having a pistol in his hand, and that the *feme* defendant asked the male defendant for his pistol, stating that she would kill deceased, that he gave her the gun and that she shot and killed deceased, *is held* sufficient to take the case to the jury on the question of the *feme* defendant's guilt of murder in the second degree and the male defendant's guilt as a co-principal in aiding and abetting the *feme* defendant.

2. Criminal Law § 81c (3)—

Testimony of officers as to the condition of the house and the location of the *feme* defendant and her male companion when they arrived at the house at a time when other officers of the law and a number of people were outside, *held* not prejudicial on the ground that it tended to show adultery between the *feme* defendant and her companion, since under the circumstances the jury could not have been improperly influenced thereby.

3. Same—

The admission of testimony on examination and on cross-examination in regard to collateral matters which could not have influenced the jury in reaching its verdict will not be held for reversible error.

4. Homicide § 27f—

Defendants' contention that the court failed to adequately charge on the aspect of an accidental homicide, supported by defendants' evidence, *held* untenable, it appearing that the court clearly and adequately charged

that defendants would not be guilty if the fatal injury was the result of an accident, and defined the terms.

5. Homicide § 27d—In defining murder in the second degree court need not charge that killing must be intentional in addition to unlawful.

In this prosecution of defendants for murder in the second degree, the court defined murder in the second degree as the unlawful killing of a human being with malice but without premeditation and deliberation and correctly defined the terms. The court also correctly defined manslaughter and adequately charged the jury upon defendants' defense that the fatal pistol wound was accidentally inflicted, and correctly placed the burden of proof on the State. The court did not charge on the presumptions arising from an intentional killing with a deadly weapon. *Held:* In defining murder in the second degree it was not error for the court to fail to charge that the killing must not only be unlawful but must also be intentional in order to constitute murder in the second degree, defendants' defense of accidental killing having been fully presented to the jury.

6. Criminal Law § 85d—

An opinion of the Supreme Court must be considered in the light of the case in which it is delivered.

APPEAL by the defendants from *Clement, J.*, March Term, 1953. WILKES. No error.

This is a criminal action in which Grace Hayes Wingler, Calvin Miller and Duel Miller were tried on a bill of indictment charging them with the murder of Lance Owens. The solicitor did not put them on trial for first degree murder. The jury's verdict was guilty of murder in the second degree as to Grace Hayes Wingler and Calvin Miller. The State was nonsuited as to Duel Miller at the close of its case.

The State presented evidence tending to show the following facts.

Between 7:30 and 8:00 o'clock p.m., on 3 November 1952, Grace Hayes Wingler, Calvin Miller and Duel Miller and one Woodie went to Lloyd Bare's beer joint in the Blue Ridge Mountains in Wilkes County near the Ashe County line. Johnny Ashley and Freeman Bauguess were there when they arrived. All had some beer. Then Lance Owens and Kyle Blackburn came in and had beers to drink. The piccolo was playing, and Grace Wingler and Duel Miller were dancing. Lance Owens got up, and "was stomping around there too by himself." After they danced about half an hour Bare told them they had to quit. Then Duel Miller and Lance Owens had an argument. Duel Miller said if he had a gun he would shoot Lance. Lance replied "you know damn well you wouldn't as much as we have worked on the road together." Lance got out his knife. Duel Miller told Calvin Miller to go out and get his gun. Bare told Owens to put up his knife. Owens shut it up, and put it in his pocket, but "balled up his fist." Bare ordered them to leave.

Duel Miller went out first, and took a seat in his car. Owens went out, and came back in. Then Owens hit Calvin Miller, knocking him out of the door. Owens went out of the store, followed by Grace Wingler. Calvin Miller went to Grace Wingler's car, and got a pistol. Owens was in front of the store, and Calvin Miller was on the other side of the road. Back of Owens were Blackburn and Ashley. Calvin Miller fired the pistol, and the bullet hit by them on the gravel. Calvin Miller and Grace Wingler walked toward each other, meeting about the middle of the road. Owens was also going that way. Grace Wingler said to Calvin "give me the gun, I will shoot the s—— of a b——." Calvin gave Grace Wingler the pistol and ran down the road. Owens grabbed her arm. They scuffled in the road. Grace Wingler shot the pistol hitting Owens in the leg. He turned her loose, and reached down on his leg with one of his hands. He was standing kind of bent over, and she raised the pistol up, stuck it against his chest and fired. Owens fell on his face, and she fell. Owens never spoke again. The bullet in his chest lacked about a half inch coming through the skin at the back. Owens died the night he was shot.

The defendants' evidence tended to show these facts. Grace Wingler heard the shot Calvin Miller fired, and walked toward him, and asked him to give her the gun before somebody got shot. She denied saying "give me the gun, I will kill the s—— of a b——." Owens was approaching them with his knife open. Neither Owens nor Calvin Miller said anything. Calvin Miller gave her the gun in about the middle of the highway. She started toward her car. Owens said "you damn b——, I will kill you," and grabbed her, and slung her down. She thought he was going to come on her with the knife, so she shot under his feet to scare him. She scrambled to her feet, and started again to her car. Owens caught her by the back of the neck, and grabbed her arm. They scuffled in the road. All at once something hit her in the back of her head, and that is all she remembered. Owens never said he was going to kill Calvin Miller. Duel Miller was the owner of the pistol.

The court sentenced both defendants to imprisonment. Both defendants appeal, assigning errors.

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

Trivette, Holshouser & Mitchell and Whicker & Whicker for defendants, appellants.

PARKER, J. In the record the defendants have 89 exceptions, and 38 assignments of error. However, only 9 assignments of error and 19 exceptions are argued in their brief.

The appellants' assignment of error No. 11 is to the court's overruling their motions for nonsuit, particularly as to Calvin Miller. The State's evidence tends to show that Calvin Miller, with a pistol in his hand, and Lance Owens were approaching each other on the highway. There had been previous trouble between them. Grace Wingler came up, and asked Miller for the gun saying "give me the gun, I will shoot the s—— of a b——." He gave her the gun, and she shot Owens, and killed him. We are of opinion that there was plenary evidence to carry the case to the jury that Grace Wingler was guilty of second degree murder, and that Calvin Miller was present as a co-principal aiding and abetting Grace Wingler and equally guilty. *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127; *S. v. Williams,* 225 N.C. 182, 33 S.E. 2d 880; *S. v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113; *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272; *S. v. Moore,* 236 N.C. 617, 73 S.E. 2d 467. The assignment of error No. 11 is without merit.

The appellants' assignment of error No. 22 is based upon their exceptions Nos. 66, 67, 68, 69, 70 and 71. Grace Wingler testified as a witness for herself, and Duel Miller testified as a defense witness. According to the defendants' evidence, Grace Wingler and Duel Miller were partners in the operation of a store with beer and groceries in sight of Lloyd Bare's beer joint. Duel Miller on 3 November 1952 had been sick in bed, Grace Wingler had been working in the store all day, and when Duel Miller got up they closed their store about 7:30 or 8:00 p.m., and went to Bare's place. The State in rebuttal offered the testimony of Charley Dancy and Wrenn Hayes, both deputy sheriffs of Wilkes County. About midnight on 3 November 1952, these two deputy sheriffs went to Grace Wingler's and Duel Miller's place of business to arrest her for the murder of Lance Owens. Owens was then dead. They found present several patrolmen and the Sheriff of Ashe County. When they went in Grace Wingler was in the kitchen, and Duel Miller was sitting on the bed. Dancy, during his examination in chief, was asked these questions: Q. When you arrived up there at Grace Wingler's place of business and Duel Miller's, what was the condition of the rooms there, if you know? Wingler objects. Overruled. Exception 66. A. She was in her bedroom. I pecked on the front door and saw her come around to the back door. I went around to the back door and she opened the door. I went in the kitchen, and she was in the bedroom. Q. Was anybody in there with her at that time? Wingler objects. Overruled. Exception 67. A. I believe Duel was there. I am not sure. Defendant Wingler moves to strike out answer. Motion allowed. Q. You may state if Grace Wingler had her clothes strewn around there in the room when you went in? This question was not answered. The defendant Grace Wingler moves to strike his evidence on this ground, they asked her about it and we say for the purpose of im-

peaching her and she denies it and they are bound by it. Overruled. Exception 68. Wrenn Hayes testified on direct examination that he was a deputy sheriff of Wilkes County on 3 November 1952, and on that night went to Grace Wingler's and Duel Miller's place of business. When he and Charley Dancy arrived two patrolmen were there and the Sheriff of Ashe County with several standing out in the yard. The defendant Calvin Miller objected. The court instructed the jury that this testimony was not evidence against Calvin Miller. Grace Wingler objected. Overruled. Exception 69. Hayes was asked this question: Q. Where was Grace and where was Duel when you went in? Defendant Wingler objects. Overruled. Exception 70. A. When we went in Grace was standing in the kitchen. She had undone the door and Duel was in the bed, sitting on the bed. Q. What, if anything did she tell you about how it happened? Defendant Wingler objects. Exception 71. A. She said she was in a scuffle.

The defendants contend that this tended to show adultery between Grace Wingler and Duel Miller; that Grace Wingler beforehand denied spending the night sometimes with Duel Miller; that the State is bound by her answer, and that the admission of this evidence is prejudicial error. The testimony of the two Wilkes County deputy sheriffs as to where Grace Wingler and Duel Miller were when they arrived with three officers already in the store and people outside, in our opinion, could not have improperly influenced the jury in arriving at their verdict. This assignment of error is untenable.

Assignment of error No. 12 based on exceptions Nos. 30, 31 and 32 is that on cross-examination of Grace Wingler the State brought out over her objections that she had had two husbands, and both were dead—one a suicide. Assignment of error No. 8 based on exception 23 is that Blackburn, a witness for the State, was allowed to say, over objection, that he is now in the Service. Assignment of error No. 10 based on exceptions Nos. 27 and 28 is that Bauguess after testifying he could not help Owens in the car after he was shot because he was crippled, was allowed to say, over objection, that he had an artificial right leg. This was exception 27. Exception 28 is that he was asked if he was related to either the State's or the defendants' witnesses, and over objection replied, not that I know of. Obviously, the admission of such testimony would not justify the overthrow of the jury's verdict upon such slender technicalities.

The appellants' assignment of error No. 35, based on exception No. 86, is that the court failed to charge the jury adequately that if Grace Wingler intentionally pointed the pistol at the deceased and the pistol accidentally discharged killing Owens, the defendants would be guilty of no greater crime than manslaughter, provided she was not committing a felony at the time of the fatal shot, and failed to charge properly as to an

accidental killing. The court stated clearly and fully the contentions of the appellants as to an accidental killing. Then it charged "if they were scuffling over the gun, somebody hit her in the head and knocked her unconscious, even though the gun went off in her hand, she would not be guilty, because to make her guilty, she must have intended to commit the act with which she is charged, and if she was unconscious, she couldn't form an intent to do a thing, it would be an accident." Then the court defined "an accident." This is a substantial compliance with the law as set forth in our decisions on accidental homicide. *S. v. Banks,* 204 N.C. 233, 167 S.E. 851; *S. v. Williams,* 235 N.C. 752, 71 S.E. 2d 138; *S. v. Bright,* 237 N.C. 475, 75 S.E. 2d 407.

Assignment of error No. 36, based on exception No. 87, is that the court failed to instruct the jury that the State was required to show that Owens came to his death as a proximate result of the pistol wound inflicted by the defendant Wingler, and that the burden of proof rested upon the State to show beyond a reasonable doubt that said wound was intentionally inflicted.

The court correctly defined murder in the second degree as the unlawful killing of a human being with malice, but without premeditation and deliberation, and manslaughter as the unlawful killing of a human being without malice and without premeditation and deliberation. He then correctly defined malice, and reasonable doubt, and correctly placed the burden of proof on the State. The court in stating the State's contentions said in part: "the State contends . . . that you should be satisfied beyond a reasonable doubt that both the defendants Wingler and Calvin Miller are guilty of murder in the second degree in that they unlawfully slew the deceased, and they did it with malice"; and further on "the State contends you should find beyond a reasonable doubt from the testimony that he (Calvin Miller) gave her the gun and he gave it to her for the purpose of letting her shoot him and that she did shoot him, that she shot him twice and that he died as a result of the shot, so the State contends you should be satisfied beyond a reasonable doubt that she killed him by shooting him, that when she did so, she did it unlawfully, and that she did it with malice." The court further charged "the State contends you should be satisfied beyond a reasonable doubt that Calvin Miller gave her the gun, that he gave it to her for the purpose of letting her shoot Owens, that he aided and abetted her in the shooting, and therefore you should find he is guilty of murder in the second degree . . . that you should be satisfied beyond a reasonable doubt that he is guilty of murder in the second degree in that he unlawfully slew the deceased by aiding Grace and that he did it with malice."

The defendants' defense was based on the theory of an accidental killing and self-defense, and hence the verdict that the shooting of Owens

was unlawful was vital in contradiction of the appellants' contention of death by accident. The cases are many in which we have said that murder in the second degree is the unlawful killing of a human being with malice. *S. v. Suddreth,* 230 N.C. 239, 52 S.E. 2d 924; *S. v. Burrage,* 223 N.C. 129, 25 S.E. 2d 393; *S. v. Starnes,* 220 N.C. 384, 17 S.E. 2d 346; *S. v. Bright,* 215 N.C. 537, 2 S.E. 2d 541; *S. v. Benson,* 183 N.C. 795, 111 S.E. 869. We have also said in numerous cases, when it is admitted or proven that the defendant intentionally killed the deceased with a deadly weapon, the law raises two presumptions against him; first, that the killing was unlawful; and second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188; *S. v. Chavis,* 231 N.C. 307, 56 S.E. 2d 678; *S. v. Suddreth, supra; S. v. Burrage, supra; S. v. Benson, supra.*

The court did not in its charge refer to the principle of law that an intentional killing with a deadly weapon raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice, but it did charge accurately all the essential elements of murder in the second degree as the unlawful killing of a human being with malice, and all the essential elements of manslaughter. The appellants argue there was error, because the court nowhere in the charge stated that the killing must not only be unlawful, but *must be intentional,* and cites this language from *S. v. Williams,* 235 N.C. 752, "to convict a defendant of murder in the second degree, the State must prove that the defendant intentionally inflicted the wound which caused the death of the deceased." We have examined the full charge of the court in the *Williams case,* and in that case the trial judge charged the principle that when it is admitted or proven that the defendant intentionally killed the deceased with a deadly weapon the law raises two presumptions against him, etc. We are admonished by authority no less eminent than *Chief Justice Marshall* that every opinion to be correctly understood ought to be considered with a view to the case in which it was delivered. *U. S. v. Burr,* 4 Cranch 470, 2 L. Ed. 684. Reading the quoted language from the *Williams case* with a view to the case in which it was delivered it means that when the doctrine that the intentional killing of a human being with a deadly weapon is admitted or proven it implies malice and, if nothing else appears, constitutes murder in the second degree is stated that the use of the word *intentional* is indispensable, and the judge must be meticulous to use it. *S. v. Suddreth, supra; S. v. Burrage, supra; S. v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562; *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387. The quoted language in the *Williams case* does not mean that we have changed the definition of murder in the second degree as stated by us so many times, and that murder in the second degree is now defined as the unlawful and *intentional* killing of a human being with malice. It is not essential that

there be an *intentional killing* of a human being with malice to constitute murder in the second degree, for instance, "if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, the person violating the statute is guilty of manslaughter at least, and, under some circumstances, of murder." *S. v. Palmer,* 197 N.C. 135, 147 S.E. 817; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580. In *S. v. Phillips,* 229 N.C. 538, 50 S.E. 2d 306, the State's evidence tended to show that the deceased was killed by the unintentional discharge of a pistol being handled by the defendant in a criminally careless and reckless manner. The defense was an accidental killing. The State did not ask for a verdict of first degree murder but for a verdict of second degree murder or manslaughter. This Court held that it was prejudicial error to charge the presumptions arising from an intentional killing with a deadly weapon, as there was no evidence of an intentional killing. The case was sent back for trial for manslaughter.

This was the crux of this case: was the killing of Owens an unlawful killing with malice, or was it an unlawful killing, or was it an accidental killing, or a killing in self-defense? We think that the court sufficiently presented these views in substantial compliance with the law of this State, and that there could be no misapprehension on these points on the part of the jury. The assignment of error No. 36 is overruled.

We have examined each of the appellants' assignments of error, whether herein specifically referred to or not, and find none of them sufficient to justify a new trial.

We conclude that in the trial there was

No error.

N. E. GOODE, SR, ADMINISTRATOR OF THE ESTATE OF N. E. GOODE, JR., v. KENNETH H. BARTON AND DOUGLAS WILLIAM BARTON.

(Filed 4 November, 1953.)

1. Pleadings § 22c—

A motion to amend after time for answering has expired is addressed to the discretion of the trial court, and the court's ruling thereon will not be reviewed on appeal unless a prejudicial abuse of discretion is clearly shown.

2. Appeal and Error § 38—

The burden is upon appellant to show error clearly and that such error was material, as the presumption is against him.

3. Automobiles § 20a—

In an action by the personal representative to recover for the wrongful death of his intestate, killed while a passenger in defendant's car, assump-

tion of risk is not available as a defense, since there was no contractual relationship between the parties.

4. Automobiles § 25—

Liability under the family purpose doctrine in this State is not confined to the owner or driver but depends upon use and control, and therefore asserted error in the court's statement of the contentions that the car was bought with funds of the father, rather than funds of his son, is immaterial when the record shows that the license for the car was issued in the name of the father and that he had control of its use.

5. Same: Courts § 14—

Where the accident causing the death of plaintiff's intestate occurs in this State, the court correctly applies the family purpose doctrine as enunciated here rather than as obtaining under the laws of the state of the residence of defendant, since the matter is governed by the *lex loci*.

6. Automobiles §§ 8j, 18i: Negligence § 20—

The statement by the court of the doctrine of sudden emergency will not be held for error as confining the application of the doctrine to emergencies resulting from the negligence of another when such limitation occurs in one instance only in the charge and in other portions of the charge the doctrine is correctly and accurately stated.

7. Appeal and Error § 39a—

A new trial will not be awarded for mere technical error, but appellant must show that the error complained of was material so that there is a reasonable probability that the result of the trial was prejudicially affected.

APPEAL by the defendants from *Phillips, J.*, June Civil Term, 1953. BUNCOMBE. No error.

This is a civil action for damages for the death of plaintiff's intestate caused by the alleged negligence of the defendants.

This is a statement of the material facts. On 22 November 1950, plaintiff's intestate, N. E. Goode, Jr., the defendant Kenneth H. Barton, and Fred Matthews, students at the University of North Carolina, left Chapel Hill in a Chevrolet automobile registered in New Jersey in the name of the defendant Douglas William Barton, for a trip to Asheville. The day after Thanksgiving there had been a severe ice and snowstorm all over middle and eastern North Carolina and in the Asheville area. These three young men left Asheville about 9:00 a.m. the following Sunday to return to Chapel Hill. Matthews drove the automobile to Mocksville. The weather was clear, the sun shining, and the temperature around freezing. In Mocksville Kenneth Barton took the wheel, and was driving at the time N. E. Goode, Jr., received his fatal injuries. Goode was sitting in the middle and Matthews to his right. In Mocksville the highway was "not too clear, not frozen, just slushy." The country-side was covered with snow, and ice and snow were along the

shoulders of the highway between Mocksville and the scene of the wreck. The highway from Mocksville east to the place of the wreck and prior to it, had two low and shady places, where there was very slick glazed ice on the highway. The last icy space was about a quarter of a mile away from the scene of the wreck.

At a point about 3½ miles east of Mocksville on Highway #64, just beyond the crest of a hill and in a shaded downhill left-hand curve, the car entered on a glazed sheet of ice about 300 yards long across the highway, skidded on the ice, left the highway on the right-hand side and proceeded down a steep embankment into a ravine. The car was lying about 150 feet from the pavement. The grade going East at the scene of the wreck is a pretty good down-hill grade, and a medium left turn. The ice extended from about the bottom of the hill, up the hill and around the curve, pretty nearly to the crest of the hill. Fred Matthews, a witness for the defendants, testified "when we got to the top of the hill, I saw the ice 50 to 100 feet away." The tracks of the car showed it traveled off the pavement to a bank on the left, then across the pavement to a bank on the right, then along the latter bank 115 feet, then it hit a large rock, and went on for a further distance of about 60 feet. It turned over one or more times before it came to rest. Plaintiff's intestate was found in the car seriously injured, and died about 12 hours later.

Thomas A. Rice, a witness for plaintiff, went down the embankment to the wreck. He found Barton and Matthews outside the car, and Goode, unconscious, inside. He asked Barton and Matthews what caused the wreck. They replied they were driving too fast.

Walter R. Sawyer, a State Patrolman, who was the plaintiff's witness, saw Barton and Matthews in a hospital in Salisbury. Both appeared to be normal mentally. Kenneth H. Barton said he was driving the automobile at the time of the wreck; and just as he came over a little knoll on the hill, he ran over some ice. He guessed he was driving too fast to control the car when he ran into the ice. He said he was driving approximately 55 miles an hour. Fred Matthews heard the conversation, and said that was about right. Matthews further said that about ½ mile back up the road he had seen ice on the road.

The plaintiff saw Kenneth H. Barton in the hospital. Kenneth told him they were going too fast, was the cause of the accident; they came over the hill, and hit the ice.

The defendants' evidence tended to show that the ice at the scene of the wreck began just over the crest of the hill, was not visible until the car was virtually on it, and that the speed of the car was about 45 miles per hour.

Kenneth H. Barton and Douglas William Barton filed separate answers to the complaint. In Paragraph 5 of their answers it was admitted by

both defendants that the legal title to the Chevrolet automobile described in the complaint on the date mentioned in the complaint was registered in the name of Douglas William Barton. In Paragraph 7 of their answers each defendant admitted that on 26 December 1950, Kenneth H. Barton was 19 years of age and was a member of the household of his father, Douglas William Barton. Paragraph 8 of the complaint alleges that on 26 November 1950, the Chevrolet Coupe bearing New Jersey license No. NO-108 was being operated, driven, used and possessed by Kenneth H. Barton with the knowledge, consent and permission of his father, Douglas William Barton, the owner of said automobile. It is admitted in Paragraph 8 of the answers of both defendants that the allegations of Paragraph 8 of the complaint are admitted, except in respect to the ownership of the Chevrolet automobile, as to which ownership it is alleged that Douglas William Barton was the legal owner of said automobile and Kenneth H. Barton was the beneficial owner of the automobile. It is admitted in Paragraph 9 of both answers that Douglas William Barton purchased the Chevrolet automobile prior to 26 November 1950, for the use of Kenneth H. Barton and permitted his son to use and possess the same. The plaintiff introduced in evidence the aforesaid parts of the pleadings.

The defendants' evidence also tended to show that the defendant Douglas William Barton was a resident of Elizabeth, New Jersey; that he purchased this automobile with funds of his son; that this automobile was not driven by Douglas William Barton for his business or benefit. That money of Douglas William Barton helped to maintain the automobile in that Douglas W. Barton provided his son with his upkeep and support at the University.

Upon issues submitted to it, the jury found that plaintiff's intestate was killed by the negligence of the defendant Kenneth H. Barton, as alleged; that at the time, the defendant Kenneth H. Barton was operating the automobile as the agent of the defendant Douglas William Barton under the family purpose doctrine, as alleged; and awarded damages in the sum of $12,000.00.

From judgment signed in accordance with the verdict, both defendants appealed to the Supreme Court.

Harkins, Van Winkle, Walton & Buck for plaintiff, appellee.
Adams & Adams for defendants, appellants.

PARKER, J. Summons in this action was duly issued on 15 November 1951. On 4 June 1953, the defendants duly served on plaintiff a notice that at the convening of court on 9 June, or as soon thereafter as convenient to the court, they would move the court for leave to amend their

respective answers so as to allege assumption of risk and contributory negligence of plaintiff's intestate in failing to protest against the manner in which Kenneth Barton was driving and in failing to warn him of danger on the road. Copies of the proposed amendments were attached to the notice. This motion was made to the court upon the call of the action for trial on 9 June 1953. The court in its discretion denied the motion, and the defendants excepted. This is their Assignment of Error No. One.

During the trial the defendant Kenneth Barton, at the beginning of his testimony, said the money that bought the car was his own money that he had saved. At this point the defendants moved for leave to amend Paragraph 9 of each answer by adding "that the money for the purchase of said automobile was the property of the defendant Kenneth H. Barton." The court, in its discretion, denied the motion, and the defendants excepted. This is their Assignment of Error No. Seventeen.

These two assignments of errors will be discussed together.

It is a firmly established rule of practice with us that an application for leave to amend a pleading, after time for filing has expired, is a matter addressed to the sound discretion of the trial court, and a ruling thereon is not subject to review on appeal unless the circumstances affirmatively show a manifest abuse by the court of its discretionary power. *Motor Co. v. Wood, ante,* 468, 78 S.E. 2d 182; *Hooper v. Glenn,* 230 N.C. 571, 53 S.E. 2d 843.

On appeal error will not be presumed. The burden is on the appellant to make it plainly appear. *Beaman v. R. R., ante,* 418, ... S.E. 2d ....., where many authorities are cited. Our decisions are uniform that the burden of alleging and proving contributory negligence is on the defendant. *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730. If contributory negligence had been pleaded, it would not avail the defendants for they have offered no evidence that plaintiff's intestate failed to warn Kenneth Barton of any danger or hazard on the highway or failed to protest against the manner in which he was driving.

Assumption of risk was not available as a defense for there was no contractual relation between plaintiff's intestate and the defendants. *Cobia v. R. R.,* 188 N.C. 487, 125 S.E. 18; *Broughton v. Oil Co.,* 201 N.C. 282, 159 S.E. 321.

As to the second proposed amendment. In Paragraph 9 of their respective answers each admitted that Douglas William Barton purchased said automobile prior to 26 November 1950 for the use of his son, and permitted him to use it fully, freely and exclusively. Kenneth Barton testified his father was paying the money for the trips, except for certain money he had earned in the summer; he was taking care of me; he had the automobile registered in his name with a New Jersey license. The

proposed amendment in the midst of the trial was too late. Further, the failure to allow the amendment did not hamper the defendants in their defense, for under the family purpose doctrine as set forth by this Court "liability under this doctrine is not confined to owner or driver. It depends upon control and use." *Matthews v. Cheatham,* 210 N.C. 592, 188 S.E. 87.

The record does not justify an inference that the trial court abused its discretion in the premises, and Assignments of Errors Nos. One and Seventeen are untenable.

The defendants' Assignment of Error No. 28—as stated in their brief—"relates to what the appellants urge is a misapplication of the family purpose doctrine. The court . . . charged the jury on the family purpose doctrine as the same prevails in North Carolina. In this it is felt that error was committed to the prejudice of the defendant Douglas William Barton." In support of their contention they cite four New Jersey cases which they assert decide that New Jersey does not follow the family purpose doctrine, certainly not to the extent as in North Carolina, and that Kenneth Barton could not, under the New Jersey law, be regarded as an agent of his father unless the car was in some manner used on the business or for the benefit of the father.

The actionable quality or nature of acts causing death is to be determined by the *lex loci. Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558; *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126; 11 Am. Jur., Conflict of Laws, Sec. 182.

In *Young v. Masci,* 289 U.S. 253, 77 L. Ed. 1158, 88 A.L.R. 170, these were the facts. Masci, a citizen and resident of New York, brought this action in a court of New Jersey against Young, a citizen and resident of the latter state, to enforce liability for personal injuries under a New York statute. The New York statute imposed liability on the owner of an automobile operated on the highways of the state for the negligence of one driving it with his permission. Young lent his automobile to Michael Balbino for a day without restriction upon its use, the contract of bailment and delivery of the car being made in New Jersey; that Balbino took the car to New York; and that while driving there negligently struck Masci. There was evidence to justify a finding that the car was taken to New York with Young's permission, express or implied. By the law of New Jersey Young was immune from liability for Balbino's negligence. Young moved for a directed verdict on the ground that the bailment was made in New Jersey; that he was not in New York at the time of the accident; that Balbino was not his agent or engaged on business for him; and that to apply the law of New York and so make the defendant responsible for something done by Balbino in New York would deprive the defendant of his property and his liberty without due process

of law, in violation of the 14th Amendment to the U. S. Constitution. The jury found a verdict for the plaintiff, and the judgment entered thereon was affirmed by the highest Court of that State. 109 N.J.L. 453, 162 Atl. 623, 83 A.L.R. 869. In affirming the case the U. S. Supreme Court said: "When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master to servant. A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it . . . The power of the State to protect itself and its inhabitants is not limited by the scope of the doctrine of principal and agent." The Court further on in the opinion said "obviously there is no denial of equal protection, since all who permit their cars to be driven in New York are treated alike." See also *Ewing v. Thompson,* 233 N.C. 564, 65 S.E. 2d 17.

The family purpose doctrine with respect to automobiles has been adopted as the law of this jurisdiction, and applied in numerous cases. *Ewing v. Thompson, supra; Matthews v. Cheatham, supra; Grier v. Woodside,* 200 N.C. 759, 158 S.E. 491.

The appellants do not contend that the trial court failed to charge or erroneously charged the law of this jurisdiction relative to the family purpose doctrine. The court was correct in charging the law of this State as it applied to the second issue, and appellants' Assignment of Error No. 28 is overruled.

The appellants' Assignment of Error No. 25 is that the court's instructions to the jury as to the doctrine of sudden emergency limited the application of the rule to an automobile driver who, by negligence of another and not by his own negligence is suddenly confronted with an emergency. In this exception appellants pick out one phrase "who by negligence of another" in a charge consisting of three paragraphs on the rule of sudden emergency. The words picked out occur in the first paragraph. The first paragraph is taken verbatim from *Bullock v. Williams,* 212 N.C. 113, 193 S.E. 170, except that the charge in the instant case says it is a question for the jury and the *Bullock case* says it is ordinarily a question for the jury. In the *Bullock case* the Court said "the statement of the general rule relating to emergencies, as contained in the charge, was in accord with the authorities," citing authorities. The appellants contend that the facts in the *Bullock case* show that the emergency involved the negligence of another, and the question was of no moment; and that the emergency in this case was created by weather conditions. If what the

Court said in the first paragraph was not applicable to the facts, it did state the doctrine of sudden emergency in the second and third paragraphs clearly and fully as set forth in our decisions. *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343; *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593; *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562. If the use of the words "by the negligence of another" was not applicable to the facts, and is technical error, we do not think that it was prejudicial error sufficient to cause a new trial.

The appellants assign as Errors Nos. twenty-six and twenty-seven part of the court's statement as to the contentions of the plaintiff *and the defendants* regarding the source of the funds for the purchase of the automobile for Kenneth Barton. This grew out of the facts that both defendants in their answers admitted that Douglas William Barton purchased the automobile for his son, and that Kenneth Barton testified he bought the car with his own money that he had saved.

As to whose funds paid for the car is not material, for liability under the family purpose doctrine as to automobiles is not confined to owner or driver; it depends upon control and use. *Matthews v. Cheatham, supra.* However, the appellants contend that it is manifest throughout the charge that the trial judge was inclined toward a recovery by the plaintiff, and that nowhere is this more outstanding than in the court's statement of the position of the defendants regarding the source of the funds for the purchase of the automobile for Kenneth Barton. There was evidence to support the contentions stated by the court. There is no assignment of error that the trial court expressed any opinion as to the facts. While the form and manner in which the contentions were stated are open to criticism, we are unable to reach the conclusion that the defendants were prejudiced thereby sufficient to order a new trial, for the burden is upon the appellants not only to show error, but also to make it appear that the result was materially affected thereby to their hurt. From a close reading of the whole charge, and especially the statements of contentions which form the bases of assignments of errors twenty-six and twenty-seven, we are of opinion that that burden the appellants have failed to carry. *Garland v. Penegar,* 235 N.C. 517, 70 S.E. 2d 486; *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Stewart v. Dixon,* 229 N.C. 737, 51 S.E. 2d 182.

We have examined all the assignments of errors brought forward in the appellants' brief, and find none of them of sufficient merit to order a new trial. While there may have been technical error in the trial, that is not sufficient to disturb the verdict and judgment. It is the practical rule of appellate procedure that the burden is on the appellants to make it plainly appear that such error affected prejudicially a substantial right belonging to them, and that there is a reasonable probability that the

result of the trial might have been materially more favorable to them, if the error had not occurred. *Beaman v. R. R., supra; Call v. Stroud, supra,* where the authorities are cited.

When the exceptions reserved by the defendants are laid alongside of the rule of appellate procedure, it becomes clear that the case should not be sent back for a new trial.

For the reasons given, we find that there is in a legal sense

No error.

W. N. LANCE v. C. M. COGDILL.

(Filed 4 November, 1953.)

1. Injunctions § 8—

Ordinarily, a temporary restraining order will be continued to the hearing if there is probable cause for supposing that plaintiff will be able to maintain his equity and there is reasonable apprehension of irreparable loss unless it remains in force or if it is reasonably necessary to protect plaintiff's rights until the controversy can be determined.

2. Same—

Where plaintiff seeks to restrain a continuing trespass, the temporary order will ordinarily be continued to the hearing when the facts are in dispute and can be determined only by a jury.

3. Same—

Even when plaintiff establishes a recognized equity, the continuance of a temporary restraining order rests in the sound discretion of the judge, to be determined by balancing the probable inconvenience and damage which would result to the defendant against the benefit to plaintiff which would result from its continuance, and the court properly dissolves a temporary order when it appears that its continuance would produce greater injury than would result from its denial.

4. Same—

Ordinarily, a temporary order restraining the operation of a legitimate business will not be continued to the hearing except in extraordinary cases when necessary to preserve the rights of plaintiff.

5. Appeal and Error § 40c—

While the Supreme Court is not bound by the findings or ruling of the judge below in injunction cases, the presumption is in favor of the correctness of the judgment of the lower court with the burden upon appellant to assign and show error, and therefore when the record does not show affirmatively to the contrary it will be presumed that the order was based upon a proper exercise of discretionary power supported by the facts of the case.

6. Judgments §§ 29, 32: Tenants in Common § 9—

Where one tenant in common obtains an order restraining a material continuing trespass by a stranger, such order does not preclude another tenant in common from thereafter instituting an action against the same stranger to restrain an asserted material trespass, since the second tenant in common, not being a party to the first action, is not bound by the judgment therein, and is not, therefore, relegated to the remedy of a motion in the original cause.

APPEAL by plaintiff from *Clement, J.*, at Chambers in Brevard, North Carolina, 27 July, 1953. From HENDERSON.

Civil action instituted on 17 July, 1953, by the issuance of a summons and the filing of verified complaint. The purpose of the action is to (a) enjoin the defendant from blasting, dynamiting or otherwise operating his quarry in such a manner as to cause limestone or other rocks to be thrown upon the adjacent property of the plaintiff; (b) require that a dike constructed by the defendant be removed; (c) for the recovery of damages sustained by the plaintiff to his real and personal property by reason of the unlawful, careless and negligent operation of the defendant's quarry.

Allegations and facts pertinent to this appeal may be stated as follows:

1. The plaintiff alleges that he owns a one-half undivided interest in the Jerusha Lance dower tract, containing approximately 109 acres, adjacent to the leasehold estate of the defendant; that he is in possession of and lives thereon; that the dwelling in which he resides is located approximately 200 feet west of Kimsey Creek that flows in a southerly direction along the dividing line of these properties, and that the quarry operated by the defendant on the east side of Kimsey Creek extends to within about ten feet thereof.

2. It is further alleged that the defendant's quarry extends along Kimsey Creek a distance of approximately 1,400 feet, and is being operated by the defendant for commercial purposes.

3. That during the past few weeks and since 1952, the defendant has been loosening rock in his quarry for processing purposes by the use of large quantities of explosives; that on various occasions many cases of dynamite have been placed in the limestone to be exploded and have been exploded several times each week; that as a result of said explosions, large quantities of stone in sizes ranging from an ordinary marble to several feet in diameter have been blown out of defendant's deposit of limestone and upon the lands of the plaintiff; that so frequent and violent have been these explosions that many acres of plaintiff's property have been covered with these rocks. That such explosions have thrown rocks over and upon plaintiff's property for a distance of 300 to 500 yards, making the property unsafe for occupancy; that on or about 14 July,

1953, the defendant set off a large explosion of dynamite in his quarry which blasted limestone over a wide area of several hundred yards along Kimsey Creek, some of which fell upon plaintiff's automobile near his residence and upon his stock, seriously wounding some of his ponies grazing on said lands.

4. Plaintiff alleges that he has been greatly damaged and that his damages are irreparable and will continue to be as long as these operations exist in an unlawful manner; that the plaintiff does not desire to stop the defendant from operating his quarry, provided he does so in such manner as not to damage his property or endanger life on his premises.

5. The defendant in his answer admits that some rock falls upon the plaintiff's property by reason of his blasting, but alleges that he is not liable therefor because of a previous injunction issued heretofore involving these premises.

6. It appears from the record that in September, 1947, C. E. Lance, brother of the plaintiff in this action, and the owner of the other one-half undivided interest in the lands referred to herein, instituted an action against the defendant alleging damages resulting from the alleged unlawful manner in which the defendant was operating his quarry. He alleged in his complaint that the quarry was located some 600 feet from a barn and cabins on his premises and some 800 feet from his residence, and prayed the court that the defendant, his agents, servants and employees be forever restrained and enjoined from so using his quarry as to throw rocks, stones and debris on the lands of the plaintiff, and from trespassing in any manner on the property of the plaintiff. The former action came on for hearing at the January Term, 1948, in the Superior Court of Henderson County. The court found the facts and entered judgment enjoining the defendant, his agents, servants and employees from operating the quarry described in the complaint in such a manner as to cause rocks and stones to be thrown on the premises of the plaintiff. The judgment, however, contains the following proviso: "Provided however . . . that a rare and isolated case of hurling or throwing of a small quantity of stone and rock on the area of plaintiff's pasture land described in the findings of fact by blasting, provided it does not endanger plaintiff's home and barn, shall not constitute a continuing trespass and violation of this judgment."

7. A temporary restraining order in the present action was entered by Zeb V. Nettles, Resident Judge of the Nineteenth Judicial District, on 17 July, 1953, and such order directed the defendant to appear before his Honor J. H. Clement, Judge of the Superior Court holding the courts of the Eighteenth Judicial District, in the City of Brevard, on 27 July, 1953, at 10:00 a.m., and show cause if any he has, why the restraining order should not be continued to the final hearing.

This cause was heard before Clement, J., at the designated time and place upon the complaint and answer filed in said cause and used as affidavits, and after hearing arguments of counsel, the court being of the opinion that the temporary restraining order theretofore issued should be dissolved, the court, in its discretion, entered an order dissolving the temporary restraining order, but retaining the cause for the further orders of the court. The plaintiff appeals, assigning error.

Monroe M. Redden and Monroe M. Redden, Jr., for plaintiff, appellant.
Harkins, Van Winkle, Walton & Buck for defendant, appellee.

DENNY, J. The court below found no facts and it does not appear that it was requested to do so. Therefore, the ground upon which it exercised its discretionary power to dissolve the temporary restraining order is not disclosed.

Ordinarily, a temporary restraining order will be continued to the hearing if there is "probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if in the opinion of the court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined." *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80; *Seip v. Wright,* 173 N.C. 14, 91 S.E. 359; *Boushiar v. Willis,* 207 N.C. 511, 177 S.E. 632; *Porter v. Insurance Co.,* 207 N.C. 646, 178 S.E. 223; *Hare v. Hare,* 207 N.C. 849, 178 S.E. 545; *Little v. Trust Co.,* 208 N.C. 726, 182 S.E. 491; *Bailey v. Bryson,* 214 N.C. 212, 198 S.E. 622; *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383.

Likewise, when a continuing trespass is sought to be enjoined and the facts are in dispute and can be determined only by a jury, the courts will ordinarily continue the cause to the hearing. *Norfolk Southern R. Co. v. Rapid Transit Co.,* 195 N.C. 305, 141 S.E. 882. Even so, "whether the Court will dissolve an injunction on hearing the answer only or will order the bill to stand over for proofs, much must depend upon the sound discretion of the judge who is to decide the question." *James v. Lemly,* 37 N.C. 278; *McCorkle v. Brem,* 76 N.C. 407; *Cobb v. Clegg, supra.*

In *Lewis v. Lumber Co.,* 99 N.C. 11, 5 S.E. 19, the defendant was engaged in the manufacture of lumber. The plaintiff obtained an injunction restraining the defendant from cutting timber on certain lands, the title to which was claimed by both parties. Upon appeal, the Court said: "The business is a legitimate one, and ought not to be arrested, especially if this can be avoided consistently with the rights of the plaintiff. Indeed, it is against the policy of the law to restrain industries and lawful enterprises. It ought not to be done, unless in extreme cases, certainly when

it may be avoided." *Hurwitz v. Sand Co.*, 189 N.C. 1, 126 S.E. 171; *Tobacco Growers' Ass'n. v. Bland*, 187 N.C. 356, 121 S.E. 636; *Stewart v. Munger*, 174 N.C. 402, 93 S.E. 927; *Lumber Co. v. Wallace*, 93 N.C. 22.

Bynum, J., in speaking for the Court in *Perry v. Michaux*, 79 N.C. 94, said: "If upon the hearing of an answer the statements are such as to leave upon the mind of the Court a reasonable doubt whether the plaintiff's equity is sufficiently negatived, the injunction will not be dissolved, but be continued to the hearing. . . . But it is also a well settled rule that when by the answer the plaintiff's whole equity is denied, and the statement in the answer is credible and exhibits no attempt to evade the material charges in the complaint, an injunction on motion will be dissolved." *Riggsbee v. Durham*, 94 N.C. 800; *Tobacco Growers' Ass'n. v. Harvey & Son Co.*, 189 N.C. 494, 127 S.E. 545, 47 A.L.R. 928.

In the case of *Tobacco Growers' Ass'n. v. Bland, supra*, this Court quoted with approval from the opinion in *American Smelting Co. v. Godfrey*, 158 F. 225, 14 Ann. Cas. 8, the following: "It may be stated as a general rule that in determining whether to grant an injunction it is the duty of the Court to consider the inconvenience and damage that will result to the defendant as well as the benefit that will accrue to the complainant by granting the writ. . . . Upon balancing the conveniences, if it appears that an injunction would be productive of greater injury than would result from its denial, it should not be granted." *Huskins v. Hospital, ante*, 357. Naturally, this same reasoning would apply in determining whether or not a temporary restraining order should be continued to the hearing. We presume the court below in exercising its discretion took all these factors into consideration; therefore, we will not disturb his ruling. Neither are we inadvertent to the fact that we are not bound by the findings or ruling of the judge below in injunction cases, but may look into and review the evidence on appeal. Even so, there is a presumption that the judgment entered below is correct, and the burden is upon the appellant to assign and show error. *Little v. Trust Co., supra; Teeter v. Teeter*, 205 N.C. 438, 171 S.E. 620; *Seip v. Wright, supra; Hyatt v. DeHart*, 140 N.C. 270, 52 S.E. 781. However, if the record disclosed affirmatively that the ruling of the court below was based on the grounds urged by the defendant in his brief, we would be confronted with an entirely different question from that now before us.

The defendant admits in his answer that in the operation of his quarry, occasionally small stones are thrown over and upon the lands of the plaintiff. He alleges, however, in his answer and contends in his brief that if the plaintiff has been damaged as alleged in his complaint, he is not entitled to obtain any relief in this action, but must proceed by motion in the cause in the case instituted in 1947 by his brother, C. E. Lance.

Moreover, he contends that the acts complained of must be found to be violative of the provisions contained in the judgment entered in that action; otherwise he is estopped from obtaining any relief.

In support of the above position the defendant cites in his brief the case of *Faison v. McIlwaine,* 72 N.C. 312, in which it is stated: "It is well established in this state that no party to a suit is permitted by new and independent action praying for an injunction to seek any relief which he might obtain by motion in the original action . . . the present plaintiff might have obtained the relief he seeks by a motion in the original action, as upon *audita querela,* which the judge would have allowed on such terms as might be just." Certainly this is a correct statement of the law, but it applies only to parties who were parties to the original suit.

We do not concur in the view that this plaintiff is bound by the action instituted in 1947 by his brother, C. E. Lance. The plaintiff was not a party to that action and is not bound by it. One tenant in common may sue alone and recover possession of the common property, as against a third party claiming adversely to him and his cotenants, even though he can prove title to only an undivided interest, since each tenant in common is entitled to possession of the whole, except as against a cotenant. *Yancey v. Greenlee,* 90 N.C. 317; *Thames v. Jones,* 97 N.C. 121, 1 S.E. 692; *Gilchrist v. Middleton,* 107 N.C. 663, 12 S.E. 85; *Moody v. Johnson,* 112 N.C. 804, 17 S.E. 579; *Morehead v. Hall,* 126 N.C. 213, 35 S.E. 428; *Winborne v. Lumber Co.,* 130 N.C. 32, 40 S.E. 825; *Shelton v. Wilson,* 131 N.C. 499, 42 S.E. 937; *Taylor v. Meadows,* 169 N.C. 124, 85 S.E. 1; *Davis v. Morgan,* 228 N.C. 78, 44 S.E. 2d 593; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673. However, one tenant in common cannot recover damages for trespass against a third party in excess of his *pro rata* interest in the common property. *Winborne v. Lumber Co., supra. Cf. Hinson v. Shugart,* 224 N.C. 207, 29 S.E. 2d 694.

In the case of *Winborne v. Lumber Co., supra, Clark, J.* (later *Chief Justice*), said: "As to damages for cutting the timber, the plaintiff was entitled to recover only one-fifth, since this judgment would not be a bar to an action by the other four tenants in common for their *pro rata* part of the damages."

As stated in *Huskins v. Hospital, supra,* our ruling on the action of the court below, dissolving the temporary restraining order, will have no bearing whatever on the rights of the parties when the action is tried on its merits.

For the reasons given, the action in the court below, in dissolving the temporary restraining order, is

Affirmed.

LICURKIS JONES AND OLIVE JONES v. M. DEWITT BRINSON AND WIFE, LESSIE R. BRINSON.

(Filed 4 November, 1953.)

1. Courts § 2—

Jurisdiction is the power of the court to decide a case on its merits and presupposes the existence of a duly constituted court with control over the subject matter and the parties.

2. Venue § ½—

Venue refers to the county in which the action is to be tried. Constitution of North Carolina, Art. IV, secs. 2 and 10.

3. Courts § 2—

Jurisdiction of the subject matter cannot be conferred on a court by consent of the parties, waiver or estoppel.

4. Same—

A court may obtain jurisdiction over the person of a party litigant by his consent since the constitutional right of a party litigant to be served with process in a legal manner is a personal privilege which he may waive.

5. Venue § ½—

Venue is not jurisdictional and may be waived by the parties or changed by their consent, express or implied.

6. Venue § 4f—

Where order for change of venue is entered, it is the duty of the party procuring the order, or either or both parties in case of removal by consent, to have the transcript of the record transferred to and deposited in the court to which the cause is ordered removed within the time limited, or, if no time is set forth in the order of the removal, within a reasonable time. G.S. 1-87.

7. Same—

Upon the entering of an order for change of venue, the court to which the cause is ordered removed does not acquire jurisdiction until the transcript, or at least enough thereof to allow the court to determine what is in controversy and what is to be adjudicated by it, is filed in the county of removal, but *eo instante* it obtains jurisdiction the court of original venue loses jurisdiction except for the purposes set out in G.S. 1-87 and G.S. 8-62.

8. Same—

Upon the entering of an order for change of venue, the jurisdiction of the court of original venue becomes dormant and that court is *functus officio* to deal with substantive rights of the parties during the interval for filing the transcript in the court to which the case is ordered removed.

9. Same—

In the event the transcript is not filed in the court to which the cause is ordered removed within the time limited by the order of removal or within a reasonable time if the order of removal fixes no time, the dormant juris-

diction of the court of original venue, on proper notice, may be reactivated for exclusive control of the cause.

10. Same—

This cause was ordered removed to another county, but no part of the transcript was ever certified to or filed in the court of removal. After seven regular terms of court had intervened in the county of removal, defendants issued notice to plaintiffs that they would move in the court of original venue for a hearing of the cause. Plaintiffs' counsel accepted service of this notice without objection or protest. *Held:* Plaintiffs waived their right to object to further proceedings in the court of original venue, and its dormant jurisdiction was reactivated.

11. Judges § 2b: Judgments § 27a—

After the expiration of the term of court at which judgment is entered, a special judge is without jurisdiction to hear a motion to set aside the judgment for surprise or excusable neglect. G.S. 1-220.

APPEAL by plaintiffs from *Burgwyn, Special Judge,* at April Term, 1953, of PAMLICO.

Civil action involving an accounting, heard below on exceptions to referee's report.

This action was originally instituted to establish a parol trust in land. It was here at the Fall Term, 1949, when this Court affirmed a judgment of the Superior Court sustaining the defendants' demurrer to the complaint for failure to allege facts sufficient to constitute a cause of action. *Jones v. Brinson,* 231 N.C. 63, 55 S.E. 2d 808.

When the case went back, a compulsory reference was ordered to determine matters of accounting between the parties, including the question of plaintiffs' liability on the injunction bond. The referee in his report filed 9 November, 1951, concluded upon facts found that the defendants are entitled to recover of the plaintiffs and their surety a stipulated sum. The plaintiffs in apt time filed exceptions to the material findings and conclusions of the referee.

These further disclosures appear from the record:

1. Excerpt from the minutes of the November Term, 1952, of Pamlico Superior Court:

"This case is transferred to Craven County Docket, by consent, in open court, and all counsel being present."

2. Certificates of the Clerk of the Superior Court of Pamlico County (included in the record on appeal, but not in the statement of case on appeal) disclose:

(a) Statement of the Clerk that when the case was ordered transferred to Craven County, "all the attorneys in the case agreed that when the case could be set in Craven County Superior Court that the papers would be called for by one of the attorneys employed in the case, however, the

papers were never actually conveyed to the Craven County Superior Court, to the knowledge of this affiant." (It nowhere appears that the papers were deposited there.)

(b) Statement of the Clerk that on 30 June, 1953, after adjournment of the April Term, 1953, of Pamlico Superior Court, he received from counsel for defendants an order signed by Judge Stevens at the April Term, 1953, of Craven County Superior Court (which convened 6 April, 1953), directing remand of the case to Pamlico County.

3. On 18 April, 1953, plaintiffs' counsel accepted service of the following notice from defendants' counsel:

"Notice is hereby given that the defendants will ask that their motion heretofore filed in this cause that the referee's report be affirmed and judgment entered thereon, be heard by his Honor Henry L. Stevens, Judge presiding at the April Term of the Superior Court of Pamlico County on the 28th day of April, 1953, at such hour as it may please the court to hear the same."

4. On Tuesday, 28 April, 1953, Judge Burgwyn, presiding at the April Term, 1953, of Pamlico Superior Court, entered judgment overruling the plaintiffs' exceptions and approving and confirming the referee's findings and conclusions, and decreeing that the defendants recover against the plaintiffs and their surety the sum of $590 with interest and costs.

5. Plaintiffs' counsel was not present when the case was heard and judgment entered.

From the judgment so entered, the plaintiffs appealed, assigning errors.

Charles L. Abernethy, Jr., for plaintiffs, appellants.

A. D. Ward, Bernard Hollowell, and H. P. Whitehurst for defendants, appellees.

JOHNSON, J. The plaintiffs' chief assignment of error is that the Superior Court of Pamlico County "had no jurisdiction" to hear the exceptions to the referee's report. The plaintiffs take the position that by virtue of the order of removal the Pamlico court lost jurisdiction of the case and the Craven court acquired it; and that while the Craven court thereafter entered an order remanding the case to Pamlico, nevertheless, the judgment based on the hearing in Pamlico was a nullity because the order of remand was not filed in Pamlico until after the hearing and entry of judgment. Thus, in the final analysis the plaintiffs' challenge to the jurisdiction of the Superior Court of Pamlico County rests on the contention that the actual filing in the Pamlico court of the order of remand was a *sine que non* to its recapture of jurisdiction.

The plaintiffs' contention is untenable. It discloses a failure to give due consideration to (1) the basic distinctions between "jurisdiction"

and "venue," and (2) the procedural requirements of G.S. 1-87 relating to transfer of jurisdiction on change of venue.

Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment. Jurisdiction presupposes the existence of a duly constituted court with control over a subject matter which comes within the classification limits designated by the constitutional authority or law under which the court is established and functions. *Williams v. Williams,* 188 N.C. 728, 125 S.E. 482; *S. v. Hall,* 142 N.C. 710, 55 S.E. 806; 14 Am. Jur., Courts, Sections 160 to 162. Jurisdiction also presupposes control by the court over the parties litigant, duly acquired either by general appearance or by such service of process as brings them before the court, actually or constructively, in a constitutional sense. *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709; McIntosh, North Carolina Practice and Procedure, pp. 6 and 7.

Venue means the place wherein the cause is to be tried. As it relates to the Superior Court of North Carolina, venue refers to the county in which the action is to be tried. *Graham v. Charlotte & S. C. R. Co.,* 64 N.C. 631; *Shaffer v. Bank,* 201 N.C. 415, 160 S.E. 481; Constitution of North Carolina, Art. IV, Sections 2 and 10. See also 56 Am. Jur., Venue, Sec. 2.

Jurisdiction over the subject matter of an action cannot be conferred by consent of the parties where it is not otherwise possessed by the court. Nor can jurisdiction in this sense be conferred by waiver or estoppel. In short, it may not be rested on agreements between the parties. "The question is whether the court is itself competent under any circumstances to adjudicate a claim against the defendant, not whether a competent court has obtained jurisdiction of a party triable before it." 14 Am. Jur., Courts, Sec. 184.

While it is true that no consent can give a court jurisdiction of the subject matter of an action which the court does not possess without such consent, it is equally true that a court may obtain jurisdiction over the person of a party litigant by his consent. This for the reason that it is a mere personal privilege of a defendant to require that he be served with process in a legal manner, and since it is a personal privilege—even though of a constitutional nature—he may consent to the jurisdiction of the court without exacting performance of the usual legal formalities as to service of process. *Springer v. Shavender,* 118 N.C. 33, 23 S.E. 976; 14 Am. Jur., Courts, Sec. 184.

Similarly, the venue of an action as fixed by statute or by former order of the court may be changed by consent of the parties, express or implied. *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133; *Heuser v. Heuser,* 234 N.C. 293, 67 S.E. 2d 57; *Bisanar v. Suttlemyre,* 193 N.C. 711, 138 S.E.

1; 56 Am. Jur., Venue, Sec. 43. Also, a litigant's rights as to venue may be waived. This because venue is not jurisdictional. *Shaffer v. Bank, supra; Rector v. Rector,* 186 N.C. 618, 120 S.E. 195; 56 Am. Jur., Venue, Sec. 2.

With us, the basic procedure to be followed in transferring jurisdiction on change of venue is prescribed by G.S. 1-87. This statute provides: "When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidence filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court."

In *Fisher v. Mining Co.,* 105 N.C. 123, 10 S.E. 1055, this Court recognized and applied the principle that the party procuring the order of removal, or either or both parties in case of removal by consent, has until the term of court to which the cause is removed in which to pay the costs, procure the transcript of the record, and deposit it in the court to which the transfer is ordered. See also *Cline v. Mfg. Co.,* 116 N.C. 837, 21 S.E. 791; *Eldred v. Becker,* 60 Wisc. 48, 18 N.W. 720; 67 C.J., p. 210.

Where, as here, the order of removal is by consent and no time is limited in the order of removal, it would seem, and we so hold, that the parties, or either of them, should have a reasonable time in which to deposit the transcript in the other court. *Howard v. Barbee,* 21 Ind. 221; 67 C.J., p. 210.

Here we are at grips with questions respecting the jurisdictional powers of the respective courts during the interval allowed for perfecting the order of removal. Jurisdiction cannot exist simultaneously in both courts, unless, as permitted by G.S. 1-87, it is "otherwise provided by the consent of the parties in writing duly filed, or by order of court." And there is the further exception that, by virtue of G.S. 8-62, subpoenas for witnesses and commissions to take depositions may issue from either court during the interval between the entry of the order of removal and the filing of the transcript in the court to which removal is ordered. Therefore, subject to these exceptions—none of which exists in the present case—when jurisdiction of the court to which the cause is removed attaches, the court of original venue *eo instante* loses jurisdiction. *S. v. Reid,* 18 N.C. 377; 14 Am. Jur., Courts, Sec. 195. And we think a fair interpretation of G.S. 1-87 is that until the transcript is filed in the court to which removal is ordered, it does not acquire jurisdiction over the cause. As to this, we do not mean to declare as a postulate that it is absolutely essential to the acquirement of jurisdiction by the court to which the venue is changed that a copy of the entire record be transmitted. It would seem to be sufficient to bring its power of jurisdiction

into exercise if enough is transmitted to enable the court to determine what is in controversy and what is to be adjudicated by it. Once this is done, defects may be cured, if need be, by *certiorari,* upon suggestion of a diminution of the record. *S. v. Reid, supra;* 56 Am. Jur., Venue, Sec. 76. Meanwhile, the jurisdiction of the court of original venue becomes dormant and that court is *functus officio* to deal with the substantive rights of the parties during the interval allowable for the filing of the transcript in the court to which the case is ordered removed.

In the event the transcript of removal is not filed within the time limited by the court, or within a reasonable time after the order of removal is entered where no time for removal is fixed, the dormant jurisdiction of the court of original venue, on proper notice may be reactivated for exclusive control over the cause. Such procedure is analogous to that followed on an appeal to this Court where, if the transcript is not docketed here at the proper time and *certiorari* is not sought or allowed, the Superior Court, on proof of such facts, may, on proper notice, adjudge that the appeal has been abandoned, and proceed in the cause as upon a recapture of its jurisdiction, as if no appeal had been taken. *Pentuff v. Park,* 195 N.C. 609, 143 S.E. 139; *Dunbar v. Tobacco Growers Co-op. Ass'n.,* 190 N.C. 608, 130 S.E. 505; *Jordan v. Simmons,* 175 N.C. 537, p. 540; 95 S.E. 919; *Avery v. Pritchard,* 93 N.C. 266.

In the case at hand, the record indicates that Pamlico is the county of original venue. The order of removal was entered at the term of court which convened in Pamlico on 3 November, 1952. It further appears that no transcript of the record was docketed in Craven County. Nor does it appear that the order of removal, or any jurisdiction-conferring memorandum in connection therewith, was certified to or filed in the Craven Court. The minimum requirements of G.S. 1-87 were never complied with. Therefore the Superior Court of Craven County never acquired jurisdiction over the cause. It was finally heard before Judge Burgwyn at the term of court which convened in Pamlico 27 April, 1953.

Here the question arises whether the dormant jurisdiction of the Pamlico court was sufficiently reactivated to restore its power to hear and determine the rights of the parties. We take judicial notice that seven regular terms of civil and mixed court were held in Craven County during the period the order of removal was outstanding, at either of which this cause might have been heard. These terms began on the following dates: 10 November, 1952; 17 November, 1952; 5 January, 1953; 26 January, 1953; 2 February, 1953; 9 February, 1953; and 6 April, 1953.

Neither party having taken steps to perfect the removal of the cause during the foregoing interval, either party had the right to move the Pamlico court for a reactivation of its jurisdiction, and have it determine, on notice to the other party, whether the order of removal should be

rescinded as upon abandonment of the right of removal. The defendants pursued this procedure in effect when they issued notice to the plaintiffs that they would move in Pamlico Superior Court for a hearing of the cause on 28 April, 1953. Plaintiffs' counsel accepted service of this notice. He lodged no objection or protest to the contemplated proceedings in the Pamlico court. The plaintiffs thereby waived their rights to object to further proceedings in Pamlico.

The order entered in the Craven Court at the April Term, 1953, directing that the cause be returned to Pamlico may not be treated as an acquirement of jurisdiction by the Superior Court of Craven County. At most the order of remand entered by the Craven court was but a disclaimer of jurisdiction—a declaration by that court that it would not assume jurisdiction over the case.

The fact that the order of remand was not filed in the Pamlico court until after the entry of Judge Burgwyn's judgment is inconsequential. In our view of the case, it was not essential that the order of remand be filed in Pamlico at all.

We have examined the rest of the plaintiffs' assignments of error and find them to be without substantial merit. They are overruled. The judgment of Judge Burgwyn will be upheld. This without prejudice to the rights of the plaintiffs to move before the proper court, if so advised, to have the judgment set aside for mistake, surprise, or excusable neglect under G.S. 1-220. Judge Burgwyn rightly declined to entertain a motion thereunder after the expiration of the term of court at which the judgment was entered. He was without jurisdictional power to act. *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445; *Ipock v. Land Bank,* 206 N.C. 791, 175 S.E. 127.

The judgment below is

Affirmed.

MRS. MARTHA E. LAUGHTER AND MRS. FRANCES SPROUSE, PETITIONERS, v. NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 4 November, 1953.)

1. Eminent Domain § 22—

A release and accord and satisfaction executed by the owner of land to the Highway Commission for the taking of land for highway purposes and for damages to contiguous lands, is a good plea in bar of a subsequent proceeding by the owner to recover compensation for such taking.

2. Same—

Where, after pleading a release and accord and satisfaction executed by the owner of land in bar of the owner's proceeding to recover compensation for the taking of land for highway purposes, the Highway Commission participates without objection in proceedings in which commissioners of appraisal are appointed, and does not object or except to the order appointing the commissioners until after report has been filed, it waives its plea in bar, leaving for determination only the question of the amount of compensation to be paid.

APPEAL by respondent from *Phillips, J.*, at June Term 1953, of BUNCOMBE.

Special proceeding by owners to recover compensation for land actually taken for highway purposes, and for damage to remaining land of owner by reason of the construction of the highway. G.S. 136-19 and G.S. 40-12, *et seq.*

The record proper on this appeal shows the following:

1. The petitioner, Mrs. Martha E. Laughter, instituted this special proceeding against respondent under provisions of statutes above cited, and filed petition before Clerk of Superior Court of Buncombe County to recover compensation (1) for the taking of certain portions of her land for a right of way for a public highway, and (2) for damage to the remaining portion of her land and premises by reason of the taking, and of the construction of the highway. It is alleged in the petition that the land of petitioner comprises her homeplace designated as lot No. 5 in Block 3 of the Arlington Heights property in West Asheville, plat of which is duly registered; that the lot is located between Westwood Place, a paved street, 24 feet in width, extending from Haywood Road to Murphy's Junction on the Southern Railway, and Midland Avenue, an unpaved street; that the residence is located on a "little knoll" five or six feet above the street, Westwood Place, and is a five-room house with bath, porches, and modern conveniences, such as electric lights, running water and sewer; that the premises had been beautified by landscaping and planting; that there was also on the back of the lot a vineyard, a cow stable, a chicken house, and a large garage; that the right of way for approach to a high level bridge, across French Broad River, cut through the northwest corner of petitioner's lot; that the approach when constructed left an embankment approximately 40 to 50 feet in height, extending all the way from the west end of the bridge to petitioner's property and on west for considerable distance, across the street, Westwood Place, making it a dead end a few feet from petitioner's north line, and then on across Midland Avenue, thereby cutting off "petitioner's property from all means of locomotion to the north" either by Westwood Place or Midland Avenue, without any access to the new highway; and that by

reason thereof petitioner has been damaged in sum of $8,000, and is entitled to have a jury appointed, as provided by law, to assess the damages, accruing to petitioner by reason thereof. (2) Summons, in due form, was issued on 15 September, 1950, and served on respondent 19 September, 1950, and it filed answer on 24 November, 1950. In the answer the taking of a small portion of petitioner's lot within the right of way for the highway, and of a small addition where the cut slopes exceeded the regular right of way, is admitted. However, it is denied that petitioner is the sole owner of the land,—suggesting that Frances Strauss has a mortgage on the land, and should be made a party to this proceeding. Other material allegations, in the main, are denied. And for further defense, and as a bar to recovery in this proceeding, it is averred (1) that prior to the construction of the project respondent negotiated for and obtained from petitioner an option to purchase the right of way for highway purposes "over, upon and across" her land, for the price of $25.00, which option was exercised and the purchase price paid by respondent, and release of claim for right of way and damage was executed to it by petitioner on 16 August, 1948; and (2) that, during the construction of the project, it being ascertained that the construction limits would exceed the limits of the right of way, respondent negotiated for and obtained from petitioner on 9 November 1948, a supplementary right of way agreement covering such excess for the consideration of $100, which amount was tendered to petitioner on 7 December, 1948, and refused by her.

3. The petitioner, in reply filed 9 December, 1950, to the further answer and defense of respondent, alleges in summary that she was induced to sign the option for the right of way and to receive the payment of $25.00 because of false and fraudulent statements made to her by agent representing respondent all in manner specifically set forth; and that, in like manner, she was induced to sign the paper in respect to the supplementary right of way. And, hence, petitioner alleges that the options and release are void,—and she reiterates her prayer for judgment as set forth in her original complaint.

4. Record of subsequent procedural matters in this proceeding are referred to and set forth in sufficient detail in order and findings of fact by Phillips, J., at pre-trial conference, 3 June, 1953, after the proceeding had reached the Superior Court on appeal by petitioner and respondent from judgment of Clerk of Superior Court confirming report of commissioners, and need not here be recited.

5. The order of Phillips, J., reads as follows:

"The above entitled matter coming on to be heard before the undersigned Judge holding the courts of the Nineteenth Judicial District at a pre-trial conference thereof, at which time counsel for petitioner and counsel for the respondent were present and participated, and after fully

hearing the same and considering all of the pleadings, allegations, orders and judgment of the Clerk of the Superior Court, and other matters concerning the same, the court finds the following facts and enters the following pre-trial order:

"1. The petitioner presents to the court an application of one Frances Sprouse to be made party plaintiff to said action, and being the same person referred to in paragraph 3 of the respondent's answer as Frances Strauss, as the mortgagee of said lands, and thereupon the court entered an order making said Frances Sprouse a party and she formally adopted the pleadings of the petitioner as her pleadings in said cause.

"2. The petitioners thereupon presented to the court in writing a written plea of Waiver and Estoppel, dated June 1, 1953, which the court, in its discretion, permits petitioners to file and the original of which is on file among the papers in this cause; that in effect the petitioners contend by said Plea of Waiver and Estoppel that the only matter to be determined in this case in this court is the exceptions filed by both petitioner and respondent of the amount of damages awarded by the Commissioners in their report and that all of the other matters contained in said pleadings have been waived by the respondent since the filing of the original pleadings in said case; that thereupon the court heard said matter by conferring with counsel for petitioners and respondent and a thorough examination of the papers and documents filed in said cause and in regard thereto the court finds the following facts: (a) That this proceeding was instituted in the Superior Court before the Clerk on September 15, 1950, and the respondent answered the same November 24, 1950, and the petitioner filed a reply to the further answer and defense of the respondent on December 9, 1950; that counsel for petitioner gave a written notice to counsel for respondent and delivered a copy thereof to local counsel for respondent that he would, on Saturday, June 16, 1951, at 10 o'clock A.M., request the Clerk of the Superior Court to enter an order appointing commissioners of appraisal in said matter and notified them to be present at said time and place; that pursuant to said notice, counsel for petitioner and local counsel for respondent did meet with the Clerk of the Superior Court, at which time counsel for petitioner presented to the court an order appointing commissioners of appraisal in which the names of the commissioners were left blank for the Clerk to enter, and then local counsel for respondent and counsel for petitioner discussed with the Clerk and agreed to the appointment of the commissioners named in said order of appointment, and thereupon the Clerk of the Superior Court wrote in the names of said commissioners and signed the order and judgment appointing the commissioners dated June 16, 1951.

"(b) That the Clerk of the Superior Court in his judgment entered in said cause, dated July 6, 1951, finds the following facts: 'the Clerk there-

upon proceeded to confer with counsel for petitioner and respondent with respect to the appointment of Commissioners to assess damages and benefits to the petitioner on account of the appropriation or taking of said lands; and'

" 'The said petitioner and respondent having agreed to the appointment of H. B. Posey, E. B. Roberts and W. S. Harrison, Commissioners, to act as jurors to assess damages and benefits in this cause, . . .' "

"(c) That the original order of the Clerk of the Superior Court appointing the commissioners of appraisal, dated June 16, 1951, does not contain thereon any objections or exceptions thereto; that the commissioners appointed therein were duly sworn in on the 21st day of June, 1951, and in writing, signed by each of said commissioners, made their report of appraisal on the 21st day of June, 1951.

"(d) That the respondent, through its counsel, prepared written exceptions to the report of said commissioners, and said written exceptions were contained in a folder of the State Highway and Public Works Commission and signed by the chief counsel of said Highway Commission, and dated June 26, 1951, and also bears the signature of said local counsel of said respondent, and was actually filed in the office of the Clerk of the Superior Court of Buncombe County on June 28, 1951, and in which in addition to exceptions of report of appraisal, respondent undertook to object and except to the appointment of the commissioners; that this written paper of said date does not, and could not, constitute an exception and objection to the order appointing commissioners to which counsel for the respondent had previously consented and made no objection until after the commissioners were sworn in, visited the premises, and made the appraisal and filed their report.

"(e) That the paper writing, dated June 26, 1951, and filed in the Clerk's office of Buncombe County on June 28, 1951, constitutes and is an exception to the report of the commissioners and entitles the respondent to a hearing thereon before the jury as to the amount of damages, if any, that the petitioners are entitled to recover because of the taking of said property.

"3. That at the time of said pre-trial conference counsel for respondent presented in writing a request to the court to strike out the defense plea of the Statute of Limitations and this was allowed.

"4. The court heard the motion of the respondent to strike out portions of the petition and reply to respondent's answer and allowed some of the motion to strike and disallowed some, all of which was entered on the original pleadings by running a line through the parts stricken out.

"CONCLUSION. The court is of the opinion that because of the matters and things hereinbefore set forth that there is only one issue to be submitted to, and heard by, the jury and that issue is: What amount, if any,

the petitioners are entitled to recover from the respondent because of the injuries and damages and because of the taking of their property as alleged in the petition."

Appeal entries are these: "To the foregoing order and each and every one of the findings of fact and conclusions of law herein," the respondent objects; objection overruled—and exception. Exception No. 1.

"To the signing and entry of the foregoing order" the respondent objects; objection overruled, and exception. Exception No. 7.

And upon trial in Superior Court, both petitioners and respondent offered evidence relating to the issue as determined by the judge on such pre-trial conference, on which the case was submitted to the jury.

And respondent offered to introduce in evidence portions of the pleadings and documents pertaining to the pleas in bar set up in answer of respondent, and tendered issues in respect thereto, with request for peremptory instruction thereon, all of which, upon objection by petitioner, were excluded, and respondent excepted in each instance.

The jury answered the issue, submitted by the court, in the sum of $2,500.

Thereupon the court entered judgment in accordance therewith,—and defining the easement acquired over land of petitioner, and directing that copy of the judgment be certified, under seal of the court, to the Register of Deeds of Buncombe County and be by him recorded among the land records of said county.

Respondent excepts thereto, and appeals to Supreme Court and assigns error.

Don C. Young for petitioners, appellees.

R. Brookes Peters, Kenneth Wooten, Jr., and Gudger, Elmore & Martin for respondent, appellant.

WINBORNE, J. This is the pivotal question on this appeal: In the light of the pleadings, and of the orders shown in the record, and upon the facts found by the Judge, as set forth in the order of 3 June, 1951, entered pursuant to pre-trial conference, did the court correctly rule that only one issue as therein stated should be submitted to the jury? This Court holds in the affirmative.

Petitioner in her complaint seeks compensation in large amount for the taking of right of way, and for constructing a certain public highway across her property. In answer to this, respondent pleads release and accord and satisfaction in bar of petitioner's right to recover any further compensation. In this connection, release and accord and satisfaction, if established, are, in accordance with decisions of this Court, good pleas in bar. See among other cases: *Jones v. Beaman,* 117 N.C. 259, 23 S.E.

248; *McAuley v. Sloan,* 173 N.C. 80, 91 S.E. 701; *Bank v. Evans,* 191 N.C. 535, 132 S.E. 563. See also McIntosh's N. C. P. & P. in Civil Cases, Sec. 523, at page 564.

Such pleas, if established, would defeat the right of petitioner to maintain this proceeding, and to recover any further compensation. And respondent had the right to stand to, and abide by its pleas. But when respondent, without obtaining a ruling on its pleas in bar, elected to appear before the Clerk of Superior Court, upon notice, and to participate in, and to agree to the selection of commissioners to appraise the compensation to which petitioner is entitled, it waived the benefit of the pleas. From such act it is reasonable to assume after all that respondent had changed its mind,—not an unreasonable assumption in the light of the amount paid, and offered to be paid for the release and accord and satisfaction pleaded, on the one hand, and the amount of compensation to which the jury later found petitioner to be entitled, on the other. Indeed, it has been said, in reference to a plea in abatement, that it is waived, even after joinder of issue thereon, where defendant, without obtaining a ruling on the plea, appears to the merits of the action. 1 C.J.S. 272, Abatement and Revival, Sec. 211.

Careful consideration has been given to all points urged for error, and debated in brief of counsel for respondent, in respect to the findings of fact, and rulings of the Judge below as set forth in the pre-trial order of 3 June, 1951, and prejudicial error is not made to appear.

And, too, all assignments of error based upon exceptions taken in the course of the trial in Superior Court, as well as those based upon exceptions to the charge, have been duly considered, and in them prejudicial error is not revealed.

The case appears to have been fairly presented to the jury, and the jury has spoken. So be it!

No error.

LOYD PHILLIPS, T/A PHILLIPS MOTOR COMPANY, v. EUGENE SHAW, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 4 November, 1953.)

1. Statutes § 5a—

When the language of a statute is unambiguous there is no room for judicial construction.

2. Taxation § 30—

Under the provisions of G.S. 105-168 a sale by a wholesale merchant to anyone not taxable under the statute as a retail merchant is taxable as a retail sale, and this provision applies to a sale by a wholesale second-hand

car dealer in this State to retail merchants of another state for the purpose of resale out of this State.

3. Statutes § 5a—

Where a particular provision of a statute is in conflict with a prior general provision, the particular provision will ordinarily be given effect as an exception to the general provision.

4. Appeal and Error §§ 8, 40l—

Where the question of the constitutionality of an act is not raised in the court below, it may not be raised for the first time in the Supreme Court upon appeal.

5. Constitutional Law § 29: Taxation § 30—

Where the sale of second-hand automobiles by a resident wholesaler to out-of-state retailers takes place in this State, so that title and possession pass to the purchasers before the property enters the channels of interstate commerce, the sale is not an interstate transaction.

APPEAL by plaintiff from *Clement, J.*, April Term, 1953, WILKES. Affirmed.

Civil action to recover sales tax paid under protest.

At the hearing in the court below the parties stipulated the facts, waived trial by jury, and submitted the cause to the court on the facts agreed which may be summarized as follows:

Plaintiff is engaged in the business of selling second-hand automobiles. His place of business is in Wilkes County. Defendant is the duly authorized Commissioner of Revenue of the State of North Carolina. He made an audit of the books of plaintiff. As a result of the audit, defendant, on 25 June 1952, asserted an amended assessment against plaintiff for additional sales tax due for the period from 1 July 1948 to 30 April 1951 in the sum of $2,016.90 plus $201.69 penalty and $307.58 interest. Plaintiff duly protested the additional assessment. As a result of the hearing, the Commissioner allowed certain credits on the assessment, thereby reducing the amount of taxes due under the assessment to $854.55.

All the automobiles for the sale of which an assessment was made and sustained by the Commissioner were sold and delivered to purchasers in this State. The purchasers, however, (1) were residents of South Carolina; (2) were licensed retail merchants in said State; (3) purchased said automobiles for the purpose of resale outside this State; and (4) were not taxable as "retail merchants" under the sales tax law of this State. None of these automobiles were in fact resold in this State.

While it is not expressly so stipulated, it is apparent plaintiff was a wholesale dealer in used automobiles and paid the tax assessed against wholesalers.

Plaintiff has in all respects complied with the procedural requirements of the statute, G.S. 105-267, 241.1, and the court had jurisdiction over the parties to and the subject matter of this action.

It was agreed that if plaintiff is entitled to recover any amount, he is entitled to judgment in the sum of $854.55 less $25.24 (wholesale tax paid), or $829.31 plus costs.

The court below, upon the facts agreed, concluded, as a matter of law, that plaintiff is not entitled to recover any amount in this action. It thereupon entered judgment that plaintiff recover nothing. Plaintiff excepted and appealed.

W. H. McElwee, Jr., for plaintiff appellant.

Attorney-General McMullan and Samuel Behrends, Jr., Member of Staff, for defendant appellee.

BARNHILL, J. The sales tax statute, General Statutes ch. 105, art 5, defines the terms "wholesale sale," "sale at wholesale," "sale of tangible personal property," and like terms. G.S. 105-167.

It levies a one dollar license tax on both wholesalers and retailers, G.S. 105-168, and provides that:

"An additional tax is hereby levied for the privilege of engaging or continuing in the business of selling tangible personal property as follows:

"(a) Wholesale Merchants.—Upon every wholesale merchant as defined in this article, an annual license tax of ten dollars ($10.00). Such annual license shall be paid in advance . . . There is also levied on each wholesale merchant an additional tax of one-twentieth of one per cent (1/20th of 1%) of the total gross sales of the business.

"The sale of any article of merchandise by any 'wholesale merchant' to anyone other than to a licensed retail merchant for resale shall be taxable at the rate of tax provided in this article upon the retail sale of merchandise. In the interpretation of this article, the sale of any articles of commerce by any 'wholesale merchant' to *anyone not taxable under this article as a 'retail merchant'* . . . shall be taxable by the wholesale merchant at the rate of tax provided in this article upon the retail sale of merchandise . . ." (Italics supplied.)

These are the provisions of our sales tax statute under which the Commissioner acted in levying the assessment about which plaintiff now complains. They control decision here.

The language of these provisions is unambiguous. Its meaning is clear. Therefore, there is no room for judicial construction. *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610; *In re Taxi Co.*, 237 N.C. 373, 75 S.E. 2d 156; *Perry v. Stancil*, 237 N.C. 442, 75 S.E. 2d 512;

Watson Industries v. Shaw, Comr. of Revenue, 235 N.C. 203, 69 S.E. 2d 505; *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484.

The statute prescribes a fee of one dollar for a license to engage in the business of wholesale or retail sale of automobiles. It levies on wholesalers an additional license tax of ten dollars plus 1/20 of 1% of the total gross sales of the business, to be paid by the merchant. It guards against sales by wholesalers to persons other than retail merchants, free of tax, by providing that a sale to any person other than a licensed retail merchant for retail shall be taxable at the retail rate of 3%. It then defines or prescribes the interpretation of the phrase "to anyone other than a licensed retail merchant for resale." Any sale by a wholesaler to anyone not taxable as a retail merchant under the sales tax statute shall be deemed a sale at retail and the wholesale merchant must collect and account for the tax on such sale at the rate of 3%, but not to exceed $15 on the sale of any one automobile.

These provisions are not in conflict with prior provisions of the Act defining "wholesale sale," "sale at wholesale," "retail merchant," "retail," and like terms contained in G.S. 105-167.

The General Assembly simply took note of the fact that wholesalers sometimes sell to persons who are not retail merchants or persons who purchase for resale. It did not intend that such sales should escape taxation at the retail rate. In providing that a wholesaler must account for a tax on such sales at the retail rate, it declared that a sale by a wholesaler "to anyone not taxable under this article" shall be deemed a sale at retail. It relates only to sales made by wholesalers and provides the method of ascertaining the license and sales tax due by wholesalers. Thus the Legislature closed a loophole in the law which, otherwise, would have furnished a way for material evasion of the sales tax law. Clearly the definition is broad enough to include the sales which are the subject matter of this action.

Even if we concede that the quoted provisions are incompatible with the general definitions contained in G.S. 105-167, this is no cause for declaring them invalid. It is a recognized canon of construction that: "Where the same statute contains a particular provision, which embraces the matter under consideration, and a general provision, which includes the same matter and is incompatible with the particular provision, the particular provision must be regarded as an exception to the general provision, and the general provision must be held to cover only such cases within its general language as are not within the terms of the particular provision." *Utilities Commission v. Coach Co.,* 236 N.C. 583, 73 S.E. 2d 562, and cases cited.

The question of constitutionality of the Act was not raised in the court below. It may not be raised for the first time in this Court. *Woodard*

v. Clark, 234 N.C. 215, 66 S.E. 2d 888; *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22; *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663; *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151; 11 A.J. 720.

However, lest our failure to pass on that question invite further litigation on this subject, we may say that the appellant's contention in that respect is untenable.

The contract of purchase and sale was consummated in this State. Delivery was had here. The property entered the channels of interstate commerce—if at all—after both title and possession had passed to the purchaser. In no sense was it an interstate transaction. *Watson Industries v. Shaw, Comr. of Revenue, supra; McGoldrick v. Berwind-White Coal Min. Co.,* 309 U.S. 33, 84 L. Ed. 565; *Treasury of Indiana v. Wood Preserving Corp.,* 313 U.S. 62, 85 L. Ed. 1188; *International H. Co. v. Dept. of Treasury,* 322 U.S. 340, 88 L. Ed. 1313.

We are of the opinion, therefore, that the court below, on the facts agreed, correctly concluded that plaintiff is not entitled to recover the tax paid by him under protest. Therefore, the judgment entered must be

Affirmed.

H. C. BUCHAN, JR., T/A NORTH WILKESBORO HARDWARE AND SPARTA HARDWARE, v. EUGENE SHAW, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 4 November, 1953.)

Taxation § 38c: Declaratory Judgment Act § 1—

G.S. 105-267 provides the sole remedy of a taxpayer to determine his liability for a sales tax, and he may not maintain an action under the Declaratory Judgment Act to determine his liability therefor.

APPEAL by plaintiff from *Clement, J.,* June Term, 1953, WILKES.

Civil action under the Declaratory Judgment Act to determine plaintiff's tax liability under the sales tax statute.

Plaintiff is a licensed wholesale dealer and "sells a vast amount of merchandise to merchants for resale . . . outside of the State of North Carolina," principally to licensed retail merchants of Virginia and Tennessee. He seeks a judgment adjudicating his tax liability on such sales. The defendant demurred for that the court has no jurisdiction over the subject matter of this action. The demurrer was sustained and judgment dismissing the action was duly entered. Plaintiff excepted and appealed.

W. H. McElwee, Jr., for plaintiff appellant.

Attorney-General McMullan and Samuel Behrends, Jr., Member of Staff, for defendant appellee.

BARNHILL, J. An action against the Commissioner of Revenue, in essence, is an action against the State. *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E. 2d 619. Since the State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act to adjudicate his tax liability under the sales tax statute, the court properly sustained the demurrer. *Insurance Co. v. Unemployment Compensation Com., supra.* See also *Bunn v. Maxwell, Comr. of Revenue,* 199 N.C. 557, 155 S.E. 250; *Rotan v. S.,* 195 N.C. 291, 141 S.E. 733.

Plaintiff's only remedy is provided by G.S. 105-267. He must follow the procedure there prescribed.

In any event, the question the plaintiff seeks to have the court answer by declaratory judgment is put at rest in the opinion in *Phillips v. Shaw, ante,* p. 518, this day filed.

The judgment entered in the court below is

Affirmed.

E. J. SPRUILL AND M. J. SPRUILL v. CECIL NIXON.

(Filed 4 November, 1953.)

1. Easements § 2—

Where the owner of a tract of land which has a road or cartway thereon which has been used so long and so obviously as to show that it was meant to be permanent, divides the tract into separate parcels by deed, and the use of the easement is necessary to the beneficial enjoyment of a portion of the land so divided, the grantee of such portion is entitled to an easement by implication of law.

2. Judgments § 1—

A judgment by consent is a contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and such judgment cannot be modified or set aside without the consent of the parties except for fraud or mistake in an independent action instituted for that purpose.

3. Judgments §§ 3½, 32: Easements § 2—

A judgment entered by consent of the owners of adjacent tracts of land in an action instituted solely for the purpose of establishing the boundary line between said tracts, without reference to an easement by implication of law existing in favor of the one party against the other, will not be construed as affecting the easement, and will not bar a subsequent proceeding to enjoin the obstruction of the cartway, instituted by the owner through *mesne* conveyances of the one tract against the owner through *mesne* conveyances of the other tract.

SPRUILL *v.* NIXON.

APPEAL by defendant from *Parker (Joseph W.), J.*, at April Term, 1953, of WASHINGTON.

Civil action for an injunction preventing defendant from obstructing or otherwise interfering with a road leading from U. S. Highway No. 64 through land of defendant to adjoining lands of plaintiff E. J. Spruill.

In the Superior Court the parties stipulated that the sole controversy to be determined and tried herein shall be the claim of plaintiffs to an easement or outlet between land of plaintiff E. J. Spruill and the public highway through and over the lands of defendant Cecil Nixon.

The parties waived jury trial and consented that the court hear the evidence, find the facts and enter judgment thereon.

And the parties further stipulated, in substance, that on 18 March, 1915, Axie Lane owned, as an entire tract, the lands of plaintiff E. J. Spruill and of defendant; that on "that date Axie Lane conveyed to Sarah E. Phelps, by deed which has been duly registered, all of the tract which was adjacent to the public road, and same has passed by *mesne* conveyances to and is now owned by defendant"; that on same date Axie Lane conveyed part of the remaining land to S. S. Lane, by deed which has been duly registered, and the remainder to Enoch Nixon, by deed which has been duly registered, and these two tracts of land passed by specific *mesne* conveyances to plaintiff E. J. Spruill, and that the deeds from Axie Lane to S. S. Lane and Enoch Nixon, and all of the said *mesne* conveyances contained *habendum* and *tenendum* clauses as follows: "together with all privileges and appurtenances thereto belonging."

And from the evidence adduced upon the hearing the court finds the following facts: (Numbers and paragraphing supplied.)

(1) "That the plaintiffs' and defendant's title to their respective lands described in the complaint and answer is derived from a common source, to wit, Axie Lane;

(2) "That at the time Axie Lane was in possession of the lands now owned by plaintiffs and defendant there was a road leading from the public highway now designated as U. S. Highway 64 through the lands now owned by the defendant, into and across the lands now owned by the plaintiffs;

(3) "That subsequent to this date, to wit, on the 18th day of March, 1915, Axie Lane conveyed her entire tract of land in three parcels to her daughter and two sons, Sarah E. Phelps, S. S. Lane, and Enoch Nixon;

(4) "That through *mesne* conveyances the land of Sarah E. Phelps came into possession (of), and is now owned by the defendant in this action—the same lying between U. S. Highway 64 and the two tracts conveyed to her sons;

(5) "That the lands conveyed by Axie Lane to her sons S. S. Lane and Enoch Nixon through *mesne* conveyances are now in the possession of and owned by the plaintiffs in this action;

(6) "That this roadway has been in use for at least 65 years up until the present date by the plaintiffs and their predecessors in title;

(7) "That there was prior to 1951, and for a period of as much as 35 years, a cart path from the lands of the plaintiffs across lands formerly owned by J. E. Davenport and now belonging to Wesley Chesson; and that this road or pathway has not been in use since 1951, due to the alteration of its point of junction with the highway leading from Plymouth to Mackey's Ferry by the State Highway and Public Works Commission;

(8) "That at this time there is no other way of ingress or egress into and out of the lands owned by the plaintiffs other than the road leading across the lands of the defendant to U. S. Highway 64;

(9) "That in a previous action entitled 'T. E. Ainsley against Cecil Nixon,' having to do with the establishment of a boundary line between the lands of Cecil Nixon, the defendant in this action, and the lands of T. E. Ainsley, the plaintiff in the former action, which lands are now owned by and in the possession of the plaintiffs in this action, a judgment was rendered establishing said line and adjudging the defendant in the action to be the owner of and entitled to the possession of the lands lying between U. S. Highway 64 and the lands of T. E. Ainsley, said lands now being the same lands now owned by the plaintiffs in this action; and

(10) "That prior to the alteration of the path or roadway by the State Highway and Public Works Commission, as hereinabove set forth, plaintiffs' predecessors in interest used both paths or roadways for ingress and egress into and out of the lands described herein as plaintiffs'.

"The court being of the opinion, contrary to the contention of the attorney for the defendant, that the judgment entered in the action entitled 'T. E. Ainsley against Cecil Nixon' does not constitute a bar to the plaintiffs' right to the use of the path from the lands of the plaintiff over and across the lands of the defendant to U. S. Highway 64, overruled his motion for judgment as of nonsuit at the conclusion of the plaintiffs' evidence and renewed at the conclusion of all the evidence."

And "the court further finds as a fact that the plaintiffs are entitled to the use of the roadway across the lands of the defendant as hereinabove described."

Thereupon the court "ordered, adjudged and decreed that the defendant Cecil Nixon, his agents, servants and employees, be, and they are hereby permanently restrained and enjoined from interfering, obstructing, molesting, or in any other manner preventing or attempting to prevent the plaintiffs, their successors and assigns, from the use of the roadway leading from the lands of the plaintiffs across the lands of the defendants into U. S. Highway 64," and "that the defendant pay the costs of this action to be taxed by the clerk."

Defendant appeals therefrom to Supreme Court and assigns error.

Bailey & Bailey for plaintiffs, appellees.
W. L. Whitley for defendant, appellant.

WINBORNE, J. Two questions, determinative of this appeal, are here presented for consideration and decision. 1. Was an easement in the road across the land, now owned by defendant, created by implication of law, upon the severance of unity of title by the common grantor, Axie Lane, as set forth in the facts found by the trial court? 2. If so, was such easement extinguished by the judgment in the civil action instituted by T. E. Ainsley, immediate predecessor in title of present plaintiff, against Cecil Nixon, the present defendant?

In the light of applicable principles of law, applied to the facts found by the trial judge, this Court holds that the first question is properly answered in the affirmative, and that the second merits a negative answer.

As to the first question: "It is a well settled rule of law that where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude at the time of the severance is in use and is reasonably necessary to the fair enjoyment of the other part of the estate, then upon a severance of ownership, a grant of the right to continue such use arises by implication of law . . . The underlying basis of the rule is that unless the contrary is provided, all privileges and appurtenances as are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor, are included in the grant." 17 Am. Jur. 945, Easements, Implied, Section 33.

There are three essentials to the creation of an easement by implication upon severance of title: (1) A separation of the title; (2) Before the separation took place the use which gave rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained. 17 Am. Jur. 948, Easements, Section 34.

These principles as to creating easements by implication of law upon severance of unity of title has been recognized, and applied in numerous cases in North Carolina. See *Bowling v. Burton,* 101 N.C. 176, 7 S.E. 701; *Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224; *Ferrell v. Trust Co.,* 221 N.C. 432, 20 S.E. 2d 329; *Packard v. Smart,* 224 N.C. 480, 31 S.E. 2d 517, 155 A.L.R. 536; *Neamand v. Skinkle,* 225 N.C. 383, 35 S.E. 2d 176.

Now as to the second question: The judgment referred to was entered by consent. It is a settled principle of law in this State that a consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and that such

contracts cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and that in order to vacate such judgment an independent action must be instituted. See *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209, and cases there cited. See also among other cases: *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576; *S. v. Griggs,* 223 N.C. 279, 25 S.E. 2d 862; *Rodriguez v. Rodriguez,* 224 N.C. 275, 29 S.E. 2d 901; *Williamson v. Williamson,* 224 N.C. 474, 31 S.E. 2d 367; *Davis v. Whitehurst,* 229 N.C. 226, 49 S.E. 2d 394; *Ledford v. Ledford,* 229 N.C. 373, 49 S.E. 2d 794.

In the case in hand the premises set out in the consent judgment in *Ainsley v. Nixon* is that "this cause comes on now to be adjudged by the Clerk by consent, the parties having agreed upon a settlement of all matters in controversy herein as herein set out." And there is in the entire proceeding no mention of the easement created by implication of law. Hence giving effect to the consent agreement, as stated by the parties then owning the lands, it seems manifest that the parties did not intend that the judgment should affect the easement created by implication of law by the severance of unity of title at the common source.

All assignments of error have been duly considered, and error in them is not made to appear.

Hence the judgment below is

Affirmed.

STATE v. JAMES POWELL, SR.

(Filed 4 November, 1953.)

1. Criminal Law § 31a—

A medical expert testified as to the bullet wounds in, and powder burns on, the hand and head of deceased. *Held:* The medical expert is competent to testify from his examination as to the position of deceased's hand when the fatal shot was fired.

2. Same—

The rule that an expert witness may not express an opinion on the very issue before the jury is subject to exceptions permitting the admission of evidence as to ultimate facts in regard to matters of science, art or skill.

3. Homicide § 27h—

Where there is any substantial evidence of defendant's guilt of murder in the second degree, the trial court correctly submits the question to the jury.

4. Homicide § 25—

The State's evidence tended to show that defendant got up from his bed, went to another room and procured a pistol which he put under his pillow

to scare his wife and make her stop arguing, that as she continued to argue defendant raised up in bed and pointed the pistol at her, and that she grabbed it and the pistol went off inflicting fatal injury. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree.

5. Homicide § 16—

A pistol is a deadly weapon *per se*.

6. Same—

An intentional killing of a human being with a deadly weapon implies malice, and, nothing else appearing, constitutes murder in the second degree, casting the burden upon defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the charge to manslaughter or excuse it.

APPEAL by defendant from *Moore, J.*, February Term, 1953. CATAWBA. No error.

The bill of indictment charged the defendant with the murder of his wife, Bessie Rector Powell. Before the trial the Solicitor announced that he would not ask for a verdict of guilty of murder in the first degree, but would ask for a verdict of guilty of murder in the second degree or manslaughter, as the evidence might warrant. The defendant pleaded Not Guilty. The jury's verdict was guilty of murder in the second degree.

The State's evidence tended to show the following facts. As the result of a call the sheriff of the county went to the defendant's home 7 January 1953, arriving there about 4:00 a.m. It was a two-story house. The bedroom of the defendant and his wife was on the lefthand side of the house as you enter. The sheriff went into this bedroom, and found there two deputy sheriffs, James Powell, Jr., a son of the defendant by a former marriage, William Rector, brother of Bessie Rector Powell, and the defendant, who was asleep in the bed in which his wife had been shot. The defendant's wife had been carried to the hospital, where she died about 9:00 a.m.

The defendant's son, James, there in his father's presence made this statement. He and William Rector were asleep upstairs. He was awakened by a shot. Shortly thereafter his father called, saying come down, Bessie had been hurt. He awakened Rector, and they went downstairs. He saw Bessie Rector Powell lying in bed, a lot of blood on her and on the bed, and his father standing beside the bed trying to wipe the blood away. He also tried to wash the blood away, and stop the bleeding. Being unsuccessful, he went to a deputy sheriff's home. An ambulance was called, and she was carried to a hospital. When he came downstairs his father's pistol was lying on the bed beside Bessie. His father took it up, and put it on a chest of drawers in the room, where he showed it to the sheriff.

The sheriff then talked to the defendant. In the sheriff's opinion he did not appear under the influence of intoxicants, but the sheriff smelt a faint odor. The defendant talked freely about all of it. This is a summary of what he there told the sheriff. Early that evening he and his wife went to Newton, and at a whiskey store bought a fifth of Old Stag Whiskey. They went to a friend's home, and had a few drinks. He and his wife returned home about 10:00 p.m. About one inch of whiskey was left in the bottle. About 10:30 p.m. they went to bed. His wife was in a very argumentative mood and drunk. He was sleepy, and could not get her to stop arguing. Later on that night his wife was still making a noise, and wouldn't go to sleep. He got up, turned on the light, went into the next room, unlocked a big tool chest where he kept a rifle, shotgun and pistol, and took his pistol out, and locked the chest. He then went back into the bedroom, where the light was on, and Bessie in bed. He thought she saw the pistol. He was trying to scare her and get her to hush and go to sleep. He put the pistol under his pillow, turned off the light, and got in bed. His wife continued to argue. He raised up in bed with the pistol in his hand. He wasn't sure whether she grabbed at the pistol or grabbed at the barrel; he had the butt of the pistol in his hand, his finger on the trigger, the pistol pointed at his wife, when it fired. His wife was lying in bed flat on her back. He said his wife's head was lying on a pillow, and the pool of blood on the pillow came from her head wound. Lower in the bed, where she apparently slipped down, was another pool of blood. The best he could recall Bessie's injury occurred about 2:30 a.m.

The body of Bessie Rector Powell was examined by two physicians—one of whom performed an autopsy. Her death resulted from a penetrating wound of the skull with a laceration and tearing of the brain and rupture of the superior blood sinus that caused her to bleed to death. At the autopsy a soft lead bullet, extremely distorted, was removed from her skull. There was a bullet wound through the ring finger of her right hand—the exit of the bullet was apparently on the back of the hand. There were powder burns on the inside of her hand and on the surface of her forehead.

This is a brief summary of the defendant's evidence. He and his wife were on good terms, and had never had any trouble. It was his custom to keep his pistol under his pillow at night. That night he and his wife had no argument, except she wanted more liquor. After he had been in bed 15 or 20 minutes, he got up, and put his pistol under his pillow. After midnight he was awakened by someone pulling at the pistol. He raised up, Bessie was getting hold of the pistol, he grabbed, and got hold of it, and then it fired.

From judgment imposed the defendant appealed.

Attorney-General McMullan, Assistant Attorney General Love, and Gerald F. White, Member of Staff, for the State.

Louis A. Whitener for defendant, appellant.

PARKER, J. Defendant's Assignment of Error No. One is to the admission over his objection of the following testimony of Dr. J. C. Reece, who performed an autopsy on the body of Bessie Rector Powell, and who was admitted by the defendant to be an expert witness as a physician and pathologist. Dr. Reece was asked these questions. Q. You have described the wound on the finger of the deceased woman. Based upon your examination of her and your training and experience in matters of this sort, have you an opinion satisfactory to yourself where her hand was when the fatal bullet shot was fired? Objection—Overruled—Exception. A. I do. Q. Would you tell the court and jury what that opinion is? A. I think the hand was somewhere in front of the face in this particular area (indicating). Q. Would you say, Doctor, that it was turned—in other words like that, to her face? (indicating). A. Yes.

This witness spoke from a professional and personal examination of the body of Bessie Rector Powell, and the answers, to our minds, were clearly within the domain of expert opinion. The witness had testified in minute detail as to the penetration of the bullet through the ring finger of the right hand into the skull and brain of Bessie Rector Powell, and also the powder burns on her hand and forehead. His opinion required expert skill or knowledge in the medical or pathologic field about which a person of ordinary experience would not be capable of satisfactory conclusions, unaided by expert information from one learned in the medical profession. The questions and answers are approved and upheld, we think, in *S. v. Jones,* 68 N.C. 443 (opinion of doctor who saw deceased as to his posture and position when shot); *S. v. Fox,* 197 N.C. 478, 149 S.E. 735 (opinion of doctor that deceased was lying down when he received the fatal wound); *S. v. Stanley,* 227 N.C. 650, 44 S.E. 2d 196 (physician testified that deceased was in a prone position when fatal injuries inflicted); *McManus v. R. R.,* 174 N.C. 735, 94 S.E. 455 (physician testified the intestate was lying down at time of injury); *George v. R. R.,* 215 N.C. 773, 3 S.E. 2d 286 (similar opinion testimony as in *McManus case*).

It has been frequently stated that the testimony of an expert witness should be excluded when it expresses an opinion on the very issue before the jury, but this rule is not inflexible. It is frequently relaxed in the admission of evidence as to ultimate facts in regard to matters of science, art or skill, *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312; where cases are cited.

We have examined the cases relied upon by the defendant, and they have different facts.

Defendant's Assignment of Error No. One is overruled.

Defendant's Assignments of Errors Nos. Two and Three are to the refusal of the trial court to nonsuit the State as to murder in the second degree made at the close of the State's evidence, and renewed at the close of all the evidence. The defendant contended the court should have submitted the case to the jury on manslaughter alone.

This presents the question was there any substantial evidence to carry the State's case to the jury that the defendant was guilty of murder in the second degree. If so, it is a matter for the jury. *S. v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676; *S. v. Bright,* 237 N.C. 475, 75 S.E. 2d 407.

The evidence for the State discloses these facts. His wife was drunk and in a very argumentative mood; they went to bed about 10:30 p.m.; he was sleepy and tried to get her to stop arguing, which she would not. Later on she was still making a noise, and wouldn't go to sleep. The defendant got out of bed, turned on the light and went into another room, got his pistol, and put it under his pillow turning off the light, and got back in bed. He got the pistol to scare her, to get her to hush, and go to sleep. She continued to argue. He raised up in bed, had the butt of the pistol in his hand, his finger on the trigger, and the pistol pointed at his wife. He told the sheriff he wasn't sure whether she grabbed at the pistol or the barrel. His wife was lying on the bed on her back. Under those conditions the pistol fired, and a bullet penetrated his wife's ring finger of her right hand, and entered her skull causing her death. The opinion of Dr. Reece, an expert witness, who performed the autopsy, was that his wife's right hand was in front of her face when the pistol fired.

Considering the evidence in the light most favorable to the State, and giving to it the benefit of every intendment upon the evidence and every reasonable inference to be drawn therefrom, *S. v. Smith,* 237 N.C. 1, 74 S.E. 2d 291, we are of the opinion that the trial judge was correct in submitting to the jury the question of an intentional killing of Bessie Rector Powell with a pistol. A pistol is a deadly weapon *per se. S. v. Beal,* 170 N.C. 764, 87 S.E. 416.

The law is well established in this State that the intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree. When this is established by proof, the law casts upon the defendant the burden of showing to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter, or to excuse it. *S. v. Burrage,* 223 N.C. 129, 25 S.E. 2d 393; *S. v. Staton,* 227 N.C. 409, 42 S.E. 2d 401; *S. v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188.

The defendant's Assignments of Errors Nos. Two and Three are without merit.

The remaining two assignments of errors are to the refusal of the court to set the verdict aside as contrary to the evidence, and to the signing of the judgment. They are overruled. The charge of the court is not brought forward.

The facts of the case are gruesome. The defendant, who was not under the influence of intoxicants, after the foul and midnight murder of his wife, was found by the sheriff at 4:00 a.m. asleep in the bed drenched with her blood. It is difficult to imagine more heartless indifference.

In the trial below we find

No error.

MRS. VINA SIMMONS v. NORTH CAROLINA STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 4 November, 1953.)

1. Eminent Domain § 23: Appeal and Error § 39f: Trial § 31e—

Where the court, in charging the jury on the issue of damages, correctly instructs the jury to deduct general and special benefits accruing to petitioner from the construction of the highway, G.S. 136-19, and correctly leaves it to the jury to determine the amounts, the fact that the court also states that it is a matter of common knowledge that the building of a highway brings certain benefits to property owners along the highway, *is held* insufficient to constitute prejudicial error as an expression of opinion by the court on a fact in issue. G.S. 1-180.

2. Eminent Domain § 23—

An instruction to the effect that the damages for the lands taken, together with damages resulting to the remaining lands from the taking, would amount to the difference between the fair market value of the entire tract before the taking and the fair market value of the remaining lands after the taking, *is held* without error.

3. Same—

In a proceeding to recover compensation for the taking of lands, the failure of the court to define the meaning of general and special benefits, or to distinguish between them, will not be held for error in the absence of timely request for instructions.

4. Trial § 31d—

The failure of the court to explain the phrase "greater weight of the evidence" will not be held for prejudicial error on plaintiff's appeal.

APPEAL by plaintiff from *Grady, Emergency Judge,* February Term, 1953, of PITT. No error.

The plaintiff, some of whose land was taken by the State Highway & Public Works Commission for the purpose of widening Highway #43,

filed her petition for compensation under the statute. G.S. 40-12; G.S. 136-19.

It was admitted that in widening the highway in front of plaintiff's house the defendant Highway Commission acquired easement for highway purposes over a strip of plaintiff's land 23 feet wide and 600 feet long. In addition plaintiff contended her dwelling house was damaged and shrubbery removed from her front yard. Petition for compensation for the land taken and for injury to the remainder of the land, in conformity with the statute, was duly filed.

Commissioners were appointed to determine the amount of compensation due plaintiff for injury to her property, and the Commissioners so appointed rendered their report. To this report the plaintiff filed exception, and thereafter the cause came on for trial in the Superior Court (G.S. 40-20) where the jury answered the issue submitted to them as follows:

"1. What sum, if any, is the petitioner, Mrs. Vina Simmons, entitled to recover of the respondent, State Highway & Public Works Commission, for the appropriation of the lands described in the pleadings, over and above the general and special benefits, if any, accruing to petitioner's lands by reason of the widening of State Highway No. 43?

"Answer: $430.00."

From judgment on the verdict the plaintiff appealed.

Taylor & Allen and Lindsay C. Warren, Jr., for plaintiff, appellant.

R. Brookes Peters, General Counsel, E. W. Hooper, Legal Department North Carolina State Highway & Public Works Commission, for respondent, appellee.

DEVIN, C. J. The plaintiff, dissatisfied with the result of the trial below, has brought the cause here for review and asks for a new trial on the ground that the court erred in the instructions given to the jury, and that the verdict was improperly influenced thereby.

1. The plaintiff complains that the court in charging the jury used the following language to which she excepted:

"It must be admitted as a matter of common knowledge that the building of highways in this state brings with it certain benefits to property owners who have the additional advantage of the use of such highway."

The statute which makes provision for compensation for land taken under the power of eminent domain for highway purposes prescribes that "In all instances the general and special benefits shall be assessed as offsets against damages." G.S. 136-19. Accordingly the judge in charging the jury in this case called attention to this provision and instructed the jury that in arriving at the amount of compensation plaintiff was entitled to

receive the jury should "estimate the value of the land actually taken for an easement thereon and the damage thereon, if any, to petitioner's tract of land by the widening of Highway #43, and from such sum you will deduct as a counterclaim or set-off any benefits, general or special, if any, which the petitioner received or sustained by reason of the addition to the value, if any, to the tract of land described in the petition. In a proceeding of this kind petitioner is entitled to recover as compensation not only the value of the land taken but also the damage thereby caused to her remaining property, less such benefits, if any, you find the petitioner received by reason of the widening of Highway #43."

While the learned judge who presided over the trial of this case might well have omitted the remark excepted to, we are unable to perceive that any prejudicial effect was likely to have resulted to plaintiff's cause, or that the jury was improperly influenced thereby in arriving at their verdict. The statute referred to recognizes the fact that the construction of improved highways is beneficial to the State, and that it also may be of benefit to those whose lands adjoin the highway. The judge was stating a matter of general knowledge in general terms. It may also be noted that the court in charging the jury with respect to the issue left it to them to determine the amount and repeatedly instructed them that they could deduct "benefits general or special, if any." We do not think the language criticized should be construed to be an expression of opinion as to a fact in issue, or that it comes within the prohibition of G.S. 1-180.

2. The plaintiff contends that the court's instructions to the jury as to the measure of damages to be applied in this case were inadequate, and she has excepted to the following portion of the charge:

"The burden of this issue is upon the plaintiff. If she has offered evidence which satisfies you by its greater weight that the condition of that house, as testified to by her witnesses, that is, the deterioration in the house, the cracks, etc., were caused by the excavation made by the defendant then it would be your duty to take into consideration the damage to that house in arriving at your verdict. If the evidence is not sufficient to satisfy you by its greater weight that the work done by the State Highway & Public Works Commission had anything to do with any deterioration in the house itself, you will disregard that and then proceed to ascertain from this evidence and by its greater weight what was the value of the entire property owned by her prior to the taking of this 600-foot strip of land 23 feet wide. What was the fair market value of the entire property prior to the taking and then what was the fair market value after the taking, whether or not it had depreciated in value by reason of the taking; deducting the latter figure from the former, that would be the net damage that she would be entitled to recover."

The portion of the charge to which this exception is directed seems to be in substantial accord with the decisions of this Court in *Proctor v. Highway Com.*, 230 N.C. 687, 55 S.E. 2d 479; *Highway Com. v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314; *Light Co. v. Reeves*, 198 N.C. 404, 151 S.E. 871. The assignment of error in this respect cannot be sustained. Just compensation, as the phrase is used in condemnation proceedings, includes all that the landowner is entitled to receive as a fair equivalent for the land taken and for the injury to remaining land resulting from the taking. *S. v. Lumber Co.*, 199 N.C. 199, 154 S.E. 72. The failure to define more fully the meaning of general or special benefits or to distinguish between them, in the absence of timely request, may not be held for error. *Light Co. v. Reeves*, 198 N.C. 404, 151 S.E. 871; *Ward v. Waynesville*, 199 N.C. 273, 154 S.E. 322; *Elks v. Comrs.*, 179 N.C. 241, 102 S.E. 414.

3. Plaintiff assigns as error the failure of the court to explain to the jury the phrase "greater weight of the evidence." While the significance of these words is frequently illustrated by trial judges by reference to balances, we cannot hold that failure to do so or to explain more fully words which presumably are understood by an intelligent jury should be held for error, or that failure to do so in this case was prejudicial to the plaintiff upon whom rested the burden of the issue. *S. v. Puckett*, 211 N.C. 66, 189 S.E. 183; *Wilson v. Casualty Co.*, 210 N.C. 585, 188 S.E. 102; *S. v. Anderson*, 208 N.C. 771 (788), 182 S.E. 643.

The jurors, who heard all the evidence of the plaintiff and that offered by the defendant, and who in addition were afforded a jury view of the premises, have, under a fair charge by the Court, determined the amount of plaintiff's compensation, and we find no sufficient reason to disturb the result.

No error.

STATE v. LEWIS SHINN.

(Filed 4 November, 1953.)

1. Criminal Law § 29c: Intoxicating Liquor § 9c—

In a prosecution for illegal possession of intoxicating liquor, based in part upon defendant's constructive possession of liquor hidden near his house, defendant is not entitled to cross-examine the State's witnesses for the purpose of showing that others who lived in the vicinity were known to deal in liquor, since evidence tending to cast a suspicion or conjecture that the crime may have been committed by another is incompetent.

2. Intoxicating Liquor § 9f: Criminal Law § 81c (2)—

An instruction limiting to one gallon the amount of tax-paid liquor a person may lawfully possess in his home in a "dry" county will not be held

for prejudicial error on defendant's appeal from conviction of illegal possession of intoxicating liquor in and near his home when the State's evidence tends to show that less than one gallon of tax-paid liquor was found in defendant's home, defendant not being convicted of possession for the purpose of sale.

8. Intoxicating Liquor §§ 4a, 9f—

The possession of any quantity of tax-paid liquor outside one's home is illegal unless it is being legally transported to one's home for the purpose of personal consumption or the consumption of the members of one's family or *bona fide* guests, and, therefore, upon evidence tending to show that defendant hid tax-paid liquor in the vicinity of his home, an instruction to the effect that defendant was entitled to possess not more than one gallon of such liquor, is favorable to defendant.

4. Intoxicating Liquor § 4b—

If defendant hides intoxicating liquor in the woods near his home, it is in his constructive possession at least, regardless of whether it is on his own property or that of another.

APPEAL by defendant from *Nettles, J.*, April Term, 1953, of CABARRUS.

Criminal action tried in the Cabarrus County Recorder's Court upon a warrant charging that the defendant did unlawfully possess, and possess for the purpose of sale, intoxicating liquors in violation of the Turlington Act (Cabarrus County not having elected to operate liquor stores under the Alcoholic Beverage Act of 1937). Upon conviction in the Recorder's Court, the defendant appealed to the Superior Court of Cabarrus County, where he was tried *de novo*.

The State offered C. J. Hammonds, a deputy sheriff of Cabarrus County, as a witness, who testified that he knew the defendant, and about 1:20 p.m., on 21 March, 1953, he saw him drive his car to the rear of his home and carry a package into his house; that immediately thereafter he came out of his house and took a paper bag out of his car and walked to the south of his driveway and went into the woods some twenty or thirty feet; that he bent down and put out four pints of tax-paid liquor in one place, and then moved two or three feet and put out two more pints, and left four pints in the bag which he wrapped up and stuck under a little bush, and then turned around and walked back to his house. That at the time he saw the defendant carry the ten pints of tax-paid liquor into the woods and leave it he was in a little broom sage about twenty feet west of Walter Street and approximately 100 yards from the defendant's house watching the defendant through field glasses; that the defendant was not out of his sight from the time he left his car until he returned to his home; that he called other officers by means of a walkie-talkie radio to come and make a search; that upon their arrival about 1:40 p.m., he directed the search and they found the ten pints of tax-paid liquor in the three places referred to above.

The State's evidence further shows that the ten pints of tax-paid whiskey described by the deputy sheriff were found about 150 feet from the defendant's house; that seven pints of nontax-paid liquor were found about 300 feet from his house and two half-gallon jars of white liquor were found in some honeysuckle vines near where the seven pints of nontax-paid liquor were found; that paths led in almost every direction in the area searched by the officers; that none of them could testify that any of the liquor, except 7½ pints of tax-paid liquor that were found in the defendant's house, was found on his premises.

A verdict of guilty of unlawful possession of intoxicating liquors was returned by the jury, and from the sentence imposed on the verdict the defendant appeals and assigns error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State.

B. W. Blackwelder, Ernest R. Alexander, R. Furman James, and Clyde L. Propst, Jr., for appellant.

DENNY, J. The defendant excepts to and assigns as error the refusal of the trial judge to permit him on cross-examination of the State's witnesses, to show that others who lived in the immediate vicinity of the defendant's home were known to deal in liquor. It is argued that since the State did not prove that the liquor found outside of the defendant's home or any part thereof was on his premises, the excluded evidence "might well point with equal gravity to the defendant's innocence."

Evidence which can have no effect except to cast suspicion upon another or to raise a mere conjectural inference that the crime may have been committed by another (or as in this case that someone else may have been responsible for the presence of some of the liquor seized), is not admissible. 22 C.J.S., Criminal Law, section 622, at page 951; *S. v. Beverly,* 88 N.C. 632; *S. v. Gee,* 92 N.C. 756; *S. v. Smarr,* 121 N.C. 669, 28 S.E. 549; *S. v. Smith,* 211 N.C. 93, 189 S.E. 175; *S. v. Howie,* 213 N.C. 782, 197 S.E. 611. These exceptions are without merit.

The defendant also excepts to the following portions of his Honor's charge to the jury: "Under the law you are permitted to have in your possession or in your home one gallon or eight pints of tax-paid liquor, and the Court charges you that if you find from the evidence in this case and beyond a reasonable doubt, the burden being upon the State to so satisfy you that the defendant had in excess of one gallon of liquor in his home or in his possession at any one time upon his premises, and if you so find, whether tax-paid or nontax-paid, it would be your duty to return a verdict of guilty of the unlawful possession of intoxicating liquor. . . .

"And so if you find from the evidence in this case and beyond a reasonable doubt, the burden being upon the State so to satisfy you that the defendant had in his possession at the time and place in question, . . . in excess of one gallon of tax-paid liquor, and you so find from the evidence beyond a reasonable doubt, that is in his possession and upon his premises, and you so find from the evidence and beyond a reasonable doubt, the burden being upon the State to so satisfy you, it would be your duty to return a verdict of guilty of unlawful possession of intoxicating liquor."

The above charge was clearly erroneous with respect to the amount of tax-paid liquor a person may lawfully have or keep in his private dwelling while the same is occupied and used by him exclusively as his dwelling, when such liquor is for his personal consumption, the consumption of the members of his family residing in such dwelling, or for his *bona fide* guests when entertained therein by him. *S. v. Brady,* 236 N.C. 295, 72 S.E. 2d 675; *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. Hammond,* 188 N.C. 602, 125 S.E. 402. Even so, the uncontradicted evidence introduced by the State in the trial below was to the effect that only 7½ pints of tax-paid liquor were found in the home of the defendant; and the trial judge charged the jury that a person is entitled to have in his home one gallon or eight pints of tax-paid liquor, provided he does not have it for the purpose of sale. Therefore, since the defendant was not convicted of having any liquor in his possession for the purpose of sale, we cannot see how he could have been prejudiced by the charge with respect to the 7½ pints of liquor found in his home.

The other aspect of the charge, to which the defendant complains, was, in fact, favorable to him. It was not necessary for the jury to find that the defendant had in excess of one gallon of tax-paid liquor in his possession or upon his premises, that is, outside of his house in order for him to be guilty of the unlawful possession thereof. The defendant was guilty of the unlawful possession of intoxicating liquor if he was in the actual or constructive possession of any of the tax-paid or nontax-paid liquor found outside of his home unless it was tax-paid liquor which was being legally transported to his home for the purposes heretofore pointed out. *S. v. Barnhardt, supra; S. v. McAllister,* 187 N.C. 400, 121 S.E. 739. Certainly by no stretch of the imagination can it be logically argued that placing the ten pints of tax-paid liquor in the woods, as described in the State's evidence, constituted an act of legal transportation. Furthermore, if the defendant placed the liquor in the woods near his home, as the State's evidence tends to show, it was in his possession at least constructively, whether he placed it on his own property or that of another.

It is clear that if the jury followed the instructions given, it could not have found the defendant guilty of the unlawful possession of intoxicating

liquors without finding that he was in possession of some of the liquor which was found outside of his home.

In our opinion the errors pointed out by the defendant were not prejudicial but harmless.

In the trial below we find no prejudicial error.

No error.

WILLIAM JAMES SUTTLES v. BLUE RIDGE INSURANCE COMPANY.

(Filed 4 November, 1953.)

1. **Insurance § 43½—**

A policy covering damage to an automobile caused by accidental collision will be construed to cover all such losses unless the policy itself excludes from its coverage losses occasioned while the vehicle is being used for specified hazardous purposes.

2. **Same—**

The policy in suit covered damage to the insured vehicle caused by accidental collision while the vehicle was being used for business or pleasure, with the sole exception that coverage should not apply while the vehicle was being used as a public conveyance. *Held:* The policy covers damages to the vehicle sustained when it overturned while being driven in a stock car race with insured's permission, since such loss is "accidental" and the use was not excluded by the policy, and the use was for "business or pleasure" within the meaning of its terms.

APPEAL by defendant from *Moore, J.*, March-April Term, 1953, of CLEVELAND.

This is an action instituted by the plaintiff to recover on an automobile insurance policy issued to the plaintiff by the defendant.

The defendant issued its standard comprehensive public liability insurance policy, including loss by collision, less $50.00 deductible, to the plaintiff on his 1949 Plymouth automobile for the period from 31 May, 1950, to 29 February, 1952, in consideration of a premium of $148.25 which was duly paid.

The original policy when issued was assigned to the M & J Finance Corporation with a loss payable clause in its favor to the extent of its interest therein.

On 30 July, 1950, George Mantooth was driving the automobile covered by the above policy, with the plaintiff's permission, in a stock car race in Concord, North Carolina, when the automobile turned over and was completely demolished, resulting in a loss to the plaintiff of $2,000.

Proof of loss and demand for settlement under the terms of the policy were duly made. Defendant promptly paid the M & J Finance Corpora-

tion the balance due under its contract with the plaintiff in the sum of $1,168.45, which amount was pleaded as a set-off against any recovery the plaintiff might obtain in this action. The defendant, however, denied any liability to the plaintiff on the ground that at the time the car was damaged it was not being used for either business or pleasure.

According to the plaintiff's evidence, the stock car race was on a circular track about a mile in length and approximately 200 feet wide. It was a dirt track, and "they wet the track before the race." The cars could not travel at an average speed of more than fifty to sixty miles per hour on account of the condition of the track. No other car hit his car and no other car wrecked it, but all of a sudden it turned over. If his car had won the race he would have got the prize of a little over $5,000.

The defendant offered no evidence.

The court submitted the following issues to the jury and directed the answers as they appear thereto:

"1. Did the plaintiff breach the contract by entering this car in the stock car race? Answer: No.

"2. Was the plaintiff damaged by accidental means? Answer: Yes."

It was agreed that if the plaintiff was entitled to recover anything he was entitled to recover $781.55, and judgment was entered in favor of the plaintiff for that amount. The defendant appeals, assigning error.

Horace Kennedy for appellant.
Horn & West for appellee.

DENNY, J. The defendant's only exception is to the failure of the trial judge to sustain its motion for judgment of nonsuit. This simply challenges the right of plaintiff to recover for his loss under the terms of the insurance contract.

The only limitations on the plaintiff's use of his automobile were set out in the policy as "Use: Business and Pleasure" and "Exclusions . . . (a)," which states, "This policy does not apply under any of the coverages, while the automobile is used as a public or livery conveyance . . ."

The defendant argues in its brief that the destruction of the plaintiff's car did not result from an accident within the meaning of the policy. This contention is without merit. Moreover, if the damage to plaintiff's car was not the result of an accident within the meaning of the policy, why did the defendant pay to the M & J Finance Corporation the sum of $1,168.45 for the benefit of the plaintiff?

The real question is not whether the damage to plaintiff's car was the result of an accident within the meaning of the insurance contract, but whether its use at the time of the accident was within the use permitted under the terms of the policy.

The general rule in this respect is stated in 45 C.J.S., Insurance, section 798 (a), page 841, as follows: "Unless there are special limitations in a policy insuring against loss of, or damage to, an automobile caused by accidental collision, the coverage extends to all losses caused by accidental collision however occasioned."

Likewise, in Appleman's Insurance Law and Practice, Volume 13, section 7465, page 190, we find the following statement: "A collision clause is strongly construed against the insurer upon the basis that, if it desired to insert exceptions precluding liability under the circumstances presented, it should have done so by inserting such exceptions as would limit the effect of the general terms employed," citing *St. Paul F. & M. Ins. Co. v. American Compounding Co.*, 211 Ala. 593, 100 So. 904, 35 A.L.R. 1018.

In the case of *Hallock v. Casualty Co.*, 207 N.C. 195, 176 S.E. 241, this Court construed a limitation in a policy similar to the one now before us. The plaintiff's chauffeur took a car covered by the policy without permission and damaged it. The question was whether at the time of the accident the car was being operated for the owner's "business or pleasure." The Court held that since the insurer had not limited recovery to damages resulting from an accident while the car was being used for business or pleasure by the owner, or some person authorized by him, the plaintiff was entitled to recover. *Pauli v. St. Paul Mercury Indemnity Co.*, 167 Misc. 417, 4 N.Y.S. 2d 41.

In *Life & Casualty Ins. Co. of Tenn. v. Benion*, 82 Ga. App. 571, 61 S.E. 2d 579, the Court was interpreting a policy covering injuries received by "external, violent and accidental means." The insured voluntarily drove in a stock car race and was killed while engaged therein. The Court said: "The policy did not contain any reference to or restrictions on the use of the automobile. If the insurer meant to restrict the use of such automobile, it could easily have done so by the insertion of a use-restriction clause in the policy." It was also contended there as here that stock car racing is so hazardous that an accident while engaged therein cannot be held to be unusual, unforeseen and unexpected. However, the Court held that engaging in a stock car race was not "so dangerous as to take the misfortune of the insured out of the realm of accident or accidental means," quoting with approval the following language from 29 Am. Jur., Insurance, section 944, page 716: "Voluntary exposure to danger by the holder of an accident insurance policy will not defeat recovery for an injury caused by accidental means, where such exposure is not an exception in the policy and the insured has no intention of producing the injury received."

We think the use of the automobile permitted under the policy is broad enough to cover the car while it was being operated for any legitimate

purpose not expressly excluded by the terms of the policy. Therefore, the ruling of the court below on the motion for judgment as of nonsuit will be upheld.

No error.

MRS. O. M. HENRY v. D. BRYCE FARLOW, MRS. D. BRYCE FARLOW, H. S. FORKNER AND MRS. H. S. FORKNER.

(Filed 4 November, 1953.)

1. Easements § 8—

Mere use of a way over another's land cannot ripen into an easement by prescription, no matter how long it may be continued, but claimant must show also that such use was adverse and under claim of right, since otherwise the law would presume that the use was permissive.

2. Same—

Evidence tending to show that plaintiff and her tenants used the roadway across defendants' land for a period of 25 years, without asking permission of defendants or their predecessors in title, and that neither defendants nor their predecessors in title objected to such use during that time, although they knew of such use, *is held* insufficient to be submitted to the jury on the question of plaintiff's acquisition of a prescriptive right.

APPEAL by defendants from *Hatch, Special Judge,* and a jury, at January Term, 1953, of RANDOLPH.

Civil action by plaintiff to enjoin the obstruction of a roadway leading from her land over the lands of the defendants to a public highway.

1. This action involves three adjoining parcels of land in a rural section of Randolph County. The first tract is owned by the plaintiff Mrs. O. M. Henry; the second tract is owned by the defendants D. Bryce Farlow and Mrs. D. Bryce Farlow; and the third tract is owned by the defendants H. S. Forkner and Mrs. H. S. Forkner.

2. During the twenty-five years immediately preceding the event described in the next paragraph, the plaintiff and her tenants used a definite and specific roadway leading from her land over the lands of the defendants to a public highway.

3. In 1951, the defendants, acting in concert, blocked the portions of the roadway on their lands, and in that way obstructed its use by the plaintiff.

4. The plaintiff thereupon brought this action against the defendants, alleging that the plaintiff had acquired a right of way by prescription in the portions of the lands of the defendants included in the roadway, and praying that the defendants be enjoined from interfering with the plaintiff's use of the roadway. The defendants denied the validity of the plaintiff's claim.

5. The action was heard upon the merits before Judge Hatch and a jury at the January Term, 1953, of the Superior Court of Randolph County. The plaintiff's testimony indicated that the plaintiff acquired her land in 1926; that the roadway existed and bore evidences of considerable age at that time; that the plaintiff and her tenants used the roadway in sight of the defendants and their predecessors in title throughout the twenty-five years enumerated in paragraph 2; that the defendants and their predecessors in title did not object to the plaintiff or her tenants using the roadway at any time during the period mentioned in paragraph 2; and that the plaintiff and her tenants did not ask the defendants or their predecessors in title for permission to use the roadway at any time during the period specified in paragraph 2. The evidence of the defendants tended to show that the plaintiff and her tenants used the roadway with the consent of the owners of the soil.

6. Judge Hatch submitted this issue to the jury: "Has the plaintiff acquired an easement in the way over the lands of the defendants by prescriptive, adverse, hostile and non-permissive use, as alleged in the amendment to the complaint, entitling her to use the same without interference or obstruction?" The jury answered the issue "Yes," and Judge Hatch entered judgment on the verdict granting the plaintiff injunctive relief. The defendants excepted and appealed, assigning error.

Ottway Burton for plaintiff, appellee.
G. E. Miller and Adam W. Beck for defendants, appellants.

ERVIN, J. The assignment of error raises this solitary question: Did the trial judge err in refusing to dismiss the action upon a compulsory nonsuit after all the evidence on both sides was in?

The defendants assert that the evidence is not sufficient to show that the use of the roadway by the plaintiff and her tenants was adverse or under claim of right, and that the question must be answered in the affirmative on that ground, even though the evidence may be ample to establish that the use of the roadway by the plaintiff and her tenants was continuous and notorious for twenty years or longer. We are constrained to agree.

The mere use of a way over another's land cannot ripen into an easement by prescription, no matter how long it may be continued. *Williams v. Foreman, ante,* 301, 77 S.E. 2d 499; *Hemphill v. Board of Aldermen,* 212 N.C. 185, 193 S.E. 153; *McPherson v. Williams,* 205 N.C. 177, 170 S.E. 662; *Colvin v. Power Company,* 199 N.C. 353, 154 S.E. 678; *Gruber v. Eubank,* 197 N.C. 280, 148 S.E. 246; *Grant v. Power Company,* 196 N.C. 617, 146 S.E. 531; *Durham v. Wright,* 190 N.C. 568, 130 S.E. 161; *Draper v. Conner,* 187 N.C. 18, 121 S.E. 29; *S. v. Norris,* 174 N.C. 808,

93 S.E. 950; *Snowden v. Bell,* 166 N.C. 208, 80 S.E. 888; *Snowden v. Bell,* 159 N.C. 497, 75 S.E. 721; *Boyden v. Achenbach,* 79 N.C. 540; *Ray v. Lipscomb,* 48 N.C. 185; *Smith v. Bennett,* 46 N.C. 372; *Ingraham v. Hough,* 46 N.C. 39; *Mebane v. Patrick,* 46 N.C. 23.

This is necessarily so because the law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. *McCracken v. Clark,* 235 N.C. 186, 69 S.E. 2d 184; *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371; *Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906; *Darr v. Aluminum Co.,* 215 N.C. 768, 3 S.E. 2d 434; *Weaver v. Pitts,* 191 N.C. 747, 133 S.E. 3; *Perry v. White,* 185 N.C. 79, 116 S.E. 84. "There must be some evidence accompanying the user, giving it a hostile character, and repelling the inference that it is permissive and with the owner's consent in order to create the easement by prescription and impose the burden upon the land." *Darr v. Aluminum Co., supra; Nash v. Shute,* 184 N.C. 383, 114 S.E. 470; *Boyden v. Achenbach,* 86 N.C. 397.

The evidence does not suffice to show that the use of the roadway by the plaintiff and her tenants was accompanied by circumstances giving it an adverse character and rebutting the presumption that it was permissive. The circumstance that the owners of the soil did not object to the use of the way harmonizes with the theory that they permitted the use of the way. There is, moreover, no inconsistency between the circumstance that the plaintiff and her tenants used the way without asking the owners of the soil for permission to do so, and the conclusion that the plaintiff and her tenants used the way with the implied consent of the owners of the soil. When all is said, the assertion that the plaintiff and her tenants used the way without asking the permission of the owners of the soil is tantamount to the assertion that the plaintiff and her tenants used the way in silence. Neither law nor logic can confer upon a silent use a greater probative value than that inherent in a mere use.

For the reasons given, the judgment is

Reversed.

HARRIETT MARKS v. RUTH THOMAS AND FANNIE THOMAS.

(Filed 4 November, 1953.)

1. Wills § 31—

The cardinal principle in the interpretation of wills is to discover the intent of testator.

2. Same—

The intent of testator must be ascertained if possible from the language used, considered in the light of attendant circumstances and giving its terms their legal significance.

3. Wills § 38—Provision that after life estate realty should go "back to my estate" held to devise remainder to heirs general.

Testatrix left all of her real and personal property to her sister "excepting the following bequests." Testatrix then devised the sister a life estate in certain realty with provision that at her sister's death it should go to named nieces for life and at their death "back to my estate." *Held:* The sister did not take the fee in the realty even though the first clause be construed as a residuary clause, since the realty was excepted from that clause, and the term "back to my estate," in the context, means heirs general of testatrix. This construction will not be defeated by a provision of the will that testatrix did not wish her nephew to inherit any of the estate.

APPEAL by plaintiff from *Frizzelle, J.*, August Term, 1953, of CRAVEN. Affirmed.

This was a controversy without action submitted to the court by the parties in accord with the provisions of G.S. 1-250, to determine the title to certain real property under the last will and testament of Belle Marks Hyman.

The holographic will of Belle Marks Hyman, which has been duly probated, contains the following pertinent provisions:

"To my sister, Harriet Marks, I leave everything I own, both real and personal, excepting the following bequests: . . . My interest in the McLellan Store and the two stores on Middle Street, to Harriet Marks during her life time, and at her death to Ruth Thomas and Fannie Thomas only during their lifetime, and at their death, back to my estate." Following numerous bequests of personal property appeared this clause: "I am not desirous that Albert Marks should inherit any of my holdings as it was my mother's request, as he has the property which was his father's which came from my father and he had part of the business and lost it."

Two codicils were added but these relate only to certain personal property and are not involved in the decision of the question presented.

The plaintiff Harriett Marks contends that under the terms of the will she acquired a fee simple title to the real property described. On the other hand, the defendants contend that at the termination of the life estates provided in the will title to this property will vest in the heirs of the testatrix Belle Marks Hyman.

The court below was of opinion that upon the falling in of the life estates referred to the heirs of Belle Marks Hyman would be entitled to the fee in the real property described, and so adjudged.

The plaintiff excepted and appealed.

R. E. Whitehurst and George B. Riddle, Jr., for plaintiff, appellant.

C. E. Hancock, Jr., for defendants, appellees.

DEVIN, C. J. The question presented by this appeal involves the interpretation of the provisions of the will of Belle Marks Hyman wherein she devised certain real property "to Harriett Marks during her lifetime, and at her death to Ruth Thomas and Fannie Thomas only during their lifetime, and at their death, back to my estate." Under this provision, considered in connection with the language of the first clause of the will, does the plaintiff Harriett Marks acquire a fee simple title to the property, or does the phrase "back to my estate" carry the limitation over to the heirs of the testatrix?

The cardinal principle in the interpretation of wills is to discover the intent of the testator (*Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356), and this intent must be ascertained if possible from the language used by the testator according to the circumstances attendant. *Patterson v. McCormick,* 181 N.C. 311, 107 S.E. 12. The intention of the testator as expressed in the language of the will must prevail. *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662. "It is our duty, as far as possible, to give to words used by a testator their legal signification, unless it is apparent from the will itself that they were used in some other sense." *May v. Lewis,* 132 N.C. 115, 43 S.E. 550.

The appellant's position is that in the first clause of the will she was in effect made residuary devisee, and that the words "back to my estate" meant that the title to the property after the termination of the life estates would pass under this residuary clause, and that thus she acquired fee simple title to the property, subject only to the intermediate life estate of Ruth and Fannie Thomas.

The appellant cites in support of this position the case of *Lee v. Lee,* 216 N.C. 349, 4 S.E. 2d 880. But that case does not help us. In the *Lee case* the devise of a life estate in the property to T. W. Lee was followed in a later clause in the will by a specific devise of the remainder to the same person. "Thus the life estate and the remainder became united in the same person."

The intent of the testator must be determined in conformity with the legal significance of the language used considered in the light of the attendant circumstances. In providing for the final disposition of the property after the termination of the intermediate life estates the testatrix wrote "back to my estate"—not Harriett's. She had given her sister a life estate and provided that upon the death of her sister her nieces should thereafter have a life estate in the property. Under these circumstances we think the conclusion is inescapable that by the language used the testatrix intended that after the death of her sister and nieces her own heirs should be the ultimate takers.

This view is supported by the decision of this Court in *Reid v. Neal,* 182 N.C. 192, 108 S.E. 769. In that case the testator devised land to his

daughter for life and at her death "to her bodily heirs, if any, and if none to return to my estate." It was held that the daughter took a fee defeasible upon her dying without issue, in which event the remainder over was to the heirs general of the testator, and that the provision should be construed as if the testator had written "if none, to my heirs."

While the word "estate" has more than one meaning and is susceptible of more than one construction, we think its legal significance here must be determined by the provisions of the will in the context in which it appears. *Reid v. Neal, supra.*

If it be conceded that the language of the first clause of the will constituted Harriett Marks the residuary devisee, it also appears that after the words "to my sister Harriett Marks I leave everything I own," the testatrix wrote "excepting the following bequests," including the provisions as to the real property.

The plaintiff calls attention to the clause in the will in which the testatrix expressed her desire that her nephew should not inherit any of her holdings as evidence that she did not intend that the property should pass to her heirs general. However, it was argued on the other hand that if she had intended that her sister Harriett should have a fee simple title to the property her nephew would have no interest in its ultimate devolution.

Judge Frizzelle has properly interpreted the provisions of the will of Belle Marks Hyman, and his judgment thereon is

Affirmed.

STATE v. HUGH J. SLOAN, JR.

(Filed 4 November, 1953.)

1. Indictment and Warrant § 13—

A motion to vacate the judgment on the ground that the court is without jurisdiction will be treated as a motion to quash the warrant on that ground.

2. Courts § 11—

Statutory provision that a county recorder's court should have exclusive original jurisdiction of all general misdemeanors committed in the county, and statutory provision that a municipal recorder's court in the county should likewise have original exclusive jurisdiction of such misdemeanors committed within the municipality, or within a radius of five miles thereof, cannot be reconciled, and the two courts will be held to possess concurrent jurisdiction of such misdemeanors committed within the municipality. G.S. 7-190, G.S. 7-222.

APPEAL by the State from *Stevens, J.*, June Term, 1953, CRAVEN. Reversed.

Criminal prosecution under warrant issued out of the County Recorder's Court of Craven County in which it is charged that defendant operated his automobile on the public roads of said county at a speed of 70 m.p.h.

At the trial in the Recorder's Court the defendant entered a plea of *nolo contendere*. The court pronounced judgment on the plea and defendant appealed.

In the Superior Court the defendant moved to vacate the judgment entered in the County Recorder's Court for that the offense charged was committed within the corporate limits of New Bern or within five miles thereof, and the Municipal Recorder's Court of New Bern has exclusive original jurisdiction. In this connection it is admitted that the offense charged was committed within the territorial limits of the Municipal Court of New Bern.

The court below allowed the motion and entered judgment vacating the judgment entered in said court and directing that the fine and costs paid by defendant be refunded to him. The State excepted and appealed.

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

Charles L. Abernethy, Jr., for defendant appellee.

BARNHILL, J. The motion entered by defendant must be treated as a motion to quash the warrant for that the Recorder's Court of Craven County has no jurisdiction of the offense therein charged. The appeal from the judgment allowing the motion requires an examination of ch. 277, P.L. 1919, now General Statutes, ch. 7, subchapter VI, art. 24 and 25, which authorizes the creation of Municipal Recorders' Courts and County Recorders' Courts.

In 1919 the General Assembly enacted this statute "to establish a uniform system of recorders' courts for municipalities and counties . . ." Proceeding under this Act, the Board of Commissioners of Craven County, in 1921, created a County Recorder's Court for Craven County.

In 1947 the governing board of the City of New Bern, acting under the authority vested in it by the same statute, created a Municipal Court for the City of New Bern.

The Act, ch. 277, P.L. 1919, vests in Municipal Recorders' Courts created as therein provided "exclusive original" jurisdiction of all general misdemeanors committed within the corporate limits of the municipality or within a radius of two (now five) miles thereof. G.S. 7-190.

It likewise vests in the county courts established pursuant thereto "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 felony as now defined by law, and the same are hereby declared to be petty misdemeanors." G.S. 7-222.

Thus the County Recorder's Court of Craven County has exclusive original jurisdiction of offenses below the grade of felony committed anywhere in the county, while the Municipal Court of New Bern has like jurisdiction of such offenses when committed within the limits of the municipality or within a radius of five miles thereof.

That this creates an impossible situation is self-evident. *Reductio ad absurdum.* We cannot conceive any sound reason why we should give the word "exclusive" as used in section 4 any more force and effect than is accorded the same term as used in section 27 of the same Act. The two sections are irreconcilable to the extent they attempt to confer on both courts exclusive original jurisdiction of general misdemeanors committed within the territorial limits of the Municipal Recorder's Court of New Bern. To this extent one cancels out the other.

As we cannot reconcile the irreconcilable, we conclude that, within the territorial limits of the Municipal Recorder's Court of New Bern, the two courts possess and may exercise concurrent jurisdiction. *In re Barnes,* 212 N.C. 735, 194 S.E. 499. This necessitates a reversal of the judgment entered in the court below. The cause is remanded to the end that the solicitor may proceed with the prosecution.

Reversed.

STATE v. WOODROW BENNETT.

(Filed 4 November, 1953.)

APPEAL by the State from *Stevens, J.,* June Term, 1953, CRAVEN.

Criminal prosecution under two warrants issued out of the County Recorder's Court of Craven County. Defendant is charged in each warrant with a violation of the motor vehicle law. In the court below the two warrants were consolidated for trial. Thereupon, the court, upon motion of the defendant, quashed the warrants for that the Recorder's Court of Craven County was without jurisdiction of the offenses therein charged. The State excepted and appealed.

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

Charles L. Abernethy, Jr., for defendant, appellee.

BARNHILL, J. This appeal presents the identical question decided by this Court in *S. v. Sloan, ante,* p. 547, this day filed. On authority of the opinion in that case, the judgment below is

Reversed.

STATE v. TOMMIE POWELL.

(Filed 4 November, 1953.)

Criminal Law § 77b—

The rule requiring a narrative statement of the evidence in the case on appeal is mandatory and may not be waived by the parties, and a record containing in an "agreed statement of facts" a mere summary of the evidence, largely in the form of conclusions, is not a compliance with the rule and requires a dismissal of the appeal, and a statement of the evidence in question and answer form in the brief does not alter this result.

APPEAL by defendant from *Harris, J.,* and a jury, at April Term, 1953, of DUPLIN.

Criminal prosecution tried on appeal from General County Court upon a warrant charging the defendant with (1) possession of nontax-paid whiskey, and (2) possession of nontax-paid whiskey for the purpose of sale.

The jury returned a verdict of guilty, and from judgment pronounced the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

Latham A. Wilson for defendant, appellant.

JOHNSON, J. The Attorney-General moves to affirm the judgment and dismiss the appeal for failure to include in the case on appeal a narrative statement of the evidence as required by Rule 19 (4), Rules of Practice in the Supreme Court, 221 N.C. 544, p. 556.

This Rule requires that the evidence "shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception." The Rule further provides that "If the case is settled by agreement of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, . . . the appeal will be dismissed." This Rule is mandatory, and may not be waived by the parties. *Bank v. Fries,* 162 N.C. 516, 77 S.E. 678; *Anderson v. Heating Co., ante,* 138, 76 S.E. 2d 458. See also *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *In re De Febio,* 237 N.C. 269, 74 S.E. 2d 531.

Here the record contains a statement labeled "Agreed Statement of Facts," which summarizes—largely in the form of conclusions—what transpired in the trial of the case, but nowhere in the record do we find anything that approximates a narrative statement of the evidence in the case as required by Rule 19 (4). Instead, the defendant has included in his brief, as an appendix thereto, all the evidence, in question and answer form. This does not meet the requirements of the Rule. The motion of the Attorney-General will be allowed, and it is so ordered.

But while reaching this conclusion, the entire record has been read and considered, as has the evidence brought forward in the brief, and no substantial merit is found in any of the defendant's assignments of error.

Judgment affirmed; appeal dismissed.

H. M. SAVAGE AND WIFE, DORA MAE SAVAGE, v. THE CITY OF KINSTON, A MUNICIPAL CORPORATION, GUY ELLIOTT, MAYOR OF THE CITY OF KINSTON; EDWARD P. JOHNSON, ALDERMAN; JOHN W. RIDER, ALDERMAN; CHARLES R. TAYLOR, ALDERMAN; BURWELL TEMPLE, ALDERMAN; JESSE P. WOOTEN, ALDERMAN; W. J. HEARD, CITY MANAGER, AND W. G. McADAMS, SUPERINTENDENT OF PUBLIC UTILITIES.

(Filed 4 November, 1953.)

Appeal and Error § 5—

Where the relief sought by *mandamus* has been granted pending the appeal, the appeal will be dismissed, since the question has become academic.

APPEAL by defendants from *Harris, J.*, June Term, 1953, of LENOIR.

This is a civil action instituted to compel the City of Kinston, which owns and operates the electric and water systems supplying its inhabitants, by *mandamus*, to supply electric and water service to the premises of the plaintiffs known as 208½ East Washington Street in Kinston.

The defendants in their answer deny that the plaintiffs are entitled to the service they seek on the ground that the building in question had been remodeled or reconstructed in such manner as to violate the Building and Plumbing Codes of the City of Kinston and also its Zoning Ordinance.

When the matter came on to be heard, the plaintiffs moved for judgment on the pleadings. Whereupon, the court below held that the matters pleaded as a defense were collateral, extraneous and irrelevant to the merits of this controversy and allowed the motion. Judgment was entered directing the defendants to have the proper inspectors of the City of Kinston to inspect the plumbing and electrical facilities in the above described premises, and upon a finding by the inspectors that the plumbing and electrical facilities are installed and located substantially in com-

pliance with the Building and Plumbing Codes of the City of Kinston and G.S. 160-141, to furnish such light and water service as may be required at the premises in controversy.

From the above judgment the defendants appeal and assign error.

Geo. B. Greene, E. W. Price, and James H. Brooks for appellants.

Wallace & Wallace, Taylor & Allen, and Lindsay C. Warren, Jr., for appellees.

PER CURIAM. The Court has been informed that the inspections directed to be made by the judgment entered below have been made by the proper inspectors of the City of Kinston; that the plumbing and electrical facilities in the building have been found to comply with the requirements of the Building and Plumbing Codes of the City of Kinston and G.S. 160-141, and that the City of Kinston is now furnishing to the plaintiffs the light and water service as demanded in their complaint. The City of Kinston having complied with the provisions of the judgment, the question as to whether or not the plaintiffs were entitled to the relief sought and granted in the judgment entered below, becomes academic. *Pickler v. Bd. of Education,* 149 N.C. 221, 62 S.E. 902; *Wallace v. Wilkesboro,* 151 N.C. 614, 66 S.E. 657; *Moore v. Monument Co.,* 166 N.C. 211, 81 S.E. 170; *Allen v. Reidsville,* 178 N.C. 513, 101 S.E. 267; *Person v. Watts,* 184 N.C. 499, 115 S.E. 336.

The City of Kinston, however, is not foreclosed of any remedy it may have with respect to the violation of its Building Code or its Zoning Ordinance by reason of the manner in which the building in question had been reconstructed.

Appeal dismissed.

PENN DIXIE LINES, INC., v. JONAS GRANNICK.

(Filed 11 November, 1953.)

1. Compromise and Settlement § 1—

The law favors the settlement of controversies out of court and encourages such action by decreeing that an offer to compromise the controversy involved in a litigation is inadmissible in evidence.

2. Compromise and Settlement § 2—

An extrajudicial compromise settlement made by a party with one person cannot be shown in evidence in a subsequent lawsuit arising out of the same transaction between such party and another person.

3. Pleadings § 31—

An allegation of fact is irrelevant and ought to be stricken from the pleading on motion if the fact pleaded is not legally receivable in evidence on the trial.

4. Same—

A motion to strike an allegation from a pleading for irrelevancy admits, for the purpose of the motion, the truth of all facts well pleaded in the allegation, and any inferences of fact deducible therefrom, but it does not admit conclusions of the pleader.

5. Compromise and Settlement § 2—

A compromise agreement is conclusive between the parties as to the matters compromised, but it does not extend to matters not included within its terms.

6. Compromise and Settlement § 2: Pleadings § 31: Automobiles § 18a—Settlement between drivers and guests does not preclude drivers from litigating between themselves liability for the collision.

Where a collision between the motor vehicle of plaintiff and the motor vehicle of defendant results in personal injuries to third persons riding in the motor vehicle of defendant, and the plaintiff and defendant, acting in concert, execute an extrajudicial compromise settling the claims made against them by the injured passengers, the compromise settlements do not bar a subsequent action in negligence by plaintiff against the defendant for damage done to the plaintiff's motor vehicle in the same collision, and the denial of plaintiff's motion to strike the paragraph of the answer setting forth the compromise agreements as a defense is prejudicial error.

7. Parties § 9: Insurance § 51: Pleadings § 31—

In an action to recover damages to plaintiff's vehicle resulting from a collision with a vehicle of defendant, allegations to the effect that plaintiff had been paid in full by its insurer for such damages are relevant, since in such instance plaintiff is not entitled to maintain the cause of action.

8. Pleadings § 31—

Defendant alleged as a defense that plaintiff had been paid by its insurer in full for the loss in suit. The court, solely on the basis of a mere conclusory affidavit filed by plaintiff, struck this defense from the answer on the ground that it constituted a sham defense within the purview of G.S. 1-126. *Held:* The striking of the defense was error, since the record does not indicate in any way that the defense was a mere pretense set up by defendant in bad faith and without color of fact.

WINBORNE, J., dissents.

APPEALS by plaintiff and defendant from *Burgwyn, Special Judge,* at the March Term, 1953, of HARNETT.

Civil action to recover damages for actionable negligence heard upon motion to strike allegations from answer.

Ellis Avenue, which runs north and south, and West Broad Street, which runs east and west, intersect and cross each other in the corporate limits of the Town of Dunn. On 17 February, 1952, a Ford tractor, which was owned by Clark P. Craumer and operated by William J. Reichert, pulled a loaded trailer belonging to the plaintiff Penn Dixie Lines, Inc., southward along Ellis Avenue. The tractor-trailer combina-

tion collided with a west-bound Dodge automobile owned and operated by the defendant Jonas Grannick at the intersection of Ellis Avenue and West Broad Street. The collision damaged the tractor, the trailer, the cargo of the trailer, and the Dodge car, and injured Bernard Saks and Morton Vogelson, who were riding in the Dodge car.

On 3 November, 1952, the plaintiff brought this action against the defendant to recover compensation for the loss suffered by it on account of the damage to the trailer and its cargo. The complaint charges in detail that such damage was occasioned by the actionable negligence of the defendant in the management of his automobile.

The defendant answered, denying actionable negligence on his part and pleading contributory negligence on the part of the driver of the tractor-trailer combination. The answer pleads additionally this new matter:

1. "For a third further answer and defense, defendant alleges: (1) That at the time of the aforesaid motor vehicle collision two passengers, Morton Vogelson and Bernard Saks, were riding in the automobile of the defendant; that said passengers sustained severe personal injuries in said collision as a result of which each of them made claim against the plaintiff, Penn Dixie Lines, Inc., and this defendant for damages on account of said personal injuries; that thereafter representatives of the plaintiff and the defendant negotiated settlements of said claims with said claimants in the State of New York where said claimants resided, a portion of the consideration for said settlements being paid on behalf of the plaintiff and the remaining portion being paid on behalf of this defendant; that said claimants thereupon signed full releases absolving the plaintiff and this defendant from any further liability on account of said injuries; and that if this defendant was ever legally liable to this plaintiff by reason of any of the matters set forth in the complaint, which is again hereby expressly denied, said releases completely terminated any such liability and the same are hereby pleaded in bar of any recovery by the plaintiff herein."

2. "For a fourth further answer and defense, defendant alleges: (1) Upon information and belief that the plaintiff was insured with respect to the damages alleged in the complaint in a policy of motor vehicle collision insurance written by State Automobile Insurance Association, an insurance company authorized and existing under and by virtue of the laws of the State of Indiana; that pursuant to said policy of insurance, said insurance company has paid to the plaintiff the damages alleged in the complaint in this action and has in law and by virtue of the terms of said insurance policy become subrogated to the rights of plaintiff, if any, against this defendant. (2) That said insurance company, and not the plaintiff, is the real party in interest in this action and should be made a party plaintiff hereto."

The plaintiff moved to strike the third further answer and defense as irrelevant, and the fourth further answer and defense as sham. The motion was accompanied by the *ex parte* affidavit of an officer of the State Automobile Insurance Association, which contained the conclusory statement that the Association has never paid to the plaintiff the full amount of the damages suffered by it in the collision.

On the hearing of the motion to strike, the presiding judge concluded as a matter of law "that the allegations contained in the third further answer and defense are relevant" and declined to strike them from the answer. The plaintiff excepted and appealed, assigning this ruling as error.

The presiding judge found as a fact on the basis of the affidavit of the officer of the State Automobile Insurance Association "that the allegations contained in the fourth further answer and defense are untrue," and struck them from the answer. The defendant excepted and appealed, assigning this ruling as error.

Talmadge L. Narron for plaintiff, appellant and appellee.

A. J. Fletcher, F. T. Dupree, Jr., and G. Earl Weaver for defendant, appellant and appellee.

ERVIN, J. Inasmuch as the motion to strike the third further answer and defense from the answer is based on its supposed irrelevancy, the plaintiff's appeal presents this question for decision: Where a collision between the motor vehicles of the plaintiff and the defendant results in personal injuries to third persons riding in the motor vehicle of the defendant, and the plaintiff and the defendant, acting in concert out of court, compromise and settle extrajudicial claims made against them by the injured third persons, do the compromise settlements bar a subsequent action in negligence by the plaintiff against the defendant for damage done to the plaintiff's motor vehicle in the same collision?

Although actions arising out of motor vehicle collisions are almost as numerous as the "autumnal leaves that strow the brooks in Vallambrosa," a diligent and protracted search has not unearthed a decision answering this precise question. For this reason, we turn to the authorities summarized below for the solution of this problem.

1. The law favors the settlement of controversies out of court. *Patrick v. Bryan,* 202 N.C. 62, 162 S.E. 207; *Armstrong v. Polakavetz,* 191 N.C. 731, 133 S.E. 16; 11 Am. Jur., Compromise and Settlement, section 4. It encourages such action by securing to every man the opportunity to negotiate for the purchase of his peace without prejudice to his rights. 31 C.J.S., Evidence, section 285. To this end, the law declares that evidence of an offer to compromise the controversy involved in a litigation

is inadmissible. *Merchant v. Lassiter,* 224 N.C. 343, 30 S.E. 2d 217; *Stein v. Levins,* 205 N.C. 302, 171 S.E. 96; *Greensboro v. Garrison,* 190 N.C. 577, 130 S.E. 203; *Baynes v. Harris,* 160 N.C. 307, 76 S.E. 230; *Peeler v. Peeler,* 109 N.C. 628, 14 S.E. 59; *Hughes v. Boone,* 102 N.C. 137, 9 S.E. 286; *Smith v. Love,* 64 N.C. 439; *Lucas v. Nichols,* 52 N.C. 32; *Daniel v. Wilkerson,* 35 N.C. 329; *Poteat v. Badget,* 20 N.C. 349; Michie: The Law of Automobiles in North Carolina, section 277; Stansbury: North Carolina Evidence, section 180; 31 C.J.S., Evidence, section 285.

2. Moreover, in North Carolina and the majority of other American jurisdictions, the law decrees that a compromise settlement made by a party with a third person cannot be shown in evidence in a subsequent lawsuit between the party and another person arising out of the same transaction. *Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805; *Herring v. Coach Co.,* 234 N.C. 51, 65 S.E. 2d 505; *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171; 31 C.J.S., Evidence, section 292. "The reason for the rule is that the law favors the settlement of controversies out of court, and, if a man could not settle one claim out of court without fear that this would be used in another suit as an admission against him, many settlements would not be made." *Fenberg v. Rosenthal,* 348 Ill. App. 510, 109 N.E. 2d 402; *Hill v. Hiles,* 309 Ill. App. 321, 32 N.E. 2d 933; *Powers' Adm'r v. Wiley,* 241 Ky. 645, 44 S.W. 2d 591.

3. An allegation of fact is irrelevant and ought to be stricken from a pleading on motion if the fact pleaded is not legally receivable in evidence on the trial. *Pemberton v. Greensboro,* 203 N.C. 514, 166 S.E. 396; *Johnson v. Herring,* 89 Mont. 156, 295 P. 1100.

4. A motion to strike an allegation from a pleading for irrelevancy admits, for the purpose of the motion, the truth of all facts well pleaded in the allegation, and any inferences fairly deducible from them. But it does not admit the conclusions of the pleader. *Kurtzon v. Kurtzon,* 395 Ill. 73, 69 N.E. 2d 341; 71 C.J.S., Pleading, section 451.

5. Compromise agreements are governed by the legal principles applicable to contracts generally. As a consequence, a compromise agreement is conclusive between the parties as to the matters compromised. *Snyder v. Oil Co., supra; Sutton v. Robeson,* 31 N.C. 380; 11 Am. Jur., Compromise and Settlement, section 25. But it does not extend to matters not included within its terms. 15 C.J.S., Compromise and Settlement, section 27.

The task of applying these principles to the plaintiff's appeal must now be performed.

The third further answer and defense affords no factual foundation whatever for any contention that the plaintiff and the defendant actually compromised the controversy involved in this action. When that portion

of the answer is stripped of the conclusions of the pleader, it discloses that the plaintiff and the defendant merely purchased from Saks and Vogelson such peace as Saks and Vogelson could sell.

This being true, the allegations relating to the extrajudicial settlements of the plaintiff and the defendant with Saks and Vogelson have no proper place in the answer in this case, unless logic is willing to accept the plaintiff's participation in the settlements as an implied admission on its part of at least partial legal responsibility for the damage to its property, and unless the law is willing to accept the defendant's participation in the settlements as a sufficient reason for abrogating the salutary principle of public policy which favors and encourages the settlement of controversies out of court.

Logic would ignore the facts of life if it accepted the plaintiff's participation in the extrajudicial settlements with Saks and Vogelson as an implied admission of legal culpability on its part. It costs time, trouble, and money to defend claims, whether well founded or not, and prudent persons constantly purchase their peace against unfounded claims to avoid these outlays. *Georgia Ry. & Electric Co. v. Wallace & Co.*, 122 Ga. 547, 50 S.E. 480. Dean Wigmore had this common knowledge in mind when he made this observation: "The true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a belief that the adversary's claim is well founded, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered; in short, the offer implies merely a desire for peace, not a concession of wrong done." Wigmore on Evidence (2d Ed.), section 1061. The validity of our conclusion in respect to the probative value of the plaintiff's settlements with the third persons is not impaired in any wise by the defendant's participation in the settlements. This is true because we cannot look to the conduct of the defendant for implied admissions of the plaintiff.

The relevant authorities make it crystal clear that the sound principle of public policy which favors settlement of controversies out of court would have precluded the defendant from invoking the settlements with Saks and Vogelson as a defense to the cause of action stated in the complaint if the settlements had been made by the plaintiff alone. We have cudgeled our brains and searched the authorities to ascertain whether there is any valid reason why the defendant's participation in the settlements with the third persons should set at naught this sound principle of public policy in the case at bar. We have discovered no such reason. Indeed, it seems to us that the ever increasing number of motor vehicle collisions with their resultant multiple injuries rather demands that the

courts enforce without relaxation in cases like this the salutary rule that the law favors the extrajudicial settlement of controversies.

It is a far cry from the question arising on the plaintiff's appeal to the matters under review in the portions of the opinions in *Coach Co. v. Stone,* 235 N.C. 619, 70 S.E. 2d 673; *Snyder v. Oil Co., supra,* and *Herring v. Coach Co., supra,* invoked by the defendant.

The compromise of the plaintiff and the defendant with Saks and Vogelson did not include the controversy involved in the claim for damages made by the plaintiff against the defendant in this case; whereas, the extrajudicial compromise between the Kenan Oil Company and Mary P. Dixon adjusted the exact controversy involved in the claim for contribution made by the Kenan Oil Company against Mary P. Dixon in the *Snyder case,* and the judicial compromise between the Queen City Coach Company and Mabel Spivey, Administratrix of Paul Spivey, settled the identical controversy involved in the claim for contribution made by the Queen City Coach Company against Mabel Spivey, Administratrix of Paul Spivey, in the *Herring case.* Moreover, the settlements under consideration in the instant action were made by contract out of court, and did not involve any judicial adjudication in respect to the claim of the plaintiff against the defendant; whereas, the settlements under scrutiny in the *Snyder* and *Stone cases* were made by consent judgments in court, and involved judicial adjudications establishing the invalidity of the claim of the Queen City Coach Company against Mabel Spivey, Administratrix of Paul Spivey, and the claim of the Lumberton Coach Company against H. W. Stone.

What has been said compels the conclusion that the third further answer and defense should have been stricken from the answer for irrelevancy. It is obvious, we think, that its retention in the answer is likely to cause harm or injustice to the plaintiff. *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185.

This brings us to the appeal of the defendant. When he struck the fourth further answer and defense from the answer, the presiding judge purported to act under the statute now codified as G.S. 1-126, which specifies that "Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may in its discretion impose."

The fourth further answer and defense alleges, in substance, that the plaintiff insured its trailer and cargo against loss by collision with a specified insurance company; that the insurance company paid the plaintiff in full for the loss suffered by it in the collision mentioned in the complaint; and that in consequence the insurance company is the sole owner of the cause of action, which the plaintiff is attempting to assert against the defendant.

These allegations are certainly relevant, for they undoubtedly state a defense to the cause of action alleged in the complaint. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231.

The presiding judge found as a fact upon a mere conclusory affidavit submitted by the plaintiff "that the allegations contained in the fourth further answer and defense are untrue," and struck the fourth further answer and defense from the answer on the ground that it constituted a sham defense within the purview of the statute. The presiding judge erred to the defendant's prejudice in thus rejecting the fourth further answer and defense. This is necessarily so because the record does not indicate in any way that this defense is a mere pretense set up by the defendant in bad faith and without color of fact. *Boone v. Hardie,* 83 N.C. 470. See, also, in this connection: *Broocks v. Muirhead,* 221 N.C. 466, 20 S.E. 2d 273.

This cause is remanded to the Superior Court of Harnett County for further proceedings agreeable to this opinion.

On plaintiff's appeal, error and remanded.

On defendant's appeal, error and remanded.

WINBORNE, J., dissents.

CLARK P. CRAUMER v. JONAS GRANNICK.

(Filed 11 November, 1953.)

APPEAL by plaintiff from *Burgwyn, Special Judge,* at March Term, 1953, of HARNETT.

Civil action to recover damages for actionable negligence heard upon motion to strike allegations from answer.

This is a companion case to the action this day decided entitled *Penn Dixie Lines, Inc., v. Jonas Grannick.* The plaintiff Clark P. Craumer sued the defendant Jonas Grannick for damages for the injury done his Ford tractor in the collision involved in that action. The complaint and the answer in this suit are couched in practically the same language as the complaint and the answer in the *Penn Dixie Lines case.* The plaintiff moved to strike from the answer in this suit third and fourth further answers and defenses virtually identical with the third and fourth further answers and defenses pleaded in the *Penn Dixie Lines case.* The presiding judge entered an order whereby he struck the fourth further answer and defense, and refused to strike the third further answer and defense.

Each party noted an appeal from the portion of the order adverse to him. The defendant subsequently abandoned his appeal.

Talmadge L. Narron for plaintiff, appellant.

A. J. Fletcher, F. T. Dupree, Jr., and G. Earl Weaver for defendant, appellee.

ERVIN, J. The plaintiff's appeal challenges the validity of the portion of the order refusing to strike the third further answer and defense from the answer. For the reasons stated in the *Penn Dixie Lines case,* this cause is remanded to the Superior Court of Harnett County with directions that an order be entered striking out the third further answer and defense.

Error and remanded.

WINBORNE, J., dissents.

J. P. McABEE, ADMINISTRATOR OF THE ESTATE OF ANNIE MAY McABEE, v. JOHN C. LOVE AND J. P. McABEE, INDIVIDUALLY.

(Filed 11 November, 1953.)

1. Automobiles § 18g (5)—

Testimony of a patrolman that he saw tire tracks on the shoulder of the road near the scene of the accident some ten or twelve days after the collision is properly excluded, especially where the evidence further tends to show that no such marks were seen immediately after the collision, since the evidence fails to connect the tire marks with the car in question.

2. Negligence § 20—

The trial court, in defining negligence, is not required to use any particular arrangement of words, and the charge will be upheld if it sets forth correctly each essential element of negligence.

3. Trial § 31d—

The failure of the trial court to define the term "greater weight of the evidence" will not be held for error in the absence of a request for special instructions.

APPEAL by plaintiff from *Sink, J.,* at May-June Term, 1953, of HENDERSON.

Civil action to recover damages (1) for alleged wrongful death of plaintiff's intestate, Annie May McAbee, allegedly resulting from inju-

ries sustained in a motor vehicle collision, and (2) for alleged pain and suffering of plaintiff's intestate prior to her death.

This action grows out of a motor collision which took place about the hour of 7 o'clock p.m., on 1 February, 1953, between a Chevrolet pickup truck owned and operated by J. P. McAbee, in which his wife, Annie May McAbee, the intestate in whose behalf he, as her administrator brings this action, was a passenger, and a 1941 model Plymouth sedan, owned and operated by defendant, John C. Love, in which his wife and infant were passengers. Both the pickup truck and the sedan were traveling in the same direction on the Dana Highway, a paved highway leading from Hendersonville, N. C., to Dana, N. C., the sedan preceding the truck. The collision occurred on a straight stretch of the highway,—at or just before reaching the point of intersection of the highway with Hill Road. This road connected with the left side of the highway in the direction the truck and sedan were traveling.

Plaintiff alleged in his complaint, and upon trial in Superior Court, offered evidence tending to show that the pickup truck followed the sedan for several hundred feet, and, reaching a point where the visibility on the highway was clear, unobstructed and straight for a distance of some seven or eight hundred feet, proceeded around the sedan, when suddenly and without warning the sedan was negligently and recklessly driven into the rear and side of the truck causing it to overturn, resulting in serious injury to and death of Mrs. McAbee on 3 February, 1953.

And plaintiff sets forth in detail the respects in which it is contended defendant Love was negligent.

The defendant John C. Love, answering the complaint, denies that the collision was caused by any negligence on his part. And for a further answer, and defense, he avers, and upon trial in Superior Court, offered evidence tending to show that at the time and place of the collision he was operating his sedan in a reasonable, careful and lawful manner, as he approached the intersection of Hill Road with Dana Highway, that as he approached the intersection and at a point a considerable distance before reaching the intersection, he gave an arm and hand signal for the purpose of signaling and indicating a left turn off the Dana Highway onto Hill Road, and continued to make such signal until he reached the intersection, when he drew his hand into the car for the purpose of making a left turn; that after he began to make the left turn, the pickup truck, suddenly and without prior warning, attempted to pass to the left of the sedan, whereupon he, the defendant Love, brought the sedan to a complete stop and, despite his efforts, the right front fender or bumper of the pickup truck ran into and against the bumper or left front wheel of the sedan; and that the pickup truck traveled on some distance further and turned over.

And for a second further defense, and cross action, the defendant Love averred, in substance, that the collision, and consequent injury to and death of plaintiff's intestate, were caused solely and proximately by the negligence of J. P. McAbee, individually, in respects set forth in detail; that if it be adjudicated that he, defendant Love, was negligent, then J. P. McAbee was negligent, and, therefore, is, in law, a joint tort-feasor with defendant Love, and is a necessary and proper party defendant to this action, and should be made such party, and required to contribute to any award of damages to plaintiff, to the end that any and all controversies existing between the parties be fully determined in one action and as provided by G.S. 1-240.

A third further answer and defense set up by defendant Love is not pertinent to this appeal, and need not be stated.

Whereupon defendant Love prays judgment, among other things,

(1) That plaintiff take nothing by this action, etc.,

(2) That J. B. McAbee be made a party defendant as a joint tort-feasor, etc.

Thereupon J. P. McAbee, after service of notice of motion therefor, voluntarily came into court and agreed to become a party to the action, and answering (1) the complaint, admitted all allegations, and (2) the further answers and defenses of defendant Love, denied in material aspect all averments, and prayed that defendant Love take nothing by his cross action and that his further defense be denied, and that he, McAbee, as an individual, recover his costs, etc.

Upon the trial in Superior Court, both plaintiff and defendants offered testimony bearing upon, and tending to support their respective versions —as to how and what caused the collision aforesaid, and the case was submitted to the jury upon these issues, which the jury answered, as indicated:

"1. Was the death of plaintiff's intestate, Annie May McAbee, caused by the negligence of the defendant, John C. Love, as alleged in the complaint? Answer: No.

"2. Was the death of plaintiff's intestate, Annie May McAbee, caused by the negligence of J. P. McAbee, as alleged in the Answer of John C. Love? Answer: Yes.

"3. What amount, if any, is the plaintiff entitled to recover of the defendant or defendants by reason of the death of Annie May McAbee? Answer: None.

"4. What amount, if any, is the plaintiff entitled to recover of the defendant or defendants by reason of pain and suffering of Annie May McAbee because of the injuries sustained by her, as alleged in the complaint? Answer: None."

Thereupon, upon motion of defendant John C. Love it was ordered and adjudged (1) that plaintiff have and recover nothing of him, and that the action as to him be dismissed, (2) that plaintiff have and recover nothing of J. P. McAbee, and that the action as to him be dismissed, and (3) that plaintiff McAbee, Administrator, be taxed with the costs herein incurred.

Plaintiff and defendant, J. P. McAbee, each for himself excepts thereto, and appeals to Supreme Court and assigns error.

Arthur J. Redden, Monroe M. Redden, and Monroe M. Redden, Jr., for plaintiff, appellant.

Harkins, Van Winkle, Walton & Buck for defendant, appellee.

WINBORNE, J. Appellants present their assignments of error in three groups, and they will now be so treated.

I. Exception is taken to the exclusion of testimony of a highway patrolman, that he observed tire marks on the shoulder of Dana Road east of Hill Road ten or twelve days or more after the accident.

In this connection, commenting on the subject of footprints and other tangible clues, Stansbury in his work on North Carolina Evidence, Sec. 85, says: "Tangible traces of various sorts may indicate the presence of a person or the happening of an event of a certain character at a particular place, and evidence of them is therefore admissible if the inference sought to be drawn is a reasonable one . . . and the circumstances of an automobile accident may be inferred from . . . the direction and appearance of tire marks."

And in *S. v. Ormond,* 211 N.C. 437, 191 S.E. 22, it would seem that the admissibility depends upon whether the marks be connected with the automobile.

Also in *S. v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908, in opinion by *Ervin, J.,* it is said: "In the nature of things, evidence of shoe prints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) That the shoe prints were found at or near the place of the crime; (2) that the shoe prints were made at the time of the crime; and (3) that the shoe prints correspond to shoes worn by the accused at the time of the crime" . . . citing numerous cases. And it is further declared that "Similar criteria apply to evidence of automobile tracks offered to identify the owner of a motor vehicle as the perpetrator of an offense," citing among others *S. v. Young,* 187 N.C. 698, 122 S.E. 667.

Testing the testimony under consideration by these rules, it does not seem that the requirements are met. The witness had testified that on the night of the collision he did not see any tire marks east of Hill Road;

that he saw some at a later date; but that he did not know what made them. Hence, prejudicial error is not made to appear.

II. Assignments of error numbers 3 and 5 are based upon exceptions of like numbers taken to portions of the charge defining the word "negligence." As to these, it is pertinent to note here that the reports of this Court are full of instances in which the definition of "negligence," as variously stated by trial judges, has been challenged, and under scrutiny. And while the basic elements constituting the definition are standardized, it does not appear that any particular arrangement of words is required to define what is negligence. It seems sufficient if the essential elements are stated. See *S. v. Lee,* 237 N.C. 263, 74 S.E. 2d 654.

Now testing the definitions here questioned, it cannot be said that they are not sufficient to convey to the jury the meaning of the term.

III. Assignment of error number 6 predicated upon exception number 7, is that the trial court erred because it failed to explain to the jury the meaning of the term "greater weight of the evidence." As to this, appellants, in their brief, concede that this Court has held that the failure of the court to define this term is a subordinate feature for which no relief will be given in the absence of a special request therefor—citing particularly the cases of *Wilson v. Casualty Co.,* 210 N.C. 585, 188 S.E. 102, and *Arnold v. Trust Co.,* 218 N.C. 433, 11 S.E. 2d 307. It is also conceded by appellants that no such special request was made. Moreover, no sufficient reason is advanced to merit a change in the recognized rule.

Other assignments of error appear to have been abandoned, or are formal, and need no discussion.

Finally, the record discloses that the case was clearly presented to the jury, and its verdict must stand.

No error.

R. D. EVERETT, D. W. EVERETT, EVELYN E. YOPP, ORA MAE KING, LILLIE EVERETT SMITH, AND HUGH VINSON EVERETT v. E. C. SANDERSON AND WIFE, MRS. E. C. SANDERSON.

(Filed 11 November, 1953.)

1. *Adverse Possession* § 19—

Evidence tending to show that defendants' grantor used the entire tract of land in question under definite boundaries for more than twenty years by putting the land to appropriate uses in keeping hogs thereon throughout the year and pasturing cattle and renting it to others for the operation of fisheries during the entire appropriate season each year, and that such use was open and notorious and under claim of right, *is held* sufficient to overrule nonsuit in plaintiffs' action to establish title to the *locus* by adverse possession. G.S. 1-40.

2. Adverse Possession § 18—

In an action to establish title to lands by adverse possession for twenty years, evidence indicating that claimants' grantor claimed the *locus in quo* during the statutory period is competent to show that he occupied the land under claim of right or title.

3. Appeal and Error § 39e—

The admission of evidence over objection cannot be held prejudicial when the witnesses in other portions of their examinations testify to the same import without objection.

APPEAL by defendants from *Grady, Emergency Judge,* at June Special Term, 1953, of ONSLOW.

Civil action involving the title to realty.

For convenience of narration, R. D. Everett, D. W. Everett, Evelyn E. Yopp, Ora Mae King, Lillie Everett Smith, and Hugh Vinson Everett are called the plaintiffs, and E. C. Sanderson and Mrs. E. C. Sanderson are designated as the defendants.

The pleadings of the parties put in issue the ownership and right to possession of a tract of 210 acres adjoining the Atlantic Ocean in Stump Sound Township in Onslow County.

The cause was tried by Judge Grady without a jury pursuant to the consent of the parties entered in the minutes. The only evidence at the trial was that presented by the plaintiffs. Judge Grady made detailed findings of fact from this evidence to the effect that the plaintiffs and their grantor, L. W. Everett, had possessed the land in dispute under known and visible lines and boundaries adversely to all other persons "for more than thirty years prior to the commencement of the action." Judge Grady concluded as a matter of law that such possession gave the plaintiffs title in fee to the land in controversy under the statute codified as G.S. 1-40, and rendered judgment accordingly. The defendants excepted and appealed, assigning errors.

Summersill & Summersill and Moore & Corbett for plaintiffs, appellees.

Wyatt E. Blake for defendants, appellants.

ERVIN, J. The defendants assert primarily that the evidence of the plaintiffs does not suffice to show adverse possession for twenty years within the purview of G.S. 1-40, and that the action ought to have been involuntarily nonsuited on that ground in the trial court.

When the evidence is interpreted in the light most favorable to the plaintiffs, it discloses these facts:

1. On 12 January, 1948, L. W. Everett executed a deed sufficient in form to convey the 210 acres to the plaintiffs in fee.

2. For at least thirty-five consecutive years antedating his deed, L. W. Everett put the 210 acres to the only uses to which they could then be applied. In so doing, he kept and fed hogs on the land throughout each year; he pastured cattle on the land during the entire grazing season of each year; and he permitted rent-paying tenants to operate fisheries on the land during the entire fishing season of each year. He maintained hog-pens and a fish house on the land in connection with these operations. Moreover, he cut cedar trees on the land when he could find a market for cedar posts.

3. The activities of L. W. Everett and his rent-paying tenants on the 210 acres were carried on openly and publicly, and were known to all the people in the vicinity of the premises.

4. In carrying on their activities, L. W. Everett and his rent-paying tenants employed the entire 210 acres, whose external boundaries were plainly delineated by a fence, a high hill, and the waters of the ocean and a bay.

5. During the entire period specified in paragraph 2, L. W. Everett openly and publicly claimed title in fee to the 210 acres, and excluded from them those persons who undertook to enter upon them without his permission.

6. The defendants entered upon the 210 acres against the will of the plaintiffs a few months before the issuance of the summons.

A just and learned judge, the late *Justice Platt D. Walker*, gave us this celebrated definition of adverse possession in the leading case of *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347: "What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner."

When the facts in evidence are laid alongside this famous definition, it is manifest that the trial judge rightly refused to dismiss the action upon a compulsory nonsuit. The facts are ample to show that the grantor of the plaintiffs was in the actual possession of the *locus in quo* under known and visible lines and boundaries for the full statutory period of twenty years, and that his actual possession during the entire statutory period was open, notorious, and visible, exclusive, continuous, and uninterrupted, and under claim of right or title by him. G.S. 1-40; *Alexander*

v. Cedar Works, 177 N.C. 137, 98 S.E. 312; *Wall v. Wall,* 142 N.C. 387, 55 S.E. 283; *Loftin v. Cobb,* 46 N.C. 406; *Bynum v. Carter,* 26 N.C. 310; *Williams v. Buchanan,* 23 N.C. 535, 35 Am. Dec. 760; *Simpson v. Blount,* 14 N.C. 34; *Carter v. Stewart,* 149 Ark. 189, 231 S.W. 887, 232 S.W. 936; *Kellogg v. Huffman,* 137 Cal. App. 278, 30 P. 2d 593; *Berry v. Cohn,* 47 Cal. App. 19, 189 P. 1044; *McRae v. Ketchum,* 138 Fla. 610, 189 So. 853; *Davis v. Haines,* 349 Ill. 622, 182 N.E. 718; *O'Banion v. Simpson,* 44 Nev. 188, 191 P. 1083; *Fulton v. Rapp,* ..... Ohio App. ....., 98 N.E. 2d 430.

The defendants insist secondarily that the trial judge committed reversible error in admitting testimony over their objections, and that they are entitled to have the cause tried anew on that account.

This position is insupportable. The evidence indicating that L. W. Everett claimed the *locus in quo* during the possessory period was admissible to show that he occupied the premises under a claim of right or title. *Bunch v. Bridgers,* 101 N.C. 58, 7 S.E. 584; *Phipps v. Pierce,* 94 N.C. 514; *Smith v. Reid,* 51 N.C. 494; Stansbury on North Carolina Evidence, section 160. The testimony of some of the witnesses that it was generally reputed in the community during the possessory period that the *locus in quo* belonged to L. W. Everett was not competent to establish title. *Sullivan v. Blount,* 165 N.C. 7, 80 S.E. 892; *Locklear v. Paul,* 163 N.C. 338, 79 S.E. 617; Stansbury on North Carolina Evidence, section 148. It may be argued with much reason, however, that this testimony was rightly received to show notoriety of L. W. Everett's claim of title and notice of the same to the true owner. 2 C.J.S., Adverse Possession, Section 223. We are spared the task of making a decision on this point by the conduct of the defendants, who waived the objections covering the receipt of this particular evidence by allowing the same witnesses to testify without objection to substantially the same facts in other portions of their examinations. *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326; *Lipe v. Bank,* 236 N.C. 328, 72 S.E. 2d 759; *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179; *Spivey v. Newman,* 232 N.C. 281, 59 S.E. 2d 844.

For the reasons stated, the judgment is

Affirmed.

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 11 November, 1953.)

1. Appeal and Error §§ 10a, 31b—

When appellant relies solely upon his exception to the judgment entered, the record proper constitutes the case on appeal, and therefore appellee's motion to dismiss for failure of appellant to serve a case on appeal will be denied.

2. Appeal and Error § 51a—

After decision was rendered, the unsuccessful party petitioned for rehearing. The petition was denied. Thereafter judgment was entered in the lower court in accordance with the opinion, and an appeal therefrom was taken. *Held:* The denial of the petition to rehear put an end to the case, and the judgment appealed from is affirmed.

3. Wills § 44—

Plaintiff widow contended that her personal property had been used by her husband in the improvement of his realty. The will bequeathed her all the personal property with the exception of one piano and devised her a life estate in the realty. *Held:* By electing to accept the devise and bequest under the will, she is estopped from asserting the debt or claiming a lien on the realty.

APPEAL by plaintiff from *Grady, Emergency Judge,* April Term, 1953, LENOIR. Affirmed.

This cause was here on former appeal, *Rouse v. Rouse,* 237 N.C. 492, 75 S.E. 2d 300. Plaintiff alleges that her husband, before his death, received $1,000 in cash which belonged to her as a part of her separate estate and that he invested said sum in the construction of a combination residence and store building located on his land. He thereafter died, leaving a last will and testament in which he devised his real estate—including the combination residence and store—to plaintiff for life. He also bequeathed to her all his personal estate except one piano. In his will he also directed his executor to pay all his just debts.

"At the time of the calling of the above captioned proceeding for trial (on the original hearing), the plaintiff and the defendants, through their respective attorneys of record . . . did . . . agree that in the event the jury answered the issues in favor of the plaintiff, the amount of damages plaintiff would be entitled to recover of the defendants would be determined by the court as being $1,000, with interest from May 3, 1935."

There was a verdict for plaintiff on the original appeal. We reversed.

At the April Term 1953, defendants moved for judgment in accord with the opinion certified from this Court. The motion was allowed and the court below entered judgment "that the plaintiff take nothing in this action" and that defendants recover their costs. Plaintiff excepted and appealed.

Jones, Reed & Griffin for plaintiff appellant.
Allen, Allen & Langley for defendant appellees.

BARNHILL, J. On this appeal plaintiff relies on her exception to the signing of the judgment entered in the court below. No case on appeal was required. The record proper constitutes the case on appeal. *Wilson v. Chandler, ante,* p. 401; *In re Suggs, ante,* p. 413. Hence the motion of defendants to dismiss the appeal for failure of plaintiff to serve a case on appeal is without merit and is denied.

On the original appeal plaintiff argued that (1) she is entitled to judgment in the sum of $1,000; (2) she is entitled to an equitable lien on the combination residence and store building property as security for the payment of the amount alleged to be due; and (3) the acceptance by her of the devise and bequest made to her by her husband in his last will and testament does not constitute an election or estop her from now asserting the debt and the lien. This Court adopted the contrary view.

If plaintiff conceived there was error in the original opinion, her remedy was by petition to rehear. She was so advised. Within the time allowed by Rule 44, Rules of Practice in the Supreme Court, 221 N.C. 570, she petitioned for a rehearing. In her petition she again presented these questions for consideration and contended that there was error in the conclusions of the Court in respect thereto. In her petition she stressed her contention that she is at least entitled to a judgment for the alleged debt and "mended her lick" by citing additional authorities. The petition was denied.

She now seeks to present the identical questions for review. Thus this appeal is nothing more than an attempt to have the Court again review and rehear the original appeal. This is contrary to the usual practice and procedure of the courts. The denial of the petition to rehear put an end to the case.

There must be an end to litigation. Causes must be heard and disposed of in accord with well-recognized rules of procedure. Departure therefrom would tend to produce confusion and uncertainty in the administration of justice.

It is true that when a testator makes a devise or bequest to one of his creditors equal to or greater in value than the debt and, at the same time, specifically directs the payment of his debts, the creditor is not ordinarily

put to an election whether he will accept the benefits and forego his debt or reject the gift and insist upon the payment of the amount due him. 57 A.J. 1076, 77; Anno. 86 A.L.R. 23; *Perry v. Maxwell,* 17 N.C. 488; *Dey v. Williams,* 22 N.C. 66.

However, that rule may not be invoked on the facts in this case. Plaintiff had the right to trace the trust fund to the property in the improvement of which the fund had been invested. Here such real estate was devised to her for life. She elected to take the property, so improved. The personal property of decedent is primarily liable for the payment of his debts. Nothing else appearing, plaintiff would have had the right to demand that the personal property belonging to her husband's estate be sold to satisfy her claim. Her husband bequeathed to her all his personal estate except one piano, and she accepted the gift. If she is seeking an opportunity to sell the one piano not bequeathed to her, it might well be said that the case comes within the maxim *de minimis non curat lex.*

In this connection it is a significant fact that neither the original record nor the one now before us makes it appear that the personal estate of the testator is not amply sufficient to satisfy plaintiff's claim.

The judgment entered in the court below is in strict accord with the mandate of this Court, and it must be

Affirmed.

C. P. DICKSON v. FOGARTY BROTHERS TRANSFER, INC., AND RALEIGH BONDED WAREHOUSE, INC.

(Filed 11 November, 1953.)

Appearance § 2a—

An appearance by a nonresident defendant in claim and delivery proceedings in which such defendant requests that the action be dismissed for want of jurisdiction and further prays that plaintiff be required to make restitution of the property retained under the claim and delivery or that defendant recover on plaintiff's bond for its retention, *is held* a general appearance notwithstanding defendant's denomination of the appearance as special, and such appearance waives any defect in the jurisdiction of the court for want of service of summons.

APPEAL by plaintiff from *Harris, J.,* at July Civil Term, 1953, of WAKE.

Civil action, invoking ancillary remedy of claim and delivery, for recovery of personal property, and for damages for wrongful detention of it. Article 36 of Chapter One of General Statutes.

Plaintiff alleges in his complaint substantially the following: That on 14 August, 1952, he employed defendant Fogarty Brothers Transfer,

Inc., to move certain machinery and other things from Tampa, Florida, to Henderson, N. C., and to deliver same at Henderson on a certain date, at which time he, the plaintiff, expected to be there, and settle with defendant Transfer, Inc.; that the shipment of freight arrived in Henderson, N. C., three days ahead of time, and he, plaintiff, was not there to receive it; that, then, without plaintiff's knowledge or direction, defendant Transfer, Inc., refused to unload the freight, but stored same with defendant Raleigh Bonded Warehouse, Inc., in Raleigh, N. C., and did not notify plaintiff where it was stored; that defendant Transfer, Inc., charged excessive freight rate in amount stated; that plaintiff has tendered the correct amount of transportation charges to defendant Transfer, Inc.; that defendant Transfer, Inc., has breached the agreement to deliver the freight at Henderson, N. C., as above set forth, and in charging excessive rate for transporting the freight, to plaintiff's damage as specified; and that defendant Raleigh Bonded Warehouse, Inc., has said property in its possession, and plaintiff has caused claim and delivery to be issued for same.

And the statement of case on appeal recites that this action and claim and delivery were instituted in Superior Court of Wake County on 25 September, 1952; that summons and claim and delivery were served on the Bonded Warehouse, and the property was turned over to the sheriff, and, in due course, to the plaintiff; that the sheriff returned the summons endorsed, "after due and diligent search, the defendant, Fogarty Brothers Transfer, Inc., is not to be found in Wake County (said defendant being a foreign corporation located in the State of Florida)"; that complaint was filed on the date of issuing summons, and copies mailed by the clerk of the court to defendant at its mailing address in Florida as the record shows; that upon the seizure and delivery of the property to plaintiff, a judgment was signed as to defendant Bonded Warehouse; that defendant Fogarty Brothers never appeared or filed answer; but that thereafter on 22 June, 1953, said defendant made a purported special appearance and filed the motion set out in the record, to which plaintiff answered and moved to dismiss it on the ground that defendant alleged, and asked for affirmative relief, which in law constituted a general appearance.

In this connection the record discloses that the document filed by Fogarty Brothers Transfer, Inc., was styled "Special Appearance . . . and motion to dismiss with restitution." It begins as follows: "Now comes the defendant Fogarty Bros. Transfer, Inc., and enters a special appearance solely for the purpose of making this motion, and upon such appearance respectfully shows to the court"; and it ends with this motion: "Wherefore, the defendant, Fogarty Brothers Transfer, Inc., moves the court: 1. That this action be dismissed, with costs to be paid by the plaintiff. 2. That the plaintiff be ordered to make restitution to the

defendant Fogarty Brothers Transfer, Inc. of the property taken under the claim and delivery in this action, together with compensation for depreciation and injury to said property; that if the said property cannot be restored to the defendant, Fogarty Brothers Transfer, Inc., that the plaintiff be held liable on his undertaking in said proceedings for the damages thus caused to the defendant, Fogarty Brothers Transfer, Inc., including, but not limited to the total proper freight charges, plus the waiting time caused by the plaintiff in delaying delivery of the property transported, together with interest on such amounts from August 18, 1952."

The motion so made came on for hearing pursuant to notice before Harris, Resident Judge of Seventh Judicial District on 17 July, 1953, who, after reciting that "it further appearing that plaintiff has filed this action and obtained property from the lawful possession of the defendant Fogarty Brothers Transfer, Inc., under claim and delivery proceedings ancillary to the principal action, all without having the said defendant served in said action and without seeking to obtain such service under the methods provided by law in such cases, and that the time for obtaining service on the said defendant in this action has expired," ordered, adjudged and decreed: (1) that the action be dismissed, and (2) "that the plaintiff make restitution to the defendant Fogarty Brothers Transfer, Inc., of the property taken under claim and delivery proceedings in this action at the place from which it was taken; and if the said property cannot be restored to the defendant in substantially the same condition it was in when taken, or if it will not bring on sale substantially the same price it would have brought when taken from the defendant, then the plaintiff shall be liable on his undertaking in said claim and delivery proceedings for the damages thus caused the said defendant."

Plaintiff excepted to the judgment, and appeals therefrom to Supreme Court and assigns error.

S. J. Bennett for plaintiff, appellant.

Allen & Hipp for defendant Fogarty Brothers Transfer, Inc., appellee.

WINBORNE, J. This is the question: Was the appearance made by defendant Fogarty Brothers Transfer, Inc., a special appearance, as it purported to be, or was it a general appearance? This Court holds that it exceeds the purposes for which a special appearance may be had, and was, in law, a general appearance. And a general appearance waives any defects in the jurisdiction of the court for want of service of summons. The case of *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848, 25 A.L.R. 2d 818, in so far as it relates to the subjects of special and general appearances, is decisive of the question here. What is so recently said there is controlling here, and need not be repeated.

Decisions cited and relied upon by appellee have been duly considered, and are found to be inapplicable to the situation in hand.

Hence the judgment rendered, and from which this appeal is taken, is erroneous and will be, and it is hereby set aside, and the cause is remanded for further proceedings as to right and justice appertain, and as the law provides. Defendant Fogarty Brothers Transfer, Inc., will be allowed thirty days from the date this opinion is certified to Superior Court in which to demur or answer. G.S. 1-125.

Error and remanded.

T. F. DARDEN, ADMINISTRATOR OF W. R. DARDEN, DECEASED, v. BEECHER LEEMASTER.

(Filed 11 November, 1953.)

1. Automobiles § 18i: Trial § 31b—Instruction submitting material fact not alleged and shown in evidence is reversible error.

Where, in an action involving an accident at an intersection, plaintiff alleges, *inter alia*, that defendant was driving while under the influence of intoxicating liquor and introduces supporting evidence thereof, but there is neither allegation nor evidence that plaintiff's intestate was driving while under the influence of intoxicating liquor, an instruction to the effect that the allegations of contributory negligence made by defendant were in all respects the same as those made against defendant by plaintiff, and that defendant contended intestate was guilty of contributory negligence in the manner and fashion alleged by defendant, must be held for prejudicial error as submitting to the jury a fact not supported by allegation and evidence.

2. Negligence § 16—

Defendant must allege the facts relied on by him as constituting contributory negligence, and mere allegations that the death of plaintiff's intestate was caused by his own negligence and not any negligence on the part of defendant is not a sufficient plea of contributory negligence.

APPEAL by the plaintiff from *Stevens, J.*, May Term, 1953. SAMPSON. New trial.

This is a civil action for damages for the death of plaintiff's intestate caused by the alleged actionable negligence of the defendant.

The plaintiff's evidence tended to show these facts. W. R. Darden, plaintiff's intestate, was killed instantly on 18 April 1950 in an automobile collision about 8:00 p.m. at the intersection of McKoy and Johnson Streets in Clinton. Darden, with two passengers, was driving his automobile north on McKoy Street. The defendant was driving an automobile east on Johnson Street. There were stop signs on Johnson Street

at the intersection of McKoy Street. Darden drove into this intersection on his right-hand side of the road from 25 to 30 miles an hour. Darden had entered the intersection, and was passing through it, when the automobile driven by the defendant at a speed of at least fifty miles an hour, without stopping at the intersection "dashed right in front" of the Darden automobile, and the two automobiles collided in the intersection. When the defendant was picked up at the scene, and put in an ambulance, he had the odor of liquor on his breath. One of the allegations of the complaint is that the defendant was driving his automobile under the influence of intoxicating liquor.

The defendant's evidence tended to show these facts. He was driving an automobile east on Johnson Street. When he reached near the intersection with McKoy Street, he stopped his automobile and not seeing any automobile coming on his left and right on McKoy Street, he put his automobile in gear and entered the intersection. After he had crossed the center of the intersection, the Darden automobile entered the intersection and ran into the right-hand side of the defendant's automobile. The defendant had not drunk any intoxicants that night. There is no allegation in the answer that the plaintiff's intestate was driving under the influence of intoxicating liquor. The defendant offered no evidence that plaintiff's intestate was drinking any intoxicants.

Issues of negligence, contributory negligence and damages were submitted to the jury. The jury answered the first two issues: "Yes." Judgment was signed in accord with the verdict.

The plaintiff appeals assigning error.

D. Stephen Jones for the plaintiff, appellant.
Britt & Warren and Butler & Butler for defendant, appellee.

PARKER, J. The plaintiff assigns as error No. Six this part of the court's charge to the jury: "The allegations of contributory negligence made by the defendant against the plaintiff's intestate in all respects are the same as made against the defendant by the plaintiff, except the only additional one I remember is that he was driving down the street without lights. I am not going to repeat the law as to each allegation which I have already given you. The law in regard to contributory negligence is identically the same as it was with respect to the alleged negligence of the defendant." The complaint as one of its allegations of negligence alleges that the defendant "was operating his said automobile while under the influence of intoxicating liquor." The defendant in his answer makes no such allegation as to plaintiff's intestate's driving of his automobile.

Further on in its charge the court said: "the defendant contends in this case he has offered evidence tending to prove, as the defendant contends,

that the plaintiff's intestate in this case came to his death through his own contributory negligence in the manner and fashion alleged by the defendant."

The court charged the jury "the allegations of contributory negligence made by the defendant against the plaintiff's intestate *in all respects are the same* as made against the defendant by the plaintiff, except . . . that he was driving down the street without lights," when the plaintiff had alleged in his complaint that the defendant "was operating his said automobile while under the influence of intoxicating liquor," and when the defendant in his answer had made no such allegation against plaintiff's intestate; and the recital of the contention "the defendant contends in this case he has offered evidence tending to prove . . . that the plaintiff's intestate in this case came to his death through his own contributory negligence *in the manner and fashion alleged by the defendant,*" when the defendant had offered no evidence tending to show that plaintiff's intestate had been drinking any intoxicants, brings this case within the principle announced in *S. v. Alston,* 228 N.C. 555, 46 S.E. 2d 567; *S. v. Isaac,* 225 N.C. 310, 34 S.E. 2d 410; *Curlee v. Scales,* 223 N.C. 788, 28 S.E. 2d 576; *Cummings v. Coach Co.,* 220 N.C. 521, 17 S.E. 2d 662; *S. v. Wyont,* 218 N.C. 505, 11 S.E. 2d 473; *Smith v. Hosiery Mill,* 212 N.C. 661, 194 S.E. 83; to the effect that where the court in its charge submitted to the jury for their consideration facts material to the issue, which were no part of the evidence offered, it constitutes prejudicial error. Its harmful effect is obvious. Those of us who have served on the Superior Court Bench know how intently juries watch and listen to the trial judge.

In *Smith v. Hosiery Mill, supra,* this Court held "that the summation of the complaint, 'the dyestuffs were deleterious and poisonous,' when no such allegation appears therein, and the recitation of the contention, 'the calves were born with something wrong with them, they were unable to stand or walk and born blind,' when there was no evidence to support such a contention" necessitated a new trial.

A serious question is presented as to whether the defendant has pleaded contributory negligence. Contributory negligence implies or presupposes negligence on the part of the defendant. *Scenic Stages v. Lowther,* 233 N.C. 555, 64 S.E. 2d 846. The allegation in an answer that the death of the intestate was caused by his own negligence and not by any negligence of the defendant is not a sufficient plea. *Cogdell v. R. R.,* 132 N.C. 852, 44 S.E. 618. "To be sufficient, a plea of contributory negligence must aver a state of facts to which the law attaches negligence as a conclusion." *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312. The defendant in his answer alleges that the death of the intestate was caused solely by his own negligence and without any negligence on the part of the defendant,

and then alleges the defendant specifically pleads the contributory negligence of the intestate as a bar to plaintiff's recovery. This is the sole reference to contributory negligence in the answer. Where there is no plea of contributory negligence, the submission to the jury of an issue of contributory negligence is not proper. *Bevan v. Carter,* 210 N.C. 291, 186 S.E. 321.

As this action goes back for a New Trial the court may, and no doubt will, permit an amendment of the answer in this respect, if the defendant desires it. *Cogdell v. R. R., supra.*

The plaintiff is entitled to a New Trial, and it is so ordered.

New trial.

NEIL S. SOWERS v. HOME-MADE CHAIR COMPANY, INC., AND L. O. GIBSON, M. W. GIBSON, AND M. B. BROSIUS, INDIVIDUALLY, AND AS STOCKHOLDERS, OFFICERS AND DIRECTORS OF THE HOME-MADE CHAIR COMPANY, INC.

(Filed 11 November, 1953.)

Appeal and Error § 40g—

The denial of plaintiff's motion to strike certain paragraphs from the answer will not be held for error when the retention of such allegations can result in no substantial prejudice.

APPEAL by plaintiff from *Patton, Special Judge,* June Term, 1953, of IREDELL.

This is a civil action instituted by a minority stockholder of the defendant corporation for a writ of *mandamus* to compel the directors of the corporation to declare and pay out all the accumulated profits of the corporation as dividends.

The plaintiff duly filed his complaint and the defendants filed an answer thereto, and set up a First, Second and Third Further Answer and Defense to plaintiff's cause of action.

The plaintiff moved to strike all of the Second and Third Further Answers and Defenses.

The motion to strike was heard below, and the court granted the motion only as to paragraph two of the Second Further Answer and Defense.

The plaintiff excepted to the ruling and appeals to the Supreme Court, assigning error.

Burke & Burke, W. T. Ward, Jr., and Isaac T. Avery, Jr., for appellant.

Helms & Mulliss, Buren Jurney, and R. A. Collier for appellee.

DENNY, J. The allegations retained in the Second Further Answer and Defense simply set out the provisions of the by-laws of the corporation with respect to the payment of dividends and the retention of surplus for certain corporate purposes. While the Third Further Answer and Defense is, more or less, in the nature of a statement of the present condition of the corporation, its past growth and its immediate needs, we cannot see how these allegations can be prejudicial to the plaintiff. Neither may it be stated that they are entirely irrelevant to the controversy in view of the action the plaintiff seeks to require of the directors of the corporation.

In *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185, *Ervin, J.,* 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." *Ledford v. Transportation Co.,* 237 N.C. 317, 74 S.E. 2d 653.

The ruling of the court below is

Affirmed.

LESSIE ANDERSON v. B. N. WORTHINGTON.

(Filed 11 November, 1953.)

Appeal and Error § 12—

When application to the clerk of the Superior Court, supported by affidavit and certificate, for leave to appeal *in forma pauperis* is not made until more than ten days after expiration of the term of court at which the judgment was rendered, the appeal must be dismissed, the requirements of the statute being mandatory and jurisdictional. G.S. 1-288.

APPEAL by plaintiff from *Stevens, J.,* at May Civil Term, 1953, of PITT.

Civil action for assault and battery.

These are the facts:

1. The cause was heard before the presiding judge and a jury at the May Civil Term, 1953, of the Superior Court of Pitt County, which began on Monday, 18 May, 1953, and expired by law on Sunday, 24 May, 1953. G.S. 7-70; *Taylor v. Ervin,* 119 N.C. 274, 25 S.E. 875.

2. When the plaintiff had presented her evidence and rested her case, the defendant moved to dismiss the action upon a compulsory nonsuit.

The presiding judge allowed the motion, and entered judgment accordingly.

3. The plaintiff gave notice of appeal from this ruling to the Supreme Court in open court, and was allowed time for preparing and serving her statement of case on appeal. The presiding judge fixed her appeal bond at $100.00.

4. The plaintiff did not give an appeal bond. Fifty days after the expiration by law of the May Civil Term, 1953, of the Superior Court of Pitt County, to wit, on 13 July, 1953, the plaintiff presented to the Clerk of the Superior Court of Pitt County an affidavit of poverty and a certificate of counsel, and procured from the Clerk an order allowing her to appeal *in forma pauperis.*

Dan H. Jones for plaintiff, appellant.

James & Speight and Sam O. Worthington for defendant, appellee.

ERVIN, J. Appeals *in forma pauperis* in civil actions tried and determined in the Superior Court are governed by G.S. 1-288. Under this statute, the party aggrieved by the judgment of the Superior Court may apply to either the trial judge or the clerk of the Superior Court for leave to appeal to the Supreme Court *in forma pauperis.* In either case, the essential requirements of the statute must be observed, for they are mandatory and jurisdictional in character. *Williams v. Tillman,* 229 N.C. 434, 50 S.E. 2d 33; *McIntire v. McIntire,* 203 N.C. 631, 166 S.E. 732.

The plaintiff elected to apply to the clerk of the Superior Court for leave to appeal *in forma pauperis.* It was essential under the statute for her to present to the clerk "during the term at which the judgment was rendered or within ten days from the expiration by law of the term" an affidavit of poverty made by herself and a written statement made by a practicing attorney complying substantially with the requirements of the statute as to form and content. *Clark v. Clark,* 225 N.C. 687, 36 S.E. 2d 261; *Franklin v. Gentry,* 222 N.C. 41, 21 S.E. 2d 828; *Stell v. Barham,* 85 N.C. 88. It was likewise essential under the statute for the clerk to pass upon and grant the plaintiff's application for leave to appeal *in forma pauperis* within ten days from the expiration by law" of the term at which the judgment was rendered. *Cole v. Gaither,* 205 N.C. 473, 171 S.E. 611; *Powell v. Moore,* 204 N.C. 654, 169 S.E. 281.

Since the essential requirements of the statute in respect to the time for seeking and granting leave to appeal *in forma pauperis* were not observed by the plaintiff and the clerk, we are without jurisdiction to entertain the appeal. *Franklin v. Gentry, supra; Powell v. Moore, supra.*

Appeal dismissed.

EDGECOMBE BANK & TRUST COMPANY, ADMINISTRATOR, D. B. N., C. T. A., OF THE ESTATE OF ALICE LEE JOYNER, v. MURIEL J. BARRETT, A WIDOW, MARY LEE J. DAUGHTRIDGE AND HUSBAND, W. H. DAUGHTRIDGE, ANDREW JOYNER, JR., AND WIFE PEARLE A. JOYNER, ANDREW JOYNER, JR., TRUSTEE OF EDITH HELEN JOYNER, AN INCOMPETENT, EDITH HELEN JOYNER, AN INCOMPETENT, EMILY J. THIGPEN AND HUSBAND PERCY L. THIGPEN, ARCHIE B. JOYNER, JR., AND WIFE, ALISIA G. JOYNER, AND CONNIE THIGPEN LINDE.

(Filed 25 November, 1953.)

1. Trusts § 5d—

Ordinarily, property impressed with a trust may be followed through all changes in its state and form, and the beneficial owner may assert title thereto, except as against an innocent purchaser for value without notice, so long as the proceeds or product of the initial trust property may be traced and substantially identified.

2. Same—

The rule of trust pursuit is based upon a continuation of ownership in the *cestuis que trustent* and not on the theory of damages or compensation for the loss of the property.

3. Same—

Ordinarily, the right of the beneficial owner to follow the trust property through changes of state and form embraces not only the trust property and its proceeds, but also any increase in value or profit realized from the management of the trust estate, since equity will not permit a fiduciary to make a profit out of funds committed to his custody.

4. Same—

As a general rule, the mere tracing of trust property or funds into the general estate of a trustee is not a sufficient identification of the trust property within the rule of trust pursuit, but when the trustee has no individual property of appreciable value, or the trust property may be identified and segregated from his general estate, the rule of trust pursuit is applicable.

5. Trusts § 19a—

Ordinarily, increases in the value of real estate and of securities, as well as profits made by purchase and sale of property, are *corpus* increments which go to the ultimate beneficiaries and not the life beneficiary of the trust.

6. Estoppel § 6c—

The mere fact that beneficiaries of a trust who are *sui juris* acquiesce in permitting the trustee to invest and reinvest the trust funds without sanction or approval of a court of equity does not estop them from invoking the rule of trust pursuit, it not being made to appear that anyone was misled to his hurt by reliance on the silence or acquiescence of the beneficiaries.

7. Trusts § 5d—

Findings of fact to the effect that the trustee, who was also life beneficiary of the trust, had only a specified piece of real property when she received the trust estate, that she died possessed of this realty, and that all the remainder of the property left by her represented investment and reinvestment of the trust funds, *is held* to require the application of the rule of trust pursuit, and an adjudication that the beneficiaries of the trust are the owners of the property acquired with funds of the trust.

APPEAL by defendants (except Muriel J. Barrett) from *Parker (Joseph W.), J.*, at June Term, 1953, of EDGECOMBE.

Civil action by Edgecombe Bank & Trust Company, Administrator, *d.b.n., c.t.a.*, of the Estate of Alice Lee Joyner, for advice and instruction.

Alice Lee Joyner died 18 November, 1948, leaving a last will and testament which has been admitted to probate in the office of the Clerk of the Superior Court of Edgecombe County.

The testatrix was survived by the following five children and one grandchild, her heirs at law and next of kin: Mary Lee Joyner Daughtridge, Muriel J. Barrett, Emily Joyner Thigpen, Andrew Joyner, Jr., and Edith Helen Joyner, children; and Archie Braswell Joyner, Jr., sole heir at law and next of kin of Archie Braswell Joyner, a deceased son, who died intestate in 1923.

Alice Lee Joyner was a daughter of Archelaus Braswell, who died in Edgecombe County in 1903, leaving her by the terms of his will a farm located in Pitt County "to have and to hold during her natural life and after her death, to go to her issue and their heirs."

On 18 June, 1912, an *ex parte* special proceeding was instituted in the Superior Court of Pitt County by Alice Lee Joyner and all her children (of whom three were minors represented by next friend) in which authority was sought to sell at private sale for reinvestment the farm devised to Alice Lee Joyner for life by her father. It is alleged in paragraph 10 of the petition that the petitioners desire that the Trustee to be named by the court to receive the purchase price of the land "shall hold the same in like manner as said land is now held; . . ." Judgment was entered by the Clerk, approved by the Resident Judge of the Superior Court, authorizing private sale of the land at the price of $17,500. Alice Lee Joyner was appointed Trustee to receive and handle the fund, and the judgment directs that the purchase price "be held upon the same terms and conditions that the said land is now held; that is to say, for the fund to be held intact during the life of Mrs. Alice Lee Joyner, and after her death distributed among the remaindermen as their interest may appear."

On 10 August, 1912, by order of the Superior Court of Pitt County, Alice Lee Joyner was authorized to remove the trust fund to the County of Guilford, where she and her family resided; and it was directed that

all further reports of the Trustee and all subsequent orders and decrees concerning the investment, custody, and disposition of the fund be made and entered in the Superior Court of Guilford County.

Alice Lee Joyner collected and received the purchase money from the sale of the farm amounting to $17,500, less court costs and attorney fees amounting to $118.20, leaving a net sum of $17,381.80. The investments of this fund made by the Trustee during the early years of her trusteeship were in the nature of purchases of real estate located in Greensboro, the titles to which were held in the name of "Alice Lee Joyner, Trustee."

On 1 October, 1917, Alice Lee Joyner, Trustee, instituted a special proceeding in the Superior Court of Guilford County requesting leave of the court to substitute for her then existing fidelity bond with corporate surety a bond in like amount with personal surety. In her petition it is stated: "Your petitioner would further certify that the entire amount received from the sale of lands in Pitt County, by authority and direction of the powers conferred in her as trustee, have been transferred to Guilford County and have been invested to good advantage and that the fund as invested now represents a valuation of more than the original amount derived from said sale." And in support of her petition she filed with the Clerk a report of her transactions as Trustee, as follows:

RECEIPTS.

Received from O. L. Joyner	$17,500.00

INVESTMENTS.

House and Lot on Blanwood Ave., City of Greensboro—valued at	5,000.00
House and Lot on Blanwood Ave., City of Greensboro—valued at	5,000.00
House and Lot on Leftwich Street, City of Greensboro—valued at	5,000.00
Note & Mortgage of V. B. Morgan to A. Lee Joyner, Tr.	4,350.00
Vacant Lot on Leftwich St., City of Greensboro—value	2,000.00
	$21,350.00.

An order was entered by the Clerk of the Superior Court of Guilford County authorizing the Trustee to make the bond substitution as requested. It is in the penal sum of $2,500 and is conditioned upon the faithful accounting by Alice Lee Joyner, Trustee, to her daughter Edith Helen Joyner, incompetent, in respect to the management of the trust

estate. The other children of the Trustee were then of full age and had waived bond for their protection. They signed as sureties the bond given in substitution of the corporate surety bond for the protection of their sister Edith Helen.

No further report of her transactions as Trustee was filed thereafter with the court by Alice Lee Joyner. She continued to purchase vacant lots and stocks and bonds, to build houses, and to sell portions of this property at profits, but the subsequent purchases with the trust funds were made in her name individually.

The only property owned by Alice Lee Joyner, other than household furnishings, at the time of her appointment as Trustee in 1912 was a house and lot at 431 West Gaston Street in the City of Greensboro. This property was conveyed to her in 1902. It was the family residence during the period she resided in Greensboro—until she returned to Edgecombe County in 1934. It was owned by her at the time of her death.

John J. Mason, Vice-President and Trust Officer of Edgecombe Bank & Trust Company, Administrator, as a witness at the trial, described the property left by Alice Lee Joyner and gave his estimate of values as of 5 June, 1953. This inventory and appraisal may be summarized as follows:

House and Lot, W. Gaston Street, Greensboro (former home place) estimated value	$15,000 to $20,000.
House and lot—Leftwich Street, Greensboro, estimated value	8,000 to 10,000.
312 shares Security Life & Trust Company stock valued at	51,480.
Total value of other corporate stocks	8,151.02
Bank deposits	4,478.94
Notes and written evidences of debt signed by these three children of the testatrix: Andrew W. Joyner, Jr., Emily J. Thigpen, and Mary Lee Daughtridge, (approximately)	8,400.
U. S. Government bonds of the following denominations and registry: $2,000 in the name of "Alice Lee Joyner or Muriel J. Barrett"; $2,000 in the name of "Alice Lee Joyner or Emily J. Thigpen"; and $1,000 in the name of "Alice Lee Joyner or Connie Lee Thigpen" (now Connie Lee Thigpen Linde—daughter of Emily J. Thigpen)	5,000.

These bonds were not delivered to the plaintiff administrator, but advice is sought respecting their status as possible items of set-off against

the persons whose names appear thereon. Like advice is sought by the Administrator in respect to the notes and evidences of debt signed by the three children of the testatrix.

By the terms of her last will and testament, which was executed 25 October, 1941, the testatrix attempted to dispose of the foregoing property in a manner that would work an unequal distribution among her heirs at law and next of kin, with the inequality being predominantly in favor of the appellee Muriel J. Barrett, to whom she bequeathed the 312 shares of stock in Security Life & Trust Company, valued by Trust Officer Mason at $51,480, so as to give Mrs. Barrett a share of the property worth approximately $60,000, as against distributions to the other heirs at law and next of kin of about $6,000 and less.

The issues of fact raised by the pleadings revolve around these main questions: (1) Whether the property held by Alice Lee Joyner at the time of her death, except the home place in Greensboro, was purchased with funds belonging to the trust. (2) If so, whether the appellants are estopped or precluded from asserting their rights in the property under the doctrine of trust pursuit and the rule of *corpus* increment.

Jury trial was waived by stipulation of the parties, and the trial court, after hearing the evidence offered by the parties, found facts, made conclusions of law, and entered judgment, the gist of which follows:

FINDINGS OF FACT.

"6." That plaintiff's testate, Alice Lee Joyner, during her life "was entitled to the . . . increment" derived from the investment of the trust funds obtained from the sale of the Pitt County farm, and that such "increment is and does constitute a part of the individual estate of . . . Alice Lee Joyner, and passes under her last will and testament."

"8. That . . . Alice Joyner invested, reinvested, controlled and exercised dominion over said original trust fund free from interference of any and all remaindermen under the last will and testament of her father, Archelaus Braswell, and with the knowledge, aid, assistance, consent and approval of said remaindermen, her children and grandchild, with the exception of Helen Joyner, . . . incompetent . . ."

"12. That the total sum of said Trust Fund to be accounted for by the estate of Alice Lee Joyner is $17,391.80."

"13. That the interest of each remainderman, subject to the life estate of Alice Lee Joyner, at the date of said fund, under said special proceedings in Pitt County, North Carolina, was the sum of $2,896.96, and that each, including Archie Braswell Joyner, Jr., as representative of his deceased father, Archie Braswell Joyner, is now entitled to the same from said fund subject to the charges, if any, against the interest of each remainderman, as may hereafter appear."

"16. That Emily Joyner Thigpen is indebted to said Trust Fund and the Estate of Alice Lee Joyner in the sum of $3,000 with interest . . . as appears from two notes, one dated January 30, 1923, in the sum of $500.00 . . ., and the other dated April 30, 1923, in the sum of $2,-500.00 . . ., and that these sums are to be considered a part of the Trust Fund herein referred to and the Estate of Alice Lee Joyner, and charged against the distributive share and interest of the said Emily Joyner Thigpen in and to said Trust Fund and the Estate of Alice Lee Joyner."

"17. . . . Andrew Joyner, Jr. is indebted to said Trust Fund and the Estate of Alice Lee Joyner in the sum of $1663.42 with interest . . ., and this sum shall become a part of said Trust Fund and the Estate of Alice Lee Joyner and charged against the distributive share and interest of Andrew Joyner, Jr., in and to the Trust Fund herein referred to and the Estate of Alice Lee Joyner."

"18. That Mary Lee Joyner Daughtridge is indebted to said Trust Fund and Estate of Alice Lee Joyner in the sum of $2700.00 with interest . . ., and this sum shall become a part of the Trust Fund and Estate of Alice Lee Joyner and shall be charged against the distributive share and interest of the said Mary Lee Joyner Daughtridge in and to said Trust Fund and the Estate of Alice Lee Joyner."

"19. That the sum of $5,000, purchase price of the real property known as the Leftwich Street property, deed to which is recorded in the name of Alice Lee Joyner in book 280 at page 115, office of the Register of Deeds of Guilford County, were funds belonging to the trust fund herein referred to."

"21. That the Government bonds made payable to Alice Lee Joyner or Emily J. Thigpen in an amount of $2,000, Alice Lee Joyner or Muriel J. Barrett in an amount of $2,000, and Alice Lee Joyner or Connie Thigpen Linde in an amount of $1,000, became the individual property of the said Emily J. Thigpen, Muriel J. Barrett and Connie Thigpen Linde, respectively, upon the date of death of Alice Lee Joyner on November 18, 1948."

"22. That the sum of $3,000, initial purchase price of stock in the Security Life & Trust Company, now totaling 312 shares, was funds belonging to the Trust Fund herein referred to."

"23. That the remaining parts and portions of the Trust Fund amounting to $17,381.80 were invested in whole or in part in other stocks set out in plaintiff's Inventory and evidence."

CONCLUSIONS OF LAW.

"1. That the Administrator *c.t.a., d.b.n.*, will have discharged the obligations of Alice Lee Joyner in full toward her children and grandchildren

by dividing between them in equal shares the trust fund of $17,381.80 or the sum of $2,896.96 each."

"3. That the remaindermen *sui juris* acquiesced in the manner of investing such funds which include all remaindermen other than Helen Joyner, incompetent, are estopped to plead and prove wrongful, fraudulent conversion or commingling of funds by the said Alice Lee Joyner, Trustee, and that Helen Joyner, Incompetent, has suffered no loss and her interest has at all times been adequately protected for that said estate is and has been at all times solvent and can pay the *corpus* of said trust fund as originally intended under the Last Will and Testament of Archelaus Braswell."

The judgment directs, among other things, that the plaintiff administrator proceed as follows:

"5. . . . to deliver, assign and transfer to . . . Muriel J. Barrett all stock of decedent in the Security Life & Trust Company, comprising 312 shares, subject, however, to a charge against said stock in the sum of $3,000 for the benefit of the Trust Fund set out in this cause, in accordance with Item THIRD of the last will and testament of Alice Lee Joyner."

"14. To pay to each party herein, including Archie B. Joyner, Jr., as representative of his deceased father, Archie B. Joyner, the sum of $2,896.96 as the distributive share and interest of each of said parties in and to the Trust Fund herein referred to, subject, however, to any charge that may have been directed to be made in this judgment against each of said distributive shares and interests."

From the judgment entered, the defendants (except Muriel J. Barrett) appealed, assigning errors.

John M. King for defendant appellants Mary Lee J. Daughtridge and husband, W. M. Daughtridge.

Andrew Joyner, Jr., and Henry C. Bourne for defendant appellants Andrew Joyner, Jr., and wife, Pearle A. Joyner.

S. L. Arrington for defendant appellant Edith Helen Joyner.

Smith, Sapp, Moore & Smith and Stephen Millikin for defendant appellants Archie B. Joyner, Jr., and wife, Alisia G. Joyner.

Leggett & Fountain for plaintiff, appellee.

Bunn & Bunn for defendant appellee Muriel J. Barrett.

JOHNSON, J. It is a well-established general principle of equity that property impressed with a trust may be followed through all changes in its state and form, so long as such property or its proceeds or its products are capable of identification. *Edwards v. Culberson,* 111 N.C. 342, 16 S.E. 233; *Erickson v. Starling,* 233 N.C. 539, 64 S.E. 2d 832; 54 Am. Jur., Trusts, Sec. 248; 65 C.J., p. 967 *et seq.*

Mr. Pomeroy amplifies the rule this way: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, . . . or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust." Pomeroy's Eq. Jur., Fifth Edition, Vol. 4, Sec. 1053. See also *Edwards v. Culberson, supra;* Am. Jur., Trusts, Sec. 245; Annotations: 43 A.L.R. 1415, p. 1418; 47 A.L.R. 371; 48 A.L.R. 1269.

This rule, known as "the rule of trust pursuit," is grounded on the principle that even though the form and physical character of the property be changed, nevertheless the property ownership continues and may be asserted by the beneficial owner. Therefore, trust pursuit rests in no sense on the principle of a debt due or owing, nor on the theory of damages or compensation for the loss of property. *Cheshire v. Cheshire,* 37 N.C. 569; *Younce v. McBride,* 68 N.C. 532; *Cooper v. Landis,* 75 N.C. 526; 54 Am. Jur., Trusts, Sec. 248.

But it is a cardinal rule of trust pursuit that the proceeds or the product of the initial property must be traced and identified through any and all intermediate transfers into the property sought to be reached; otherwise the beneficiary has only the rights and remedies of a general creditor to claim damages as for conversion or as for money had and received. *Bank v. Bank,* 115 N.C. 226, 20 S.E. 370; 54 Am. Jur., Trusts, Sec. 249; 65 C.J., p. 965 *et seq.* However, trust pursuit does not fail where substantial identification of the trust property or of the proceeds or product from a conversion thereof, is made. 54 Am. Jur., Trusts, Sec. 249. See also *Bank v. Waggoner,* 185 N.C. 297, 117 S.E. 6. And under application of the rule of trust pursuit, the trust follows and embraces not only the property or its proceeds or products, but ordinarily it also includes any profit or increase in the value of such proceeds or products over the original trust property. *Erickson v. Starling, supra* (233 N.C. 539); *Rouse v. Rouse,* 167 N.C. 208, bot. p. 211, 83 S.E. 305; 54 Am. Jur., Trusts, Sec. 251. It is well settled that a court of equity will not permit a fiduciary to make a profit out of funds committed to his custody. *Williams v. Hooks,* 199 N.C. 489, p. 492, 154 S.E. 828; *Motley v. Motley,* 42 N.C. 211. See also *Irwin v. Harris,* 41 N.C. 215; *Bohle v. Hasselbroch,* 64 N. J. Eq. 334, 51 A. 508, 61 L.R.A. 323; *Holmes v. Gilman,* 138 N.Y. 369, 34 N.E. 205, 20 L.R.A. 566.

In *Bohle v. Hasselbroch, supra,* a trustee (mother of ultimate beneficiaries and herself a life beneficiary of the trust), in disregard of the testator's directions, used trust funds in her hands, together with her own funds, to buy real estate, and took the title in her own name. The amount of trust funds so used could not be precisely ascertained, but it exceeded one-half of the price paid at the time of purchase. *Held,* that the *cestuis que trustent* were entitled in equity to elect whether they would claim a charge upon the real estate for the amount of trust funds so invested, or would claim the real estate itself, as owners, subject to a charge for the trustee's own money so used. The Court went on to say: ". . . that, in endeavoring to ascertain how much was trust money and how much was the trustee's own, every reasonable intendment should be made against the trustee, through whose fault the truth had become obscure."

It is true, as a general rule, that the mere tracing of trust property or funds into the general estate of a trustee is not a sufficient identification of the trust property or funds, within the rule of trust pursuit, to preserve the trust *res,* and where such commingling is made to appear, the beneficiary ordinarily stands merely in the position of a general creditor of the trustee or of his estate. *Roebuck v. Surety Co.,* 200 N.C. 196, 156 S.E. 531; *Corporation Commission v. Trust Co.,* 193 N.C. 696, 138 S.E. 22; 54 Am. Jur., Trusts, Sec. 259.

However, where it is made to appear that the trustee had no individual property of appreciable substance susceptible of being commingled, or which was commingled with the trust property or funds, in either event we apprehend the true rule to be that equity will impress the trust character upon the entire mass and treat it as trust property or funds except in so far as the trustee may be able to distinguish what is his. *Bohle v. Hasselbroch, supra; Bank v. Waggoner, supra* (185 N.C. 297). See also 54 Am. Jur., Trusts, Sections 256 and 260.

The foregoing rules operate in harmony with the principles which govern the respective rights of the life beneficiary of a trust and the rights of the ultimate beneficiary thereof, under which increases in the value of real estate and of investment securities in the possession of the trustee as a general rule are treated as *corpus* increments and go to the ultimate beneficiary, as do profits made by purchase and sale of such property. *Gibbons v. Mahon,* 136 U.S. 549, 34 L. Ed. 525, 10 S. Ct. 1057; *Holcombe v. Ginn,* 296 Mass. 415, 6 N.E. 2d 351, 108 A.L.R. 1134; *Hornsby v. Hornsby,* 185 Ky. 847, 216 S.W. 88; *Boardman v. Mansfield,* 79 Conn. 634, 66 A. 169; *Bains v. Globe Bank & Tr. Co.,* 136 Ky. 332, 124 S.W. 343; *Long v. Rike,* 50 Fed. 2d 124, 81 A.L.R. 521; *First Nat. Bank v. Mulholland,* 123 Miss. 13, 85 So. 111, 13 A.L.R. 1000; 54 Am. Jur., Life Estates, Remainders, etc., Sections 333, 335, 336, and 340;

Annotations: 13 A.L.R. 1004; 56 A.L.R. 1315; 81 A.L.R. 542. See also American Law Inst. Restatement, Trusts, Vol. 1, Sections 233, 236.

When we come to apply the foregoing principles to the case at hand, it would seem that decision lies in a narrow compass.

First we examine the findings and conclusions of the court below bearing on the question of estoppel. As to this, we conclude that the findings of fact are insufficient to support the legal conclusion and adjudication that the heirs at law and next of kin of Alice Lee Joyner are estopped to assert their rights in the trust fund. The fact that the beneficiaries of the trust acquiesced in permitting the Trustee, their mother, to invest and reinvest the trust funds as she did, without sanction or approval of the court, does not support the inference or conclusion that they are estopped to assert their rights under the rule of trust pursuit. It nowhere appears on this record that anyone has been misled to his hurt by reliance on the conduct of these beneficiaries, as is required in estoppel. *Hawkins v. Finance Co., ante,* 174, p. 177, 77 S.E. 2d 669.

Next it is noted that Alice Lee Joyner owned the house and lot on West Gaston Street in Greensboro before the trust fund came into existence. She owned this property at the time of her death. All parties concede that it belongs to her individual estate. Hence we eliminate it from further consideration.

This leaves in controversy (1) the Leftwich Street property in Greensboro, (2) the corporate stocks, (3) the bank deposits, (4) the notes and evidences of debt shown in the plaintiff's inventory, and (5) the $5,000 in U. S. Government bonds.

It is noted that under findings of fact Nos. 19, 22, and 23, the court below found these crucial facts: "19." That the Leftwich Street property in Greensboro was purchased with "funds belonging to the trust fund"; "22." That the "$3,000, initial purchase price of stock in Security Life & Trust Company, now totalling 312 shares, was funds belonging to the trust fund"; and "23. That the remaining . . . portions of the trust fund, amounting to $17,381.80, were invested in whole or in part in other stocks set out in the plaintiff's inventory and evidence." It thus appears that under these findings all the property in controversy derives from the trust fund, except the bank deposits, the notes and evidences of debt, and the U. S. Government bonds; and as to these three items or groups of items, it appears that the court's findings are not conclusive one way or the other. On the basis of the facts as found, the court below should have concluded that the Leftwich Street property in Greensboro and all the corporate stocks, including the shares of stock in Security Life & Trust Company, belong to the trust fund.

The recitals in finding of fact No. 6 that Alice Lee Joyner "was entitled to the . . . increment" derived from the investment of the trust funds

and that such "increment is and does constitute a part of the individual estate of . . . Alice Lee Joyner, and passes under her last will and testament," are not findings of fact at all. They are erroneous conclusions of law to be disregarded.

The case seems to have been tried on a misapplication of the pertinent principles of law. Where this occurs, the usual practice is to remand the cause for a hearing *de novo*. *Credit Corp. v. Saunders,* 235 N.C. 369, p. 373, 70 S.E. 2d 176; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477.

It is so ordered here.

Error and remanded.

W. R. WINKLER v. APPALACHIAN AMUSEMENT COMPANY.

(Filed 25 November, 1953.)

1. Landlord and Tenant § 33—

In the absence of express contractual provision to the contrary, the lessee is liable for willful or negligent damage to the premises, including damages resulting from a fire caused by his negligence.

2. Same—

Evidence tending to show that lessee of a theater operated a popcorn machine, with open flame gas burner, in a small room in which the operator kept a quantity of oil used in popping the corn, that contrary to written instructions of the manufacturer not to leave the machine unattended, the attendant, on orders from his superior, left the room to deliver a quantity of popcorn to the front of the theater, and that upon his return fire had broken out, *is held* sufficient to be submitted to the jury upon the question of whether the fire proximately resulted from the lessee's negligence.

3. Contracts § 7e—

Contracts for exemption from liability for negligence are not favored by the law, and are strictly construed against exemption from liability.

4. Landlord and Tenant § 33—

Provisions in a lease that lessee should return the property in good condition, ordinary wear and tear and damage by fire excepted, and that lessee should make all repairs necessary except in case of destruction or damage by fire, *are held* not to exempt lessee from liability for damage from fire proximately resulting from lessee's actionable negligence.

5. Insurance § 24e—

Insurer paying a loss is subrogated to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid, both by the provisions of G.S. 58-176 and under equitable principles.

6. Landlord and Tenant § 33—

Provision in a lease that lessor should keep the premises insured to the extent of its full insurable value does not expressly or impliedly exempt lessee from liability for damage by fire proximately caused by lessee's negligence.

7. Evidence § 37—

Where a written lease forms the basis of a defense asserted by defendant, it is not collateral, and therefore testimony as to its contents is inadmissible by reason of the best evidence rule.

8. Appeal and Error § 39e—

Upon appeal from judgment as of nonsuit, the admission of incompetent secondary evidence will not be held harmless on the ground that the same matter would be established by competent evidence upon a second trial when it is not apparent from the record that the best evidence would be of the same import, or, if it were, that it would establish a defense as a matter of law.

9. Estoppel § 11b: Compromise and Settlement § 2: Trial § 24a—

Estoppel and compromise and settlement are affirmative defenses upon which defendant has the burden of proof, and therefore nonsuit upon such defenses is improper unless the evidence establishes them as a matter of law.

10. Landlord and Tenant § 33: Insurance § 24e—

Where defendant lessee introduces in evidence provisions of the lease requiring lessor to maintain insurance on the premises, plaintiff lessor is entitled to introduce evidence that insurer had not paid the full loss, to rebut defendant's evidence and to show that plaintiff is entitled to maintain the action as the real party in interest.

APPEAL by plaintiff from *Patton, Special J.*, June Term 1953. WATAUGA.

Civil action by a landlord against his tenant to recover damages for the burning of a theater building allegedly caused by the negligent operation of a popcorn machine.

These are the pertinent facts of the plaintiff's evidence. On 21 January 1950 W. R. Winkler, the plaintiff, owned a building in Boone, which was leased as a moving picture theater to the Appalachian Amusement Company, the defendant. This lease dated 14 September 1938 was between Arthur Hamby and the plaintiff as lessors, and A. F. Sams, Sr., and A. F. Sams, Jr., as lessees. Prior to 21 January 1950, the plaintiff had become the sole owner of the premises and successor to the original lessors, and the defendant the sole lessee and successor to the original lessees.

At the southwest corner of the building behind the stage and screen was a small room about six or seven feet by about five feet, with the ceiling

about seven feet high. The room had a wood floor and plastered walls and ceiling. In this room the defendant operated a popcorn machine. The popcorn machine was about two or two and one-half feet high, and was on top of a wood table about two feet high and around three feet long. Beside the table was a wood hopper in which to dump the popped corn. The machine was operated by Rulane Gas. It had a circular burner under the pan in which the corn was popped. This pan was about two inches above the gas burner, and had a lid on one side, and the other side was stationary; it was about six or seven inches deep and about fifteen to eighteen inches wide. Heat was applied to the pan by lighting the gas burner. The gas was controlled by a valve. There was no automatic control or cut off in case of over-heating. To make a quantity of popcorn the operator lit the burner; as the pan became warm he would follow instructions as to placing oil, salt and corn in the pan. When the gas was burning, the flame was approximately one and one-half to two inches above the burner. The flame was not enclosed.

The operator would put about half a pint of oil in the pan, two teaspoons of salt, and one or two cups of corn. The oil was some kind of popcorn oil, and poured out like motor oil. The base of the oil was peanut oil. There was no evidence as to how volatile peanut oil is, or the temperature at which it ignites. When popping corn there was brought into this room a gallon can of oil, popcorn and about 50 or 100 cardboard boxes for the popped corn. The floor of the room was kept swept out. There was a little oil on the floor that day. A little oil was soaked into the top of the table. Sometimes the popcorn would fill up, and run over, but there was a place for it to run into.

On the afternoon of 21 January 1950 Bill Jones, a 16 year old boy, was popping corn for the defendant in this room. Previously he had helped Russell Swift to pop the corn, and had been told by Swift or Mr. Beach, the local manager of the defendant, how to pop the corn. He had completed the popping of a quantity of the popcorn, when Mr. Beach came back, and asked him to box him 50 boxes of corn. 25 had been boxed. He took those, and asked Jones to bring 25 more boxes up to the front on Main Street. Just before going to the front of the building with the popcorn, Jones filled up the machine, and left it in operation with the flame burning underneath the popper. A crowd in the auditorium was watching the show.

When Jones returned to the room from the front, he saw "flame around next to the hopper, and down in between the popcorn and the hopper, the woodwork. The flames were down next to the hopper and up to the table. The wood was burning. The popcorn was not burning." The popcorn machine was on fire—flames were coming out from under the popper. Jones threw his coat over the fire to put it out. He was unsuccessful.

He went out, reported the fire, and came back with Mr. Beach and Mr. Agle, district manager for the defendant. The room then "was just one blaze, and was reaching to the ceiling." They used a fire extinguisher without success. About a minute or a minute and a half elapsed from the time Jones first saw the fire, until he returned with Beach and Agle.

There was a cooling machine in the theater placed under the left side of the stage. The air ducts were used for cool air in the summer and hot air in the winter. The fire spread rapidly as a result of the flames coming out of the air duct next to the moving picture screen at the back of the theater, causing the damage complained of. This air duct passed over the small room where Jones was popping corn. The air duct was made of a composition fiber board of some type. In the ceiling were holes "about 6 by 6," that had been there several months. These holes were caused by a leak in the roof. Robert Agle described the fire in these words, "As a result of the fire coming through the air duct, then coming out, breaking out through the drapes, the fire just rode up the side of the wall of the dressing room, and those boards, Nos. 1, 2 and 3 at various places, and the fire seemed to jump up the side of the wall and on to the balcony." The floor of the little room did not burn. It is still there in use.

The plaintiff offered in evidence the instructions of the manufacturer of the popcorn machine for its operation. Therein appear the following words: "Always empty popper promptly when corn stops popping, and never leave machine unattended while in operation."

The plaintiff offered in evidence the written lease, dated 14 September 1938, above referred to. Paragraph 9 of this lease reads as follows: "The lessees agree that they will, at the expiration of this lease, deliver up and return possession of the premises to the lessors in as good order, repair and condition as at present, ordinary wear and tear excepted, and damage by fire or other casualty excepted."

Paragraph 3 of this lease contains the following provisions: "The lessees . . . shall, at their own cost and expense, make any and all repairs that may be necessary inside the portion of the building hereby demised, excepting in case of destruction or damage by fire or other casualty, as set forth in Paragraph Six hereof."

Paragraph 6 of this lease contains the following provisions: "The lessors agree to keep said theater buildings, and the equipment hereby leased, insured to the extent of its full insurable value in some reliable insurance company. In event the premises or property hereby leased shall at any time during the operation and continuance of this lease be damaged or destroyed by fire or other casualty, the lessors shall thereupon and forthwith repair and restore said premises and property to the same condition in which they were before the happening of such fire or other casualty."

There was evidence to show that the reasonable market value of the theater building immediately prior to the fire was $100,000.00, and that immediately after the fire the reasonable market value was $60,000.00 to $65,000.00 The plaintiff spent in repairing the damage done by this fire $34,191.40. The plaintiff spent additional money at the same time on the building. None of that was included in the figures $34,191.40.

On cross-examination of the plaintiff this evidence was brought out. On 3 March 1950 the plaintiff and the defendant canceled the lease of 14 September 1938, and the plaintiff and his wife entered into a new written lease with the defendant. Then the record shows the following on cross-examination of the plaintiff by defendant's counsel: "Q. I will ask you if you didn't agree to this: 'It is stipulated and agreed that the lessors (that is you) at their own expense shall replace the building suitable for occupancy as a first-class theater.' Did you agree to that? Plaintiff objects—overruled. EXCEPTION. EXCEPTION No. 1. A. Yes, I entered into that agreement, and I did replace the building. Yes, I turned it back over to the Appalachian Amusement Company under this new agreement. Q. And Mr. Sams has paid you everything he promised to pay you in that agreement, hasn't he? Plaintiff objects; overruled; EXCEPTION. EXCEPTION No. 2. A. Yes. The Appalachian Amusement Company does not owe me anything under that agreement. (Counsel for defendant interrogates witness as to whether under the agreement of March 3, 1950, he received $17,250 in cash money. The objection by plaintiff was sustained, but in the meantime the witness replied, 'No, I received $15,000 under that agreement, and under another agreement $2,250.00.') Q. Did you use the money received under the March 3, 1950, agreement in paying for the repairs to the building. (Objection by plaintiff sustained. The witness is permitted to whisper his answer to the Court Reporter. His reply was, 'Yes.')." Later on recross-examination of the plaintiff the record shows the following: "At the same time, I entered into the lease agreement of March 3, 1950; I entered into the lease agreement which you hand me—myself and my wife—with the Appalachian Amusement Co. Q. Did you receive the $15,000 provided for in this from the Appalachian Amusement Co.? Plaintiff objects; overruled; EXCEPTION. EXCEPTION No. 3. A. Yes. Q. Did you receive the $2,250.00? A. Yes. Plaintiff objects; overruled; EXCEPTION. EXCEPTION No. 4. Q. Did you use the money in paying for the repairing of the Appalachian Theatre that was burned on January 21, 1950? Plaintiff objects; overruled; EXCEPTION. EXCEPTION No. 5. A. Yes, I used the money for that. In making this lease agreement March 3, 1950, that was the same building that had formerly been operated by the Appalachian Amusement Co. Q. Was the building as repaired, the repairing of the building, suitable for occupancy as a first-class theatre by the Appalachian Amusement Company? Plaintiff ob-

jects; overruled; EXCEPTION. EXCEPTION No. 6. A. Yes. Q. Were the damages to the building the damages that occurred from the fire of January 21, 1950? Plaintiff objects; overruled; EXCEPTION. EXCEPTION No. 7. A. Yes."

The plaintiff offered the following testimony, which was excluded by the court upon objection of the defendant, but was written into the record in the absence of the jury. The plaintiff carried two policies of fire insurance on this building. He collected $8,265.76 from one company and $8,265.75 from the other company—making a total of $16,531.51. This amount was paid by the insurance companies for fire damage to this building.

It was stipulated that the two fire insurance policies offered by the plaintiff and excluded by the court provided as follows: One issued by Traders and Mechanics Insurance Company in the amount of $16,000.00 on the theater building and equipment, and one issued by Implement Dealers Mutual Fire Insurance Company in the same amount on the same property. Each policy contained the following provisions: "'EIGHTY PER CENT CO-INSURANCE CLAUSE.—It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall at all times maintain insurance on each item of property insured by this policy of not less than eighty per cent of the actual cash value thereof, and that, failing so to do, the assured shall be an insurer to the extent of such deficit, and in that event shall bear his, her or their proportion of any loss.'" Both policies were in effect at the time of the fire.

At the close of the plaintiff's evidence the court allowed the defendant's motion for judgment of nonsuit. The plaintiff appeals assigning error.

Deal, Hutchins & Minor for plaintiff, appellant.

Scott, Collier & Nash and Trivette, Holshouser & Mitchell for defendant, appellee.

PARKER, J. The defendant contends that the court was correct in nonsuiting the plaintiff on these grounds: (1) There was not sufficient evidence of actionable negligence to carry the case to the jury; (2) that the language of paragraphs 3 and 9 of the lease relieved the defendant from liability for damages by fire, no matter if caused by its own negligence; and (3) that the language of paragraph 6 of the lease required the plaintiff to keep the building fully insured in order to protect the defendant, even against its own negligence.

In every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to use reasonable diligence to treat the premises demised in such manner that no injury be done to the property, but that the estate may revert to

the lessor undeteriorated by the willful or negligent act of the lessee. The lessee's obligation is based upon the maxim *sic utere tuo ut alienum non laedas.* The lessee is not liable for accidental damage by fire; but he is liable if the buildings are damaged by his negligence. *Moore v. Parker,* 91 N.C. 275; *Hollar v. Telephone Co.,* 155 N.C. 229, 71 S.E. 316; *U. S. v. Bostwick,* 94 U.S. 53, 24 L. Ed. 65; 32 Am. Jur., Landlord and Tenant, 669; 51 C.J.S., Landlord and Tenant, 904.

Considering the instructions of the manufacturer of the popcorn machine to "never leave machine unattended while in operation"; that the popcorn machine was about two or two and one-half feet high and the wood table on which it was placed was about two feet high and the ceiling of the room in which it was in operation was about seven feet high; that this machine had an open gas flame from holes in a circular burner about two inches below a pan which contained oil and corn; that this machine was hot from popping fifty boxes of corn; that the manager of the theater instructed the 16 year old boy in charge to bring 25 boxes of corn to the front of the theater; that this boy left the machine in operation with the flame burning; that there had been a hole in the ceiling for several months which exposed the composition material of the air duct; that when this boy returned from the front of the theater where he had carried the 25 boxes of corn, the machine was on fire and flames were down next to the hopper and up to the table; that "as a result of the fire coming through the air duct then coming out, breaking through the drapes the fire just rode up the side of the wall of the dressing room . . . and the fire seemed to jump up the side of the wall and on to the balcony," we are of the opinion, interpreting this evidence in the light most favorable to the plaintiff, and giving to him the benefit of every inference which the testimony fairly supports, as we are required to do on a motion for nonsuit, there was sufficient evidence of actionable negligence for the jury to consider.

The defendant contends that the language of paragraphs 3 and 9 of the lease relieved the defendant from liability for damages by fire, no matter if caused by its own negligence, and in support of its contention makes these points. That paragraph 9 of the lease of 14 September 1938 stipulates that except in case of fire and other casualty and ordinary wear and tear the building shall be delivered up at the expiration of the lease in as good order as at present; and paragraph 3 of this lease says that the lessee shall make necessary repairs to the inside of the building but excludes damages caused by fire, as set forth in paragraph 6. That these provisions of the lease clearly show that the lessors should restore the building destroyed by fire regardless of the cause of the fire. That the plaintiff in March 1950 agreed to replace the building suitable for occupation as a first-class theater, and received from the defendant the sum

of $17,250.00, and is now estopped to deny that the original lease did not contemplate restoration by the plaintiff in the event of defendant's negligence and is barred from maintaining this action by reason of settlement, accord and satisfaction. That the provision of paragraph 6 that the plaintiff should carry insurance to the full insurable value of said building shows the intention of the parties that the lessors should restore the building damaged by fire, regardless of its cause.

These contentions require us to determine whether the language in the instant lease is clear and explicit that the parties intended that the lessee should be relieved of liability for damage by fire caused by its actionable negligence, if the jury should find the defendant guilty of actionable negligence.

Contracts for exemption from liability for negligence are not favored by the law, and are strictly construed against the party asserting it. The contract will never be so interpreted in the absence of clear and explicit words that such was the intent of the parties. *Hill v. Freight Carriers Corp.*, 235 N.C. 705, 71 S.E. 2d 133, where the authorities are cited.

The first question involved is: Whether the words in the lease in paragraph 9 "the lessees agree that they will, at the expiration of this lease, deliver up and return possession of the premises to the lessors in as good order, repair and condition as at present, ordinary wear and tear excepted, and damage by fire . . . excepted," and the words in paragraph 3 "the lessees . . . shall, at their own cost and expense, make any and all repairs that may be necessary inside the portion of the building hereby demised, excepting in case of destruction or damage by fire," exempt the defendant from liability for damage by fire caused by its actionable negligence, if there was such actionable negligence on its part. Similar words have been used in leases for many years to relieve the lessee from any liability caused by accidental fires, or fires caused by the wrongful act of another. Did these words mean that the lessee was to be exculpated from a fire which was the result of its own negligence? Such a concession would scarcely be looked for in a contract between business men. If the parties intended such a contract, we would expect them to so state in exact terms. It would be natural for the lessee, who had contracted to keep up repairs, to desire to escape liability for purely accidental fires and for the lessor to be willing to grant that relief, but it would not be natural that the lessor would be willing to release the lessee from damage caused by its own active negligence. In our opinion, the words in paragraphs 9 and 3 of the lease do not exempt the defendant from liability for fire damage, if caused by its actionable negligence.

There seems to be sound authority to support our position. In 32 Am. Jur., Landlord and Tenant, p. 669, it is said: "A tenant is, however, liable for injury to his landlord from the destruction by fire of a building

on the demised premises caused proximately by the tenant's negligence, even though the lease contains a provision that at the end of the term he shall yield possession 'subject to loss by fire' "—citing *Brophy v. Fairmont Creamery Co.*, 98 Neb. 307, 152 N.W. 557, L.R.A. 1918 A, 367; *Carstens v. Western Pipe & Steel Co.*, 142 Wash. 259, 252 P. 939. The cases unquestionably support the text. The headnote in *Cerny Pickas & Co. v. C. R. Jahn Co.*, 347 Ill. App. 379, 106 N.E. 2d 828, correctly summarizes the decision in these words: "Lease providing, among other things, that lessee is to return premises in good repair and condition at termination, loss by fire excepted, and that lessee is to keep all improvements in good repair, injury by fire or other causes beyond lessee's control excepted, did not expressly or impliedly exempt lessee from liability for alleged negligence causing fire or for alleged violation of positive duty imposed by fire ordinances." The defendant relies upon *General Mills v. Goldman*, 184 F. 2d 359, which adopted a different view. However, that was a three-man court, and *Sanborn, C. J.*, wrote a vigorous dissenting opinion. The opinion of the majority of the Court seems to have been largely affected by the fact that the lessor had fire insurance. In dealing with this point *Sanborn, C. J.*, said: "If the defendant was negligent, as the jury found it was, it became indebted to the owners of the leased premises, on the day the building was destroyed, to the extent of $142,500, regardless of whether the building was then covered by insurance or not. That the insurer is entitled to recoup its loss out of what the defendant owes the plaintiff for having negligently destroyed the insured building, is, in my opinion, of no legal concern to the defendant. *Evans v. Chicago, Milwaukee & St. Paul Railway Co.*, 133 Minn. 293, 158 N.W. 335, 336." *Kansas City Stock Yards Co. v. A. Reich & Sons* (Missouri), 250 S.W. 692, cited by the defendant has different facts. In that case the contract exempted the tenant from liability, if the premises were destroyed by fire, in consideration for increased rental with which landlord was to purchase insurance.

The second question involved is whether the words in paragraph 6 that the lessor shall keep the building insured to the extent of its full insurable value, exculpates the defendant from liability for fire damage caused proximately by its negligence, if there was such.

Upon paying a loss by fire, the insurer is entitled to subrogation to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid, both by the provisions of G.S. 58-176 and under equitable principles. *Buckner v. Ins. Co.*, 209 N.C. 640, 184 S.E. 520; *Ins. Co. v. R. R.*, 179 N.C. 255, 102 S.E. 417; *Powell v. Water Co.*, 171 N.C. 290, 88 S.E. 426. To use the language of *Sanborn, C. J., supra*, that the insurer is entitled to recoup its loss out of what the defendant

owes the plaintiff for having negligently destroyed the insured building is of no legal concern to the defendant.

In our opinion the language in the instant lease does not expressly or impliedly exempt the defendant from liability for any damage by fire to the demised premises caused proximately by its negligence.

The defendant further contends that under the new lease of 3 March 1950 the plaintiff was paid $17,250.00 by the defendant, and is now estopped to deny that the original lease did not contemplate restoration by the plaintiff in the event of defendant's negligence, and is barred from maintaining this action by reason of settlement, accord and satisfaction.

This contention based upon testimony elicited by the defendant over the plaintiff's objection, and his exceptions thereto, form the basis of his assignment of errors Nos. 1 and 2. This new lease agreement embodies a contract between the plaintiff and the defendant; it forms the basis of a defense of the defendant; it is clearly not collateral, and the best evidence rule applies. It was error to admit it. *Chatham v. Chevrolet Co.*, 215 N.C. 88, 1 S.E. 2d 117; *Chair Company v. Crawford*, 193 N.C. 531, 137 S.E. 577; *Mahoney v. Osborne*, 189 N.C. 445, 127 S.E. 533; *Ledford v. Emerson*, 138 N.C. 502, 51 S.E. 42; Stansbury N. C. Evidence p. 415. The defendant states in its brief that if this Court decides that this evidence is incompetent, it is not reversible error for the facts will be brought out at any future hearing. The answer to that is twofold. First, the entire lease is not before us so that we can determine all its terms. On page 33 of the Record the plaintiff said he received $15,000.00 under this agreement, and under another agreement $2,250.00, so apparently there were two agreements subsequent to the fire. Second, nowhere in this testimony does it appear that by this new lease the plaintiff released the defendant from liability for fire damage caused proximately by its negligence. The defendant has not pleaded estoppel as a defense. Further, estoppel, even if pleaded, settlement, accord and satisfaction are affirmative defenses, and ordinarily a nonsuit will not be allowed in favor of the party on whom rests the burden of proof. The evidence admitted by the court, even if competent, does not establish the truth of these affirmative defenses as a matter of law to bring the case within the one exception to the general rule. *Howard v. Bingham*, 231 N.C. 420, 57 S.E. 2d 401; *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742; *Hedgecock v. Ins. Co.*, 212 N.C. 638, 194 S.E. 86.

The next question presented: Did the court err in excluding evidence offered by the plaintiff tending to show that the fire insurance companies had not paid plaintiff's full loss, and, therefore the plaintiff was not divested of his cause of action by subrogation? The answer is Yes.

The plaintiff offered in evidence the lease of 14 September 1938, which contained the following provision "the lessors agree to keep said theater

buildings and equipment hereby leased insured to the extent of its full insurable value in some reliable insurance company." This evidence was competent to rebut any inference or contention to be drawn from the lease, that the plaintiff had been paid in full. If the plaintiff had been paid in full by the insurance companies, the insurance companies by right of subrogation would become entitled to the entire recovery, if any, and would be the real party in interest. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231, where the cases are cited.

The plaintiff's assignment of error No. 4 that the trial court erred in sustaining the motion for nonsuit is good.

For the reasons stated above the case should be submitted to a jury, and the ruling to the contrary is

Reversed.

FRED L. SALE AND JACK WESTALL, TRUSTEES OF THE J. M. WESTALL TRUST, AND MYRTLE SALE, MINNIE W. BOEHM, MARY WESTALL, JACK WESTALL AND ANNIE WESTALL, CESTUIS QUE TRUSTENT, PETITIONERS, v. STATE HIGHWAY & PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 25 November, 1953.)

1. Eminent Domain § 22—

Where the State Highway and Public Works Commission purchases a right of way under authority of G.S. 136-19 it acquires the same rights as though it had acquired the land by condemnation.

2. Eminent Domain § 21½: Highways § 8c—

While neither the State nor its agencies can take private property for public use without just compensation, the State Highway and Public Works Commission cannot be sued in contract, and the sole remedy by the owner of lands to recover compensation for its taking by the Commission is by a proceeding in accordance with statute. G.S. 136-19, G.S. 40-12 *et seq.*

3. Same—Where petition seeks compensation for the taking of land and evidence supports recovery for failure to pay compensation as stipulated in right of way agreement, nonsuit for variance should be allowed.

The owners of land filed a petition in the usual form pursuant to G.S. 136-19 and G.S. 40-12 *et seq.* to recover compensation for land taken for a right of way without reference to any option or right of way agreement. Petitioners introduced in evidence an option and right of way agreement requiring respondent, as a part of the consideration for the taking of the land, to remove certain buildings and reconstruct them, in as good condition as they were before moving, on other lands of petitioners, and to replace certain paving and fencing. Petitioners also introduced evidence that the buildings were destroyed by fire during the process of removal, and that the paving and fencing had not been replaced as stipulated.

Held: Nonsuit should have been entered for material variance between allegation and proof.

4. Pleadings § 24—

A party must succeed, if at all, on the case as set up in his complaint, and the proof must correspond to the allegations.

5. Trial § 23f—

Where there is a material variance between the allegation and proof, nonsuit should be allowed.

6. Appeal and Error § 5—

Where the disposition of respondent's appeal renders academic the questions presented on petitioners' appeal, petitioners' appeal will be dismissed.

APPEAL by petitioners and respondent from *Phillips, J.*, at February "A" Civil Term 1953 of BUNCOMBE.

This is a special proceeding instituted by petitioners by virtue of G.S. 136-19 and G.S. 40-12 *et seq.* before the Clerk of the Superior Court of Buncombe County to recover compensation for the alleged taking of an easement of right of way over property of the petitioners for the construction of a bridge over the French Broad River for the relocation of U. S. Highways Nos. 19 and 23 in the City of Asheville.

Fred L. Sale and Jack Westall are trustees of the J. M. Westall Trust, and Myrtle Sale, Minnie W. Boehm, Mary Westall, Jack Westall and Annie Westall are *cestuis que trustent*, and they are the petitioners herein. The petitioners own a tract of land situate on West Haywood Street and Riverside Drive in Asheville.

On 19 May 1948 Jack Westall and Fred L. Sale, trustees of the J. M. Westall Trust, executed and delivered an option to the respondent. These are its material parts. In consideration of the sum of one dollar paid to the J. M. Westall Trust by the respondent, the Westall Trust granted to the respondent an option for 180 days to purchase a right of way for highway purposes over, upon and across its lands situate in the City of Asheville—said right of way being 75 feet in width, and described with particularity. This option also includes the purchase price of a small garage building. Other buildings on the right of way were to be removed therefrom, and reconstructed on property belonging to the trust, under the general contract and at the expense of the respondent. That the Westall Trust will execute, and deliver to the respondent at its request on or before 19 November 1948 a good and sufficient deed or agreement for the right of way across its lands, provided the respondent pay to it the sum of $3,622.50, and remove, and reconstruct said buildings. It is further agreed that the consideration to be paid shall be paid, and received in full payment of the purchase price of the right of way, and in full compensation for all damages, if any, resulting from the granting of

this right of way and the construction of streets, roads and sidewalks upon the right of way.

In July 1948 the respondent exercised this option, and the Westall Trust by Fred L. Sale, Trustee, executed and delivered to the respondent in accordance with the terms of the option a right of way agreement. This agreement was not signed by Jack Westall, Trustee, and is not dated. This agreement released the respondent from all claims for damages by reason of said right of way, and of the past and future use thereof by the respondent, its successors and assigns for all purposes for which the respondent is authorized by law to subject the right of way. This agreement provided that the small garage purchased by the respondent is to be demolished, and removed from the right of way by the respondent, and that the respondent is to remove at its expense one two-story frame warehouse and such portion of lumber shed as is within the right of way limits of the project from the right of way, and pay to the trust $3,622.50, which amount shall be in full settlement for the right of way, the small garage, and any and all damages to the property due to construction of this project. The buildings on the right of way to be removed, and reconstructed as set forth in the option. It was further provided there are no conditions to this agreement not expressed herein. Then follows general covenants of warranty of title.

The petitioners introduced in evidence the option and right of way agreement.

The petitioners introduced in evidence the General Contract referred to in the option and right of way agreement. All of the General Contract is not in the record. The parts of it material for the purposes of this appeal are summarized below. General buildings or structures shall be prepared for, removed, and placed in their new locations, as shown on the plans, or as designated by the engineer, and left plumb and level, and in as good condition in all respects as they were before moving. New concrete driveways, or concrete driveways constructed to replace existing concrete drives, shall be Class "B" concrete, and shall be of the same thickness as existing driveways, or as specified in the plans. Payment will not be made for this work until an owner's release is secured from the property owner, certifying that the work has been performed to the owner's satisfaction, and that the respondent and the contractor are released from all responsibility in connection with this work. In extreme cases, when in the opinion of the right of way engineer, this requirement is being abused by the property owner, the requirement of the above release may be waived.

A release in accord with the terms of the option and the right of way agreement was also executed by Fred L. Sale, Trustee, and delivered to the respondent. It was not introduced in evidence.

About the time the right of way agreement and release were executed, and delivered to the respondent, the respondent tendered to the trustees of the J. M. Westall Estate its properly issued cheque in the amount of $3,622.50. The trustees of the trust refused to accept it in July 1948 and also upon two later occasions.

The work of constructing the bridge over the French Broad River was done by the Bowers Construction Co. The work was begun about 31 May 1948, and was completed 20 October 1950.

The petitioners, over the objection of the respondent, introduced in evidence a copy of a contract between the Bowers Construction Co., and G. E. Crouch, a subcontractor, who was to remove the buildings referred to in the option and right of way agreement at the price of $11,500.00.

In the process of moving the ridge of the roof of the two-story warehouse was broken in, though it was in continuous use for the storage of material by J. M. Westall & Co., and the Rock Wool Insulating Co. as renters. During the process of removal and reconstruction of the buildings on the right of way by Crouch, subcontractor, and before the work was complete, they were destroyed by fire of unknown origin on 13 September 1948. Other adjacent structures were also burned.

The trustees of the trust refused to accept the cheque of $3,622.50 from the respondent because the work of removing and reconstructing the buildings, as provided for in the option and right of way agreement, has not been completed, and had not been at the time of the fire. They refused to sign an owner's release, as provided for in the General Contract, because the work of removal and reconstruction of the said buildings has not been performed to their satisfaction.

The petitioners offered evidence that J. M. Westall & Co., dealers in lumber and building material, has brought an action against Bowers Construction Co. for damages for the destruction of personal property in the warehouse being removed from the right of way allegedly caused by the negligence of the construction company, which action has not been tried.

The petitioners also offered evidence that debris was left on the property which it would cost $200.00 to remove, and that a highway engineer said he thought he could get through $700.00 to build a driveway to the removed warehouse.

The petitioners offered evidence as to the reasonable market value of the property used by the respondent as a right of way and as to the value of the property burned.

The petitioners contend that the respondent has not carried out all the provisions of the right of way agreement and General Contract, therein referred to, in that the buildings to be removed and reconstructed on property belonging to the trust, had not been placed in their new location

plumb and level and in as good condition in all respects as they were before moving; that their destruction resulted from the taking; that paving had not been replaced; that the fence on the property had not been replaced; and that they and it have been unable to agree as to the value of the property taken by the respondent and the damage to that not taken. Therefore, they instituted this proceeding.

The petitioners admitted that the right of way agreement carried out the provisions contained in the option.

The petitioners do not contend that the option and right of way agreement are invalid, neither do they contend that the respondent has taken land beyond the limits of the option and right of way agreement.

The petition makes no reference to the option, right of way agreement, and the General Contract. It is drawn in the usual form when the respondent has taken over property for a public use without instituting condemnation proceedings.

In the Superior Court two issues were submitted to the jury. The jury awarded substantial damages, but found that no benefits, general or special, had accrued to petitioners.

Judgment was signed in accordance with the verdict, and both petitioners and respondent appeal assigning errors.

R. Brookes Peters, General Counsel State Highway & Public Works Commission, Gudger, Elmore & Martin, Associate Counsel, for respondent appellant.

Uzzell & DuMont for petitioner appellants.

THE RESPONDENT'S APPEAL.

PARKER, J. At the close of the petitioners' evidence—the respondent offered none—the respondent demurred to the jurisdiction of the court. The demurrer was denied. This is respondent's exception No. 90, and forms the basis of its assignment of error No. 29. The respondent then moved for judgment of nonsuit. This motion was denied, and is respondent's exception No. 92, forming its assignment of error No. 31.

The respondent had authority by virtue of G.S. 136-19 to acquire the right of way by purchase, as it did.

The purchase of this right of way vested in the respondent the same rights as though it had acquired the land by condemnation. Lewis Eminent Domain (3rd Ed.), Sec. 474 (293); *St. Louis & B. Ry. Co. v. Van Hoorebeke,* 191 Ill. 633, 61 N.E. 326; *St. Louis, etc. R. R. v. Hurst,* 14 Ill. App. 419; *Roushlange v. Chicago & A. Ry. Co.,* 115 Ind. 106, 17 N.E. 198; *Hileman v. Chicago Gt. W. Ry. Co.,* 113 Ia. 591, 85 N.W. 800; *De Vore v. State Highway Com.,* 143 Kan. 470, 54 P. 2d 971.

In Nichols on Eminent Domain (3rd Ed.) (1950) Vol. 3 pp. 150-151 it is said: "One who agrees to give his land for a public work does not necessarily thereby release his claim for damages to his remaining land by the construction of the work, although it is usually held that, in the absence of any special circumstances or conditions indicating a contrary intent, a conveyance of land for a specified public use constitutes a release of all damages to which the owner of the property would be entitled if it was taken by eminent domain for the same purpose. One who has released his claim for damages arising from the taking is not thereby barred from an action for damages arising from the negligent manner in which the work is done." Citing cases from Georgia, Illinois, Iowa, Kentucky, Louisiana, Minnesota, Nebraska, New York, Pennsylvania, South Carolina, Texas, Vermont, West Virginia for the first sentence quoted, and cases from Oregon and Pennsylvania for the second sentence quoted.

In 29 C.J.S. Eminent Domain, Sec. 206 it is said: "Where a landowner has granted a right of way over his land, he must look to his contract for compensation, as it cannot be awarded to him in condemnation proceedings, provided the contract is valid, and all its conditions have been complied with by the grantee . . ."—citing in support of the text *De Vore v. State Highway Commission, supra; State v. Lindley*, Civ. Appeals of Texas, 133 S.W. 2d 802; *Thomas E. Jeremy Estate v. Salt Lake City*, 87 Utah 370, 49 P. 2d 405; *Person v. Miller Levee Dist. No. 2*, 202 Ark. 876, 154 S.W. 2d 15; *Shortle v. Terre Haute & I. R. Co.*, 131 Ind. 338, 30 N.E. 1084; *Heimburg v. Manhattan Ry. Co.*, 162 N.Y. 352, 56 N.E. 899. The cases cited support the text. To the same effect *Stoops v. Kittanning Tel. Co.*, 242 Pa. 556, 89 A. 686.

In Lewis Eminent Domain (3rd Ed.) Sec. 474 (293) it is said: "The conveyance of land for a public purpose will ordinarily vest in the grantee the same rights as though the land had been acquired by condemnation. The conveyance will be held to be a release of all damages which would be presumed to be included in the award of damages if the property had been condemned. The grantor therefore cannot recover for any damages to the remainder of his land which result from a proper construction, use and operation of works upon the property conveyed. Damages which result from improper construction . . . or negligence of any kind, may, of course, be recovered."

Nichols, *ibid.*, p. 148 says that where private property is taken by proceedings in exercise of the power of eminent domain, the right of the owner to receive compensation is ordinarily satisfied by payment. However, there are several circumstances under which the owner's right may be extinguished or barred without payment, for instance, (1) by release or agreement to claim no damages; (2) by waiver or estoppel; (3) by statute of limitations; or (4) by laches. On p. 149 the text states: "It

frequently happens that the owners of land through which it is proposed to lay out a public improvement are anxious to have the plan carried out, and are willing to donate the necessary land on account of the benefit which the improvement will confer upon their other property. In such a case the most approved practice is for the owners to execute deeds of the land to the corporation about to construct the improvement, protecting themselves, if necessary, by conditions subsequent contained in the deeds, or by delivering the deeds in escrow, to be held until the improvement has been completed. Such deeds are unquestionably valid, and if the corporation subsequently, to cure any possible defects in its title, effects a taking of the same land by eminent domain, the grantors of the deeds are not entitled to additional compensation."

In *Allen v. R. R.*, 102 N.C. 381, 9 S.E. 4, the defendant proposing to construct a branch road from a point in the County of Wilson on its line to a point on the boundary line between the State and the State of South Carolina, with a view to this end procured from the plaintiff free and perpetual right of entry to the plaintiff's land, an easement therein for the location of its contemplated railway, upon any part wherever the company may select its route. The deed conveyed the easement, with all the incidental rights and privileges necessary to its full enjoyment. The Court said: "The deed, if effectual, allowed the company to select its route, and would bar all claims for damages incidental to and necessarily incurred in exercising the conferred right."

It has never been held in this jurisdiction that the State or its agencies can take private property for public use without just compensation. *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182; *Lewis v. Highway Com.,* 228 N.C. 618, 46 S.E. 2d 705. The Highway & Public Works Commission cannot be sued in contract. *Dalton v. Highway Com.,* 223 N.C. 406, 27 S.E. 2d 1; nor in tort, *McKinney v. Highway Commission,* 192 N.C. 670, 135 S.E. 772; *Pickett v. R. R.,* 200 N.C. 750, 158 S.E. 398. A statutory method of procedure is provided for adjusting and litigating claims against the Highway & Public Works Commission, and the remedy set out in the statute is exclusive and may alone be pursued. *Latham v. Highway Com.,* 191 N.C. 141, 131 S.E. 385; *Moore v. Clark, supra.*

The identical contracts offered in evidence in this case by the petitioners were before this Court in *Brown v. Construction Co.,* 236 N.C. 462, 73 S.E. 2d 147. In that case Brown and wife trading as Rock Wool Insulating Company sought to recover damages for the loss by fire of goods stored in the warehouse referred to in this case. This Court held in referring to the contracts that "the matter of the removal and reconstruction of the buildings is made a part of the consideration to be paid by the State Highway & Public Works Commission."

Applying the facts to the law as above stated, we arrive at these conclusions. The petitioners introduced in evidence the option, the right of way agreement and the General Contract. The petitioners admitted that the right of way agreement carried out the provisions contained in the option. They do not contend, nor have they offered any evidence, that the contracts are invalid; neither do they contend, nor have they offered evidence, that the respondent has taken land beyond the limits of the option and right of way agreement. Under these facts the petitioners having granted a right of way over their land and having released the respondent from all claims by reason of said right of way for all purposes for which the respondent is authorized by law to subject the right of way, must look to their contract for compensation, as it cannot be awarded to them in condemnation proceedings, provided all the conditions of the contracts have been complied with by the respondent. The petitioners contend that the removal and reconstruction of the buildings, the replacing of paving and the replacing of a fence were part of the consideration to be paid them and that has not been done, and the fire was caused by negligence. The respondent contends that the replacing of the paving and the fence were not required by the contracts. If the petitioners can allege, and prove their contention that they have been damaged by the negligent manner in which the work was done, or that they have been damaged by the respondent's failure without lawful excuse to perform any of the work it contracted to do they can recover such damages in a special proceeding under G.S. 136-19 and G.S. 40-12 *et seq.*, provided the petitioners and respondent are unable to agree as to the amount of such damages, if any.

If the petitioners are to succeed at all, they must do so on the case set up in their complaint. *Moore v. Clark, supra; Suggs v. Braxton*, 227 N.C. 50, 40 S.E. 2d 470; *Simms v. Sampson*, 221 N.C. 379, 20 S.E. 2d 554; *Whichard v. Lipe*, 221 N.C. 53, 19 S.E. 2d 14, 139 A.L.R. 1147. Their petition makes no reference to the option, right of way agreement and the General Contract; it is drawn in the usual form when the respondent has taken over property for a public use without instituting condemnation proceedings, and the parties are unable to agree as to the price of property taken, and the case was tried on that theory though the petitioners introduced in evidence the option, right of way agreement and General Contract. The proof materially departs from the allegations. "It has so often been said as to have grown into an axiom that proof without allegation is as unavailing as allegation without proof. There must, under the old or new system of pleading, be *allegata* and *probata*, and the two must correspond with each other. When the proof materially departs from the allegation, there can be no recovery without an amendment." *Talley v. Granite Quarries Co.*, 174 N.C. 445, 93 S.E. 995; *Whichard v.*

Lipe, supra; Aiken v. Sanderford, 236 N.C. 760, 73 S.E. 2d 911. This variance between the allegations and proof requires a reversal on the ruling on the motion to nonsuit.

The case also seems to have been tried on a misapplication of the pertinent principles of law.

The respondent's assignment of error No. 29 that the court had no jurisdiction is without merit.

We refrain from discussing the case further, for if the petitioners pursue their case further, then upon a retrial the *allegata* and *probata* may present new and various phases of law and fact.

The judgment is ordered

Reversed.

PETITIONERS' APPEAL.

By reason of the reversal of the judgment entered in the court below in this proceeding on the respondent's appeal, the questions presented for our decision on the petitioners' appeal have become academic. It is ordered as to petitioners' appeal

Appeal dismissed.

EVA HART BREWER, WIDOW; CATHERINE B. SNEAD AND HER HUSBAND, HASSELL LEE SNEAD; CHARLES HART BREWER AND HIS WIFE, LUCY KIMBALL BREWER; STEPHEN W. BREWER AND HIS WIFE, ELIZABETH ROSE BREWER; WILLIAM F. BREWER AND HIS WIFE, PAULINE NEISLER BREWER, AND ROBERT P. BREWER AND HIS WIFE, PERCYE B. BREWER, v. MYRTLE S. BREWER, WIDOW; GEORGIE S. TILLEY AND HER HUSBAND, BERT W. TILLEY; MARY ANN REGAN AND HER HUSBAND, JOHN B. REGAN.

(Filed 25 November, 1953.)

1. Adverse Possession § 4a—

While ordinarily the possession of one tenant in common is in law the possession of all and is not adverse to the others, where one tenant in common has been in sole possession of the land for more than twenty years and has taken exclusive rents and profits from the land openly and notoriously under claim of sole ownership, an ouster may be presumed, and title may ripen in such tenant by adverse possession.

2. Adverse Possession § 18—

An admission that the tenant in common in possession made improvements upon the property under *bona fide* claim of title, even though the admission is made solely for the purpose of settling the question of betterments in the event he establishes title by adverse possession, is competent to be considered on the question of the character of his possession.

3. Adverse Possession § 8—

The requirement that possession be "hostile" in order to ripen title by adverse possession does not import ill will or animosity, but only that the possessor claim exclusive right to the property.

4. Adverse Possession § 19—

Evidence tending to show that a tenant in common obtained deed from all of his cotenants except one, and possessed the land openly, notoriously, and exclusively under claim of right for over twenty years, taking the rents and profits, paying the taxes and making improvements under claim of title, *is held* sufficient to be submitted to the jury on the question of his acquisition of the entire title by adverse possession under the theory of presumptive ouster.

5. Adverse Possession § 18—

Evidence that a tax foreclosure was instituted solely against the tenant in common in possession of the lands who had no record paper title at the time is competent upon his claim of title by adverse possession, since even though general reputation is incompetent to prove paper title it is competent to show notoriety of possession.

6. Trial § 17—

The general admission of evidence competent for a restricted purpose will not be held for error unless appellant, at the time of its admission, asks that its purpose be restricted.

7. Appeal and Error § 39f—

An inadvertence in stating that certain evidence had been introduced by respondents, when in fact the evidence had been introduced by petitioners, will not be held for reversible error when upon the whole record it is apparent that petitioners could not have been prejudiced thereby.

8. Appeal and Error § 6c (6)—

An inadvertence in the charge in stating the evidence should be called to the trial court's attention in time to afford opportunity for correction.

9. Adverse Possession § 18: Compromise and Settlement § 2—

An offer by claimant to purchase a quitclaim deed from the adverse party after title had ripened in claimant by adverse possession is not an acknowledgment of title in such adverse party, nor does it break claimant's continuity of possession or affect the validity of claimant's perfected title.

APPEAL by petitioners from *Williams, J.*, August Term, 1953, of CHATHAM.

This is a special proceedings instituted before the Clerk of the Superior Court of Chatham County for the sale of real estate for partition, and transferred to the Superior Court for trial upon the respondents' filing an answer in which they pleaded sole seizin of the real estate in question.

The evidence and facts pertinent to this appeal are as follows:

1. Stephen W. Brewer died intestate prior to the year 1919, seized and possessed of the land described in the petition, being twenty-two acres, more or less. He left surviving his widow and five children as his only heirs at law.

2. The petitioners are the widow and heirs at law of Charles S. Brewer, one of the five children of Stephen W. Brewer, and they claim a one-fifth undivided interest by inheritance from Charles S. Brewer. The respondents are the widow and heirs at law of George W. Brewer, one of the five children of Stephen W. Brewer, and they claim the whole property by inheritance from the said George W. Brewer.

3. Subsequent to the death of Stephen W. Brewer, and in the year 1919 or 1920, George W. Brewer moved upon the premises in question with his family and his mother, Mary C. Brewer, and lived thereon continuously from that time until his death on 8 December, 1950. In the meantime his mother lived in his home until her death on 29 December, 1922. By conveyance dated 29 December, 1921, Mary C. Brewer, widow of Stephen W. Brewer, two of the children of Stephen W. Brewer and the children of a deceased child, conveyed to George W. Brewer all their right, title and interest in the subject property.

4. Charles S. Brewer, the ancestor of the petitioners, died in February, 1921, subsequent to the date that his brother, George W. Brewer, moved upon and occupied the premises in question. The respondents allege that their ancestor, George W. Brewer, acquired title to the one-fifth undivided interest of Charles S. Brewer by adverse possession.

5. According to the evidence, George W. Brewer made substantial and extensive repairs and additions to the home as well as other improvements on the premises from time to time at a cost to him in excess of $9,000.00, and it is stipulated that the improvements made upon the property in controversy were made under a *bona fide* claim of title by the respondents. It is further stipulated that beginning in 1922 and each year thereafter until his death, George W. Brewer paid all the county taxes levied on the property and since his death the property has been listed in the name of the estate of George W. Brewer and the taxes levied thereon have been paid by the estate. The evidence further tends to show that in addition to the improvements made to the "Brewer homeplace" located on the premises, and several other buildings erected thereon, George W. Brewer built a new road from the homeplace to the highway, laid culverts under the road, fenced some of the land and cleared it and used it for pasture, cut and used firewood therefrom, and cultivated the cleared portions thereof; that the petitioners never made any demand on George W. Brewer for an accounting of the rents and profits therefrom, or asserted any claim to the property or any part thereof, and that George W. Brewer never made

any accounting or paid any rents or profits to the petitioners or their ancestor, Charles S. Brewer.

6. The deed described in paragraph three above was not discovered by respondents until after the death of George W. Brewer and was filed for registration on 13 December, 1950.

7. The petitioners offered in evidence the deed conveying the premises in question to Stephen W. Brewer, dated 1 April, 1887, and the deed from Mary C. Brewer and others dated 29 December, 1921, for the purpose of showing that the respondents owned only a four-fifths undivided interest in the property. The only additional evidence offered on behalf of the petitioners was the testimony of Charles H. Brewer, one of the petitioners, to the effect that John B. Regan (one of the respondents), who is an attorney at law and a son-in-law of George W. Brewer, after discovering a defect in the paper title to the premises, offered to pay $1,000.00 for a quitclaim deed from him and the other petitioners.

8. Mr. Regan testified in rebuttal to the testimony of Charles H. Brewer to the effect that when he discovered that Charles S. Brewer and his wife Eva Brewer had not signed the deed to George W. Brewer, he went to see the petitioner Charles H. Brewer; that he went on his own initiative and was not authorized to do so by anyone; that he informed Charles H. Brewer that in his opinion the petitioners had no interest in the property, but in order to get a merchantable title he would prefer to pay for a quitclaim deed rather than institute an action in the Superior Court.

The jury returned a verdict to the effect that the respondents are the sole owners of the lands, as alleged in the answer, and judgment was entered accordingly. The petitioners appeal, assigning error.

Bell & Horton for petitioners, appellants.

Ike F. Andrews and Barber & Thompson for respondents, appellees.

DENNY, J. The petitioners in the trial below moved for judgment as of nonsuit on the plea of sole seizin on the ground that the evidence offered by the respondents was insufficient to show ouster. The motion was overruled and the petitioners excepted thereto and base their seventh assignment of error thereon. They cite, in support of their motion, the case of *Cox v. Wright,* 218 N.C. 342, 11 S.E. 2d 158. This case quotes with approval the language of *Pearson, C. J.,* in *Day v. Howard,* 73 N.C. 1, as follows: "There is a fellowship between tenants in common. The law assumes they will be true to each other; the possession of one is the possession of all, and one is supposed to protect the rights of his cotenants and is not tolerated in taking an adversary position unless he acts in such manner

as to expose himself to an action by his fellows on the ground of a breach of fealty; that is, by an actual ouster."

In this connection, however, it is well to note that in *Woodlief v. Woodlief,* 136 N.C. 133, 48 S.E. 583, *Connor, J.,* in quoting the above language from *Day v. Howard, supra,* pointed out that in *Covington v. Stewart,* 77 N.C. 148, it was held that the "possession of one tenant in common is the possession in law of all, but if one have the sole possession for twenty years without any acknowledgment on his part of title in his cotenant, and without any demand or claim on the part of such cotenant to rents, profits, or possession, he being under no disability during the time, the law in such cases raises a presumption that such sole possession is rightful, and will protect it."

Furthermore, in the case of *Winstead v. Woolard,* 223 N.C. 814, 28 S.E. 2d 507, *Justice Winborne,* in speaking for the Court, said: "It is a well settled and long established principle of law in this State that the possession of one tenant in common is in law the possession of all his cotenants unless and until there has been an actual ouster or a sole adverse possession of twenty years, receiving the rents and profits and claiming the land as his own from which actual ouster would be presumed." *Duckett v. Harrison,* 235 N.C. 145, 69 S.E. 2d 176; *Whitehurst v. Hinton,* 230 N.C. 16, 51 S.E. 2d 899; *Hardy v. Mayo,* 224 N.C. 558, 31 S.E. 2d 748; *Parham v. Henley,* 224 N.C. 405, 30 S.E. 2d 372.

In the case before us it is conceded and stipulated that the improvements made upon the premises in controversy were made under a *bona fide* claim of title by the respondents. The petitioners claim, however, that this stipulation was entered into for the sole purpose of settling the question of betterments in the event the petitioners prevailed. Conceding this to be so, it was likewise an admission that the possession of the premises in question by George W. Brewer was also under a *bona fide* claim of title, otherwise he could not have erected buildings on the premises in good faith, under claim of title.

The petitioners take the further position that since the relationship between them and the respondents has always been friendly and cordial, possession of the respondents has not been hostile. It is true the definition of the word "hostile" is given by the lexicographers as "showing ill will or animosity, or as being unfriendly or antagonistic," but this does not correctly state the character of the occupancy necessary to create adverse possession. The character of the possession must be hostile in order for it to be adverse. However, this does not mean that ill will or animosity must exist between the respective claimants. It only means that the one in possession of the land claims the exclusive right thereto. 1 Am. Jur., Adverse Possession, section 138, page 872.

The evidence offered by the respondents was ample to take the case to the jury on the plea of sole seizin and the exception to the failure of the trial judge to sustain petitioners' motion for judgment as of nonsuit on this plea is overruled.

In the course of the trial below the respondents offered in evidence the pleadings in a tax foreclosure suit instituted in December, 1941, by the Town of Pittsboro against George W. Brewer and wife. In paragraph two of the Town's complaint it was alleged that "the defendants are the owners, subject to the tax liens hereinafter referred to, of the following described lands lying and being in the said Town of Pittsboro . . ." The complaint then purported to describe the lands now in controversy and concluded with these words, "being the homeplace of the said George W. Brewer . . ." The defendants in their answer denied the allegations in paragraph two of the complaint, except as admitted. They then alleged that the lands in question did not lie within the incorporated area of the Town of Pittsboro; that such fact had been established by a survey authorized by the Town in 1927 and paid for by the defendants, at which time it was agreed by the officials of the Town of Pittsboro that the described lands lie outside of the Town's corporate limits.

The petitioners excepted to and assign as error the admission in evidence of the above pleadings on the ground that it was an attempt by the respondents to prove title by reputation, citing Stansbury N. C. Evidence, section 148; *Locklear v. Paul,* 163 N.C. 338, 79 S.E. 617; *Sullivan v. Blount,* 165 N.C. 7, 80 S.E. 892.

It is true that reputation is not admissible to prove ownership of lands, but on the question of adverse possession the rule seems to be that a general reputation that land is owned by one who is in possession thereof is admissible to show the notoriety of such possession. 20 Am. Jur., Evidence, section 464, page 408, *et seq.;* 2 C.J.S., Adverse Possession, section 223, page 833, *et seq.; Maxwell Land Grant Co. v. Dawson,* 151 U.S. 586, 38 L. Ed. 279. In the last cited case the United States Supreme Court in passing upon a similar question said: "There was no error in admitting testimony to the effect that the land claimed by Dawson was generally reputed to belong to him. Claiming as he did by open, notorious and adverse possession of these lands for a period sufficient under the statutes of New Mexico to give him a good title, it was competent to prove that it was generally understood in the neighborhood, not only that he pastured his cattle upon these lands, but that he did so under a claim of ownership, and that his claim and the character of his possession were such that he was generally reputed to be the owner. While this testimony would be irrelevant in support of a paper title, it had an important bearing upon the notoriety of his possession." See *Everett v. Sanderson, ante,* 564.

The evidence disclosed on this record clearly establishes the fact that George W. Brewer entered upon the premises in question in the year 1919 or 1920 and continued to reside thereon until his death on 8 December, 1950. There is certainly no evidence that his occupancy was a permissive one, or that the petitioners, or their ancestor, prior to the death of George W. Brewer, ever asserted any claim of title to the one-fifth undivided interest in the premises they now undertake to assert. Therefore, the character and notoriety of the possession of George W. Brewer was an important factor in determining whether or not his occupancy of the premises in controversy for more than thirty years was or was not adverse to the petitioners. Consequently, since the allegations in the above pleadings with respect to ownership were clearly based on reputation, the defendants in that action having no paper title of record at that time to any part of the premises involved, we hold that the pleadings were admissible to show the notoriety of George W. Brewer's possession. Moreover, when evidence that is competent for some purposes, but not for all, is admitted generally, an exception thereto will not be sustained unless the appellant asks, at the time of its admission, that its purpose be restricted. Rule 21 Rules of Practice in the Supreme Court, 221 N.C., page 558; *S. v. Hendricks,* 207 N.C. 873, 178 S.E. 557.

The petitioners' eighth exception is to an inadvertence of his Honor in stating to the jury that the respondents offered in evidence the deed conveying the property in question to S. W. Brewer from Mr. Foushee, dated in 1887, and deed from Mary C. Brewer, Annie B. Thompson and others, heirs of S. W. Brewer, to George W. Brewer, when as a matter of fact these deeds were offered in evidence by the petitioners.

We cannot conceive how this inadvertence or misstatement could have prejudiced the rights of the petitioners. It was made clear in the pleadings and in the trial below that the respondents had no paper title to the one-fifth undivided interest involved in this action, and the jury was instructed that in order to show title thereto the burden was on the respondents to establish by the greater weight of the evidence "that the respondents have been in the open, notorious, sole, adverse, continuous peaceful possession of this property for a period of twenty years, exercising the right of dominion and ownership over it, making such use of the property and land in question as its condition made it suitable for." Moreover, this inadvertence or misstatement on the part of his Honor was one that should have been called to his attention at the time it was made, and thus afforded him an opportunity to correct it before the case was submitted to the jury. *S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608, and cited cases. This exception is without merit.

In connection with the petitioners' thirteenth exception, which is to the charge, it is contended that his Honor should have charged the jury

with respect to the offer made by the respondent, John B. Regan, for a quitclaim deed to be executed by the petitioners. The petitioners contend that by making this offer the respondents specifically recognized that title to the one-fifth undivided interest in controversy was in the petitioners, and that his Honor should have charged the jury that they must find that the respondents did not acknowledge the title of the petitioners before they could answer the issue in favor of the respondents. We do not concur in this view. The evidence with respect to Regan's offer was insufficient to bind the respondents who are the real claimants, but for the sake of argument, if it be so conceded, it would have no effect on the validity of a title theretofore perfected by adverse possession; neither would it break the continuity of such possession. In 1 Am. Jur., Adverse Possession, section 184, page 893, *et seq.*, it is said: "The continuity of the possession of an adverse claimant is not interrupted by his act in purchasing or bargaining for an outstanding title. Indeed, the person may very well deny the validity of an adverse claim or title, and yet choose to buy his peace at a small price, rather than be at great expense and annoyance in litigating it," citing *Alsworth v. Richmond Cedar Works,* 172 N.C. 17, 89 S.E. 1008; *John L. Roper Lumber Co. v. Richmond Cedar Works,* 168 N.C. 344, 84 S.E. 523, Ann. Cas. 1917B, 992.

We have carefully considered the remaining exceptions and assignments of error and, in our opinion, they present no prejudicial error that would warrant a new trial.

No error.

JULIA MAE FIELDS, ALLEGED WHOLE DEPENDENT; IOLA TEACHER McMILLAN, MOTHER; LEVIE CASPER McMILLAN, LILLIAN McMILLAN LOFTIN, MARY McMILLAN HOWARD, NATHAN McMILLAN, MABEL McMILLAN SHARPE, BEADIE JANE CARLTON AND ETHEL MAE McMILLAN, BROTHERS AND SISTERS OF WILLIAM EDWARD McMILLAN, DECEASED (EMPLOYEE), v. HOLLOWELL & HOLLOWELL (EMPLOYER); PENNSYLVANIA THRESHERMEN & FARMERS MUTUAL CASUALTY INSURANCE COMPANY (CARRIER).

(Filed 25 November, 1953.)

Master and Servant § 53d—

A woman who was living with an employee as his common law wife at the time of his death and who was actually wholly dependent upon him for support for some years prior to his death by accident arising out of and in the course of his employment is not a dependent of the deceased employee within the purview of G.S. 97-39 and is not entitled to any part of the compensation payable under the provisions of the Workmen's Compensation Act.

APPEAL by claimant Iola Teacher McMillan from *Stevens, J.*, at May Civil Term, 1953, of SAMPSON.

Proceeding under North Carolina Workmen's Compensation Act to determine liability to claimants, and to which claimant.

When this case was called for hearing before a single commissioner, counsel for claimants and counsel for defendants stipulated and agreed that the parties are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act; that the Pennsylvania Threshermen & Farmers Mutual Casualty Insurance Company is the insurance carrier; that the deceased employee, at the time of his death, was regularly employed by defendant employer at an average weekly wage of $25.00; that on 12 February, 1951, said employee sustained an injury by accident arising out of and in the course of his employment, resulting in his death; that defendants accepted liability; and that the only question before the Industrial Commission for decision is as to who is entitled to receive compensation on account of the death of deceased.

Thereupon the hearing commissioner heard the evidence offered, and, upon the evidence, made findings of fact, and, upon the facts found, made conclusions of law, denying compensation to the claimant, Julia Mae Fields, and awarding compensation to Iola McMillan, mother of deceased employee, as next of kin, etc.

The claimant, Julia Mae Fields, objected and excepted to the award so made, and appealed therefrom to the Full Commission.

Upon such appeal, and after hearing, and "for purposes of clarity, and to the end that the question involved may be squarely presented," the Full Commission vacated and set aside the opinion and award of the Hearing Commissioner, and adopted the following in lieu thereof: That this is a contest between claimants,—defendants appearing merely in the role of stakeholders; that the parties had stipulated as hereinabove shown, leaving for decision only the question as to who is entitled to receive the compensation due and payable on account of the death of William Edward McMillan.

Then, after narrating the competent evidence, the Full Commission made the following findings of fact, in so far as pertinent to question for decision:

"5. That at the time of his death the said William Edward McMillan left no children and left surviving his mother, Iola Teacher McMillan, and the seven brothers and sisters named in the caption, all of whom are over 21 years of age; that neither the mother nor any of the brothers and sisters were dependent, either in whole or in part, upon the said William Edward McMillan for support at the time of his death; that his father predeceased him and was not living at the time of his death.

"6. That William Edward McMillan first met the claimant Julia Mae Fields in Duplin County in 1939; that she bore him an illegitimate child on 3 December, 1946, which child lived only three days and died; that the said William Edward McMillan and Julia Mae Fields cohabited from time to time from 1939 until 1948, although not living together in the same house during that period; that due to difficulties with his family, the said William Edward McMillan left home in 1948, taking Julia Mae Fields with him, and established residence in Sampson County under the name of Edward McCullen and wife, Mae Lee McCullen; that from 1948 until the date of his death they lived together in the same house as man and wife, he furnishing the home, food and clothing, medical and dental services, and she performing the usual duties of a wife; that he provided the said Julia Mae Fields with all of her maintenance and subsistence from 1948 to the date of his death.

"7. That Iola McMillan is the mother of William Edward McMillan, deceased, and is his next of kin, his father being dead; that the brothers and sisters named in the caption are neither dependents, whole or partial, nor 'next of kin.'"

Thereupon the Commission, one member dissenting, for conclusion of law, posed this question: "Is a common law wife who was actually wholly dependent for support upon a deceased employee at the time of his death by accident arising out of and in the course of his employment entitled to compensation as such dependent under the provisions of the North Carolina Workmen's Compensation Act?". And the Commission concluded that the answer is "No," saying, however, that the evidence, fairly considered, shows: That Julia Mae Fields was living with William Edward McMillan at the time of his death, and was deriving her whole support from him; that no one was dependent upon him for support either in whole or in part; that unless Julia Mae Fields be regarded in law as the dependent of deceased employee compensation goes to the next of kin under G.S. 97-40, that is, the mother Iola McMillan, his father being dead, citing *Hamby v. Cobb & Homewood, Inc.*, 214 N.C. 813, and *Parsons v. Swift & Co.*, 234 N.C. 580; and that in no event do the brothers and sisters have any rights for the reason that they are neither dependents nor "next of kin."

The Commission goes on to say further that common law marriages are not recognized in North Carolina, and, hence, a common law wife has no status under the various statutes relating to widowhood; and that a common law marriage between the deceased employee in this case and Julia Mae Fields was consummated in North Carolina, and its validity or invalidity must be tested by the laws of this State,—hence there was no legal marriage between the parties and the rights of Julia Mae Fields, if any, must rest squarely upon the proposition as to whether she was a

dependent of the deceased employee within the meaning of the Compensation Act.

The Commission quotes from G.S. 97-39, that "A widow, a widower and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases, questions of dependency in whole or in part shall be determined in accordance with the facts as the facts may be at the time of the accident . . ." And then the Commission continues: "It is upon this statutory provision that Julia Mae Fields grounds her claim." However, "the Full Commission is of the opinion and so holds, that her position is untenable."

Then, after stating reasons for the above conclusion, the Commission further concluded that William Edward McMillan left no dependents, whole or partial, within the meaning of the Compensation Act, and that, consequently, compensation is payable to his mother, Iola McMillan, under the provisions of G.S. 97-40. (One member dissented.)

An award was made in accordance therewith, and Julia Mae Fields appealed therefrom to the Superior Court of Sampson County "upon errors of law."

When the matter came on for hearing in Superior Court, on such appeal, the presiding judge "being of opinion and finding as a fact and concluding as a matter of law that the plaintiff Julia Mae Fields was the sole and total dependent of William Edward McMillan, deceased employee, within the meaning of the Workmen's Compensation Act, and is entitled to an award for compensation as such dependent, and . . . being of the opinion that the exceptions of the plaintiff, Julia Mae Fields, to the conclusions of law and the award should be sustained, and the award of the North Carolina Industrial Commission should be vacated and set aside," entered judgment in accordance therewith, and remanded the cause to the North Carolina Industrial Commission "for the purpose of making an award to Julia Mae Fields, sole and total dependent of William Edward McMillan, deceased employee, and to her counsel of record."

The plaintiff Iola McMillan excepts to this judgment on grounds stated and to the signing of it, and appeals to Supreme Court, and assigns error.

Earlie C. Sanderson for plaintiff McMillan, appellant.
Butler & Butler for plaintiff Fields, appellee.

WINBORNE, J. Is a woman who was purposely and knowingly living in unlawful cohabitation with an employee at the time of his death, a dependent of such employee within the meaning of the North Carolina Workmen's Compensation Act, Chapter 97 of General Statutes? The trial court was of opinion that she was such dependent, and so ruled and adjudged. This ruling is aptly challenged by this appeal.

As used in the North Carolina Workmen's Compensation Act, the term "death" as a basis for a right to compensation means only death resulting from an injury, that is, an injury by accident arising out of and in the course of the employment. G.S. 97-2 (f) and (j).

The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in the Act. G.S. 97-2 (k).

Moreover, the Act provides that if death results proximately from such accident, the employer shall pay or cause to be paid to the dependents of the employee a weekly payment as specified. G.S. 97-38.

It is significant that the Act, in respect to dependents of an employee whose death results from an injury, as so defined, specifically defines who are meant by the terms, child, grandchild, brother, sister, parent, widow and widower. G.S. 97-2, subsections (l), (m), (n), and (o), and who are next of kin, father, mother, widow, child, brother or sister, in the event the deceased employee leaves no dependents. G.S. 97-40. The significance of these provisions is that these persons are only those to whom the deceased employee is under legal or moral obligation to support.

The Act also provides that "A widow, widower, and/or child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident," and as such be entitled to receive the benefits for the full period specified. G.S. 97-39.

The appellee, in brief filed in this Court, states that she "does not claim compensation as the common law wife of the deceased." Hence we are not here concerned with that subject. And so conceding the appellee necessarily does not claim that she is the widow of the deceased employee. But she contends that "the workman who voluntarily assumes the support of any person, who looks to and relies upon him for the necessities of life," has made of that person a dependent. Hence she contends that she comes within the purview of the term "in all other cases," appearing in the statute G.S. 97-39. And apparently the trial court agreed with this position. But this Court does not so interpret the North Carolina Workmen's Compensation Act.

The term "in all other cases" in the connection in which it appears in the statute G.S. 97-39, means in all cases other than those of widows, widowers, and children, claiming to be dependents of the deceased employee,—dependency shall be determined in accordance with the facts as the facts may be at the time of the accident. Manifestly, a woman living in cohabitation with a man, to whom she is not married, is not within the purview of the term "in all other cases."

In this connection it is appropriate to note that in the case of *Reeves v. Parker*, 199 N.C. 236, 154 S.E. 66, there is this headnote, "The common

law wife of a deceased employee is not entitled to compensation under the provisions of the Workmen's Compensation Act." But a reading of the opinion, and of the record on appeal, discloses that while the Industrial Commission considered the question as to whether or not a woman living in fornication and adultery is entitled to compensation as a dependent, and ruled adversely to the claimant, the record shows that the claimant did not appeal therefrom. Hence what is said in the reported case in this respect is *dictum*.

Nevertheless, the opinion of the hearing commissioner, J. Dewey Dorsett, incorporated in Vol. 1 at page 277 of opinions in cases heard and determined by the North Carolina Industrial Commission, is appropriate to this appeal, and is worthy of citation. We quote in part as follows: "The following instances, involving the rights and obligations of husband and wife, demonstrate the utter absurdity of the suggestion that Frances Wilson was the lawful wife of George Wilson, for if George Wilson were alive today and living with Frances Wilson, under the admitted circumstances in this case:

"1. Frances Wilson could not maintain an action for divorce against him, for such an action presupposes a valid marriage . . .

"2. She could not maintain a proceeding for alimony against him, because that remedy implies a lawful marriage. . . .

"3. She could be compelled to testify against him in a criminal action, for before a wife will be excused from giving evidence against her husband, . . . it must be shown that she was lawfully married to him. . . .

"4. If, after having lived with Frances Wilson, under the admitted circumstances in this case, George Wilson had subsequently married another woman, he could not have been convicted of the crime of bigamy, because one of the essentials of that crime would be lacking, to wit, a prior legal marriage. . . .

"5. George Wilson and Frances Wilson were subject to indictment, and under the admitted facts in this case, would have been convicted, for fornication and adultery every day they lived together. . . .

"6. George Wilson, if he had abandoned and failed to support Frances Wilson, could not have been prosecuted, . . . because . . . abandonment by a husband presupposing a valid marriage, . . .

"7. Frances Wilson, upon the death of George Wilson, would not be entitled to a year's support, . . . 'The widow is invariably entitled to the benefit of the statutory provision for support and maintenance, but in order to have the benefit of such a statute, she must have been lawfully married to decedent.'

"This is the first time that the North Carolina Industrial Commission has been called upon to determine the status of parties to a marriage not performed in accordance with the plainly expressed provisions of our

statutes. C.S. 2493 (now G.S. 51-1). The decisions of this Commission in the instant case will necessarily be one of far reaching effect, and to sustain the so-called marriage in this case would not only be in conflict with the consistent holdings of our Supreme Court, but it would also be alien to the customs and ideas of our people, and would shock their sense of propriety and decency. Grave considerations of public policy forbid it. That it would tend to impair the public estimate of the sanctity of the marriage relation, there can be no doubt. It would obscure the certainty of the rights of dependents designated in our compensation law. It would open the door to false pretenses of marriage, and would invite and encourage impostors to contest the legitimate claims of helpless dependents, and finally, it would place ordained matrimony on the same level with common lasciviousness. We believe that the North Carolina Workmen's Compensation Act should be interpreted and construed as any other public statute, and the assumption that the General Assembly, in the enactment of this law, intended to reward parties to a relationship deliberately entered into in open defiance of the penal laws of our State and against public morals, is a violation of the most fundamental canons of statutory construction."

And the majority opinion of the present Industrial Commission follows the same line of reasoning in making decision in this case. It is said by them that to honor such a claim "would create a legal right out of an illegal relationship." It could be added that such a claim is conceived in sin, and shapened in iniquity.

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

Hence, the judgment from which this appeal is taken will be, and it is hereby reversed, and the cause remanded to the end that judgment be rendered in accordance with the award of the majority of the Industrial Commission.

Reversed.

MRS. LOIS R. BUMGARDNER, ADMINISTRATRIX OF THE ESTATE OF DONNA RAE BUMGARDNER ELLIOTT, DECEASED, v. C. W. ALLISON, SR., HARRIET O. ALLISON, C. W. ALLISON, JR., and GRAHAM T. ALLISON, TRADING AS ALLISON FENCE COMPANY; AND ROBERT H. GEORGE AND H. M. BARGER, TRADING AND DOING BUSINESS AS RED BIRD TAXI.

(Filed 25 November, 1953.)

1. Automobiles §§ 8d, 11b, 18d, 21—Whether negligence in leaving vehicle parked without lights concurred in proximately causing death to passenger in car colliding with the rear of truck held for jury.

Evidence tending to show that the operator of a truck parked it on a city street and left the truck without lights or flares of any kind on a dark and misty night some 315 feet from the nearest street light, that pipes, constituting a part of the truck load, extended some nine feet beyond the truck body without flag or light at the end of the pipes, and that plaintiff's intestate was fatally injured when the driver of the taxi in which she was riding collided with the rear of the truck, causing pipe of the truck to pierce her head, *is held* sufficient to be submitted to the jury upon the issue of the truck driver's negligence in violating the provisions of G.S. 20-134 and G.S. 20-117, and whether such negligence concurred with the negligence of the taxi driver in driving at excessive speed under the circumstances, G.S. 20-141, and in failing to keep a proper lookout, it being a permissible inference from the evidence that the taxi driver was blinded by the lights of an oncoming car when he was in close proximity to the rear of the unlighted truck parked in his lane of travel, and nonsuit on the ground that the negligence of the truck driver was insulated by the intervening negligence of the taxi driver was properly denied.

2. Trial § 22c—

It is the province of the jury and not the court to resolve discrepancies and contradictions in the evidence.

3. Trial § 49½—

A motion to set aside the verdict on the ground of excessive award is addressed to the discretion of the trial court.

4. Death § 8—

In this action to recover for the wrongful death of intestate, *it is held* that no abuse of discretion is shown in the refusal of the trial court to set aside the award as excessive, there being evidence that intestate was a healthy girl eleven years old of more than average ability.

APPEAL by defendants Allison, doing business as Allison Fence Company, and Robert H. George, from *Moore, J.*, and a jury, at April Regular Civil Term, 1953, of CATAWBA.

Civil action by plaintiff to recover damages for the alleged wrongful death of her intestate granddaughter, Donna Rae Bumgardner Elliott, a child 11 years of age, who was riding as a passenger in a taxi owned and operated by the defendant Barger. She was killed when the taxi

collided with the rear end of a parked truck belonging to the defendants Allison. The collision occurred in the nighttime, about 6:05 o'clock p.m., 3 December, 1951.

The action was brought against taxi-driver Barger; the truck driver George, who parked the truck, and the truck owners, hereinafter referred to as the Fence Company. It was admitted that in parking the truck the defendant George was acting within the course of his employment as servant of the Fence Company. The gravamen of the complaint is that the intestate's death was caused by the concurrent negligence of all the defendants.

The case was here at the Fall Term, 1952, when we affirmed an order of the Superior Court overruling the demurrer of the present appellants and denying the defendant Barger's motion to strike certain allegations of the complaint, *Bumgardner v. Fence Co.*, 236 N.C. 698, 74 S.E. 2d 32.

On retrial the plaintiff offered evidence which may be summarized as follows: On the afternoon in question the intestate had been to a movie in the City of Hickory. After leaving the show she phoned her grandmother, with whom she lived, and told her it was getting dark and she was afraid to walk home "through the dip or hollow." She was instructed to take a cab home.

At about 6 o'clock p.m., shortly after dark, she employed the taxi of the defendant Barger and in it set out toward home. The route led eastwardly along Second Avenue, S.E., inside of the City of Hickory. The Avenue east of the intersection with Fifth Street is downhill, creating a dip between Fifth Street and Seventh Street. At the dip the Avenue "kind of levels off" and then starts back up. The Allison truck was parked near the bottom of the dip, "in the level part," slightly on the east side of the dip—"30 to 40 feet east of the dip." The truck was headed east, the direction the taxi was traveling. Both right wheels were against the curb on the south side. The cab of the truck was locked. The operator was not there. The street is paved, and is 30 feet wide from curb to curb. The truck was about 8 feet wide.

There were no lights, flares, reflectors, or flags on or near the truck. It was partly loaded with pipes about an inch in diameter. These pipes protruded beyond the rear end of the bed of the truck 9 feet and 3 inches. There was no light or flag at the end of the pipes. The bed of the truck was loaded with gravel and sand of a gray color piled on top of the pipes.

Looking west along Second Avenue from the rear of the truck, the nearest street light was at the intersection of Fifth Street, a distance "of 342 or 343 feet"; and looking east in front of the truck, it was 315 feet to the nearest street light—at the intersection of Seventh Street. Sixth Street was not opened.

Traveling east on Second Avenue from Fifth Street there were no houses or structures of any kind on the right, or south, or south side, to where the truck was parked. On that side it was a distance of 400 to 425 feet from Fifth Street to the first structure. On the left, or north side, of the Avenue "going east from . . . Fifth Street . . . to where the truck was parked," there was just one structure, Oliver Moore's home, and from there on east it was about 525 feet to the next building on that side of the Avenue.

An ordinance of the City of Hickory, adopted under the authority of G.S. 20-134 and then in effect, provides, among other things, that "The displaying of lights upon a vehicle when lawfully parked at night upon a street of the City of Hickory in accordance with this chapter shall not be required when there is sufficient light to reveal any person within a distance of 200 feet upon such street."

It was dark, rainy, misty and foggy. The road was wet. A person could be revealed at "that time and place" for "a distance of 100 feet at most" according to one witness. Another said "a person could be revealed by . . . car lights . . . at . . . around 100 feet ahead." Others placed the distance "by car lights" at 100, 150, and 200 feet.

Under these circumstances the defendant Barger was driving his taxi eastwardly at from 20 to 25 miles per hour when, while blinded by the lights of an oncoming car, he was suddenly startled by something crashing through his windshield, which it was later learned were the pipes which protruded from the rear of the truck body. The intestate, who was sitting on the rear seat of the taxi, on the right side, was hit by two or more of the pipes. One penetrated her right eye socket and came out the rear of her head. Another made a large gash in her face near her nose. The result was instant death.

At the point of collision the right wheels of the taxi were about "four or five feet from the right curb." The taxi "was jammed under the left side and rear of the truck body, with the cowl, at the bottom of the windshield, in contact with the end of the bed of the truck. The bumper of the taxi extended to the left rear dual wheels of the truck. The pipes projected through the taxi windshield, across the back seat, and knocked out the rear glass behind where the little girl was sitting. When officer Teague arrived, the rear lights and also the left front light of the taxi were burning.

D. E. Smith, a witness for the plaintiff, testified that he "passed there" earlier that evening, as he put it, "about 30 minutes after sundown. It was misting and raining at the time." He further said he saw the parked truck and there were no "light flares, reflectors or flags on the truck. . . . I did not hit the truck. When I first saw the truck I do not guess I was 30 feet from it. I was traveling at a speed of about 30 miles per hour.

. . . There was room to pass the truck. . . . I was going in an eastern direction, I hit the bottom of the dip and leveled out, . . . At the time I saw the truck and swerved to the left to miss it, I was not meeting any cars. . . . I was pretty close to the rear end of the pipes when I swerved; it would be hard to say how close. I was approximately 2 or 3 feet or a little more from the rear end of the pipes when I swerved."

The defendants offered no evidence.

Issues were submitted to and answered by the jury as follows:

"1. Was the death of plaintiff's intestate Donna Rae Bumgardner Elliott caused by the negligence of the Allison Fence Company and Robert H. George, as alleged in the complaint? Answer: YES.

"2. Was the death of Donna Rae Bumgardner Elliott caused by the negligence of the defendant H. M. Barger, T/A Red Bird Taxi Co., as alleged in the plaintiff's complaint? Answer: YES.

"3. What amount, if any, is the plaintiff entitled to recover for the death of her intestate, Donna Rae Bumgardner Elliott? Answer: $25,000.00."

From judgment entered upon the verdict, the defendants Fence Company and Robert H. George appealed, assigning errors.

Theodore F. Cummings for plaintiff, appellee.

Smathers & Shuford and Helms & Mulliss for defendants, appellants.

JOHNSON, J. The evidence adduced below, as it relates to the defendants Fence Company and truck-driver George, makes out a clear *prima facie* case of actionable negligence against these defendants. This, without more, on the basis of the testimony tending to show (1) that the truck was left parked in the nighttime without lights of any kind, in violation of G.S. 20-134, and also in violation of the ordinance of the City of Hickory adopted pursuant to the provisions of this statute, and (2) that there was a failure to display a red light at the end of the pipes which projected out behind the truck body, as required by G.S. 20-117. See *Barrier v. Thomas, etc., Co.*, 205 N.C. 425, 171 S.E. 626; *Brewer v. Moye*, 200 N.C. 589, 157 S.E. 871; *Williams v. Motor Express Lines*, 198 N.C. 193, 151 S.E. 197; *Hall v. Coble Dairies*, 234 N.C. 206, 67 S.E. 2d 63.

It is also manifest that the evidence adduced below, as it relates to the defendant Barger, is sufficient to make out a *prima facie* case of actionable negligence as to him. This, upon the theory that the evidence was sufficient to support the inference (1) that he was driving at a speed greater than was reasonable and prudent under the conditions then existing, in violation of G.S. 20-141 (*Cox v. Lee*, 230 N.C. 155, 52 S.E. 2d 355; *Wilson v. Motor Lines*, 230 N.C. 551, 54 S.E. 2d 53; *Morris v. Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845), or (2) that he failed to

exercise due care in maintaining a lookout. *Marshall v. R. R.*, 233 N.C. 38, 62 S.E. 2d 489; *Adcox v. Austin*, 235 N.C. 591, 70 S.E. 2d 837.

The decisive question presented by this appeal is whether, as urged by the appellants Fence Company and George, the case should have been nonsuited below as to them on the ground that their negligence was insulated by the intervening negligence of taxi-driver Barger, who does not appeal.

The appellants point to the testimony of officer Teague who said Barger told him that "as he crossed the intersection (of Fifth Street) he . . . was blinded by lights . . . and the next thing he knew something went through the windshield." The appellants insist that the single inference deducible from this evidence, and other supporting evidence offered by the plaintiff, is that Barger became blinded at the Fifth Street intersection, some 300 feet or more from the parked truck, and blindly drove his taxicab on this entire distance through the darkness without slackening his speed or keeping a proper lookout, and crashed into the rear end of the truck when there was more than 20 feet of roadway open on the left for him to have passed in safety. On this hypothesis the appellants urge that the court below erred in not holding as a matter of law that Barger's negligence insulated the negligence of the appellants. Nothing else appearing, this contention would seem to merit serious consideration.

But more appears. On cross-examination, officer Teague in commenting further on his conversation with taxi-driver Barger went on to say: "He (Barger) did not say, 'I was in the intersection,' but said he was somewhere near the intersection. He did not point out one certain place." Also the record discloses that Patrolman Brown, testifying in respect to a conversation he had with Barger, said, in part, that Barger told him: "he was going over this dip and went down the dip to Second Avenue and that an oncoming car met him and blinded him and the next thing he knew something hit him and struck the car." Cross-examination: "Mr. Barger . . . told me . . . it was raining at the time and that he was driving 20 to 25 miles per hour. *He said he was suddenly blinded by lights of an oncoming car after he went into the dip. The next thing he remembered was something hitting him.*" (Italics added.)

It thus appears that there is plenary evidence to support the inference that Barger was in close proximity to the truck, rather than at or near the Fifth Street intersection, when blinded by the lights of the oncoming car and that the collision occurred while he was so blinded. It was for the jury, and not for the court, to resolve the discrepancies and dispose of the contradictions in the testimony. *Donlop v. Snyder*, 234 N.C. 627, 68 S.E. 2d 316; *Childress v. Lawrence*, 220 N.C. 195, 16 S.E. 2d 842.

We conclude that Judge Moore correctly overruled the appellants' motion for judgment as of nonsuit. The evidence adduced below clearly

made out a *prima facie* case of actionable negligence against the appellants and also against Barger on the theory of concurrent negligence.

Decision here is controlled by the principles illustrated and explained in these cases: *Caulder v. Gresham,* 224 N.C. 402, 30 S.E. 2d 312; *Smith v. R. R.,* 200 N.C. 177, 156 S.E. 508; *Glazener v. Transit Lines,* 196 N.C. 504, 146 S.E. 134. See also: *McClamrock v. Packing Co., post,* 648; *Price v. Monroe,* 234 N.C. 666, 68 S.E. 2d 283; *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690; *Hall v. Coble Dairies, supra* (234 N.C. 206); *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276; *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197; *Pascal v. Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637; *West v. Baking Co.,* 208 N.C. 526, 181 S.E. 551; 5 Am. Jur., Automobiles, Sec. 345; Annotations: 16 A.L.R. 465; 62 A.L.R. 1425.

Another assignment of error urged by the appellants relates to the refusal of the trial court to set aside the verdict on the ground that it is excessive. This motion was addressed to the discretion of the trial court. *Caulder v. Gresham, supra* (224 N.C. 402). The evidence below tends to show that the intestate was a strong, healthy girl of more than average ability. Her school teacher, Mrs. James Whitener, testified in part that she "was a very good student . . . She was an easy child to teach. She could catch on to things . . . She was respectful and obedient and took part in everything in the school room and on the playground. She was a very happy child and was one of the nicest girls I have ever taught. . . . I considered her above average." The ruling below will be sustained; no abuse of discretion has been made to appear. *Poniros v. Teer Co.,* 236 N.C. 145, 72 S.E. 2d 9; *Hawley v. Powell,* 222 N.C. 713, 24 S.E. 2d 523; *Pruitt v. Ray,* 230 N.C. 322, 52 S.E. 2d 876.

The remaining exceptions brought forward by the appellants relate to the reception of evidence and the charge of the court. They have been examined with care, but no error sufficient to justify a retrial is disclosed. *Simmons v. Highway Commission ante,* 532; *Scenic Stages v. Lowther,* 233 N.C. 555, 64 S.E. 2d 846; *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342.

The verdict and judgment will be upheld.

No error.

MRS. KIZZIE BAREFOOT GODWIN v. JOHNSON COTTON COMPANY.

(Filed 25 November, 1953.)

1. Trial § 22a—

On motion to nonsuit, plaintiff's evidence is to be considered in the light most favorable to her and she is entitled to every reasonable inference to be drawn therefrom.

2. Trial § 22b—

On motion to nonsuit, defendant's evidence which is favorable to plaintiff or which clarifies or explains plaintiff's evidence, will be considered.

3. Automobiles §§ 8i, 18h (2)—

The evidence favorable to plaintiff tended to show that she entered an intersection within a municipality at eight or ten miles an hour, that she saw a truck approaching the intersection from her right, but that since the truck was some 200 feet away at the time, she proceeded into the intersection, and that the truck, traveling at excessive speed, struck her right door after she had passed the center of the intersection. *Held:* Defendant's motion to nonsuit was properly denied.

4. Automobiles § 18i: Negligence § 20—

An instruction to the effect that contributory negligence is some act or omission of the plaintiff which constitutes the proximate cause of the injury, rather than a proximate cause or one of the proximate causes, must be held for prejudicial error.

5. Appeal and Error § 39f—

An erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated, since it cannot be determined that the jury was not influenced by the portion of the charge which is incorrect.

JOHNSON, J., dissenting.

DEVIN, C. J., concurs in dissent.

APPEAL by defendant from *Burgwyn, Special Judge,* June Term, 1953, of HARNETT.

Civil action to recover for personal injuries resulting from a collision between an automobile and a truck in a street intersection, due to the alleged negligence of the defendant.

The collision occurred about 10:00 a.m., on 27 September, 1952, at the intersection of East Pope Street and South Wilson Avenue in the Town of Dunn. There was no sign on either street to indicate the priority of traffic.

The plaintiff testified that she was operating a 1951 Tudor Chevrolet car in a westerly direction along East Pope Street and as she approached the intersection of said street with South Wilson Avenue, she was traveling at a speed of eight to ten miles an hour; that "she looked both ways

and saw a truck approaching the intersection from her right, about one-half block, or more, from the intersection . . . I saw the truck and knew I could make it, so I put the car in second gear and went on across the street—after I entered the intersection it looked like the truck speeded up." That when she saw the truck was going to hit her she tried to pull the Chevrolet automobile over (to the left); that the truck was traveling at a speed of twenty-five to thirty miles per hour when it struck the right door of the Chevrolet car. On cross-examination the plaintiff testified that when she drove up to the intersection the truck was about 200 feet from the intersection; that she was about four feet from the intersection when she first saw the truck; that she did not stop when she saw the truck but put her car in second gear and entered the intersection.

Lutrelle Williams, a witness for the plaintiff, testified: "I saw the car of Mrs. Godwin as it approached the intersection, I was about one-half block away when I first saw the car, and at the same time I saw the truck. At the time Mrs. Godwin's car approached the intersection the truck was between 175 and 200 feet from it. At the time Mrs. Godwin approached the intersection she was going from 5 to 8 miles an hour, and almost came to a complete stop about 4 feet from the intersection, and this truck come by where I was standing; it was kindly downhill, and he was going between 40 and 45 miles an hour, and she went on across, and when she got about half way across it looked like she speeded up a little, and the truck, when he got about 50 feet from her, he hit his brakes, and it just looked like he pulled right into her, and hit her and knocked her against a pole."

Vergie Goodman Norris, a witness for the defendant, testified that she was walking south on the west sidewalk of South Wilson Avenue, and was near the intersection of East Pope Street and South Wilson Avenue when the collision occurred. That she saw the plaintiff driving on East Pope Street, west, and saw that she would have to stop for the plaintiff to pass; that the truck coming from her back passed her when she was about fifteen feet from the intersection; that she heard the truck putting on brakes and slowing down; that the truck and the Chevrolet were both going between thirty-five and forty miles per hour. On cross-examination, this witness testified that she did not see the truck until it passed her, when she was about fifteen feet from the intersection; that the car was coming across Wilson Avenue when the truck passed her; that "in her opinion the car entered the intersection before the truck got there." Other evidence of the defendant is to the effect that the two vehicles entered the intersection at approximately the same time.

The evidence tends to show that the truck ran into the Chevrolet car when it was about the center of East Pope Street and west of the center of the intersection.

The jury answered the issues of negligence and contributory negligence in favor of the plaintiff and fixed her damages in a substantial sum. Judgment on the verdict was accordingly entered. The defendant appeals, assigning error.

J. R. Barefoot and Doffermyre & Stewart for appellee.
Salmon & Hooper and I. R. Williams for appellant.

DENNY, J. The defendant assigns as error the refusal of the court below to sustain its motion for judgment of nonsuit.

The plaintiff, as in all cases where a motion for judgment of nonsuit is interposed, is entitled to have her evidence considered in the light most favorable to her and to the benefit of every reasonable inference to be drawn therefrom. *Edwards v. Vaughn, ante,* 89, 76 S.E. 2d 359; *Morrisette v. Boone Co.,* 235 N.C. 162, 69 S.E. 2d 239; *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. Moreover, on such a motion, evidence offered by the defendant which is favorable to the plaintiff, or which may be used to clarify or explain the plaintiff's evidence, will be considered. *Ervin v. Mills Co.,* 233 N.C. 415, 64 S.E. 2d 431; *Gregory v. Insurance Co.,* 223 N.C. 124, 25 S.E. 2d 398, 147 A.L.R. 283; *Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598.

A careful consideration of the evidence presented in the trial below, when considered in the light most favorable to the plaintiff, leads to the conclusion that it was sufficient to warrant its submission to the jury. Consequently, the motion for judgment of nonsuit was properly denied.

The defendant's exception No. 7 is to the following portion of the charge to the jury: "Contributory negligence is such act or omission on the part of the plaintiff amounting to a want of ordinary care, concurring and cooperating with some act or omission on the part of the defendant as makes the act or omission of the plaintiff the proximate cause or occasion of the injury complained of. Proximate cause means the direct cause that produces the result without any cause supervening to bring about the injury. Negligence of the plaintiff and its proximate cause must concur and be proven by the defendant, by the greater weight of the evidence."

Prior to giving the above instruction to which the defendant excepts, the court gave a correct charge on contributory negligence. Later, however, it instructed the jury on the issue of contributory negligence as follows: ". . . if you find the truck driver was negligent, and that his negligence was the proximate cause of the injuries to Mrs. Godwin, and then you further find that she was negligent, and that her negligence combined and concurred with his negligence, and was the proximate cause of her injury, then you would answer the second issue YES."

It is clear that if the negligence of the defendant was the proximate cause of the plaintiff's injuries, and not merely a proximate cause or one of the proximate causes thereof, then the negligence of the plaintiff, if any, would not constitute contributory negligence. *Construction Co. v. R. R.*, 184 N.C. 179, 113 S.E. 672. On the other hand, if the negligence of the plaintiff was the proximate cause of her injuries, the idea of negligence on the part of the defendant would be excluded. *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137; *Absher v. Raleigh*, 211 N.C. 567, 190 S.E. 897; *Wright v. Grocery Co.*, 210 N.C. 462, 187 S.E. 564; *Newman v. Coach Co.*, 205 N.C. 26, 169 S.E. 808; *Lunsford v. Manufacturing Co.*, 196 N.C. 510, 146 S.E. 129.

In the case of *Scenic Stages v. Lowther*, 233 N.C. 555, 64 S.E. 2d 846, *Stacy, C. J.*, said: "We have consistently held that in actions like the present the plaintiff's contributory negligence, in order to bar recovery, need not be the sole proximate cause of the injury as this would exclude any idea of negligence on the part of the defendant. . . . It is enough if it contribute to the injury as a proximate cause, or one of them. . . . The very term 'contributory negligence' *ex vi termini* implies or presupposes negligence on the part of the defendant. . . . The plaintiff is barred from recovery, in an action like the present, when his negligence concurs and cooperates with the negligence of the defendant in proximately producing the injury. *Gordon v. Sprott*, 231 N.C. 472, 57 S.E. 2d 785; *Moore v. Boone*, 231 N.C. 494, 57 S.E. 2d 783."

In *Wright v. Grocery Co., supra, Devin, J.* (now *Chief Justice*), said: "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. To charge the jury that the burden was on the defendant to show that the plaintiff's negligence was the proximate cause of the injury would exclude the idea of the concurring negligence of both plaintiff and defendant proximately contributing to the injury."

The instruction complained of would seem to be susceptible to only one interpretation—that is, that before the jury could find the plaintiff guilty of contributory negligence, it would be necessary for it to find that the plaintiff's negligence was the proximate cause of her injury. Naturally, if the jury in arriving at its answer to the second issue considered this instruction, rather than that previously given thereon, it may have been influenced in arriving at such answer to the prejudice of the defendant. Moreover, an erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated. *S. v. Ellerbe*, 223 N.C. 770, 28 S.E. 2d 519; *S. v. Isley*, 221 N.C. 213, 19 S.E. 2d 875; *S. v. Floyd*, 220 N.C. 530, 17 S.E. 2d 658; *S. v. Starnes*, 220 N.C. 384, 17 S.E. 2d 346.

In *S. v. Floyd, supra,* in passing upon a question similar to that now under consideration, *Winborne, J.,* said: "We must assume in such case, in passing upon appropriate exception, that the jury, in coming to a verdict, was influenced by that portion of the charge which is incorrect."

Therefore, the defendant is entitled to a new trial, and it is so ordered.

New trial.

JOHNSON, J., dissenting: It may be conceded that there is technical inexactness in Judge Burgwyn's instruction that "contributory negligence is such act or omission on the part of the plaintiff amounting to a want of ordinary care, concurring and cooperating with some act or omission on the part of the defendant as makes the act or omission of the plaintiff *the* proximate cause . . . of the injury . . ." (Italics added.) The approved formula is: "a proximate cause" or "one of the proximate causes," rather than "the proximate cause."

However, it is not believed that this could have misled the jury or prejudiced the defendant in view of Judge Burgwyn's clear explanation of concurrent negligence as an essential element of contributory negligence, repeatedly emphasized throughout the charge.

This was a factually simple case, fully developed by the parties and clearly presented to the jury by Judge Burgwyn in all substantive phases. An examination of the charge as a whole leaves the impression that the jury understood fully the controlling principles of law and were not misled by the inexact expression relied on by the defendant. In order to be entitled to a new trial, the defendant has the burden of establishing not only that error was committed, but that such error was material and prejudicial, since verdicts and judgments are not to be set aside for mere error and no more. *Simmons v. Highway Commission, ante,* 532; *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Wilson v. Lumber Co.,* 186 N.C. 56. 118 S.E. 797.

I am constrained to the view that the verdict and judgment below should be upheld.

DEVIN, C. J., concurs in dissent.

JACK RIDER, RACHEL D. DAVIS AND BRAXTON NEWMAN, RESIDENTS AND TAXPAYERS OF LENOIR COUNTY, IN THEIR OWN INTEREST AND IN THE INTEREST OF ALL OTHER RESIDENTS AND TAXPAYERS OF LENOIR COUNTY WHO MAY MAKE THEMSELVES PARTIES TO THIS ACTION, v. LENOIR COUNTY; B. C. LANGSTON, W. L. MEASLEY, MARK N. SMITH, HARRY SUTTON AND IKE WHITFIELD, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF LENOIR COUNTY, THE LAST NAMED BEING CHAIRMAN OF SAID BOARD OF COUNTY COMMISSIONERS.

(Filed 25 November, 1953.)

1. **Injunctions § 12—Defendant restrained from doing act in manner it intended to pursue, cannot recover on injunction bond.**

Where, in a suit to enjoin the issuance of county bonds and to restrain the disbursement of county funds, it is held that the bond election was valid but that the proposed expenditure of a large amount for the project in excess of the amount stipulated in the bond order should not be allowed because contrary to representations contained in the bond order and because it would materially vary the project as approved by the voters and thus would constitute a breach of faith with the electorate of the county, and the temporary order is continued in effect to prevent further action except in accordance with the decision, *held* the original restraining order is not wrongful nor unlawful and defendants are not entitled to recover any amounts of plaintiffs or their surety on the injunction bond.

2. **Costs § 5—**

Ordinarily, attorneys' fees are not recoverable as a part of the costs except in the types of action enumerated by G.S. 6-21.

3. **Same: Taxation § 38a—Taxpayers may not recover attorney fees in their suit against county when no money is restored to public treasury.**

Where taxpayers are successful in their suit against a county to the extent of enjoining the expenditure of nontax funds by the county in addition to the amount stipulated in the bond order for the proposed project, but the entire proposed expenditure is for a public purpose and it appears that no part of the nontax funds had been expended and therefore no sum had been restored to the general fund of the county, *held*, while the costs of the action should be taxed against the county, plaintiffs are not entitled to recover expense money to the extent of reasonable attorneys' fees. This result is not affected by the fact that the delay caused by the suit enabled the county to let a new contract which effects a saving in the construction of the project.

APPEAL by defendants from *Nimocks, J.*, second February Term, 1953, LENOIR. Judgment signed at Fayetteville, N. C., 4 April 1953, *nunc pro tunc.*

Civil action to enjoin the issuance of hospital bonds and to restrain the disbursement of county funds.

This case was here on former appeal. *Rider v. Lenoir County*, 236 N.C. 620, 73 S.E. 2d 913. The essential facts relating to the primary matters at issue are there stated.

Upon the certification of the opinion filed on that appeal, plaintiffs appeared and moved the court that they be allowed a reasonable sum as expense money, especially expense incurred in employing counsel to prosecute this action, to be paid by defendant County out of the funds preserved to the taxpayers by this action. At the same term, defendants filed a motion for the assessment of damages against plaintiffs and their surety upon their injunction bond and for the appointment of a referee to hear the evidence and determine the amount of damages sustained.

These motions came on for hearing at the first February Term which convened 16 February 1953, and the hearing was continued to the second February Term which convened 23 February 1953. When the cause came on to be heard at the second February Term, it was agreed that the motions should be continued, to be heard in chambers at Fayetteville, 4 April 1953, at which time the court would rule on the motions made and sign the final judgment on the opinion certified from this Court.

When the cause came on to be heard in Fayetteville, the defendants tendered a proposed judgment in accord with their interpretation of the opinion of this Court. They also tendered an order reciting certain facts and adjudging that defendants are entitled to damages sustained by reason of the injunction wrongfully issued herein and ordering a reference on the question of damages. Refusal of the court to sign these orders is noted at the foot thereof, but no exception to the orders of refusal is made to appear.

The court having declined to sign the judgment tendered by defendants, entered judgment in accord with the opinion certified from this Court. The court therein found certain facts relating to the motions made which may be summerized as follows: (1) That because of the delay involved in this litigation, the County has been able to award a contract to provide the hospital facilities which saves the taxpayers of the County $133,286.20. (2) Plaintiffs, through this action, restored to the County $138,713.80 of the public funds and thus preserved and protected the taxpayers against the illegal expenditure thereof. (3) Plaintiffs, exclusive of attorney fees, have expended approximately $3,750 in the prosecution of this action. It concluded that in keeping with equitable principles, plaintiffs are entitled to have the County of Lenoir relieve them of the expenses of this litigation, to the extent of a reasonable amount, as compensation to the attorneys employed by plaintiffs, and that $4,500 constitutes a reasonable compensation to be paid said attorneys. It thereupon ordered that the defendant County "pay unto the plaintiffs for compensation to their attorneys employed in this case the sum of $4,500.00 from the amount of $138,713.80 which the defendants had invalidly appropriated and had invalidly contracted to expend." Costs were taxed against defendants.

The court also included in its decree a finding that the plaintiffs and their surety are not liable to defendants in any amount on the injunction bond herein filed and ordered that plaintiffs and their surety be discharged.

To the orders entered defendants excepted and appealed.

R. S. Langley, Matt H. Allen, and John G. Dawson for plaintiff appellees.

Chas. B. Aycock, R. W. Whitaker, and Thos. J. White for defendant appellants.

BARNHILL, J. Plaintiffs first filed an injunction bond in the sum of $200. Thereafter, in compliance with an order of the court, they filed bond in the sum of $15,000, with the National Surety Corporation as surety. This constituted a novation and served to discharge the original bond. So then, the first question posed for decision is this: Are the plaintiffs and their surety, the National Surety Corporation, liable in any amount to defendants by reason of the wrongful issuance of the temporary restraining order herein? We must answer in the negative.

It is true the plaintiffs, in seeking to prevent the execution of the proposed plan for providing additional hospital facilities, attacked the bond election and we held that the election was in all respects valid. Even so, the real objective of the action was to prevent the expenditure of $138,713.80 of County funds in furtherance of the hospital facilities project, in addition to the $465,000 the voters had been advised would be expended. We reversed the order vacating the restraining order. Thus the restraining order is still in full force and effect.

In this connection, the defendants have either overlooked or misconstrued the language used in the closing paragraph of our former opinion. We gave defendants an opportunity to elect to "(1) consider the feasibility of conforming the proposed project to the limits authorized by the voters, or (2) submit another or other proposals to the voters." We directed, however, that "Meanwhile, the temporary restraining order will be deemed and treated as in force and effect to the extent of staying disbursement of funds in furtherance of the proposed hospital enlargement project and preventing further action on the part of the defendants in furtherance of the construction project, except in conformity with this opinion." Thus we, in effect, made permanent the order restraining the defendants from any further action in furtherance of the original construction project. *Rider v. Lenoir County,* 236 N.C. 620, 73 S.E. 2d 113. In no sense was the original restraining order wrongful or unlawful. A correct interpretation of our opinion discloses that we so held. Therefore, defendants are not now in position to insist that they are entitled to

recover any amount of plaintiffs and their surety upon their injunction bond.

Plaintiffs make the somewhat novel contention that they should receive credit for the saving in the cost of construction arising out of the delay occasioned by this lawsuit. They say that during this delay economic conditions changed to the extent the defendant County was able to effect a saving of $133,286.20 when it relet the contract in accord with the opinion of this Court. They also assert—and the court below found as a fact—that the plaintiffs, by this action, have "restored" to the general fund $138,713.80, thus effecting a total saving to the taxpayers of the County of a total of $272,000. They do not seek to participate in this saving. They only request that they be allowed therefrom a sufficient amount to pay the attorneys employed by them.

The court below made an allowance of expense money, as requested by plaintiffs, to which the defendants excepted. Their assignment of error based on this exception raises this second question for decision: Are the plaintiffs entitled to an allowance out of the $138,713.80, the defendants proposed to expend on the original project, as expense money to be used to pay counsel employed to prosecute this action? This question must likewise be answered in the negative.

Counsel fees in favor of the successful litigant to be taxed as a part of the costs were abolished in this State in 1879. *Midgett v. Vann,* 158 N.C. 128, 73 S.E. 801; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578. Our present statute, G.S. 6-21, by implication, authorizes attorney fees in certain enumerated actions to be taxed as a part of the costs, to be paid out of the fund which is the subject matter of the action. Cases such as this are not included.

Where the proceeding is essentially *in rem* and the services inure to the benefit of those who have an interest in the property and the property is recovered or preserved by the action or proceeding, expense money is oftentimes allowed. Likewise, such allowance is made in certain equity cases prosecuted in behalf of a class, when the successful prosecution of the cause inures to the benefit of the members of the class. *Mordecai v. Devereux,* 74 N.C. 673; *Lightner v. Boone,* 222 N.C. 421, 23 S.E. 2d 313; Anno. 49 A.L.R. 1149, 107 A.L.R. 751.

But we are interested here only in the rule which applies when a taxpayer successfully prosecutes an action on behalf of all the taxpayers of a subordinate governmental unit to protect, preserve, or recover a fund belonging to the governmental unit. This subject is fully discussed by *Johnson, J.,* speaking for the Court, in *Horner v. Chamber of Commerce,* 236 N.C. 96, 72 S.E. 2d 21. For us now to review and reiterate what is there said would be a work of supererogation. We need only call attention to the rule there stated which prevails in this State in respect to the

allowance of expense money to cover the fees of counsel in an action instituted by a taxpayer or group of taxpayers for the benefit of all the taxpayers within the bounds of the municipality.

The rule as there stated comes to this: When, in an action instituted by a taxpayer to recover a fund which has been unlawfully or wrongfully expended by a municipality, it is made to appear that (1) the fund was in fact wrongfully expended, (2) the governing board of the municipality refused, on demand, to institute an action to recover the same, (3) as a result of which the taxpayer instituted his action to recover for the benefit of the citizens of the municipality, and (4) obtained judgment (5) which has been paid, in whole or in part, and the fund is thus restored to the public treasury, the court may allow plaintiff expense money to the extent of reasonable attorney fees, to be paid out of the fund so recovered.

In that case (*Horner v. Chamber of Commerce, supra*) this Court expressly limited the application of the rule to cases in which all these facts —especially the fact the money had been actually restored—are made to appear. *Fox v. Lantrip,* 185 S.W. 136; *Trust Co. v. Schneider, supra.*

The facts stated in the petition for an allowance of expense money in this case fail to meet the test prescribed by that rule. The defendant had the fund here involved in its general fund account when the bond order was adopted; the fund has never been expended; the proposed expenditure was for a public purpose; and, finally, no sum has been restored to the general fund of the county; nor has the public treasury been enriched by this action. Instead, the particular fund here involved has remained in the general fund throughout this litigation.

That the County, due to the delay caused by this action, has been able to let a contract which effects a saving of more than $100,000 is incidental. That was not the subject matter of the action, and the saving thus effected cannot form the basis for the allowance of expense money.

In this connection it is well to note that we did not sustain the order restraining the defendants from expending $138,713.80 on the proposed project on the ground the County was without authority to expend surplus nontax County funds in furtherance of the plan to provide additional hospital facilities. It was sustained for the reasons such expenditure (1) would be contrary to the representations contained in the bond order limiting the amount of county funds to be expended for that purpose; (2) would materially vary the project after the issuance of bonds in accord with the bond resolution had been authorized by the voters; and (3) would constitute a breach of faith with the electorate of the County. *Rider v. Lenoir County, supra.*

In our opinion the costs of the action should be taxed against the defendant County. To this extent the exception to the taxation of the costs is without merit and is overruled.

The other exceptive assignments of error are without sufficient merit to require discussion.

The court below erred in allowing plaintiffs expense money to the extent of reasonable attorney fees. Likewise, the costs should have been taxed against the defendant County. The judgment entered must be so modified. In all other respects said judgment is affirmed.

Modified and affirmed.

R. H. KELLY v. HARRISON WILLIS.

(Filed 25 November, 1953.)

1. Animals § 2—

A person who knowingly or negligently permits his livestock to roam at large in stock-law territory may be held liable in damages for injuries proximately sustained by reason of the fact that the animal was running loose. G.S. 68-23, G.S. 68-39.

2. Negligence § 19b (4)—

It is not necessary that negligence be established by direct evidence, but may be proved by circumstantial evidence.

3. Animals § 2—That owner knowingly or negligently permitted mule to run at large may be inferred from fact that it repeatedly ran loose.

Plaintiff's evidence tended to show that as his employee was driving on the highway at night at a lawful rate of speed, defendant's mule suddenly appeared out of the darkness from his right and walked or ran upon the highway some fifteen feet in front of plaintiff's vehicle, that the driver could not turn left because of a car traveling in the opposite direction, and struck the mule, causing damage to the vehicle. The evidence further tended to show that this was the fourth occasion within a fortnight during which the mule was found wandering loose. *Held:* The evidence is sufficient to support an inference that defendant knowingly or negligently permitted the mule to roam at large, and therefore defendant's motion to nonsuit should have been denied.

WINBORNE, J., dissenting.

BARNHILL and DENNY, JJ., concur in dissent.

APPEAL by plaintiff from *Stevens, J.*, at the June Term, 1953, of CARTERET.

Civil action to recover compensation for property damage sustained when plaintiff's truck hit and killed defendant's mule, which was running at large on a public highway at night.

The complaint alleges that the defendant knowingly or negligently allowed his mule to run at large on the highway, and thus proximately

caused the collision between the truck and the mule and the resultant damage to the truck. The answer denies legal culpability on the part of the defendant, pleads contributory negligence on the part of the driver of the truck, and states a counterclaim against the plaintiff for the alleged negligent slaying of the mule by the driver of the truck. The answer was not served upon the plaintiff or his attorney of record.

The plaintiff offered testimony at the trial ample to establish these facts:

1. State Highway 70, which connects Morehead City on the east and Newport on the west, traverses stock-law territory in a rural section of Carteret County lying outside any business or residential district.

2. The plaintiff owned a pick-up truck of less than one ton capacity, which was equipped with adequate brakes and sufficient headlights.

3. The defendant operated a farm, which was a half mile distant from State Highway 70 as the crow flies.

4. The defendant owned a black or brown mule, which virtually blended with the darkness when it wandered abroad at night.

5. At 11 o'clock on the night of 12 August, 1951, the plaintiff's stepson drove the pick-up truck westward along State Highway 70 at a speed of less than 40 miles an hour. The headlights of the truck were burning, and by reason thereof the plaintiff's stepson, who kept a constant lookout on the roadway to the front, was able to discern clearly any substantial object on the highway at a distance of 200 feet ahead.

6. At the same time the defendant's dark colored mule roamed at large in the darkness somewhere north of the highway.

7. As the plaintiff's westbound truck and an eastbound automobile were about to meet and pass each other on the highway, the mule suddenly emerged from the darkness north of the highway and trotted onto the highway and into the path of the plaintiff's oncoming truck, which was then only 15 feet away.

8. The plaintiff's stepson saw the mule just as it emerged from the darkness and entered the highway. He applied the brakes to the truck as soon as the mule came into view, but was unable to bring the truck to a stop before it struck and killed the mule. It was not feasible for him to avoid hitting the animal by turning onto his left side of the highway because of the presence of the eastbound automobile on that part of the roadway. As a result of its impact on the mule, the plaintiff's truck sustained material damage, which substantially diminished its market value.

9. The collision between the truck and the mule marked the fourth occasion within a fortnight on which the mule wandered unattended, uncontrolled, and unrestrained in proximity to the highway half a mile from its owner's farm.

When the plaintiff had produced his evidence and rested his case, the defendant submitted to a voluntary nonsuit on his counterclaim, and moved the court to dismiss the plaintiff's action on a compulsory nonsuit. The court allowed the motion, and rendered judgment accordingly. The plaintiff appealed, assigning the compulsory nonsuit as error.

C. R. Wheatly, Jr., for plaintiff, appellant.
Luther Hamilton and Luther Hamilton, Jr., for defendant, appellee.

ERVIN, J. The appeal is concerned solely with the propriety of the compulsory nonsuit.

The statute codified as G.S. 68-23 provides that "if any person shall allow his livestock to run at large within the limits of any county, township or district in which a stock law prevails or shall prevail pursuant to law, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days." This enactment is clearly applicable to this case because the events culminating in this litigation undoubtedly occurred in territory covered by the stock law. G.S. 68-39.

The statute under scrutiny expressly subjects the owner of livestock to criminal responsibility as a misdemeanant if he knowingly allows his livestock to run at large in stock-law territory. *S. v. Brigman,* 94 N.C. 888; *Sharp v. State,* 25 Ala. App. 491, 149 So. 355; 3 C.J.S., Animals, section 141. It impliedly subjects the owner of livestock to civil responsibility as a tort-feasor if he knowingly or negligently permits his livestock to roam at large in stock-law territory, and in that way proximately causes injury to the person or property of another. *Gardner v. Black,* 217 N.C. 573, 9 S.E. 2d 10. Moreover, the common law, acting independently of this or any other legislative enactment, imposes upon the owner of livestock civil responsibility as a tort-feasor if he knowingly or negligently suffers his livestock to be at large on a highway, and in that way proximately causes injury to the person or property of a user of the highway. *Bethune v. Bridges,* 228 N.C. 624, 46 S.E. 2d 711; *Gardner v. Black, supra; Lloyd v. Bowen,* 170 N.C. 216, 86 S.E. 797; *Rice v. Turner,* 191 Va. 601, 62 S.E. 2d 24; *Smith v. Whitlock,* 124 W. Va. 224, 19 S.E. 2d 617, 140 A.L.R. 737; 2 Am. Jur., Animals, section 60.

The plaintiff did not offer any direct evidence tending to show that the defendant knowingly or negligently allowed his mule to run at large on the highway. He was not required to do so. It was permissible for him to produce circumstantial evidence sufficient to establish this crucial fact. *Wyrick v. Ballard Co., Inc.,* 224 N.C. 301, 29 S.E. 2d 900; *Corum v. Tobacco Co.,* 205 N.C. 213, 171 S.E. 78; *Lynch v. Telephone Co.,* 204 N.C. 252, 167 S.E. 847.

According to the evidence, the collision between the plaintiff's truck and the defendant's mule marked the fourth occasion within a fortnight on which the mule wandered unattended, uncontrolled, and unrestrained in proximity to the highway half a mile from the defendant's farm. When this evidence is interpreted in the light most favorable to the plaintiff, it is ample to support the inference that the mule was at large on the highway at the moment of the collision simply because the defendant knowingly or negligently allowed it to be there. The other evidence is sufficient to sustain the additional inference that the wrongful act or the negligent omission of the defendant was the sole proximate cause of the collision and the resultant damage to the truck.

It necessarily follows that the entry of the compulsory nonsuit constituted error regardless of whether the court acted on the theory that the evidence was inadequate to show legal culpability on the part of the defendant or on the theory that the plaintiff's driver was contributorily negligent as a matter of law.

The facts in this case are unlike those in *Bethune v. Bridges, supra,* and *Gardner v. Black, supra,* where the offending animals did not run at large before the events producing the litigation.

The compulsory nonsuit is

Reversed.

WINBORNE, J., dissenting: I am unable to agree with the majority opinion on this appeal. Taking the evidence in the case in the light most favorable to plaintiff, and giving to him the benefit of every reasonable intendment and every reasonable inference to be drawn therefrom, and applying the rules of law laid down by this Court in the case of *Gardner v. Black,* 217 N.C. 573, 9 S.E. 2d 10 (one member now deceased dissenting), I am of opinion that the judgment of nonsuit entered in Superior Court was, and is proper.

The evidence offered by plaintiff, as shown in the record, as I read it, is as follows: A collision occurred about 11 o'clock on Sunday night, 12 August, 1951, between plaintiff's 1946 one-half ton Chevrolet pickup truck, operated with his permission by his 16-year-old step-son, Allen Howard Garner, and defendant's mule. It occurred on U. S. Highway No. 70, as the truck was traveling westwardly from Morehead City, N. C., toward Newport, N. C., in the vicinity of a place of business located on the north side of the highway, and known as the "Wagon Wheel."

Allen Howard Garner, as witness for plaintiff, testified: That the pickup truck was equipped with excellent or perfect lights, enabling him to see at least 200 feet down the highway; that the brakes were good,—in perfect condition; that he could drive well and safely; that the traffic was not heavy, and there were no vehicles within one-half mile of him except

those meeting him; that he could see almost as well in passing those vehicles as when not passing them; that his speed was under 40 miles per hour, whereas the speed limit was 55 miles per hour; that the mule, black or brown in color, stepped out on the highway ten or fifteen feet directly ahead of the truck, "all at once, walking fast or trotting" from the north or his right side; that he saw the mule "the minute he entered said highway,"—"when he first stepped upon the highway"; that he applied his brakes immediately at first seeing the mule; that he could not turn to the left because of an oncoming car; that as he started to slow down he hit the mule; that at that time he was actually on the paved portion of the road; that as result of the impact the accelerator or throttle of motor was jammed and brakes were damaged so that the vehicle could not be stopped immediately, and it moved approximately 150 feet; that the mule was caught up and thrown in the back of the vehicle; and "that the mule's stable was just a short while away."

Plaintiff, as witness for himself, testified, that his truck was in good condition, brakes recently relined, and lights good; that he talked with defendant on Tuesday following the accident, and he, defendant, stated that he had asked the colored fellow to keep him (the mule) shut up; and that in his plaintiff's opinion, while his truck was worth $700 before the accident, it had after the wreck value of only $100.

And Robert Edward Lee, last witness for plaintiff, testified: That defendant's farm is about one mile from his place of business, known as Wagon Wheel; that defendant keeps his livestock approximately one mile from Wagon Wheel, but by direct route it would be about one-half mile; that he was at the scene of the accident, and saw the mule; that he had recognized the mule because he had removed him from his okra patch; that he had seen the mule unattended in the vicinity of his place of business approximately three times in two weeks' period immediately prior to the accident, the first time in his okra patch, and two times thereafter; that this was the same mule, in his opinion, as the one struck by plaintiff's vehicle; that this mule was black or dark gray in color, and was the same mule that was on his place a day or so before; and that he believes it was the same mule.

And in *Gardner v. Black, supra,* it is said that the liability of the owner of animals for permitting them to escape upon public highways, in case they do damage to travelers or others lawfully thereon, rests upon the question whether the keeper is guilty of negligence in permitting them to escape; that in such case the same rule in regard to what is and what is not negligence obtains as ordinarily in other situations; that it is the legal duty of a person having charge of animals to exercise ordinary care and the foresight of a prudent person in keeping them in restraint; and that even though it be unlawful to permit livestock to run at large, the fact

that defendant's mules were running at large upon a public highway is not sufficient in and of itself to establish a *prima facie* case of negligence on the part of defendant, for the doctrine of *res ipsa loquitur* does not apply.

These principles are not challenged in the majority opinion.

And applying these principles to the case in hand, the evidence offered by plaintiff as set forth above fails to show, and it is not sufficient to justify and support reasonable inference, that the mule of defendant was at large with his knowledge and consent, or at his will, or that its being at large was due to any negligence on his part. The only evidence in regard thereto, other than the fact that the mule was at large, is the statement of plaintiff that defendant said "that he had asked the colored fellow to keep him (the mule) shut up." This statement negatives any suggestion that defendant negligently allowed or permitted the mule to be at large.

But, in any event, it is manifest from the evidence that the plaintiff's truck was not being operated with due care and caution. The physical facts that "the mule was caught up and thrown in the back of the vehicle," and the truck damaged to the extent plaintiff estimated, speak louder than the witness as to the manner in which the truck was being operated. These facts establish negligence on the part of the operator of the plaintiff's truck as a proximate and contributing cause. *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88.

Hence, I vote to affirm the judgment below.

BARNHILL and DENNY, JJ., concur in dissent.

G. M. LEWIS AND WIFE, LOUVENIA LEWIS, v. S. W. HARRIS AND WIFE, SALLIE S. HARRIS, AND BANNER LUMBER COMPANY, A CORPORATION.

(Filed 25 November, 1953.)

1. Courts § 2: Appeal and Error § 6c (1)—

Objection to want of jurisdiction in the court may be made at any time, and in fact, immediately want of jurisdiction is made apparent the court should take cognizance thereof and stop the proceedings *ex mero motu.*

2. Judges § 2b—

The power and authority given to emergency judges are to be exercised only in the court in which they are assigned to hold, and an emergency judge's jurisdiction to hear "in chambers" matters terminates with the termination of the court to which he is assigned. Constitution of N. C., Art. IV, sec. 11; G.S. 7-52.

3. Same: Judgments § 19: Courts § 2—

Hearing of an order to show cause why the temporary restraining order issued in the cause should not be continued to the hearing was made returnable at a term of court in another county of the district. The order came on for hearing before an emergency judge assigned to hold the term of court in such other county, and the parties agreed that his order might be entered out of term and out of the county. *Held:* The emergency judge had no jurisdiction to enter an order in the cause out of term and out of the county and such jurisdiction could not be conferred upon him by consent of the parties, and therefore his order so entered, dismissing the action, is a nullity.

4. Injunctions § 8—

Upon return of an order to show cause why the temporary restraining order issued in the cause should not be continued to the hearing, the action is before the court solely for the hearing on the order in the cause as constituted on the civil issue docket.

APPEAL by substituted plaintiff from *Grady, Emergency Judge,* at February Term, 1953, of PAMLICO, heard upon order to show cause why injunction restraining cutting of timber should not be continued to final hearing, and upon motion of substitute defendants to dismiss the action by reason of plaintiffs' unreasonable neglect and failure to prosecute same.

The record proper, as shown in the record on this appeal, may be summarized as follows:

1. Summons in this action, entitled as above set forth, was issued by the Clerk of Superior Court of Pamlico County on 2 April, 1907, returnable to April Term, 1907, at which term complaint was filed.

2. The complaint alleges the plaintiff Louvenia Lewis was the owner in fee simple and in possession of a certain specifically described tract of land in No. 1 Township, Pamlico County; that defendants unlawfully entered thereupon and cut and removed therefrom timber to plaintiffs' damage of $300; that defendants claim an interest in said land adverse to plaintiffs; and that defendants have "no solid interest in said lands." Wherefore plaintiff demands judgment in accordance therewith.

3. A second summons was issued 23 September, 1907, by the Clerk of said Superior Court for the individual defendants; and thereafter at April Term, 1910, they filed answer in which they deny that plaintiff Louvenia Lewis is the owner in fee of all the lands described in the complaint, and assert that they own in fee simple a portion of said lands; and further they deny the allegations as to wrongful entry and trespass.

4. Subsequently, three arbitrators were appointed, and on 27 September, 1915, one of them filed report setting out that in his opinion the title to the land in controversy was in plaintiffs, and thereafter on 13 April, 1916, a substituted arbitrator made an endorsement on, concurring in said report. And upon exception to the report, the same was set aside, at

October Term, 1916, and the arbitrators ordered to rehear, after notice as to the time and place, all evidence offered by the parties, and make their report at the next term of the court.

5. And at the Spring Term, 1917, it appearing to the court that the arbitrators had failed to file further report as ordered by the court, an order was entered by the presiding judge, by consent, that if said report be not filed by the time of setting of the calendar for the term of October, 1917, the said arbitration "shall (be) and the same is set aside, and the cause shall stand for trial at the next term" of the court.

6. No motion, or notice, or order appears in the cause between the order entered at Spring Term, 1917, and 14 January, 1953, when M. M. Banks suggested to the court: (a) The death of both original plaintiffs, and that he, himself, by *mesne* conveyances has become the owner of all their right, title and interest in the land described in the complaint, and moved that he be made a party plaintiff in this action, and (b) the death of both original individual defendants, leaving as their sole heirs at law Mack D. Harris, whose wife is named Laura Harris, and Olive Harris, who is now married to Graham Dixon, and moved that they be made parties defendant in this action, and that summons be served upon them as provided by law.

7. Pursuant thereto, the Clerk of Superior Court, finding the facts to be accordant with the suggestion so made entered an order on 3 February, 1953, that M. M. Banks be made a party plaintiff to this action in place and stead of the original plaintiffs, and that Mack D. Harris and wife Laura Harris, and Olive Harris Dixon and her husband, Graham Dixon, be substituted as parties defendant in place and stead of original individual defendants, and that they be allowed twenty days from date of the order within which to file their pleadings. Service of this order, and of the motion on which it was entered, as above set forth, was made on each of the newly named defendants on 7 February, 1953. And summons for them, dated 3 February, 1953, appears in the record.

And the substituted plaintiff filed a petition alleging trespass by the substituted defendants, and prayed that they, and their agents, employees and representatives be restrained from entering and trespassing upon the land described in the complaint.

Thereupon, on 4 February, 1953, Stevens, Resident Judge of Superior Court of Sixth Judicial District issued such temporary restraining order, and ordered that said defendants appear before him, or such other judge, as may be then and there presiding, at February Civil Term, 1953, of Superior Court of Pitt County, N. C., on 16 February, 1953, at 2:30 p.m., or as soon thereafter as they can be heard, to show cause, if any they have, why this order should not be continued until the final determination of this action,—the order being conditioned upon plaintiff, M. M. Banks,

executing and filing bond in the amount of $200, etc. The petition and this order were served on each of said defendants on 7 February, 1953, by sheriff of Pamlico County.

8. Thereafter, under date of 14 February, 1953, the substituted defendants, by and through their attorneys, purporting to enter special appearance solely for the purpose of making motion to dismiss the action, moved the court (1) That the temporary restraining order heretofore issued in the cause be dissolved and vacated and the action be dismissed; (2) that the order theretofore issued by the Clerk of Superior Court of Pamlico County on 3 February, 1953, purporting to substitute parties plaintiff and defendant in this action, be declared null and void and the same be set aside and vacated; (3) that the summons, complaint, answer and several motions and orders filed in the original action be read and considered in support of the motion to dismiss; and (4) that they recover their costs in this action.

9. The cause came on for hearing, and was heard before, and by the Honorable Henry A. Grady, an Emergency Judge, specially commissioned and assigned to hold, and holding the regular Civil February Term, 1953, of Superior Court of Pitt County, a one-week term commencing 16 February, 1953, at Greenville, North Carolina, upon (1) the order to show cause, and (2) the motion by substituted defendants to abate the action, as aforesaid. Thereafter on 14 March, 1953, at Pine Crest, North Carolina, Judge Grady entered an order "that the cause stand abated," and that "the same is dismissed at the cost of the substituted plaintiff" and his surety. And in this order it is stated that: "It was agreed by counsel that this order might be entered out of term and out of the county to have the same effect as if entered at term," citing *Shepard v. Leonard,* 223 N.C. 110.

The substituted plaintiff, M. M. Banks, excepted to this judgment, and appeals to Supreme Court and assigns error.

George B. Riddle, Jr., for substituted plaintiff, appellant.
Lee & Hancock for defendant, appellee.

WINBORNE, J. While the parties debate in this Court the question as to whether the judge below erred in his ruling that the action stand abated, and in dismissing the action, it is apparent upon the face of the record that this Court does not reach this question, for there looms at the threshold, of this appeal, another question: Did Grady, Emergency Judge, have jurisdiction to enter the order now being challenged? The answer is No.

The jurisdiction of an Emergency Judge over the subject matter of an action, or of a motion in the cause, depends upon the authority granted to

him by the Constitution and laws of the sovereignty, and is fundamental. McIntosh's N. C. P. & P. 7. *Stafford v. Gallops,* 123 N.C. 19, 31 S.E. 265. And objection to such jurisdiction may be made at any time during the progress of the action. This principle is enunciated and applied in a long line of decisions in this State. See *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136, where prior cases are listed, including *Burroughs v. McNeill,* 22 N.C. 297, and *Branch v. Houston,* 44 N.C. 85. See also *McCune v. Mfg. Co.,* 217 N.C. 351, 8 S.E. 2d 219; *Edwards v. McLawhorn,* 218 N.C. 543, 11 S.E. 2d 562; *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241; *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445; *Hopkins v. Barnhardt,* 223 N.C. 617, 27 S.E. 2d 644; *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617; *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559.

In *Burroughs v. McNeill, supra,* it is stated: "The instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action, and, if it does not, such action is, in law, a nullity."

And to like effect is *Branch v. Houston, supra,* where *Pearson, J.,* wrote: "If there be a defect, *e.g.,* a total want of jurisdiction apparent upon the face of the proceedings, the court will of its own motion, 'stay, quash, or dismiss' the suit. This is necessary to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment . . . So, *ex necessitate,* the court may, on plea, suggestion, motion, or *ex mero motu,* where the defect of jurisdiction is apparent, stop the proceedings."

These principles have been applied all through subsequent decisions, even to the present time.

What then is the jurisdiction granted to an Emergency Judge by the Constitution and laws of North Carolina? Article IV, Section 11, of the Constitution of North Carolina, as amended, pursuant to proposal submitted under Chapter 775 of 1949 Session Laws of North Carolina, and adopted at the General Election on 7 November, 1950, declares, in pertinent part, that: "The General Assembly may provide by general laws for the selection or appointment of special or emergency superior court judges not assigned to any judicial district, who may be designated from time to time by the *Chief Justice* to hold court in any district or districts within the State; and the General Assembly shall define their jurisdiction . . ."

And the General Assembly, implementing Article IV, Section 11, of the Constitution, as so amended, enacted Chapter 88 of 1951 Session Laws of North Carolina, in which G.S. 7-52 was rewritten to read, in pertinent part, as follows: "Jurisdiction of Emergency Judges: Emergency Superior Court Judges are hereby vested with the same power and authority in all matters whatsoever, in the courts in which they are assigned to hold,

that regular judges holding the same courts would have. An emergency judge duly assigned to hold the courts of a county or judicial district shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, which jurisdiction in chambers shall extend until the term is adjourned or the term expires by operation of law, whichever is later."

Thus it appears that the power and authority given to emergency judges are to be exercised only "in the courts in which they are assigned to hold," but that the jurisdiction of an emergency judge "in chambers" terminates with the termination of the term of court which he is assigned to hold.

In the light of these provisions, applied to case in hand, it is seen that this action was pending, and at issue on the civil issue docket of the Superior Court of Pamlico County, and the motion of substituted defendants was made in that cause—and not at term time. Such motion can be heard "at term," and only in that county. *Shepard v. Leonard, supra.* And Judge Grady had no commission to hold, and was not holding a term of court in Pamlico County when the motion was made and heard. Moreover, the order was made after the termination of the February Term, 1953, of Superior Court of Pitt County, and at Pine Crest, N. C., the home of Judge Grady in Craven County. Thus he had no jurisdiction over the motion, and could not acquire it by waiver or consent. *McCune v. Mfg. Co., supra.*

Indeed, the cause was before Judge Grady in Pitt County only because he as an Emergency Judge was assigned and commissioned to hold, and was holding the February Civil Term, 1953, of the Superior Court of that county.

It was before him for only one purpose, and that is for hearing on the order, and notice to substituted defendants, to show cause why the temporary injunction should not be continued to the final hearing. It was before him then only as the action was constituted on the civil issue docket of Pamlico County. And it does not appear that there was a ruling on this matter.

Too, it is appropriate to note that the case of *Shepard v. Leonard, supra,* cited as authority in support of jurisdiction, relates to jurisdiction of a special judge as it existed prior to the amendment to the Constitution as above set forth, and before later enactment of the General Assembly defining jurisdiction of emergency judges.

For reasons stated Judge Grady, as an Emergency Judge, was without jurisdiction to hear and pass upon the motion of the substituted defendants. Hence the order, abating the action, is a nullity, and is so held to be.

For reasons stated, the judgment from which the appeal is taken is

Reversed.

MRS. SARAH CROWELL McCLAMROCK v. WHITE PACKING COMPANY, A CORPORATION,

and

JOHN W. McCLAMROCK, JR., v. WHITE PACKING COMPANY, A CORPORATION.

(Filed 25 November, 1953.)

1. Negligence § 19c—

Since defendant has the burden of proof on the issue of contributory negligence, nonsuit for contributory negligence can be rendered only when but a single inference, leading to that conclusion, can be drawn from the evidence.

2. Automobiles §§ 8d, 18h (3)—

Whether a driver colliding with the rear of an unlighted vehicle stopped on the highway at night is guilty of contributory negligence barring recovery as a matter of law must be determined in each case upon consideration of the concurrent circumstances, such as fog, smoke, rain, glaring lights, color of vehicles and road surface.

3. Same—Whether plaintiff was guilty of contributory negligence in colliding with rear of unlighted vehicle on highway held for jury.

The evidence considered in the light most favorable to plaintiff tended to show that she was driving at night on an asphalt road at a lawful rate of speed, that a car traveling in the opposite direction had just pulled out of the ditch on her left side of the road so that its bright lights shown across the highway and directly on her car, that the driver of this car dimmed his lights and she in turn dimmed hers, and the cars passed in safety, but that some fifty feet after passing she struck the rear of a truck. The evidence further tended to show that the truck had stopped near the center of the highway, without lights or flares, to push a stalled car, which had its lights burning, and also that the rear of the truck and its load were of dark color. *Held:* Nonsuit on the ground of contributory negligence was improperly granted, since more than a single inference may be drawn from the evidence upon the issue.

APPEAL by plaintiffs from *Nettles, J.*, February Term, 1953, of ROWAN. Reversed.

Separate actions by Mrs. Sarah Crowell McClamrock and her husband John W. McClamrock, Jr., to recover damages for personal injury in the one case, and for medical and hospital expenses incurred by the husband in the other case, were consolidated for trial. It was alleged that the injuries complained of were caused by the negligence of the defendant in leaving standing on the highway an unlighted truck.

The plaintiffs offered evidence tending to show that 30 November, 1950, about 7:30 or 8:00 p.m., the defendant's truck operated by its employees in the scope of their employment had been stopped on the paved highway leading from Woodleaf to Salisbury for the purpose of pushing

or starting a stalled Chevrolet sedan. The headlights of the Chevrolet sedan were burning. This automobile and the defendant's truck immediately behind it were headed toward Salisbury and were about in the center of the highway. No lights were observed on the truck. A witness, Phil C. Hellard, driving a Studebaker automobile, approached from the direction of Salisbury. Hellard, to avoid the automobile and truck in the center of the highway, pulled off to his right into the ditch, and, after he had passed the stopped vehicles, turned to his left back onto the highway, with his bright lights burning, and then saw the lights of an approaching automobile (later ascertained to be that being driven by plaintiff Mrs. McClamrock), proceeding in the opposite direction. Hellard dimmed his lights and she dimmed hers as they passed some 50 feet from the truck. Hellard looked back after passing and saw her rear light flash and heard the noise as her automobile struck the rear of the truck. Hellard testified her lights blinded him, and he dimmed his and she dimmed hers. He said at that time he was less than 50 feet beyond the rear of the truck. "It (her automobile) was so close to me that her lights blinded me. That is why I called for her dims. . . . We were almost face to face there. We passed immediately. My lights were still on bright when I first saw that car. My lights were shining on her car. Her car was on her right side of the highway." This witness testified he went back to the scene of the collision and saw no rear light on the truck, nor were there reflectors on the rear of the truck or flares. A dark channel iron was used for a rear bumper. He also testified he first saw the light of plaintiffs' automobile when he turned back into the road 100 feet away, that he passed her 50 feet from the truck, and driving slowly had traveled 20 or 25 feet when he saw her brake lights come on just before the collision. The defendant's truck was dark in color and was loaded with stumps. The highway was paved with asphalt. It was alleged the left front bumper and left front fender of plaintiffs' automobile collided with the rear bumper and body of the truck, demolishing the front of plaintiffs' automobile. As result of the collision plaintiff Mrs. McClamrock sustained an injury to her brain which caused retrograde amnesia so that she was unable to remember anything that occurred after she left her home some minutes before the collision. She was seriously injured as result of the collision, and her husband was caused thereby to incur substantial expense for medical and hospital care.

At the close of plaintiffs' evidence the defendant's motion for judgment of nonsuit was allowed, and the plaintiffs appealed.

Linn & Shuford for plaintiffs, appellants.

Woodson & Woodson and Carpenter & Webb for defendant, appellee.

DEVIN, C. J. As the plaintiffs undoubtedly offered evidence tending to show that the defendant was negligent on this occasion, the judgment of nonsuit must be interpreted as having been based on the theory of the contributory negligence of the plaintiff Mrs. McClamrock.

The burden of proof upon the issue of contributory negligence is upon the defendant; hence it is the settled rule in this jurisdiction that judgment of nonsuit on this ground can be rendered only when a single inference, leading to that conclusion, can be drawn from the evidence. *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598.

It was said in *Moseley v. R. R.,* 197 N.C. 628 (635), 150 S.E. 184, "A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence and certain conduct of a plaintiff contributory negligence and take away the question of negligence and contributory negligence from the jury." As was pointed out by *Chief Justice Stacy* in *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251, the question of contributory negligence in cases growing out of rear-end collisions at night with unlighted trucks on the highway is frequently fraught with difficulty. The line of demarcation is not always easy to be drawn between those cases controlled by the doctrine announced in *Weston v. R. R.,* 194 N.C. 210, 139 S.E. 237, where the speed at which the plaintiff drives his automobile exceeds the radius of his lights, and those cases where unusual circumstances tend to affect the determination of the question of reasonable prudence as applied to the exigencies of the occasion, and to carry the case to the jury.

As illustrating the application of the rule in *Weston v. R. R., supra,* we note the following cases in which nonsuit on the ground of contributory negligence was upheld: *Morgan v. Cook,* 236 N.C. 477, 73 S.E. 2d 296; *Morris v. Transport Co.,* 235 N.C. 568, 70 S.E. 2d 845; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623; *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735; *Caulder v. Gresham,* 224 N.C. 402, 30 S.E. 2d 312; *Allen v. Bottling Co.,* 223 N.C. 118, 25 S.E. 2d 388; *Pike v. Seymour,* 222 N.C. 42, 21 S.E. 2d 884; *Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887; *Beck v. Hooks,* 218 N.C. 105, 10 S.E. 2d 608; *Lee v. R. R.,* 212 N.C. 340, 193 S.E. 395.

On the other hand there are numerous decisions of this Court where the evidence, tending to show some unusual or unexpected condition affecting the question of reasonable prudence on the part of the driver, has been held sufficient to present a case for the jury. Among those we note: *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793; *Cummins v. Fruit Co.,* 225 N.C. 625, 36 S.E. 2d 11; *Leonard v.*

Transfer Co., 218 N.C. 667, 12 S.E. 2d 729; *Clarke v. Martin*, 215 N.C. 405, 2 S.E. 2d 10; *Page v. McLamb*, 215 N.C. 789, 3 S.E. 2d 275; *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637; *Williams v. Express Lines*, 198 N.C. 193, 151 S.E. 197.

Without attempting to analyze and distinguish the reasons underlying the decisions in those cases which we have cited, they illustrate the fact that frequently the point of decision was affected by concurrent circumstances, such as fog, smoke, rain, glaring lights, color of vehicles and road surface in the night, and that these conditions must be taken into consideration in determining the questions of contributory negligence and proximate cause.

Where the factors of decisions are numerous and complicated it is difficult to draw a definite and satisfactory line of distinction. As was said by *Justice Seawell* in *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637, "Practically every case must stand on its own bottom."

It may be noted that the Legislature by Ch. 1145, Session Laws 1953, added to subsection (e), G.S. 20-141, a clause which provides that the failure to stop within the radius of the driver's lights should not be considered negligence *per se* but that the facts relating thereto should be considered with other facts in determining the negligence or contributory negligence of the driver. However, as this act was ratified 29 April, 1953, it does not affect the present action.

Did the plaintiff Mrs. McClamrock in the case at bar outrun her headlights, and must her failure to observe defendant's truck standing on the highway in time to avoid the collision be held to constitute contributory negligence on her part as a matter of law?

Here the testimony of plaintiffs' witness Hellard would seem to absolve Mrs. McClamrock of the imputation of excessive speed. The plaintiffs' evidence, considered in the light most favorable for them, tended to show that the bright lights of this witness' automobile as it moved in and out of the ditch and onto the highway shone across the highway and directly on the automobile of Mrs. McClamrock, and caused cross-signals for dimming lights to be exchanged, while these two automobiles were within a short distance of the defendant's unlighted truck standing in the center of the highway. While the headlights of the Chevrolet sedan in front of the truck were burning, these did not have the effect of outlining the rear of the unlighted truck two car lengths back toward which plaintiffs' automobile was being driven. Considering these circumstances as they were likely to affect her outlook for other objects in front of her, together with the concomitant circumstances of the dark color of the unlighted truck and the blackness of the pavement which blended with the shadows of the night, we think the question of Mrs. McClamrock's contributory negligence was a matter for the jury. Whether Mrs. McClamrock acted with

the care of a reasonably prudent person under the circumstances on this occasion involves consideration of evidence from which more than a single inference may be drawn, and hence must be left to the triers of the facts. In reaching this conclusion we have considered only the plaintiffs' evidence and in the light most favorable for them, as we must do on a motion of this nature. This evidence, we hold, is sufficient to survive the motion for nonsuit. On the trial the defendant's evidence may present a different picture.

The judgment allowing the motion to nonsuit and dismissing the action is

Reversed.

STATE v. SHELLY WILLIAMSON.

(Filed 25 November, 1953.)

1. **Concealed Weapons § 1—**

In order to be guilty of violating G.S. 14-269 the accused must be off his premises, carrying a deadly weapon, and the weapon must be concealed about his person.

2. **Concealed Weapons § 5—**

Testimony to the effect that defendant was off his premises in full view of persons near enough to him to see a weapon if it were not concealed, and that the pistol carried by defendant was hidden from their observation, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution under G.S. 14-269.

3. **Criminal Law § 81c (4)—**

Where concurrent equal sentences are imposed upon conviction on each of two warrants, consolidated for trial, error relating to one count only cannot be prejudicial.

4. **Criminal Law § 14—**

The bare statement by the trial court that the charges embraced in the warrants had been first tried in the recorder's court will not be held for error as prejudicing defendant by the former proceedings, G.S. 15-177.1, there being no intimation by the court as to what happened in the recorder's court and the jury being charged that they could not convict defendant on either charge unless they were satisfied beyond a reasonable doubt from the evidence produced before them that defendant was guilty of such charge.

5. **Criminal Law § 53i—**

Where the sole evidence as to the character of defendant is that elicited on cross-examination of the State's witnesses to the effect that so far as the witnesses knew defendant had not been previously accused of a like offense and had not had "any trouble," *held* there is no evidence of the

general character of defendant in the community and the trial court properly omits any charge as to the effect of character evidence as substantive evidence and as corroborative of defendant's testimony. G.S. 1-180.

6. Criminal Law § 53f—

The charge in this case *held* to have stressed the contentions of the State and of the defendant equally and was not subject to exception on the ground that it violated G.S. 1-180.

APPEAL by defendant from *Burney, J.*, and a jury, at February Term, 1953, of FRANKLIN.

Consolidated criminal prosecutions upon warrants charging the accused with carrying a concealed weapon and assaulting the prosecutor with such weapon.

These prosecutions had their origin in the Recorder's Court of Franklin County, where the accused Shelly Williamson was tried, convicted, and sentenced on two separate warrants. The first warrant alleged that the accused willfully and intentionally carried a deadly weapon, to wit, a pistol, concealed about his person when off his own premises contrary to the statute codified as G.S. 14-269, and the second warrant charged that the accused unlawfully assaulted the prosecutor L. J. Peoples with such pistol by intentionally pointing it at him in violation of the statute embodied in G.S. 14-34. The accused appealed from the judgments of the Recorder's Court to the Superior Court of Franklin County, where the prosecutions were tried anew before Judge John J. Burney and a jury upon the original warrants, which were consolidated for trial.

The evidence of the State on the trial in the Superior Court gives this version of the occurrence resulting in these prosecutions:

The prosecutor leased a mule to the landlord of the accused, an agricultural tenant. On the occasion named in the warrants, the accused was driving the mule along a public highway at a rather rapid gait. The mule was drawing a tobacco slide on which the accused was riding. The prosecutor and a companion, who were proceeding along the highway in the former's automobile, overtook the accused. The prosecutor stopped his automobile, and remonstrated with the accused for driving the mule so rapidly. The accused became angry, dismounted from the slide, and stood in the highway in full view of the prosecutor and his companion, who were near enough to see any weapon carried by the accused if it were not hidden, and who did not observe any weapon on or about the accused's person. After taking his stand in the highway, the accused "pulled" a pistol "out from some place about his person," aimed it at the prosecutor, called him "all kinds of bad names," and threatened to shoot him. The prosecutor ceased his remonstrance at this point. The accused thereupon terminated his threat.

The accused offered evidence on the trial in the Superior Court tending to show that he was not armed with a pistol on the occasion named in the warrants, and that he merely put his hand in an empty hip pocket to deter the prosecutor from making an unprovoked assault upon him.

The jury found the accused guilty upon both charges, and the trial judge sentenced him to imprisonment as a misdemeanant for six months upon each charge. The trial judge specified, however, that the two sentences should run concurrently.

The defendant excepted and appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

Taylor & Mitchell for defendant, appellant.

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

1. The trial judge erred in refusing the motion of the accused for a compulsory nonsuit on the charge of carrying a concealed weapon.

2. The trial judge erred in his charge by giving the jury this information: "The defendant is being tried upon two warrants first tried in the Recorder's Court of Franklin County."

3. The trial judge erred in his charge by failing to instruct the jury as to the law governing the effect which the petit jurors may give to evidence of the previous good character of an accused in a criminal action.

4. The trial judge erred in his charge by unduly emphasizing the contentions of the State.

We consider the assignments of error in the order in which they are stated.

The essential elements of the statutory crime of carrying a deadly weapon are these: (1) The accused must be off his own premises; (2) he must carry a deadly weapon; (3) the weapon must be concealed about his person. G.S. 14-269; *S. v. Sauls*, 199 N.C. 193, 154 S.E. 28. Counsel for the defense concede with commendable candor that the State's evidence is sufficient to establish that the defendant carried a deadly weapon, *i.e.*, a pistol, about his person when off his own premises. They stressfully contend, however, that all of the State's evidence indicates that the pistol was not concealed at any time, and that the charge of carrying a concealed weapon ought to have been involuntarily nonsuited in the court below on that ground. We are unable to agree. The State's evidence is to the effect that the pistol was hidden from the observation of persons who were in full view of the defendant and near enough to him to see it if it were not concealed. This evidence warrants the inference that the pistol was concealed. 68 C.J., Weapons, section 27.

The defendant would not be advantaged in any practical way on the present record by the refusal of the trial judge to nonsuit the charge of carrying a concealed weapon even if he could sustain his contention that the State's evidence does not support that charge. The sentences on the two charges are concurrent and equal, and the sufficiency of the State's evidence to support the charge of assault is neither questioned nor questionable. *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871.

The statute now incorporated in G.S. 15-177.1 provides that "in all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and *de novo* by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced." *S. v. Meadows,* 234 N.C. 657, 68 S.E. 2d 406. The defendant asserts that the trial judge substantially impaired his statutory right to have the charges against him tried anew and *de novo* in the Superior Court without prejudice from the former proceedings of the recorder's court by informing the jury that the defendant was "being tried upon two warrants first tried in the Recorder's Court of Franklin County."

It would have been well had the trial judge refrained from any reference to any proceeding of the recorder's court. We are nevertheless at a loss to comprehend how the defendant could have suffered any harm from the naked statement of the trial judge that the charges embraced in the warrants had been first tried in the recorder's court. The jury was given no inkling of what happened in the recorder's court. Moreover, the trial judge instructed the petit jurors in most understandable words that the defendant was presumed to be innocent of both charges, and that they could not convict the defendant of either charge unless they were satisfied beyond a reasonable doubt from the evidence produced before them that he was guilty of such charge.

Where the accused in a criminal action testifies as a witness in his own behalf and also produces evidence tending to show that his general character in the community in which he resides or is known is good, he is entitled to have the petit jury consider the evidence relating to his general character for whatever it is worth both as corroborative evidence tending to confirm his credibility as a witness and as substantive evidence tending to prove his innocence on the issue of guilt or innocence. *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867; *S. v. Moore,* 185 N.C. 637, 116 S.E. 161.

The trial judge did not err in his charge by failing to explain this rule of law to the jury. The only testimony at the trial bearing any possible relationship to the character of the defendant was that elicited by his counsel on the cross-examination of the State's witnesses Bullock, Dement, and Joyner. Bullock deposed "I took him to be a nice boy"; Dement

stated "as far as I know, he doesn't have a record or reputation of carrying a gun or pistol"; and Joyner testified "so far as I know he does not have any record for carrying a gun or having any trouble." These bits of testimony were not equivalent to evidence of the general character of the defendant in the community in which he resided or was known. *S. v. Pearson,* 181 N.C. 588, 107 S.E. 305; *S. v. Laxton,* 76 N.C. 216. Since there was no evidence at the trial tending to show the general character of the defendant, it would have been inappropriate for the trial judge to have instructed the jury in respect to the rule of law under present scrutiny. "The court is not required to instruct on academic propositions of law which have no substantial relation to the case." *S. v. Durham,* 201 N.C. 724, 161 S.E. 398.

The ancient statute embodied in G.S. 1-180 was amended by Chapter 107 of the 1949 Session Laws so as to require the trial judge to give equal stress to the contentions of the State and the accused in his charge to the petit jury in a criminal action. The defendant insists that the trial judge in the instant case offended this statutory requirement by unduly emphasizing the contentions of the prosecution.

This criticism is not merited. When the charge is read as a whole, it is manifest that the able and experienced trial judge stated the evidence accurately, stressed the contentions of the parties equally, and declared and explained the law correctly.

For the reasons given, there is in law

No error.

STATE v. NELLIE MAY FERGUSON, PRINGLER FERGUSON, AND JAMES K. ALEXANDER.

(Filed 25 November, 1953.)

1. Searches and Seizures § 1—

Where enforcement officers, upon stopping a car in a routine check of drivers' licenses, see nontax-paid whiskey in the automobile, they thereupon have absolute personal knowledge that there is intoxicating liquor in such vehicle which dispenses with the necessity of a search warrant, G.S. 18-6, G.S. 15-27, and evidence obtained by the search is competent.

2. Intoxicating Liquor § 9d—

Evidence disclosing that nontax-paid intoxicating liquor was found unconcealed on the floor-board back of the front seat of the automobile is sufficient to be submitted to the jury as to the guilt of the driver and of the passenger in the car in whose name the vehicle was registered, but as to other passengers of the car it is insufficient in the absence of any evidence of joint possession or control over the car or the liquor.

STATE *v.* FERGUSON.

APPEAL by defendants from *Pless, J.*, and a jury, at 11 May Criminal Term, 1953, of MECKLENBURG.

Criminal prosecutions commenced by three separate warrants issued out of the County Recorder's Court charging that each of the three defendants did unlawfully "buy, possess, possess for the purpose of sale, retail and transport intoxicating liquors in violation of the Laws . . ." From convictions and judgments in the Recorder's Court, the defendants appealed to the Superior Court where upon consolidation of the cases for the purpose of trial they were tried *de novo*.

The State's evidence discloses that at about 8:15 o'clock p.m. on 22 March, 1953, two enforcement officers of the Mecklenburg County ABC Board stopped a Packard sedan near the Drive-in Theater on the Statesville-Charlotte highway. When the car stopped, the officers walked back to it and, looking in, saw on the floor-board back of the front seat a cardboard box containing 12 half-gallon fruit jars of white whiskey, upon which there were no revenue stamps of the State or Federal Government. The car was being operated by the defendant James K. Alexander. Side of him on the front seat was the defendant Pringler Ferguson. On the back seat were one Frank Gaston on the left and the defendant Nellie May Ferguson on the right. The whiskey was between Nellie Ferguson's feet, and the car was registered in her name.

These are the pertinent excerpts from the testimony of officer Moody: "We often stopped cars. We stopped him for a routine check-up of his driver's license. . . . I shined my flashlight in Alexander's face, and identified myself, and told him to pull over to the side of the road. . . . Officer Lowe examined Alexander's driver's license. . . . I walked back and looked in the car. . . . The right hand car door was opened, the one that Nellie May Ferguson was sitting beside. I saw the cardboard box and its contents in the floor-board of the . . . Packard sedan that was occupied by these three defendants, . . . This was a large 7-passenger Packard sedan with four or five feet of space between the seats. . . . I examined the contents of this . . . box and found therein 12 fruit jars containing nontax-paid white whiskey."

The defendants offered no evidence.

It was admitted by the State that its evidence was obtained without a search warrant. And the record discloses that after the jury was impaneled the defendants moved the court to suppress the State's evidence upon the ground it was incompetent and inadmissible for having been obtained without a search warrant. The court reserved its ruling, proceeded to hear the evidence, and at the close of the evidence denied the motion. To this ruling the defendants excepted.

The jury returned a verdict of guilty as charged as to each defendant, and from the judgments pronounced, all of them appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and Robert L. Emanuel, Member of Staff, for the State.

P. H. Bell and Charles V. Bell for the defendants, appellants.

JOHNSON, J. The defendants' first exception challenges the refusal of the court to grant their motion to suppress the evidence because it was obtained without a search warrant. The exception is untenable.

G.S. 18-6 provides, in so far as is material here: ". . . that nothing in this section shall be construed to authorize any officer to search any automobile or other vehicle or baggage of any person without a search warrant duly issued, *except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage.*" (Italics added.)

The uncontradicted evidence here is that officer Moody stopped the car to make a routine check of the operator's driver's license. Following this, the officer saw and had absolute personal knowledge that there was intoxicating liquor in the automobile. This, by virtue of the express language of the statute, G.S. 18-6, dispensed with the necessity of a search warrant.

We have not overlooked the provisions of Chapter 644, Session Laws of 1951, now codified as a proviso to G.S. 15-27. The pertinent part of this statute is as follows: ". . . Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, *made under conditions requiring the issuance of a search warrant,* shall be competent as evidence in the trial of any action." (Italics added.)

It thus appears that this statute, G.S. 15-27, by its express terms contemplates situations in which a search warrant is not necessary to conduct a legal search. Such a situation is presented by the express provisions of G.S. 18-6 where, as here, "the officer sees or has absolute personal knowledge" that there is intoxicating liquor in an automobile under investigation.

It necessarily follows that the defendants' exception based on refusal of the court to suppress the evidence must be overruled. Decision here reached is supported by *S. v. Harper,* 236 N.C. 371, 72 S.E. 2d 871, and cases there cited.

The defendants' remaining exception challenges the sufficiency of the evidence to carry the case to the jury over the defendants' separate motions for judgment as of nonsuit.

As to the defendant James K. Alexander, the driver, and the defendant Nellie May Ferguson, who owned the automobile, the exception is untenable under application of the principles explained and applied in this line of decisions: *S. v. Harper, supra; S. v. Elliott,* 232 N.C. 377, 61 S.E. 2d 93; *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600. See also: *S. v. Brown, ante,* 260, 77 S.E. 2d 627; *S. v. Gibbs, ante,* 258, 77 S.E. 2d 779;

S. v. Welch, 232 N.C. 77, 59 S.E. 2d 199; *S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804; *S. v. Epps,* 213 N.C. 709, 197 S.E. 580; *S. v. Norris,* 206 N.C. 191, 173 S.E. 14.

However, we are constrained to the view that the evidence does not make out a *prima facie* case against Pringler Ferguson. The evidence is silent in respect to when, where, or under what circumstances Pringler Ferguson entered the car. Nothing is shown respecting his or her relationship or association with the other occupants of the car—it does not even appear whether Pringler Ferguson is male or female. On this record he or she was a mere passenger in the automobile. That is not enough. To hold a mere passenger, knowledge of the presence in the automobile of contraband whiskey is insufficient. *S. v. Meyers, supra* (190 N.C. 239). See also *S. v. Ham, ante,* 94, 76 S.E. 2d 346. The evidence must be sufficient to support an inference of some form of control, joint or otherwise, over the automobile or the liquor. *S. v. Meyers, supra;* 48 C.J.S., Intoxicating Liquors, Sections 222 (b), 281, 346 and 376. There is no evidence that Pringler Ferguson had any control whatsoever over either the liquor or the automobile. The evidence does not support the hypothesis of joint possession of the liquor. See *S. v. Lee,* 164 N.C. 533, 80 S.E. 405.

The results, then, are:

As to the defendant Pringler Ferguson: Reversed.

As to the other defendants: No error.

MARY DELL SIDBURY SKIPPER AND HUSBAND, N. R. SKIPPER; K. C. SIDBURY, ELIJAH B. WILLIAMS AND WINSTON WILLIAMS, AND OTHERS, THE HEIRS AT LAW OF THE LATE ELIJAH B. WILLIAMS, PETITIONERS, v. E. L. YOW AND WIFE, MRS. E. L. YOW.

(Filed 25 November, 1953.)

1. Ejectment § 17—

Where plaintiffs claim through collateral heirs of the common ancestor but fail to introduce evidence that such ancestor died intestate or that he left no lineal descendants, there is a fatal *hiatus* in plaintiffs' proof, and nonsuit is proper.

2. Evidence § 43a—

Recitals contained in a deed in fee simple, as that grantor was unmarried, are mere self-serving declarations and are not evidence.

3. Ejectment § 17—

Ordinarily, plaintiff must fit the description contained in the deeds under which he claims to the land claimed by evidence *dehors* the deeds, since rarely, if ever, does a deed prove itself.

SKIPPER *v.* YOW.

APPEAL by plaintiffs from *Grady, Emergency Judge,* June Special Term, 1953, ONSLOW. Affirmed.

Plaintiffs filed a petition for partition in which they allege that they and the defendant E. L. Yow and certain other parties own, as tenants in common, a certain tract of beach land in Onslow County which adjoins the Gray-Hardison tract owned by defendant E. L. Yow. The land claimed is described by metes and bounds and contains 356 acres, more or less. In their petition they do not allege the interest owned by the individual plaintiffs. They merely allege that plaintiffs as a group own a $^{17}/_{48}$ undivided interest.

Defendants filed an answer in which they deny that plaintiffs are seized and possessed of any interest whatsoever in the land described in the petition and allege further that defendant E. L. Yow is the sole owner thereof.

The plea of sole seizin having been interposed by defendants, the cause was transferred to the civil issue docket for the trial of the issue thus raised. The *feme* defendant is joined as a party defendant by reason of her dower initiate, and so the real party in interest—E. L. Yow—will hereafter be referred to as the defendant.

When the cause came on for trial in the court below, plaintiffs offered in evidence certain registered deeds of conveyance to show title in them and in defendants, stemming from a common source. The initial motion for judgment of nonsuit was overruled. Thereupon, defendant offered the deeds which he contends constitute his record chain of title. He likewise undertook to identify the land in controversy as the identical land described in his deeds, or at least one of them, and to prove actual possession of the land by him and his predecessors in title over a long period of time.

The Federal Government had possession for an undisclosed number of years. Plaintiffs made no claim against the Government. Defendant, on the other hand, offered evidence tending to show that he and his predecessors in title collected rent therefor, paid the taxes thereon, and when the Government abandoned the property, defendant purchased the buildings and other structures erected thereon by the Government.

At the conclusion of the testimony, the court, on motion of defendant, entered judgment dismissing the action as in case of involuntary nonsuit. Plaintiffs excepted and appealed.

James & James, Nere E. Day, Jr., and Nere E. Day for plaintiff appellants.

Poisson, Campbell & Marshall, John J. Burney, Jr., Albert J. Ellis, and A. Turner Shaw for defendant appellees.

BARNHILL, J. It is difficult for us to determine whether the deeds offered in evidence by plaintiff convey or attempt to convey the same tracts of land, much less that they convey the identical tract described in the petition. One conveys twenty-five acres, another, 150 acres; another, 250 acres, and still another, 300 acres.

Plaintiffs' Exhibit 1 is a deed from M. L. F. Redd (who is apparently the alleged common source). It is dated 19 March 1870 and conveys to Elijah Williams one-half of his right, title, and interest in the land he (Redd) purchased from John A. Averitt, Sr. It also recites certain bounds and corners. On 1 March 1877, John B. Williams conveyed to Lewis Marine "All my right, title and interest which I, the said John B. Williams, has or may have in and to the several undivided tracts of land among the respective heirs at law of the late Elijah Williams died seized and possessed of in said county." The descriptions contained in other deeds are equally general in nature. There was no evidence that the land conveyed to Marine or any other tract described in the several deeds offered by plaintiffs is the land now claimed by them.

But we may concede, without deciding, that all of the deeds offered by plaintiffs convey one and the same tract of land or some part or interest in the same, and that they form a connected chain of title to the land Averitt conveyed to Redd and Redd conveyed to Elijah Williams. Even then, there is a fatal *hiatus* in plaintiffs' proof.

In the first place, plaintiffs claim through collateral heirs of Elijah Williams. If there is any evidence in the record that he died intestate or that he left no lineal descendants, it has escaped our attention. In the absence of such evidence, the plaintiffs have failed to show title through said Williams even though it be conceded that those who executed the deeds upon which plaintiffs rely are in fact his collateral heirs. *Murphy v. Smith*, 235 N.C. 455, 70 S.E. 2d 697.

That Williams never married is recited in one or more of the deeds. But this is not evidence. It is nothing more than a self-serving declaration. Recitals contained in a trustee's or mortgagee's foreclosure deed are by statute made *prima facie* evidence of the truth thereof. We know of no rule, however, that gives the effect of evidence to the recitals in a fee simple deed.

In an ejectment action a plaintiff must offer evidence which fits the description contained in his deeds to the land claimed. That is, he must show that the very deeds upon which he relies convey, or the descriptions therein contained embrace within their bounds, the identical land in controversy. If one or more of his deeds convey less than the whole, he must show that the land conveyed thereby lies within the bounds, and forms a part, of the *locus in quo*. As to the identity of the land conveyed, a deed seldom, if ever, proves itself. Fitting the description contained

in the deed to the land in controversy, or *vice versa,* must be effected by evidence *dehors* the record. *Smith v. Fite,* 92 N.C. 319; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Linder v. Horne,* 237 N.C. 129, 74 S.E. 2d 227; *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889.

"The office of description is to furnish, and is sufficient when it does furnish means of identifying the land intended to be conveyed . . . 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." *Winborne, J.,* in *Linder v. Horne, supra.*

This rule, which prevails in this jurisdiction, is aptly stated in the headnotes to *Smith v. Fite, supra,* as follows: "1. Where a party introduces a deed in evidence, which he intends to use as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession. 2. It is error to allow a jury on no evidence, or on only hypothetical evidence, to locate the land described in a deed."

The wisdom of this rule is emphasized by this case. The description contained in the deed from Williams to Marine above quoted indicates that Elijah Williams died seized and possessed of several tracts of land. Is the land in controversy one of these tracts or are they several contiguous tracts which together compose the land now claimed by plaintiffs? The record fails to answer. The descriptions contained in some of the deeds call for Swash Creek as a boundary; others (including the description contained in the complaint) do not. Thus the record title itself demonstrates the need for oral evidence to identify the land claimed as the land conveyed, if that can be done. Neither this Court nor a jury can say with any degree of certainty that there is any relation between the land claimed and the land conveyed in the deeds relied upon by plaintiffs.

In our opinion the court below correctly ruled that the plaintiffs had failed to make out a case for the jury. Therefore the judgment of nonsuit entered must be

Affirmed.

B. D. STONE v. CAROLINA COACH COMPANY.

(Filed 25 November, 1953.)

1. Pleadings §§ 15, 31—

While a plaintiff may not demur to specific paragraphs of an answer, he may demur to a further defense as a whole, and may also move to strike the specific paragraphs in which such defense is pleaded.

2. Same—

A demurrer or a motion to strike admits for its purpose the truth of the allegations challenged, and raises questions of law which must be determined upon the pleadings without hearing evidence or finding facts *dehors* the record.

3. Same: Judgments § 32—Judgment in favor of employee in action against third person held to bar such third person's action against employer.

The driver of a bus sued the owner and operator of a truck for personal injuries sustained when the bus collided with the truck. The truck owner pleaded contributory negligence and set up a counterclaim for alleged negligence of the bus driver. A consent judgment was entered under which the bus driver recovered a stipulated sum. Thereafter the truck owner instituted suit against the bus company to recover damages to his truck occasioned by the same collision. *Held:* The bus company could be held liable solely under the doctrine of *respondeat superior*, and therefore the judgment releasing the bus driver from further liability is a bar to recovery by the truck owner against the bus company. The truck owner's demurrer and motion to strike the allegations of the bus company's answer setting up the prior judgment as a defense should not have been allowed.

4. Judgment § 25—

A consent judgment regular upon its face, entered by a court of competent jurisdiction, may not be collaterally attacked by demurrer to a further defense setting up the judgment as a bar, or by motion to strike the paragraphs of the answer in which the defense of the judgment is pleaded.

APPEAL by defendant from *Burney, J.*, May Term, 1953, WAKE. Reversed.

Civil action to recover compensation for damages to personal property, heard on demurrer and motion to strike defendant's "Third Further Answer and Defense."

On 19 July 1952, at about 9:30 p.m., plaintiff was operating his truck on U. S. Highway 1, traveling from Pittsboro to Raleigh. His truck was loaded with cedar posts. When he reached a point within four or five miles of Raleigh, the posts began to "tumble off" the truck and were strewn along the highway. Defendant's passenger bus, operated by one Parker, approached from the rear, ran over the poles, and so injured the driver that he lost control of his vehicle, and the bus collided with the rear end of plaintiff's truck, causing considerable damage thereto.

Thereafter, Parker, operator of defendant's bus, instituted an action in Wake County against the plaintiff herein to recover compensation for personal injuries sustained as a result of said collision. In that case the defendant—the plaintiff in this cause—pleaded the contributory negligence of Parker. He also pleaded a counterclaim bottomed on the identical acts of negligence here alleged. A consent judgment was entered therein under which the plaintiff, Parker, was paid a stipulated sum in compensation for his injuries, and his insurance carrier was paid an

additional sum. This plaintiff's counsel in that case signed their names at the foot of the judgment as evidence of Stone's consent. This action was then pending in the same court.

Defendant herein, in an amendment to its answer, pleads said judgment in bar of plaintiff's right to recover herein. Plaintiff, in his reply, attacks the validity of the Parker judgment. He also demurred to defendant's said third further answer and moves to strike paragraphs 14, 15, and 16 which constitute all of the further defense except the prayer for relief.

At a pretrial hearing the court below found certain facts concerning the Parker judgment and concluded that it "does not meet the requirement or condition of openness and avowedness necessary to be adjudged conclusive against the plaintiff"; that plaintiff has not had his day in court, and said judgment does not constitute a bar or estoppel to plaintiff's right to recover in this action. He thereupon entered judgment sustaining the demurrer and striking paragraphs 14, 15, and 16 of the further answer. Defendant excepted and appealed.

R. Mayne Albright for plaintiff appellee.
Smith, Leach, Anderson & Dorsett for defendant appellant.

BARNHILL, J. While a plaintiff may not demur to specific paragraphs of an answer, he may demur to a further defense as a whole. *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555; *Cody v. Hovey,* 216 N.C. 391, 5 S.E. 2d 165. Likewise he may move to strike specific paragraphs in the answer. Here the plaintiff took no chances. He demurred to the further defense and also moved to strike the specific paragraphs in which that defense is pleaded.

A demurrer or motion to strike admits, for the purpose of the hearing thereon, the truth of the allegations so challenged. When the demurrer or motion is, as here, directed to the sufficiency of a pleaded defense, the one question presented to the judge for decision is as to whether the facts alleged constitute a valid defense, in whole or in part, to plaintiff's cause of action. The judge is not permitted to hear evidence or find facts *dehors* the record. He must accept the facts as alleged and bottom his answer thereon.

This defendant was the employer of Parker, who was about his master's business at the time of the collision. It is liable to plaintiff, if at all, under the doctrine of *respondeat superior.* A judgment which constitutes a release of Parker from further liability to plaintiff likewise releases this defendant, for it is legally liable only for damages proximately resulting from his negligence. *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570; *Whitehurst v. Elks,* 212 N.C. 97, 192 S.E. 850.

The pleaded judgment is regular upon its face. It was entered by a court of competent jurisdiction in a case in which this plaintiff was the defendant, and want of jurisdiction of the person is not suggested. So long as it remains of record, it constitutes a complete bar to plaintiff's right to recover in this cause. *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; *Herring v. Coach Co.*, 234 N.C. 51, 65 S.E. 2d 505.

It cannot be collaterally attacked as here attempted. *Powell v. Turpin*, 224 N.C. 67, 29 S.E. 2d 26; *Williams v. Trammell*, 230 N.C. 575, 55 S.E. 2d 81; *Hall v. Shippers Express*, 234 N.C. 38, 65 S.E. 2d 333; *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709. If plaintiff wishes to proceed further in this cause, he must first have the Parker judgment vacated by independent action or motion in the cause, as he may be advised. It is not proper for us at this time to express an opinion as to which is the appropriate remedy.

The court below erred in finding facts on which, in part at least, it based its judgment. It likewise erred in sustaining the demurrer and motion to strike. Therefore, the judgment entered in the court below must be

Reversed.

THOMAS PRESTON SMITH v. J. R. GRUBB, LAND O'LAKES CREAMERIES, INC., AND DELMA SMITH,

and

PROPST CONSTRUCTION CO., INC., v. J. R. GRUBB, LAND O'LAKES CREAMERIES, INC., AND DELMA SMITH.

(Filed 25 November, 1953.)

1. Negligence § 7—

The test to determine whether the original negligence is insulated by the intervening act of a responsible third person is whether the original negligence had become passive and had ceased to be capable of causing any injury by any intervening act which could have been reasonably foreseen.

2. Automobiles §§ 8d, 14, 18d, 18h (4)—Evidence held to disclose intervening negligence insulating primary negligence as matter of law.

The evidence tended to show that a car was stopped on the highway, that the driver of plaintiff's car, traveling in the same direction, slowed to a virtual stop some fifteen feet back of this car while giving the appropriate hand signal, and that as he did so the driver of a third car, traveling in the same direction, crashed into the rear of his car. *Held:* Any negligence of the driver of the car which had stopped on the highway was insulated by the intervening negligence of the car which crashed into the rear of plaintiff's car, and the original tort-feasor's motion to nonsuit on the ground of insulating negligence is properly allowed.

JOHNSON, J., dissents.

SMITH *v.* GRUBB and CONSTRUCTION CO. *v.* GRUBB.

APPEAL by plaintiffs from *Nettles, J.*, June Term, 1953, of CABARRUS. Affirmed.

Actions by Thomas Preston Smith to recover damages for a personal injury and by Propst Construction Company to recover damages for injury to its truck, both resulting from the same collision of automobiles, were consolidated for trial. It was alleged that the injuries complained of were caused by the concurring negligence of all the defendants.

It appeared that 6 September, 1951, about noon, while plaintiff Construction Company's pickup truck was being driven northwardly by plaintiff Thomas Preston Smith along the highway near Smithfield, North Carolina, it became involved in a collision which the plaintiffs in their complaints have described as follows:

"That as plaintiff's truck was in the vicinity of the Neuse River bridge the driver observed a 1949 Oldsmobile automobile being operated by defendant J. R. Grubb stopped or parked on the pavement on the right or eastern half of the highway headed in a northern direction; that the driver of plaintiff's said vehicle, while giving proper hand signal therefor, began slowing his speed and came to a virtual stop approximately 15 feet to the rear of the Grubb car, when suddenly and without warning plaintiff's truck was struck violently from the rear by a 1950 Chevrolet automobile owned by defendant Delma Smith and driven by Shelton Lee Smith; that the impact rendered the driver of plaintiff's vehicle unable to control the pickup truck and it was knocked forward into the Grubb automobile and then to the left; that plaintiff's truck was then struck with great force by a 1951 Chrysler automobile owned and operated by defendant John C. Dryden which was proceeding at an excessive rate of speed in a southern direction."

Defendants Grubb and Creameries, Inc., denied the allegations of negligence, and further alleged that if they were in anywise negligent, such negligence was insulated by the intervening negligence of Shelton Lee Smith, who was driving the automobile of Delma Smith as his agent.

Plaintiffs also included John C. Dryden as party defendant as one whose negligence contributed to their injuries, but subsequently took a voluntary nonsuit as to Dryden.

On the trial the demurrers *ore tenus* of Grubb and Creameries, Inc., were overruled. The jury returned verdict for plaintiffs against Delma Smith and found on Delma Smith's counterclaim or cross-action that Delma Smith's automobile was not damaged by the negligence of the plaintiffs.

After hearing all the evidence the trial judge sustained the motion of defendants Grubb and Creameries, Inc., for judgment of nonsuit and dismissed the action as to them.

Plaintiffs appealed.

John Hugh Williams and Ruark, Ruark & Moore for plaintiffs, appellants.

Hartsell & Hartsell and William L. Mills, Jr., for defendants, appellees.

DEVIN, C. J. From an examination of the allegations of the two complaints, which in this respect are identical, wherein the plaintiffs have stated the facts constituting their causes of action against the defendants Grubb and Creameries, Inc., we think it affirmatively appears that the negligence of these defendants, if any, was insulated by the active negligence of Delma Smith, and that the demurrers *ore tenus* should have been sustained, and further that on plaintiffs' evidence, which was substantially in accord with the allegations, judgment of involuntary nonsuit was properly entered.

As *Chief Justice Stacy* observed in *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808, "The application of the doctrine of insulating negligence of one by the subsequent intervention of the active negligence of another, as a matter of law, is usually fraught with some knottiness. However, the principle is a wholesome one, and must be applied in proper instances." *Gas Co. v. Montgomery Ward & Co.,* 231 N.C. 270 (275), 56 S.E. 2d 689.

"The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Butner v. Spease, supra.* "The new, independent, efficient intervening cause must begin to operate subsequent to the original act of negligence and continue to operate until the instant of injury." *Hinnant v. R. R.,* 202 N.C. 489 (494), 163 S.E. 555.

"The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected." *Balcum v. Johnson,* 177 N.C. 213, 98 S.E. 532.

In the case at bar it is apparent that the negligence of Grubb would have produced no injury to the plaintiffs but for the subsequent active negligence of Delma Smith's driver. The plaintiffs' driver had seen the Grubb automobile where it was stopped on the highway, and had driven slowly and stopped 15 feet away. The negligence of Grubb had become passive and had ceased to be capable of causing any injury to the plaintiffs which could reasonably have been foreseen. No injury would have resulted to the plaintiffs but for the subsequent intervening negligence of a third person who carelessly drove into the rear of plaintiffs' truck. The

intervening acts of Delma Smith's driver acted as a nonconductor and insulated the negligence of Grubb.

This principle, inherent in the law of negligence and proximate cause, has been upheld in numerous decisions of this Court, among which we cite. *Hooks v. Hudson,* 237 N.C. 695, 75 S.E. 2d 758; *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111; *Hollifield v. Everhart,* 237 N.C. 313, 74 S.E. 2d 706; *Godwin v. Nixon,* 236 N.C. 632, 74 S.E. 2d 24; *McLaney v. Motor Freight, Inc.,* 236 N.C. 714, 74 S.E. 2d 36; *Clark v. Lambreth,* 235 N.C. 578, 70 S.E. 2d 828; *Gas Co. v. Montgomery Ward & Co., supra; Warner v. Lazarus,* 229 N.C. 27, 47 S.E. 2d 496; *Butner v. Spease, supra; Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; *Harton v. Tel. Co.,* 146 N.C. 429, 59 S.E. 1022. This principle, however, is not applicable where the facts alleged and shown are sufficient to justify the view that the several acts of negligence on the part of different defendants concurred in contributing to the injury complained of. *Karpf v. Adams,* 237 N.C. 106, 74 S.E. 2d 325; *Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32; *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63; *Price v. City of Monroe,* 234 N.C. 666, 68 S.E. 2d 283; *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690; *Cunningham v. Haynes,* 214 N.C. 456, 199 S.E. 627; *Smith v. Sink,* 210 N.C. 815, 188 S.E. 631.

We think a correct result has been reached.

Judgment affirmed.

JOHNSON, J., dissents.

ROSS T. SIMREL v. ROY MEELER.

(Filed 25 November, 1953.)

1. Automobiles §§ 14, 18h (2), 18h (3)—

Evidence favorable to plaintiff tending to show that both plaintiff's and defendant's cars were traveling in the same direction at nighttime, each with front and tail lights burning, that defendant's car, following plaintiff's car, and traveling at a much faster speed, crashed into the rear of plaintiff's car and that defendant immediately admitted that he did not see plaintiff's car before his vehicle struck it, *is held* to support the trial court's refusal to nonsuit plaintiff's cause, either on the issue of negligence or contributory negligence.

2. Damages § 11—

While the measure of damages for a tortious injury to personal property is the difference in the market value of the property immediately before and immediately after the injury, evidence of the cost of repairs made

necessary by the injury is competent to shed light upon the question of the difference in market value.

3. Automobiles § 18a: Pleadings § 22c—

Where the facts alleged in the complaint are sufficient to imply by a fair and reasonable intendment that defendant failed to keep a proper lookout, the court has the discretionary power even after judgment to permit plaintiff to amend to allege specifically such failure. Further, the court has the authority to allow such amendment even if the original complaint does not allege by necessary implication defendant's failure to keep a proper lookout. G.S. 1-163.

APPEAL by defendant from *Crisp, Special Judge,* and a jury, at May Term, 1953, of GASTON.

Civil action to recover damages for injury to the plaintiff's automobile which was struck in the rear by the defendant's automobile when both vehicles were traveling in the same direction.

The collision occurred about 1:30 a.m. on 10 May, 1952, upon State Highway 74 in Gaston County. Both sides offered evidence at the trial.

These issues arose on the pleadings and were submitted to the jury:

1. Was the plaintiff's automobile damaged as a result of the negligence of the defendant, as alleged in the complaint?

2. If so, did the plaintiff, through his negligence, contribute to such damages?

3. What amount of damages, if any, is the plaintiff entitled to recover of the defendant?

4. Was the defendant's automobile damaged by the negligence of the plaintiff, as alleged in the counterclaim and answer?

5. What amount of damages, if any, is the defendant entitled to recover of the plaintiff?

The jury answered the first issue "Yes," the second issue "No," and the third issue "$300.00." It left the fourth and fifth issues unanswered. The trial judge awarded the plaintiff judgment against the defendant for $300.00 and costs, and the defendant excepted and appealed.

Mullen, Holland & Cooke for plaintiff, appellee.

Basil L. Whitener for defendant, appellant.

ERVIN, J. The assignments of error raise these questions of law:

1. Did the trial judge err in refusing to dismiss the plaintiff's action upon a compulsory nonsuit after all the evidence on both sides was in?

2. Did the trial judge err in permitting the plaintiff to testify that he expended $300.00 to repair the damage done to his automobile in the collision?

3. Did the trial judge err in permitting the plaintiff to amend his complaint after all the evidence on both sides was in so as to allege in explicit terms that the defendant failed to keep a reasonably careful lookout?

We consider these questions in their numerical order.

There was sharp conflict in the testimony offered by the parties at the trial. We omit reference to the evidence adduced by the defendant because it is not necessary to an understanding of the questions arising on the appeal.

The plaintiff's evidence made out this case:

The night was fair, and the roadway was dry. The plaintiff and the defendant drove their respective automobiles westward along the highway, which was virtually straight for a distance of 250 yards to the east of the place of collision. The plaintiff's automobile, which was the forward vehicle, was being driven at the rate of 15 miles an hour, and the defendants' automobile, which was the following vehicle, was being operated at the speed of 50 miles an hour. Both automobiles displayed burning head and tail lights. Nothing whatever obstructed the defendant's view of the plaintiff's automobile as the rapidly moving following vehicle neared and overtook the slowly moving forward vehicle. Yet the defendant drove his automobile into the lighted rear end of the plaintiff's automobile, causing substantial damage to both vehicles. The defendant immediately admitted that he did not see the plaintiff's automobile before his vehicle struck it.

This evidence is ample to support conclusions that the defendant was guilty of negligence proximately causing the collision and that the plaintiff was not contributorily negligent. This being true, the trial judge rightly refused to nonsuit the plaintiff's claim. *Beaman v. Duncan*, 228 N.C. 600, 46 S.E. 2d 707; *Hobbs v. Mann*, 199 N.C. 532, 155 S.E. 163; *McCoy v. Fleming*, 153 Kan. 780, 113 P. 2d 1074; *Sutherland v. McGee*, 329 Mass. 530, 109 N.E. 2d 175; *Jennings v. Bragden*, 289 Mass. 595, 194 N.E. 697; *Eickhoff v. Beard-Laney, Inc.*, 199 S.C. 500, 20 S.E. 2d 153, 141 A.L.R. 1010; *Lasater Lumber Co. v. Harding*, 28 Tenn. App. 296, 189 S.W. 2d 583; *Kinsey v. Brugh*, 157 Va. 407, 161 S.E. 41; *Clausen v. Jones*, 191 Wash. 334, 71 P. 2d 362.

The plaintiff gave evidence concerning the market value of his automobile before and after the collision. It was competent for him to testify additionally that he expended a specified sum to repair the damage sustained by his vehicle in the collision. Although the measure of damages for a tortious injury to personal property is the difference in the market value of the property immediately before and immediately after the injury, the cost of the repairs necessitated by the injury may be shown in evidence. This is so because the law is realistic enough to recognize

that the cost of the necessary repairs has a logical tendency to shed light upon the question of the difference in market value. *Guaranty Co. v. Motor Express,* 220 N.C. 721, 18 S.E. 2d 166; *Farrall v. Garage Co.,* 179 N.C. 389, 102 S.E. 617; *Kohnle v. Carey,* 80 Ohio App. 23, 67 N.E. 2d 98.

The plaintiff avowed from the beginning of the trial that the defendant was negligent in that he failed to keep a reasonably careful lookout. After all the evidence on both sides was in, the defendant asserted for the first time that the complaint did not charge him with negligence in that respect. The plaintiff moved at this point for leave to amend his complaint so as to allege in explicit terms "that the defendant . . . failed to keep a proper lookout," and the trial judge thereupon entered this order: "The court in its discretion will permit the plaintiff to amend the pleadings so as to more fully set forth the allegation that the defendant was not keeping a proper lookout." The plaintiff amended his complaint accordingly subsequent to the entry of the judgment.

The original complaint is not deficient in the respect asserted by the defendant. To be sure, it does not specifically say that the defendant failed to keep a reasonably careful lookout. But it does state in express terms facts conforming to the plaintiff's evidence and showing exactly how the plaintiff claims the collision happened, and the fact that the defendant failed to keep a reasonably careful lookout can be implied by fair and reasonable intendment from the facts expressly stated. *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620.

The legal position of the defendant would not be improved a single jot or tittle if the original complaint did not allege by necessary implication that the defendant failed to keep a reasonably careful lookout. The deficiency in the original complaint would be corrected in such case by the proceeding had under the order allowing the amendment, which finds full sanction in this statutory provision: "The judge . . . may, before and after judgment, in furtherance of justice, . . . amend any pleading . . . when the amendment does not change substantially the claim or defense, by conforming the pleading . . . to the fact proved." G.S. 1-163; *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276.

The appellant had not shown legal error. As a consequence, the trial and judgment must be upheld.

No error.

STATE v. HUGH J. SLOAN.

(Filed 25 November, 1953.)

1. **Criminal Law § 14—**

It is not necessary for the transcript of the proceedings in an inferior court to show that the judgment entered in such court was signed by the judge.

2. **Criminal Law § 60a—**

It is not essential to the validity of a judgment that it make reference to the trial or the crime of which the defendant was convicted.

3. **Criminal Law § 56—**

Where the record shows that defendant was tried in a city court of competent jurisdiction upon a warrant charging a criminal offense returnable before the judge of that court, and that defendant was tried on the warrant, found guilty and judgment duly pronounced on the verdict, there is no fatal defect appearing on the face of the record, and defendant's motion in arrest of judgment on the ground that the record fails to show on its face that a trial was actually had before the judge of the city court and the transcript failed to show that the judgment was signed by the judge, is without merit.

4. **Criminal Law § 78c—**

In the absence of any exceptions in the record, the appeal will be taken as an exception to the judgment, and when the judgment is within the statutory limits and is predicated upon a verdict sufficient to support it, the appeal must fail.

APPEAL by defendant from *Burney, J.*, June Term, 1953, of WAKE.

It appears from the transcript of the record proper, there being no case on appeal, that a warrant was duly issued by the Clerk of the City Court of Raleigh, North Carolina, on 10 March, 1953, charging the defendant, Hugh J. Sloan, with driving an automobile on the public highways of Raleigh Township and on the public streets of the City of Raleigh, to wit: Wilmington and South Streets, while under the influence of intoxicating liquor. The record further discloses that the defendant was arrested on the same day the warrant was issued; that he was tried in the City Court of Raleigh on 1 April, 1953, adjudged guilty and ordered to pay a fine of $100.00 and costs, and to surrender his driver's license for revocation for a period of one year. Notice of appeal was given and bond fixed in the sum of $150.00.

Thereafter, on 15 April, 1953, the transcript of the proceedings in the City Court of Raleigh was received in the office of the Clerk of the Superior Court of Wake County and the case docketed for trial at the May Term, 1953. At the May Term the case was continued until the June Term, 1953, at which time the defendant was tried *de novo* on the warrant issued in the court below.

The jury returned a verdict of guilty and the court imposed on the defendant a fine of $100.00 and costs. The defendant appeals, assigning error.

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

Charles L. Abernethy, Jr., for appellant.

DENNY, J. The defendant moves in this Court in arrest of judgment on the ground that the transcript of the record from the City Court of Raleigh filed in the Superior Court does not show on its face that a trial was actually had before the Judge of the City Court who was qualified and empowered to hear the case and pronounce judgment therein. And upon the further ground that the judgment as shown in the transcript was not signed by the Judge of the City Court, and did not state therein the offense of which the defendant was convicted.

The City Court of Raleigh is a court of competent jurisdiction to try such offenses as that charged against the defendant. Moreover, the transcript shows that the warrant was duly issued; that it was returnable before the Judge of the City Court of Raleigh; that the defendant was arrested pursuant thereto; that the warrant charged a criminal offense; that the defendant was tried thereon, found guilty and judgment duly pronounced on the verdict; that the defendant gave notice of appeal from the judgment and perfected his appeal in the Superior Court of Wake County by causing the case to be docketed therein for trial. This gave the Superior Court jurisdiction and the right to proceed to trial on the original warrant. *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283; *S. v. Shine,* 222 N.C. 237, 22 S.E. 2d 447; *S. v. Turner,* 220 N.C. 437, 17 S.E. 2d 501; *S. v. Samia,* 218 N.C. 307, 10 S.E. 2d 916.

It is not necessary for a transcript of the proceedings in an inferior court to show that the judgment entered in such court was signed by the trial judge. *Cf. S. v. Doughtie, ante,* 228, 77 S.E. 2d 642; *S. v. Shemwell,* 180 N.C. 718, 104 S.E. 885; *S. v. Cale,* 150 N.C. 805, 63 S.E. 958.

Moreover, it is not essential to the validity of a judgment that it makes reference to the trial or the crime of which the defendant was convicted. *S. v. Edney,* 202 N.C. 706, 164 S.E. 23; *S. v. Taylor,* 194 N.C. 738, 140 S.E. 728. Furthermore, the defendant in the trial below did not challenge the validity of the proceedings in the City Court of Raleigh or the sufficiency of the transcript to perfect his appeal therefrom to the Superior Court. Therefore, since there is no fatal defect appearing on the face of the record, the motion in arrest of judgment is without merit.

The defendant entered no exceptions in the trial below. Consequently, the appeal cannot present anything more than an exception to the judg-

ment. *Gibson v. Insurance Co.*, 232 N.C. 712, 62 S.E. 2d 320. The judgment is within the statutory limitations prescribed in such cases and is predicated upon a verdict sufficient to support it, *Lea v. Bridgeman*, 228 N.C. 565, 46 S.E. 2d 555; and since the record contains neither the evidence adduced in the trial below nor the charge of the court, it will be presumed that no error occurred in the course of the trial.

No error.

STATE v. COLEY SATTERWHITE.

(Filed 25 November, 1953.)

Assault § 14b: Criminal Law § 53d—

Where defendant introduces evidence supporting his contention that he was not the aggressor, that he shot his assailant as his assailant was advancing on him with an open knife making an effort to cut him, and that defendant had no way of retreat and shot his assailant only to save himself from great bodily harm, defendant is entitled to have the court submit the question of self-defense to the jury, and an instruction that defendant had attempted to offer evidence of self-defense which was insufficient for that purpose as a matter of law, must be held for reversible error.

APPEAL by the defendant from *Whitmire, Special J.*, August Regular Criminal Term 1953. MECKLENBURG. New trial.

This is a criminal action in which the defendant was tried on a bill of indictment charging him with a felonious assault with intent to kill with a deadly weapon, to wit, a pistol, on Cecil Ingram causing serious injury not resulting in death. The jury found the defendant guilty.

From judgment imposed the defendant appeals assigning error.

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

Welling & Welling for defendant, appellant.

PARKER, J. The evidence for the State tended to show that Cecil Ingram, the defendant, and some other Negroes were playing "skin"; that the defendant accused Ingram of taking $10.00 of his money from the table; that Ingram denied taking it; that the defendant cursed Ingram, and shot him with a pistol, the bullet going through his body; that Ingram had no weapon.

The defendant's evidence tended to show these facts. While they were playing "skin," the defendant shuffled the cards, and placed the deck on the table. Ingram had four cards, and picked up the deck to draw. The

defendant had $16.00 on the table—a ten and six ones. Ingram picked up the ten, put it in his pocket, and then ran his hand in his pocket, opened his knife, and began quarreling with the defendant. The defendant said "let's give him the ten." Ingram said to another player "George, you believe I got the ten?" When George replied "I see'd you when you got it," Ingram cussed him. Ingram said "I ain't got the ten dollars." George replied "give the man his ten dollar bill." Ingram said "look under the seat." Jim, another player, looked, the money was not there, and told Ingram "he got his ten dollar bill." Ingram had his knife open coming on the defendant, and the defendant shot him; he didn't try to kill him, but he didn't want Ingram to cut him with his knife. The defendant had no way to get out. On cross-examination the defendant said he shot Ingram once; that Ingram was about four feet from him when he shot. In reply to questions by the court the defendant testified Ingram was coming on him with his knife open; he saw the blade; that Ingram "went to make an effort to cut me with it, but I shot him." The court asked the defendant "he cussed, but he didn't threaten to cut you?" The defendant answered "Oh, yes, he was going to cut me, he said he didn't have my ten dollars, he cussed then, he was coming on me, and I was scared of that knife."

The defendant assigned as error No. One this part of the court's charge: "The defendant has attempted to offer evidence of self-defense which, in the opinion of the court, is not sufficient as a matter of law to constitute self-defense."

The surrounding facts and circumstances, as shown by the defendant's evidence, tend to show that the defendant acted on the defensive, and not as an aggressive participant; that he did not shoot the defendant willingly, that is, in the sense of its being voluntarily and without lawful excuse; that he had done nothing to bring on the difficulty, and only shot Ingram when he was advancing on him with an open knife making an effort to cut him; that Ingram was only four feet away; that the defendant had no way to get out; that the defendant shot Ingram only once because he didn't want to be cut with the knife.

Under our cases the defendant was entitled to have the issue of self-defense passed upon by a jury. *S. v. Bost,* 192 N.C. 1, 133 S.E. 176; *S. v. Godwin,* 211 N.C. 419, 190 S.E. 761; *S. v. Greer,* 218 N.C. 660, 12 S.E. 2d 238 (wherein it was held that under the evidence, it was the duty of the court, without special request therefor to instruct the jury upon the law of self-defense); *S. v. Absher,* 220 N.C. 126, 16 S.E. 2d 656.

The Attorney-General relies upon *S. v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132. The facts in that case are different, for taking the defendant's version he pulled out his knife, opened it, jumped out of the truck,

and met Bolton in the street, which clearly showed he entered the fight voluntarily and without lawful excuse.

The court committed error in failing to instruct the jury on the law of self-defense in connection with the defendant's evidence, and he is entitled to a new trial. It is so ordered.

New trial.

THOMAS PARK HOWLE v. TWIN STATES EXPRESS, INC., A CORPORATION.

(Filed 25 November, 1953.)

Appeal and Error § 51a—

Where the Supreme Court holds on a former appeal that certain matters set up in bar or abatement of plaintiff's cause were insufficient in law to preclude plaintiff from prosecuting the action, and thereafter in the subsequent trial defendant again pleads substantially the same matters by way of estoppel and in bar, the order of the court striking such allegations from the pleadings will be upheld, the former decision being the law of the case.

APPEAL by defendant F. T. Miller, Jr., Trustee in Bankruptcy of Twin States Express, Inc., Bankrupt, from an order of *Sharp, S. J.*, at 3 August, 1953, Civil Term of Superior Court of MECKLENBURG County, granting motion of plaintiff to strike from defendant's answer the First Further Answer and Defense, set up "by way of estoppel and in bar of plaintiff's right to institute or prosecute this action," for that the matters and things therein averred are reiteration of defendant's plea in bar or abatement heretofore filed, which has already been decided and adjudicated on former appeal to Supreme Court in opinion reported in 237 N.C. Reports at page 667.

Defendant appeals to Supreme Court and assigns error.

Bell, Horn, Bradley & Gebhardt and James P. Mozingo III for plaintiff, appellee.

Helms & Mulliss and John D. Hicks for defendant, appellant.

WINBORNE, J. This case was before this Court on a former appeal by plaintiff from a judgment of the Superior Court of Mecklenburg County granting defendant's plea in abatement and dismissing the action. The opinion of this Court on that appeal is reported in 237 N.C. 667. The factual situation is there set out in detail and need not be repeated here.

This Court there held that the order of the Court of Common Pleas of Florence County, South Carolina, entered 19 May, 1951, under the cir-

cumstances therein shown, as interpreted by this Court, was not intended to have, nor does it have the force and effect of precluding plaintiff from prosecuting the present action in this State, and, hence, the judgment from which that appeal was taken was reversed.

Thereafter, the opinion rendered having been certified to Superior Court of Mecklenburg County, judgment was entered therein in accordance therewith, and defendant was allowed thirty days within which to plead, which he did by answer. And "for a First Further Answer and Defense, by way of estoppel and in bar of plaintiff's right to institute this action," defendant set up the same matters and things as those on which the plea in abatement as aforesaid had been predicated. Plaintiff, by his motion to strike, says that those matters and things are *res judicata*. And, accordant with uniform decisions in this State, this Court agrees.

The record on former appeal shows that in the "plea in bar or abatement" defendant said that "the matters and things hereinbefore set forth are hereby specially pleaded in bar or abatement of any right of the plaintiff herein to institute, prosecute or maintain this action or recover anything herein." And the record on this appeal shows that defendant says in the answer filed "that the aforesaid matters and things are hereby specially pleaded by way of estoppel and in bar of any right of the plaintiff to institute, prosecute or maintain this action or recover anything herein."

The basic "matters and things" specially pleaded, in the one, "in bar or abatement" and, in the other, "by way of estoppel and in bar" are the same, and the purpose and effect are the same. Having had a day in court in respect thereto, defendant is bound by the decision rendered pursuant thereto. Such decision is the law of the case, and may not now be reheard.

But it is pertinent to say that this Court is still of opinion that the proper interpretation and decision were made on the former appeal.

Hence, the judgment from which appeal is taken is

Affirmed.

STATE v. JOE LEE BRIDGERS.

(Filed 25 November, 1953.)

Criminal Law § 81b—

The burden is on defendant not only to show error but also that the error complained of affected the result adversely to him.

APPEAL by defendant from *Paul, Special Judge,* September Term, 1953, of GASTON. No error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Max O. Cogburn, Member of Staff, for the State.

Ernest R. Warren for defendant, appellant.

PER CURIAM. The bill of indictment charged the defendant with assault upon the person of the State's witness with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, in violation of G.S. 14-32. There was verdict of guilty of assault with deadly weapon with intent to injure, and judgment was rendered imposing sentence of 18 months in jail to be assigned to work under the supervision of the State Highway & Public Works Commission.

The case on appeal was settled by agreement of counsel, and none of the evidence in the case was set out in the record. Only the charge of the court was sent up, with certain exceptions noted thereto assigned as error.

While it would seem that failure to comply with Rule 19 (4) might work a dismissal, we have examined the exceptions to the charge and conclude that prejudicial error is not made to appear. The burden was on the defendant not only to show error but also that the error complained of affected the result adversely to him. This he has failed to do.

No error.

HOME INSURANCE COMPANY v. E. M. STAFFORD, INC.

(Filed 25 November, 1953.)

Appeal and Error § 16—

An appeal must be taken to the next succeeding term of the Supreme Court beginning after the rendition of the judgment, and when this is not done the appeal will be dismissed, it being incumbent upon appellant to apply for a writ of *certiorari* if he is unable to effect his appeal in time.

APPEAL by plaintiff from *Sharp, Special J.*, January Extra Civil Term, 1953, MECKLENBURG.

Civil action to recover the value of a stolen automobile.

At the trial in the court below the court, at the conclusion of the plaintiff's evidence in chief, entered judgment of nonsuit. Plaintiff excepted and appealed.

Alvin A. London and James E. Walker for plaintiff appellant.

McDougle, Ervin, Horack & Snepp for defendant appellee.

PER CURIAM. This cause was tried and the judgment herein was entered in January 1953, prior to the convening of the 1953 Spring Term

of this Court. It was the duty of the appellant to docket its appeal in this Court at that term, twenty-one days prior to the call of the docket of the Fourteenth Judicial District, to which this case belongs. It was actually docketed 4 April 1953, only ten days before the call of the Fourteenth District cases, and was marked "Fall Term." No brief was filed at that term, and no continuance was granted. A brief was filed 5 October 1953, but this came too late.

If the appellant was unable to perfect its appeal at the Spring Term, application for a writ of *certiorari* was available to protect its right of appeal. We are therefore compelled to dismiss the appeal on authority of *In re Suggs, ante,* p. 413; *In re De Febio,* 237 N.C. 269, 74 S.E. 2d 531; and other cases to like effect.

Appeal dismissed.

CAROLINA POWER & LIGHT COMPANY v. MERRIMACK MUTUAL FIRE INSURANCE COMPANY; SENTINEL FIRE INSURANCE COMPANY; LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY; NORTH BRITISH & MERCANTILE INSURANCE COMPANY; TRAVELERS FIRE INSURANCE COMPANY; UNITED STATES FIRE INSURANCE COMPANY; WESTCHESTER FIRE INSURANCE COMPANY; AETNA INSURANCE COMPANY; CITIZENS INSURANCE COMPANY; CAPITAL FIRE INSURANCE COMPANY; LITITZ MUTUAL INSURANCE COMPANY OF LITITZ, PENNSYLVANIA; ALLIANCE INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY; THE CENTRAL MANUFACTURERS MUTUAL INSURANCE COMPANY; THE PREFERRED MUTUAL FIRE INSURANCE COMPANY; MIDDLESEX MUTUAL FIRE INSURANCE COMPANY; BRITISH AMERICAN ASSURANCE COMPANY; LONDON & LANCASHIRE INSURANCE COMPANY; ROCHESTER AMERICAN INSURANCE COMPANY; EAST & WEST INSURANCE COMPANY; NORTHERN ASSURANCE COMPANY; ST. PAUL FIRE & MARINE INSURANCE COMPANY; SUN INSURANCE OFFICE, LIMITED; PENNSYLVANIA LUMBERMEN'S MUTUAL FIRE INSURANCE COMPANY; FIREMEN'S INSURANCE COMPANY; NORTH RIVER INSURANCE COMPANY; AMERICAN NATIONAL FIRE INSURANCE COMPANY; AUTOMOBILE INSURANCE COMPANY; ATLANTIC MUTUAL FIRE INSURANCE COMPANY OF SAVANNAH; WASHINGTON COUNTY FIRE INSURANCE COMPANY—INSURERS—AND C. J. FLEMING; MRS. C. B. CHURCH; ROBERTSON CHEMICAL CORPORATION; MRS. W. T. CARTER; G. R. GARRETT COMPANY, INC.; MOON THEATES, INC.; ISEAH A. WOOD; T. J. HARRINGTON; J. H. PARK; E. M. MOODY; WEAVER FERTILIZER COMPANY, INC.; C. B. TURNER; R. E. TANNER; R. F. READ; ROBERT F. TURNER; MRS. BEATRICE K. REAVIS; MRS. BESSIE KITTLE; MRS. ELLA W. BROWN; MRS. JANIE H. KERNER, GUARDIAN OF SALLIE EUGENIA KERNER, A MINOR; SALLIE EUGENIA KERNER, MINOR; HENDER-

SON TOBACCO BOARD OF TRADE, INC.; THOMAS G. HORNER; HENRY T. MORRIS; R. W. BOYD; W. E. HICKS, INSUREDS, AND MURRAY ALLEN; T. P. GHOLSON, AND A. W. GHOLSON, JR.

(Filed 2 December, 1953.)

1. Injunctions § 4f—

A bill of peace will lie for relief against a multiplicity of suits in those instances where the suitors' rights in a common cause may properly be asserted in one action.

2. Pleadings § 19c—

Upon demurrer, a pleading will be liberally construed. G.S. 1-151.

3. Same—

A demurrer admits for its purpose the truth of all relevant facts properly pleaded and all inferences of fact properly deducible therefrom, but it does not admit conclusions of law by the pleader nor deductions advanced *arguendo* in support of its allegations of fact.

4. Injunctions § 4f—Bill of peace will not be granted in independent suit when the relief is available in pending action.

Plaintiff alleged that some twenty actions were pending against it to recover for separate losses sustained in the same fire upon allegations that the fire was caused by plaintiff's negligence, and that one suit had already been determined in its favor adjudging that it was not negligent. Plaintiff brought this action to restrain the prosecution of these twenty actions on the ground that the parties had agreed to harass plaintiff by prosecuting each suit separately and that the former judgment constituted an estoppel and *res judicata*. *Held:* Plaintiff could assert the defense of estoppel by judgment and could move for consolidation of all the actions in the next pending action brought to trial, and therefore it may not maintain an independent suit in equity to restrain the prosecution of the actions.

5. Judgments § 32—

Ordinarily a judgment in a former action constitutes an estoppel as *res judicata* in a subsequent action only if there be identity of parties, of subject matter and of issues, and it is also required that the estoppel be mutual.

6. Same—

As an exception to the general rule that there must be identity of subject matter and issues in order for a former judgment to constitute an estoppel in a subsequent action, the former judgment may constitute an estoppel whenever it necessarily affirms the existence of a particular fact, and such fact is again in issue between the parties or their privies, even though such fact comes in question incidentally in relation to a different matter.

7. Same—

The general rule that there must be identity of parties in order for a former judgment to constitute an estoppel in a subsequent action embraces not only the actual parties to the action but also parties in privity with them, and is subject to the further exception that a person not actually a party to the judgment will be bound thereby if he openly and actively

assumes and manages the defense of the action and has a proprietary or financial interest in the judgment or in the determination of a question of fact or of law with reference to the same subject matter or transaction, provided plaintiff has knowledge thereof so that the estoppel will be mutual.

8. Same—Allegations held insufficient to show estoppel by judgment as against other parties whose property was damaged by same fire.

Plaintiff's allegations were to the effect it furnished electricity to a certain warehouse, that fire broke out in the warehouse, resulting in destruction of the warehouse and damage to the property of some twenty other persons in the vicinity, that the insurer of each piece of property damaged executed a "loan" to each owner under an agreement that they should prosecute actions for the losses against plaintiff and repay the loans, without interest, only in the event and to the extent of recovery against plaintiff, giving insurers control of the litigation, and that the cases should be tried separately. Plaintiff further alleged that in the action by the owner of the warehouse final judgment was rendered in its favor establishing that plaintiff was not guilty of negligence. Plaintiff instituted this action to enjoin the further prosecution of the twenty separate actions, asserting that the former judgment constituted an estoppel by *res judicata* of the pending actions. *Held:* Each owner was entitled to maintain a separate action, and there being no allegation that the several claimants, either directly or through their insurers, participated in the trial of the first case or that they openly and actively assumed and managed the prosecution thereof, but at most only agreed as to the case which should be tried first, the facts are insufficient to establish that the other claimants were in privity with the plaintiff in the first action or that an estoppel based thereon would be mutual, and therefore demurrer to the complaint was properly sustained.

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

APPEAL by plaintiff from *Williams, J.*, March Term, 1953, of VANCE. Affirmed.

This is a suit in the nature of a bill of peace to restrain the further prosecution of 20 civil actions now pending in the Superior Court of Vance County, on the ground (1) that the causes of action therein alleged have been heretofore determined as *res judicata* by the judgment in another action for the same cause on the same facts, or (2) that equity should intervene to prevent a multiplicity of suits which would result from attempting to try each of said actions separately.

Questions relating to the subject of this action have heretofore been considered by this Court, and the decisions thereon are reported in *Fleming v. Light Co.*, 229 N.C. 397; *Fleming v. Light Co.*, 230 N.C. 65, and *Fleming v. Light Co.*, 232 N.C. 457. Out of the facts set forth in those cases the present action arose.

The plaintiff has set out its alleged cause of action herein in a complaint containing 55 paragraphs and covering with the exhibits attached

more than 50 printed pages. The pertinent facts alleged, however, may be summarized as follows:

On 22 February, 1947, the tobacco warehouse in Henderson known as the High Price Warehouse was totally destroyed by fire.

This building and all electrical facilities were under the exclusive control of the owner, C. J. Fleming, and Carolina Power & Light Co., the plaintiff herein, furnished the electric current to the building. The fire originated inside the building, but no one knows how, when, or the point in the warehouse where the fire began, and the plaintiff alleges the fire was of unknown origin, and if caused by electricity it was not due to any negligence on the part of the plaintiff, and there was no justifiable basis for allegations of negligence.

On 28 October, 1947, C. J. Fleming instituted action against this plaintiff to recover damages for the loss of the building alleging negligence on this plaintiff's part. This cause finally came to trial in the Superior Court of Vance County June, 1950, and the jury for its verdict found that the warehouse was not destroyed by the negligence of the plaintiff. From judgment on the verdict Fleming appealed to the Supreme Court, and at Fall Term, 1950, this Court found no error in the trial, and the *Fleming case* was finally terminated.

On 20 February, 1950, 20 separate actions for loss of property in the same fire were instituted against this plaintiff. With the plaintiff in each of these actions was joined one of the insurers of that particular property, and Murray Allen or Gholson & Gholson, or both, were named as attorneys. The complaint in each of the 20 cases contained substantially the same allegations of negligence against this plaintiff. All these cases were pending on the civil issue docket of Vance Superior Court at the time the *Fleming case* was tried on its merits in June, 1950. All the individuals and insurance companies named as plaintiffs in these 20 actions and their attorneys have been made parties defendant in this action.

It is alleged that the several insurance companies named as parties plaintiff with the insured in these 20 actions (defendants herein) did not pay to their respective insureds the insurance provided by the policies, but instead each insurer loaned to each insured an amount equal to the insurance money due under the policy, without interest, and this was under and pursuant to an agreement entitled "Loan Receipt." These loan receipts were repayable only in the event of recovery from the person liable for the loss of his property. By this loan receipt each insured, called "borrower," agreed to cooperate with his insurance company to promptly present claim and commence and prosecute suit against the person or corporation through whose negligence the loss was caused, and thereby appointed the manager or agent of the insurance company his agent and attorney with irrevocable power to collect his claim and to

prosecute in his name all legal proceedings to enforce such claim. It was alleged that in making these loans the insurance companies were represented by certain named insurance adjusters.

It is alleged that the purpose and effect of this loan receipt arrangement was and is to vest the representatives and agents of these insurance companies with exclusive and irrevocable dominion over the claims and causes of action subsequently sued on in the 20 suits referred to; and that the insurers thus acquired the right to control the handling of said claims and the litigation in respect thereto.

It is further alleged that by means of these "loan receipts" the insurance companies, acting through their agents and representatives placed said claims upon which the loans were made in the hands of Murray Allen and Gholson & Gholson, attorneys, under agreement which vested them with an interest in said claims.

It is further alleged that all the claims have been thus pooled and combined, and that the parties and attorneys have agreed to cooperate and work together in all things for the collection of these claims, all to the effect as if all of said claims had been originally joined together; and that since said time they have worked together in joint and common undertaking to force collection from Carolina Power & Light Co. by this litigation.

It is further alleged that in resorting to said loan receipt arrangement all the defendants acted in concert and for common purpose of collecting said claims from this plaintiff jointly instead of each proceeding independently, and have vested the insurers with control over the litigation based thereon.

It is further alleged that this combination and concert of action created a joint enterprise which merged the previously existing individual or independent quality of said claims into a pool or common interest for the common use and benefit of the entire group, in the suits against Carolina Power & Light Co. as a common adversary, and that the insurers and their agents and attorneys have agreed and confederated among themselves upon a common pursuit of this plaintiff as a common adversary.

It is alleged that learning that resort to litigation was necessary to collect these claims the defendants agreed among themselves to select from the entire group of claims one on which they were most likely to recover, as a test case to procure an adjudication that the fire was due to Carolina Power & Light Co.'s negligence, and as a result the claim of C. J. Fleming was selected by the defendants pursuant to the plan evidenced by the loan receipt.

It is further alleged that the defendants in furtherance of this plan brought to trial only the case of Fleming, and on 20 February, 1950, instituted the 20 separate suits referred to. Efforts to consolidate all these

cases for trial proved unavailing due to the active opposition of these defendants and their attorneys. It is alleged this was done to vex and harass this plaintiff by multiplicity of litigation of the same question.

It is further alleged that by reason of the acts and conduct of defendants in resorting to the loan receipt arrangement and the vesting of control of said causes of action in the defendant insurers and their attorneys, together with the selection by them of the *Fleming case* as the test case for the common benefit of all to determine the alleged negligence of this plaintiff, the individual and independent character of said claims became merged and lost in the common enterprise, creating a community of interest in all the defendants in the *Fleming case.* So that the judgment in the *Fleming case* has been rendered *res judicata* and constitutes an estoppel, preventing further proceeding in the premises by the defendants against this plaintiff.

It is alleged the defendants intend to bring said 20 cases to trial one by one and thereby carry out their joint purpose to endlessly harass and vex the plaintiff with a multiplicity of actions. To prevent this the plaintiff invokes the aid of equity on the ground that by reason of the matters herein set out the final determination of the *Fleming case* is in equity binding upon all defendants and the attempt to harass and vex the plaintiff by trying these 20 cases one by one should invoke the intervention of equity.

Plaintiff prays that the defendants be restrained from further proceeding against this plaintiff for that they are estopped by the judgment in the *Fleming case;* or in the alternative that defendants be restrained from further proceeding by virtue of the agreement for control vested in the agents of the defendant insurance companies to harass and vex the plaintiff by a multiplicity of actions for the same cause which has heretofore been finally determined by the verdict of the jury in the *Fleming case.*

To this complaint the defendants demurred on the ground (1) that the facts alleged are insufficient to invoke the jurisdiction of a court of equity; (2) that other actions are now pending in the Superior Court of Vance County involving the same subject, in which the plaintiff can move for the relief sought in this action; and (3) that the complaint does not state facts sufficient to constitute a cause of action.

The demurrer was sustained, and the action dismissed. The plaintiff appealed.

A. A. Bunn, Kittrell & Kittrell, and Perry & Kittrell, Henderson, N. C.; E. S. DeLaney, Jr., Charles F. Rouse, and A. Y. Arledge, Raleigh, N. C., for plaintiff, appellant.

Murray Allen and R. P. Upchurch for defendants other than C. J. Fleming, R. E. Tanner, R. F. Read, Robert F. Turner, T. P. Gholson, and A. W. Gholson, Jr.

Gholson & Gholson for defendants C. B. Turner, R. E. Tanner, Robert F. Turner, and R. F. Read.

William T. Joyner and Gholson & Gholson for defendants C. J. Fleming, T. P. Gholson, and A. W. Gholson, Jr.

DEVIN, C. J. The plaintiff labels its action as one in the nature of a bill of peace. The function of a bill of peace is well recognized in courts of equity. It is a proceeding instituted in that court to invoke the aid of its equitable jurisdiction on behalf of one who wishes to be made secure in his rights against the continued recurrence of vexatious litigation of unsuccessful claims, or to prevent a multiplicity of suits. *Detroit Trust Co. v. Hunrath,* 168 Mich. 180 (192). It is a bill in equity to procure repose from perpetual litigation, and for relief against a multiplicity of suits in those instances where the suitors' rights in a common cause may properly be asserted in one action. "A bill of peace is an equitable remedy to prevent vexatious litigation which might arise either by the same plaintiff prosecuting several actions against the defendant for claims involving the same question, or where there are several claimants prosecuting separate actions against the defendant upon a common liability." McIntosh 1107; Adams Equity 199.

To the complaint the defendants have interposed demurrers on the ground that the complaint does not state facts sufficient to constitute a cause of action, or to invoke the jurisdiction of a court of equity.

Both by statute, G.S. 1-151, and the uniform decisions of this Court it is required that a pleading shall be given liberal construction in order to determine its sufficiency and its effect. *Hollifield v. Everhart,* 237 N.C. 313, 74 S.E. 2d 706; *Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32; *Mills Co. v. Shaw,* 233 N.C. 71, 62 S.E. 2d 487; *Ins. Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369; *Blackmore v. Winders,* 144 N.C. 212, 56 S.E. 874. The office of a demurrer is to test the sufficiency of the complaint, admitting for that purpose the truth of all relevant facts well pleaded and such inferences of fact as may properly be deduced therefrom. But the demurrer does not admit conclusions of law asserted by the pleader. *McKinney v. City of High Point,* 237 N.C. 66, 74 S.E. 2d 440; *Leonard v. Maxwell, Comr.,* 216 N.C. 89, 3 S.E. 2d 316; *Mills Co. v. Shaw, supra.* Nor does the demurrer admit the deductions which may be drawn or reasons advanced *arguendo* in support of the allegations of fact upon which the complaint is based.

The demurrer admits the following material facts:

That the 31 insurance companies, which had insured the owners of the Fleming warehouse and adjacent property against loss by fire, immediately following the destruction of this property by fire 22 February, 1947, secured the cooperation of the insureds by means of the "loan receipts"

described in detail in the complaint. In accordance with the terms of these loan receipts, the insurance companies paid to each insured the amount covered by his policy in the form of a loan and took from him a loan receipt whereby the insured agreed to repay the amount, without interest, in the event and to the extent of recovery from the person or corporation liable for the loss of the property, and as security the insured pledged with his insurance company his claim against such person or corporation. Each insured agreed to cooperate with the insurance company insuring his property and to appoint its representative with power to control litigation thereon in his name. It was alleged that pursuant to the agreement evidenced by the loan receipt certain named representatives of the insurance companies were given control over the litigation which the plaintiff alleged was agreed to be undertaken to fix the Carolina Power & Light Co. with liability for the loss sustained.

It is alleged that pursuant to this agreement the same counsel were employed, and that it was agreed that a test case be chosen, one in which they were most likely to prevail; that accordingly the *Fleming case* was chosen in the hope that a successful outcome would secure settlement of all claims by the Power & Light Co., the other 20 cases being held in reserve; that owing to delays caused by appeals to this Court the *Fleming case* was not tried until June, 1950; that actions were instituted in the other 20 cases 20 February, 1950, with same counsel, and containing identical allegations charging the Light Co. with negligently causing the fire. In each case, with the insured, was joined as plaintiff the insurance company which had insured his property.

The complaint alleges that in spite of the efforts of the plaintiff Carolina Power & Light Co. to have these 20 cases consolidated and brought to trial, all are still pending on the civil issue docket of Vance Superior Court, though more than six years have elapsed since the fire, and the *Fleming case* was finally disposed of by this Court three years ago. It is further alleged that the defendants have agreed to bring up one of these cases at a time, and that the next one they will present will be that of Mrs. C. B. Church and her Insurer; that it will require many years in the regular course to dispose of these cases in view of the limited number of terms of Vance Superior Court; that in the meantime by reason of the contingencies inherent in the lapse of time the means of proof will be greatly hindered.

The demurrer admits the facts properly pleaded but does not admit the conclusions and arguments advanced by the plaintiff in support of its plea for the exercise of the equitable jurisdiction of the Court to restrain the prosecution of pending actions at law.

The question is thus presented whether a court of equity should intervene in actions at law pending and at issue to restrain further proceed-

ings therein upon the facts here alleged. Are they sufficient to invoke this remedy, or is the relief sought obtainable in the present actions at law?

It may be noted that when the first appeal to this Court in the *Fleming case* was heard (reported in 229 N.C. 397) no action other than that of Fleming had been instituted to recover against the Light Co. for losses sustained. But in that case the Carolina Power & Light Co. moved that the insurance companies, insurers of the several property owners whose property had been destroyed in the fire, be made parties (notice of claims having been given), and in support of that motion the Light Co. urged substantially similar grounds as those upon which the present action is based. We quote from *Justice Seawell's* opinion in that case:

"The gravamen of the motion lies in the additional argument that all the adverse parties in interest have pooled their demands and entered into a combination to fix the liability on it in a test suit,—in a sort of squeeze play,—intending, if successful, that the judgment in this action shall be thereafter pleaded as *res judicata*. By virtue of this combination it is argued, the defendant is threatened with the harassment of a multiplicity of suits involving the same liability; and it is urged that because of the involvement of the principle of subrogation the action is of an equitable nature and that it is within the power and is the duty of the Court, in the exercise of its equitable jurisdiction, to protect the rights of the defendant and relieve it from the embarrassment of a multiplicity of actions by requiring that all the matters be heard in a single action." *Fleming v. Light Co.*, 229 N.C. 397, 50 S.E. 2d 45.

As no other action had then been brought this contention of the Power & Light Co. was not regarded as tenable. The motion to make the insurance companies parties in the *Fleming case* was denied, but on rehearing this order was modified so as to bring in as parties the five insurance companies which had made payments to Fleming on account of his loss.

The plaintiff in this action has undertaken the unusual method of an independent suit in equity to restrain proceedings in actions at law which are now pending in the Superior Court of Vance County. It is an effort to determine in advance a question which it is alleged will prove decisive of those cases. While the long arm of equity is available to prevent vexatious litigation and to procure repose for one who wishes to be made secure in his rights against the harassment of a multiplicity of actions for the same cause which has heretofore been determined in his favor, we doubt that the Court should be called upon to exercise its jurisdiction by an independent suit when apparently the same facts and the same pleas may be set up in the actions at law which are now at issue. It is alleged that the defendants, in the prosecution of their plan to try these 20 actions one by one, propose next to bring to trial the case of Mrs. Church. If so,

it would seem to be open to this plaintiff in that action to interpose the pleas of *res judicata* and estoppel as a defense to that action and thus to determine the question for all subsequent actions in as ample a manner as is now sought to be done in this independent suit.

Nor would a court of equity be required to entertain an independent suit to require the consolidation of the 20 actions at law referred to in the complaint, for the reason that the defendant in those actions (the complainant here) has a right to move in any one of them for a consolidation of all those cases for trial. 19 A.J. sec. 82. Each of the persons whose property was destroyed by the fire, with or without the joinder of his insurance company, was entitled to institute a separate action for a separate wrong. A complaint embracing the claims of two or more different persons whose separate property had been destroyed, though by the same fire, would have been demurrable. "Two or more persons injured by the same wrongful act must sue separately, since each injury is a separate cause of action." McIntosh, sec. 230; *Fleming v. Light Co.*, 229 N.C. 397 (405), 50 S.E. 2d 45. Equity could not interfere to prevent these suits on account of their number. Nor would allegation that defendants had agreed to so handle these cases as to harass and vex the complainant entitle it to equitable relief when the same relief, to wit, consolidation, is available in the actions at law. *Boston & Maine Railroad v. D. & H. Co.*, 268 N.Y. 382. There is a distinction between a bill of peace of which equity will entertain jurisdiction, and a suit when the object is merely to procure a consolidation of actions which can be attained at law. High on Injunction, sec. 62; Adams Equity 199; *Tribette v. Ill. C. R. Co.*, 70 Miss. 182, 19 L.R.A. 660. In *Fleming v. Power & Light Co.*, 229 N.C. 397, 50 S.E. 2d 45, it was said, "when fire destroys the property of a number of parties, each injured party has a separate and independent cause of action." 19 A.J. sec. 82; *Southern Steel Co. v. Hopkins*, 174 Ala. 465; *Pittsburgh & W. V. Ry. Co. v. U. S.*, 6 F. 2d 646.

In *Georgia Power Co. v. Hudson*, 49 F. 2d 66, 75 A.L.R. 1439, where many suits were instituted against the Power Co. for damages caused by a dam, the Court said "that community of interest among the several parties in the questions of law and fact involved is not sufficient to confer jurisdiction upon the court to enjoin the prosecution of such actions, though they be brought against the same defendant and involve the same state of facts."

We do not think the allegations of the complaint as detailed, or the conclusion sought to be deduced from the facts alleged are sufficient to invoke the aid of equity to restrain these actions at law for the purpose of avoiding a multiplicity of suits.

Should a court of equity entertain jurisdiction in the premises and permanently restrain individuals from maintaining their several and

separate actions against the Carolina Power & Light Co. upon allegation that their property was destroyed by fire through its negligence, upon the ground that the judgment in the *Fleming case* is binding upon all these claimants as *res judicata,* and as an equitable estoppel by judgment?

"It is a principle of general elementary law that the estoppel of a judgment must be mutual." *Bigelow v. Old Dominion C. Min. & S. Co.,* 225 U.S. 111. If the judgment in the *Fleming case* had been in Fleming's favor, would the Carolina Power & Light Co. have been bound as a matter of law in all the other actions instituted by claimants for loss in this fire, without right to defend on other or additional evidence? *Bigelow v. Old Dominion C. Min. & S. Co., supra.*

Estoppel by judgment operates only on parties and their privies. It is a maxim of law that no person shall be affected by any judicial investigation to which he is not a party, unless his relation to some of the parties was such as to make him responsible for the final result of the litigation. An adjudication affects only those who are parties to the judgment and their privies, and gives no rights to or against third parties. 1 Freeman on Judgments, sec. 407. Privies are "persons connected together or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them." Black's Law Dictionary. "To make a man a privy to an action, he must have acquired an interest in the subject-matter of the action, either by inheritance, succession, or purchase of a party subsequent to the action, or he must hold the property subordinately." Ballentine's Law Dictionary. "Any of those persons having mutual or successive relationship to the same right of property." Webster.

In *Elder v. New York & Penn. Motor Express, Inc.,* 284 N.Y. 350, the principle of *res judicata* was stated as follows: "No plea in bar could estop the plaintiff from enforcing his rights since he was not a party to the prior action, unless he came within an exception to the rule of mutuality, which rule is embodied in the principle of *res judicata.* When issues on the same subject-matter have once been settled by litigation between the same parties or their privies, before a court of competent jurisdiction, and the estoppel of the judgment is mutual, that is to say that the other party would be bound if the original decision had been to the contrary, then in the interest of reasonable finality of litigation that decision should be conclusive."

In *Meacham v. Larus & Bros. Co.,* 212 N.C. 646, 194 S.E. 99, a similar question was presented and the ruling of this Court thereon throws light on the case at bar. In that case four persons, Sedberry, Meacham, Alsobrook and Proctor, were passengers in an automobile driven by one Martin and were alleged to have suffered injury as result of collision with the automobile of the corporate defendant, driven by defendant Bivens.

Four separate suits were instituted, and the plaintiffs successfully resisted defendants' motion to consolidate. The *Sedberry case* was tried first, the others joining in as witnesses, and resulted in judgment for the defendants,—nonsuit as to the corporate defendant and verdict in favor of the individual defendant on the issue of negligence. In the *Meacham case* tried next the defendants amended their answer to allege *res judicata* and estoppel by the judgment in the *Sedberry case.* From an adverse ruling below the defendants appealed. In the opinion of this Court written by *Justice Schenck* the question presented was stated as follows: "Is the plaintiff, by reason of the facts admitted and appearing in the record, bound and estopped by the judgment and findings of the jury in the case of *Sedberry v. Larus & Bros. Co. and H. S. Bivens,* and is said judgment *res judicata* as to the negligence of defendant Bivens as between the plaintiff (Meacham) and the defendant here? The answer is 'No.'" The Court in its opinion further noted that Meacham was not a party to the *Sedberry case,* had no legal interest in it, and there was no privity; that ordinarily only parties and privies are bound by a judgment and no estoppel is created. The Court said estoppels must be mutual and one not bound by an estoppel could not take advantage of it; that if the verdict had been in favor of Sedberry, Meacham could not have claimed *res judicata* in his favor. The Court also suggested that in the trial of the *Meacham case* new and different facts as to the collision might be developed.

In *Falls v. Gamble,* 66 N.C. 455, the headnote accurately summarizes the decision that no estoppel is created by the former judgment against one not a party to the record, though he instigated the trespass, aided in the defense, and employed counsel.

Also in *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321, it was held that even the father and next friend of his infant child is not estopped, in a subsequent action, by the judgment in a former suit adverse to the infant. Though he was the father there was in law no privity and the former judgment not *res judicata.*

However, in *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570, it was held that the judgment in the former action of *Newbern v. Leary* was *res judicata* and a bar to plaintiff's action. It appeared in that case that the administrator of Newbern, an agent of the Land Bank, who had been injured and killed in a collision with the automobile of Leary Bros. recovered judgment against Leary. It was held that this judgment would bar Leary in a suit against the Bank for damage to property in same collision on account of alleged negligence of Newbern, for the reason that Newbern was the agent and *alter ego* of Bank. This was based on the ground of privity between Newbern and the Bank by virtue of their relationship as principal and agent, the negligence of Leary having been determined in the former suit.

Generally, in order that the judgment in a former action may be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues. It is also a well established principle that estoppels must be mutual, and as a rule only parties and privies are bound by the judgment. These rules are subject to exception.

For instance, in *Current v. Webb,* 220 N.C. 425, 17 S.E. 2d 614, it was said, quoting from 2 Freeman on Judgments, sec. 670: "There is no doubt that a final judgment or decree necessarily affirming the existence of any fact is conclusive on the parties or their privies, whenever 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." On the same principle was based the decision in *Harshaw v. Harshaw,* 220 N.C. 145, 16 S.E. 2d 666; *Hospital v. Guilford County,* 221 N.C. 308, 20 S.E. 2d 332. However, the principle enunciated in these cases should not be extended to justify the holding that the decision in the *Fleming case* established the non-negligence of the Light Co. as a fact once for all determined.

In *Cannon v. Cannon,* 223 N.C. 664, 28 S.E. 2d 240, these and other cases were considered in determining the application of the principle of *res judicata* to the facts of that case, and *Justice Seawell* added this note of caution: "The right of a party to litigate his claim will not be defeated by a roving abstraction which does not meet the exigent standard of notice and hearing—his day in court—guaranteed to him by the Constitution."

In *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269, *Chief Justice Stacy* used this language: "Hence, as between the parties there litigant, this matter would seem to be *res judicata* (citing the *Cannon case*). But, of course, the judgment there would not be binding on the plaintiffs here. They were not parties to that suit, and they are entitled to pursue their rights in their own way. *Meacham v. Larus & Bros. Co.,* 212 N.C. 646, 194 S.E. 99."

In *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345, it was held that where the defendants had Mrs. Austin brought in as party defendant for contribution as joint tort-feasor, and set up the judgment in another action between them and Mrs. Austin wherein the same matter (automobile collision) was involved and in which it was determined that Mrs. Austin had been contributorily negligent, it was held that the same question could not again be raised between same parties. *Justice Winborne* in this case collected the authorities on the subject, and stated the principle that the estoppel of judgment must be mutual, and that there must be identity of parties, of subject matter and of issues. True, in the

Stansel case it was intimated that the husband of Mrs. Austin, who was not a party, might be bound by the judgment, but this was for the reason that she was operating the automobile as his agent under the family purpose doctrine. *Leary v. Bank, supra.*

Estoppel is the outgrowth of equity, while *res judicata* is based upon legal principles, but both rest upon the maxim that no one ought to be twice vexed for the same cause. *Watson v. Goldsmith,* 205 S.C. 215, 31 S.E. 2d 317.

In order to establish *res judicata* or the equitable principle of estoppel as applicable to the facts of this case it is necessary for the Carolina Power & Light Co. to show that the defendants, while not parties, were privies to the *Fleming case* and hence bound by the judgment, and that the estoppel by judgment in that case was mutual. The able counsel for the plaintiff argues with much earnestness that the judgment in the *Fleming case* should be held binding on defendants here for the reason that under the agreement evidenced by the loan receipts each insured agreed to cooperate with his insurer and thereby appointed the manager or agent of the insurance company with power to collect his claim, and to prosecute in his name all legal proceedings necessary to enforce such claims, and that the effect of this was to vest control of all litigation in the hands of the insurance companies or their representatives, and this agreement included and covered the *Fleming case.* It is argued that each insured in this way participated in control of the *Fleming case* for the assertion and protection of his own interest in a similar case.

The principle invoked is stated in Restatement of Judgments, sec. 84, as follows: "A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary interest or financial interest in the judgment or in the determination of a question of fact or a question of law with reference to the same subject matter or transactions; if the other party has notice of his participation, the other party is equally bound."

The rule is stated in 50 C.J.S. 318, as follows: "A person who is neither a party nor privy to an action may be concluded by the judgment therein if he openly and actively, and with respect to some interest of his own, assumes and manages the defense of the action. A person who is not made a defendant of record and is not in privity with a party to the action may, as a general rule, subject himself to be concluded by the result of the litigation if he openly and actively, and with respect to some interest of his own, assumes and manages the defense of the action, although there is some authority to the contrary." See also Freeman on Judgments, sec. 432; 30 A.J. 960.

Undoubtedly, it must be made to appear that the relation of the defendants to the *Fleming case* was that of privies in order that they may be held bound by the judgment, or that the facts here alleged were sufficient to bring them within the exception pointed out. And equally so there must be some showing upon which to base mutuality in order to support the plea of estoppel.

In the *Fleming case* none of the twenty other claimants had any legal interest. Their property was not involved. They neither won nor lost by it. The status of their cases was unchanged save for the sentimental effect of the verdict. It could hardly be said that Mrs. Church, for instance, the plaintiff in the case next proposed to be tried, controlled the *Fleming case.* At most, it may be said that her insurance company's agent agreed that the *Fleming case* be tried first. All the cases stood upon the same footing, each claimant endeavoring to secure in his own case damages for the loss of his individual property. There is no allegation that these other claimants or any of them, either directly or through their respective insurance companies, participated in the trial of the *Fleming case,* or that they "openly and actively," and with respect to some interest of their own, "assumed and managed" the prosecution of the *Fleming case,* or that Fleming's counsel were not employed by him or that his counsel did other than represent his interest alone in the trial of that case. In this Court counsel who were not of record as counsel for other claimants appeared for Fleming with Murray Allen and Gholson & Gholson. There was no allegation that Fleming was a mere figurehead, and that these defendants were in open and active control of his case. There was no community of property. The gravamen of the plaintiff's complaint is the loan receipt signed by each one of the defendants. A copy of this receipt is attached to the complaint. But this only evidenced that each insured gave authority to his insurance company to prosecute and litigate his claim in his name. It is alleged as a conclusion and deduction therefrom that the insurance companies selected certain representatives to control all the litigation but there is no substantial allegation that as a matter of fact these representatives took charge of the *Fleming case* and openly and actively managed and controlled the trial.

Fleming by signing a loan receipt doubtless gave his insurance companies power to control his litigation with the Power & Light Co., but it is not alleged, nor does the record seem to indicate, that any one exercised control over his lawsuit, save himself and the counsel whom he had employed.

After examination of the complaint and exhibits, and the well prepared briefs filed by counsel, we reach the conclusion that the ruling of Judge Williams in sustaining the demurrer should be and it is

Affirmed.

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

MARY ELIZABETH ALFORD, ADMINISTRATRIX OF THE ESTATE OF CHARLES S. ALFORD, JR., DECEASED, v. MELVERT WASHINGTON AND THE CITY OF KINSTON, A MUNICIPAL CORPORATION.

(Filed 2 December, 1953.)

1. Pleadings § 15—

A demurrer admits for its purpose the truth of the allegations of fact set forth in the complaint as well as relevant inferences of fact necessarily deducible therefrom, but not conclusions of law.

2. Electricity § 7—Any negligence in maintenance of wire and poles held insulated by negligence of motorist causing collision.

The allegations of the complaint were to the effect that defendant municipality owned its electric power and lighting system, and maintained at an intersection poles in close proximity to the street, that the street light was suspended from the poles and the wires carrying a high voltage of electricity were uninsulated and insecurely fastened, so that upon the occurrence of an accident at the intersection causing one of the cars to strike one of the poles, a wire fell across one of the cars, and that plaintiff's intestate in seeking to rescue the occupants of the car after the accident was electrocuted. *Held:* Even conceding negligence on the part of the city, such negligence was insulated by the intervening act of the driver of the car whose negligence proximately caused the accident, and demurrer was properly sustained.

3. Negligence § 7—

Where the original negligence would not cause injury except for the intervening wrongful act, neglect or default of a responsible third person, which could not have been foreseen, the original negligence is insulated.

4. Municipal Corporations § 12—

A municipal corporation engaged in the business of supplying electricity for profit is liable as a private corporation for injuries to third parties proximately caused by its negligence in respect thereto.

5. Electricity § 7—

The duty of a power company to keep its high voltage wires insulated applies only to places where people reasonably may be expected to come in contact with the wires.

6. Same: Negligence § 9½—

A power company is not required to anticipate that a motorist will negligently run into its poles and thus cause an uninsulated wire to fall and endanger persons at the scene, since a person is not under duty to anticipate negligence on the part of others.

7. Negligence § 7—

Acts transpiring prior to the alleged negligent act of defendant cannot be relied upon by defendant to insulate his negligence, since the principle of insulating negligence refers to acts and conduct subsequently occurring.

8. Negligence § 11—

A person seeking to rescue others from serious and imminent peril will not be held contributorily negligent in risking serious injury or death in attempting to effect the rescue unless the attempt is recklessly or rashly made.

9. Same: Automobiles §§ 18c, 18d—

Plaintiff alleged acts of negligence of one defendant proximately causing a collision at an intersection, that the collision knocked a high voltage wire from a pole across one of the cars, and that plaintiff's intestate was electrocuted when he attempted to rescue the occupants of the car. *Held:* Any negligence of the power company in the maintenance of the wires and poles preceded the alleged negligence of defendant driver and therefore could not insulate his negligence, and intestate will not be held guilty of contributory negligence as a matter of law in attempting to rescue the occupants of the car.

APPEAL by plaintiff and by defendant, Melvert Washington, respectively, from *Harris, J.*, at 15 June, 1953, Term of LENOIR.

Civil action to recover damages for alleged wrongful death,—heard upon demurrers to the complaint, filed by each of the defendants.

It appears from the complaint (1) That Charles S. Alford, Jr., intestate of plaintiff, came to his death at about 10:30 p.m., on 14 June, 1952, at the intersection of East Street and Blount Street in a populous section of the city of Kinston; that East Street runs in north-south direction, and is much used, and is a part of the State highway system, and is designated as a through street; that Blount Street runs in east-west direction, and that stop signs are erected and maintained on this (Blount) Street,—one on the south side about 25 feet west of the intersection, and another on the north side about 25 feet east of the intersection;

(2) That the city of Kinston, a municipal corporation, owns and operates within its corporate limits an electric power and lighting system, as a part of which there is a street light suspended about 15 feet above the paved surface over the approximate center of said intersection, by means of a wire attached to two poles, one of which was located a few inches from the curbing on the northeast corner of said intersection, and the other a few inches from the curbing on the southeast corner of said intersection, and that the said light was supplied with current by means of high voltage wires attached thereto and hanging over the intersection parallel to the supporting line;

(3) That the poles supporting the street lights owned, constructed and maintained by the city, including the poles supporting the light at the

intersection, were negligently located within a few inches of the paved or traveled portion of the street;

(4) That the city unlawfully and negligently failed to maintain any guards or other safety devices to protect the poles supporting the light at the intersection from contact by vehicles, including motor vehicles, which were likely to go out of control or to be knocked out of control as a result of traffic accidents which the city knew or, in the exercise of ordinary diligence should have known, were likely to occur in or near the intersection;

(5) That the city unlawfully and negligently failed to maintain adequate safety devices to protect and safeguard the high voltage wires, suspended as aforesaid, from falling or being lowered to a few feet above the paved or traveled portion of the street in the event the supporting wire or the pole supporting same should break or fall from its suspended position to the surface or near the surface of the street in said intersection;

(6) That the high voltage and supporting light wires suspended across the intersection were so unlawfully and negligently, loosely and insecurely attached to the poles located as aforesaid, as to cause them to fall to, or near the surface of the street in the intersection upon an automobile or other motor vehicle coming in contact therewith as the result of an accident in or near the intersection;

(7) That the city negligently equipped and maintained its street lighting system, including the one located at the intersection, with transmission lines from which the insulation had fallen, leaving them exposed to such an extent as to transmit current to any object, including a human being, with which the wires might come in contact.

And it is further alleged that defendants knew of the conditions above set forth; that they knew, or by the exercise of ordinary diligence should have known that motor vehicles traversing said intersection were likely to go out of control or to be involved in accidents, imperiling the occupants thereof, and to attract to the intersection and the individuals and vehicles involved, people residing or being in the vicinity thereof on such an occasion, whose life, limb and property would be imperiled by reason of the insecure, unsafe and dangerous condition there existing as a result of the unlawful and negligent manner in which the street lighting system was installed and maintained at the said intersection.

And it is also alleged that the maintenance by the city of Kinston of its street lighting system in the manner aforesaid, constitutes actionable negligence on its part, rendering it liable for such injury and damage as was proximately caused thereby.

And it is also alleged that at about 10:30 p.m. on 14 June, 1952, defendant, Washington, while proceeding westerly along Blount Street, when he knew, or in the exercise of ordinary diligence, should have known of the

conditions above described existing at the intersection, operated his automobile in unlawful, wrongful and negligent manner and respect as follows: (a) While under the influence of intoxicating beverages; (b) at a greater rate of speed than was reasonable and proper, and in a manner so as to endanger or be likely to endanger life, limb and property, in violation of law; (c) at a speed in excess of thirty-five miles per hour, in violation of speed limit at such place; (d) without bringing his automobile to a stop as he approached the intersection, and failed to yield the right of way to through traffic proceeding north and south on East Street, in violation of law at such intersection; and (e) without keeping a proper lookout, and without heeding the stop sign, when he saw, or in the exercise of ordinary diligence, should have seen the approach of a Nash sedan proceeding northwardly on East Street in said intersection or entering it, and when he knew, or in the exercise of ordinary diligence, should have known that he could not clear the said intersection without colliding with, or being struck by said Nash sedan, and when he knew, or in the exercise of ordinary diligence, should have known that a collision between his automobile and the Nash sedan would cause one or both of said motor vehicles to strike one or more of the poles supporting the street light of the city of Kinston, causing the wires or some part of them to fall, and to endanger the life, limb and property of those in the cars and other persons attracted to the scene as aforesaid; and that, while so proceeding through the intersection, in the manner aforesaid, caused his automobile to be collided with by the Nash sedan, and to be hurled against the pole which was located near the curbing at the northeast corner of the intersection, and which supported the street light,—jarring the support wires loose from the pole, thereby letting the exposed live high voltage wires, supplying current to the light, fall across or upon the Nash sedan, and charging it with electric current or voltage of such high degree as to produce instant death to plaintiff's intestate as he reached the scene of the accident and sought to rescue the entrapped occupants of the Nash sedan.

And it is further alleged that the acts of negligence on the part of the defendant, Melvert Washington, acting together and concurring with the negligence of defendant, city of Kinston, as alleged, was the direct and proximate cause of the injury and death of plaintiff's intestate, etc.

The defendant, Melvert Washington, demurred to the complaint, for that it does not state facts sufficient to constitute a cause of action against him in that: (a) There is no legal liability on his part, nor any legal duty owed by him to plaintiff's intestate, growing out of and arising from the matters and things therein set forth; (b) If he owed any legal duty to plaintiff's intestate under the facts alleged, then the same fails to contain sufficient allegations of negligence or wrongful acts on his part to constitute a cause of action; (c) From the allegations of the complaint

the sole and proximate cause of the death of plaintiff's intestate was the negligence of the city of Kinston; (d) "On the face of the complaint the plaintiff's intestate was guilty of contributory negligence as a matter of law."

And the defendant, city of Kinston, demurred to the complaint, upon similar grounds to those of defendant, Washington, set out in paragraphs (a) and (b) of his demurrer,—fitting the language to the viewpoint of the city,—and in paragraph (c) that the sole and proximate cause of death of plaintiff's intestate was the negligence of defendant Washington.

The court being of opinion that the demurrer of the city of Kinston should be sustained, so ordered, and dismissed the action as to it. Plaintiff excepted thereto, and appeals to Supreme Court and assigns error.

And the court being of opinion that the demurrer of defendant Washington should be overruled, so ordered. Defendant Washington excepted thereto, and appeals to Supreme Court, assigning error.

Jones, Reed & Griffin for plaintiff.
White & Aycock for defendant Washington.
James & Speight and George B. Green for defendant City of Kinston.

PLAINTIFF'S APPEAL.

WINBORNE, J. Did the court err in signing judgment sustaining the demurrer of the defendant city of Kinston? This is the question on plaintiff's appeal.

Admitting the truth of the allegations of fact set forth in the complaint, as well as relevant inferences of fact necessarily deducible therefrom, but not of conclusions of law, as is done in testing the sufficiency of a complaint to state a cause of action, when challenged by demurrer, *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Muse v. Morrison,* 234 N.C. 195, 66 S.E. 2d 783, and numerous other cases, we are of opinion that the complaint fails to state a cause of action against the defendant city of Kinston, a municipal corporation, owning and operating an electric lighting system within its corporate limits, if it be conceded that it was acting in a proprietary capacity.

Also, if it be conceded that the city of Kinston were negligent in the respects alleged, it appears upon the face of the complaint that the injury to and death of plaintiff's intestate was "independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person." *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108. See also *Harton v. Telephone Co.,* 146 N.C. 429, 59 S.E. 1022; *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849; *Smith v. Grubb. ante.* 665, and numerous other cases therein cited.

There would have been no injury to intestate of plaintiff but for the intervening wrongful act, neglect or default of those in control of and operating the automobiles involved in the collision at the intersection of East and Blount Streets at the time and under the circumstances alleged, over which the defendant city of Kinston had no control, and of which the city had no knowledge.

True, a municipal corporation engaged in the business of supplying electricity for private advantage and emolument is, as to this, regarded as a private corporation, and, in such capacity, is liable to persons injured by the actionable negligence of its servants, agents and employees. *Fisher v. New Bern,* 140 N.C. 506, 53 S.E. 342; *Harrington v. Wadesboro,* 153 N.C. 437, 69 S.E. 399; *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543. *Mintz v. Murphy, supra.*

And this Court declared in *Helms v. Power Co.,* 192 N.C. 784, 136 S.E. 9, that: "Electric companies are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury to those likely to come in contact with the wires."

And in *Small v. Utilities Co.,* 200 N.C. 719, 158 S.E. 385, it is said that, "Due to the deadly and latently dangerous character of electricity, the degree of care required of persons, corporate or individual, furnishing electric light and power to others for private gain, has been variously stated." Then after reciting such expressions, the Court said: "In approving these formulae, as to the degree of care required in such cases, it is not to be supposed that there is a varying standard of duty by which the responsibility for negligence is to be determined . . . The standard is always the rule of the prudent man, or the care which a prudent man ought to use under like circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions."

Moreover, we find it stated in 18 Am. Jur. 491-2, subject Electricity, Sec. 97, "That the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires, is only reasonable. Therefore, the law does not compel companies to insulate . . . their wires everywhere, but only at places where people may legitimately go for work, business, or pleasure, that is, where they may be reasonably expected to go. The same rule applies with equal, if not greater, force in regard to placing warning

signs." This principle is recognized by this Court in *Ellis v. Power Co.*, 193 N.C. 357, 137 S.E. 163. See also 29 C.J.S. 582—Electricity, Sec. 42.

And while it is alleged that the city of Kinston should have foreseen that motor vehicles would collide at the intersection in question, and come into contact with the light poles of the city's lighting system,—this is a conclusion that does not follow the law. "One is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act upon the assumption that others will exercise care for their own safety." 45 C.J. 705. See *Shirley v. Ayers*, 201 N.C. 51, 158 S.E. 840; *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211.

Hence, on plaintiff's appeal the judgment below is affirmed.

ON DEFENDANT WASHINGTON'S APPEAL.

Did the court err in signing the judgment overruling the demurrer of the defendant Melvert Washington? This is the question on his appeal.

This appellant contends that the allegations of the complaint properly interpreted are that the city of Kinston was negligent in the construction and maintenance of the city electric lighting system, and, hence, if he were negligent as alleged, the negligence of the city insulated his negligence. However, the principle of insulating negligence does not support this contention. It relates to acts and conduct subsequently occurring. See *Harton v. Tel. Co., supra; Smith v. Sink, supra; Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808; *Mintz v. Murphy, supra; Smith v. Grubb, supra.*

This appellant also contends that the allegations of the complaint, accepted as true, show that intestate of plaintiff was contributorily negligent as a matter of law.

True the law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of care should be commensurate with the danger to be avoided. And since the danger from uninsulated or otherwise defective wires is proportionate to the amount of electricity so transmitted, contact with such wires should be avoided where their existence is known. Thus where a person seeing such a wire knows that it is, or may be highly dangerous, it is his duty to avoid coming in contact therewith. See 18 Am. Jur. 471, Electricity 76. Also see *Rice v. Lumberton, supra,* and *Mintz v. Murphy, supra.*

Nevertheless, the principle, sometimes designated the rescue doctrine, is applicable to the factual situation alleged in the complaint. See *Norris v. R. R.*, 152 N.C. 505, 67 S.E. 1017. 38 Am. Jur. 912, Negligence Sec. 228. 65 C.J.S. 736—Negligence Sec. 120. See also Annotations 5 A.L.R. 206, and 19 A.L.R. 4.

In the American Jurisprudence citation just made the author states: "The rule is well settled that one who sees a person in imminent and serious peril caused by the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, provided the attempt is not recklessly or rashly made." To like effect is the text from C.J.S. Moreover, in the *Norris case, supra,* our own Court, in opinion by *Hoke, J.,* clearly stated and applied the principle. Hence in the light of this rule, a case for the jury is alleged in this respect.

Thus the allegations of negligence against this appealing defendant are sufficient to withstand the test of a demurrer. And, the judgment overruling his demurrer is

Affirmed.

STATE OF NORTH CAROLINA ON RELATION OF THE UTILITIES COMMISSION v. ATLANTIC COAST LINE RAILROAD COMPANY, DEFENDANT APPELLANT.

(Filed 2 December, 1953.)

1. Utilities Commission § 5—

An order of the Utilities Commission is *prima facie* just and reasonable, and an appeal therefrom is limited to review, without a jury, of the record as certified by the Commission, and its order, supported by findings, may be reversed or modified only if substantial rights have been prejudiced because of findings and conclusions not supported by competent, material and substantive evidence. G.S. 62-26.10.

2. Utilities Commission § 2—

The Utilities Commission has authority to compel common carriers to maintain all such public service facilities and conveniences as may be reasonable and just. G.S. 62-39.

3. Carriers § 1½—

Each application by a common carrier to be permitted to discontinue services or facilities must be determined in accordance with the facts and circumstances of the particular case, weighing the benefit to the carrier against the inconvenience to the public which would result from such discontinuance.

4. Utilities Commission § 5—

The rule that an order of the Utilities Commission must be considered *prima facie* reasonable and just does not preclude the common carrier affected thereby from showing that the order is unsupported by competent, material and substantive evidence.

5. Same—

In this application by a railroad company to change one of its two north and south bound trains operated through a particular municipality from regular stops to flag stops, *held* the evidence is sufficient to support the findings of the Utilities Commission that the slight advantage to the carrier and slight improvement in service which would result from the change was insufficient to outweigh the small amount of public convenience and necessity in having the trains stop regularly, and the order of the Utilities Commission denying the application was properly affirmed.

APPEAL by defendant from *Frizzelle, J.*, at April Term, 1953, of WAYNE.

Proceeding instituted before the North Carolina Utilities Commission by application of the Atlantic Coast Line Railroad Company for permission to change Fremont, North Carolina, from a regular stop to a flag stop for passenger trains Nos. 48 and 49.

At hearing on 18 June, 1952, before a single commissioner, the applicant, Atlantic Coast Line Railroad Company, offered evidence in support of its application. Protestants, the town of Fremont and citizens of the town of Fremont, appeared, and offered evidence in opposition to the application.

Thereupon the hearing commissioner makes this statement of facts: "The Atlantic Coast Line Railroad Company, Applicant herein, operates four daily passenger trains, two in each direction, between the cities of Wilmington and Rocky Mount, North Carolina. All of these trains are regular conventional type trains, consisting of engines, baggage cars, express cars, mail cars, coaches for white and colored passengers, and carry Pullman cars which operate between Wilmington and New York, and between Wilmington and Washington, D. C. The trains are numbered 41 and 42, and 48 and 49. Trains 42 and 48 are northbound, that is, leave Wilmington and operate to Rocky Mount, while Trains 41 and 49 operate from Rocky Mount southbound to Wilmington.

"The Wilmington-Rocky Mount Division, proceeds from Wilmington to Contentnea, a junction point with the main line of the Coast Line operating between Richmond-Rocky Mount and Florence, South Carolina. The trains operating over the Wilmington-Rocky Mount Division switch from the tracks coming from Wilmington at Contentnea Junction over to the main line, and thus proceed on to Rocky Mount.

"Train No. 42 leaves Wilmington at 7:30 p.m. daily, arrives at Contentnea at 11:14 p.m. and at Rocky Mount at 11:55 p.m. Train No. 41 leaves Rocky Mount daily at 2:30 a.m., passes through Contentnea at 3:51 a.m. and arrives in Wilmington at 7:30 a.m. Train No. 48 leaves Wilmington at 3:40 p.m. daily, arrives in Contentnea at 6:17 p.m., and at Rocky Mount at 6:55 p.m. Train No. 49 leaves Rocky Mount daily at

9:35 a.m., and passes through Contentnea at 10:12 a.m. and arrives at Wilmington at 1:15 p.m.

"The cities of Goldsboro and Wilson are located along the line traveled by these four passenger trains, and Fremont, North Carolina, a town of 1395 residents (1950 census) is located on the line of the Atlantic Coast Line, Wilmington to Rocky Mount Division, twelve miles north of Goldsboro and fourteen miles south of Wilson.

"By application filed in this proceeding the Applicant, Atlantic Coast Line Railroad Company, seeks to change its operation through Fremont for Trains Nos. 48 and 49 by making Fremont a flag stop for each of said trains; heretofore Fremont has been a regular stop for such trains. By making Fremont a flag stop, the Applicant proposes to continue stopping the two said trains at Fremont at any and all times when there are passengers to either get off or be taken on.

"Train No. 48 from Wilmington to Rocky Mount passes through Fremont at 6:05 p.m. daily, and Train No. 49, operating in the opposite direction, that is from Rocky Mount to Wilmington, passes through Fremont at 10:25 a.m. daily.

"The applicant proposes no change with reference to Trains Nos. 41 and 42, and expects to continue the stopping of each of these trains regularly at Fremont. Train No. 41, which it proposes to continue stopping at Fremont, proceeding from Rocky Mount to Wilmington, passes through Fremont at 3:34 a.m., and Train No. 42, which it also proposes to continue stopping regularly, and proceeding from Wilmington to Rocky Mount, passes through Fremont at 10:56 p.m. daily.

"The application of the Applicant to make these changes was vigorously protested by the citizens of Fremont, and those of the area surrounding Fremont, and by the Town of Fremont, a municipal corporation which has made itself a party to this proceeding."

Then the hearing commissioner after stating contentions of the parties, and reviewing the evidence offered, in the light of applicable statute, G.S. 62-47, came to the questions as to reasonableness of the application, and as to the convenience and necessity of the public at Fremont with respect to services afforded the public by trains Nos. 48 and 49.

And to the reasonableness of the request, the commissioner states the following: "The Applicant's trains must pass through Fremont each day. If it is not necessary for them to stop, the company will effect a small financial savings, and it can eliminate approximately five minutes time in the running time between Wilmington and Rocky Mount. There are no close connections at junction points involved, and it is admitted that there is now ample time to transfer passengers and to switch sleeping cars where connections are made. The only advantage the Applicant will gain will be in the saving of time, a small economy in expenses, and some added

convenience to passengers on its train who chafe at annoying frequent stops along the way. Such circumstances as these do not impress the Hearing Commissioner as being a material improvement in either service or operation of the trains involved, and he is led to the conclusion that the reasons for the Applicant seeking to effect the change are of little consequences. The evidence shows that Train No. 48 stopped an average of five times per month to pick up passengers at Fremont, and an average of 11 times per month to discharge passengers. Of course it may have been that on some stops when passengers were discharged others were picked up, and that thus one stop accounted for both purposes, but it would be fair to assume that on the average of five and eleven stops, totaling 16 stops, there would have been at least eight or ten necessary stops per month for Train No. 48; Train No. 49 handled an average of 43 passengers from Fremont and 18 to Fremont per month, and using the same reasoning it would appear that this train necessarily stopped an average of from 15 to 20 times per month. Under this reasoning it would appear that if this application is granted the Applicant would be forced to stop its trains approximately one-half of the days in each month. This being true it seems that the Applicant could not well afford to revise its schedules for a saving of time when there is uncertainty as to whether or not its trains will have to stop.

"The two trains in question herein are the only trains that serve Fremont at a reasonable hour of the day, and it would appear to the Hearing Commissioner that it would be far more reasonable for the Applicant to have requested making the station a flag stop for the other two trains, both of which pass through Fremont at late hours during the night."

Then as to convenience and necessity, the commissioner continues:

"On the other hand there is no evidence of any compelling need for the trains to make unnecessary stops when there are neither passengers to receive or to be discharged, and other than the fact that the change will cause a change in the delivery of mail and express, for which the Applicant is not responsible, the principal motive of the Town of Fremont, and its citizens for opposing this application is civic pride—they just do not want their fine town to become a "whistle stop." There is some inconvenience in the flagging of a train. If this station becomes a flag stop, more than likely such passenger traffic as now moves to and from Fremont will be diverted to other forms of transportation.

"The town has become accustomed to the service the railroad now provides, and when there is a need for such service, it depends upon the trains stopping. Upon a showing of no more advantage than that which appears under the evidence in this case, the Hearing Commissioner cannot conclude that this application is a reasonable improvement in service

sufficient to outweigh the small amount of public convenience and necessity that the trains now serve. Thus the Hearing Commissioner has concluded to deny the application."

Thereupon by order dated 2 July, 1952, the application was denied, and defendant Atlantic Coast Line Railroad Company in apt time filed exceptions to the report and recommended order of the hearing commissioner.

"EXCEPTION No. I. The Commissioner erred in finding and concluding that 'upon a showing of no more advantage than that which appears under the evidence in this case, the Hearing Commissioner cannot conclude that this application is a reasonable improvement in service sufficient to outweigh the small amount of public convenience and necessity that the trains now serve.'

"EXCEPTION No. II. The Commissioner erred in failing to find and conclude that applicant's request that it be permitted to change Fremont from a regular to a flag stop for Trains 48 and 49 is just and reasonable, and that public convenience and necessity do not require that Trains 48 and 49 stop regularly at Fremont.

"EXCEPTION No. III. The Commissioner erred in denying applicant's request that it be permitted to change Fremont from a regular to a flag stop for Trains 48 and 49."

Thereafter the commission, upon consideration of the exceptions, being of the opinion that the evidence offered at the hearing was sufficient to warrant the findings and order to which the exceptions are directed, entered an order on 9 September, 1952, overruling each of the exceptions, and making the findings and order of 2 July, 1952, the findings and order of the commission.

Thereafter the applicant, Atlantic Coast Line Railroad Company, petitioned the commission to rehear the matter, and to reverse and set aside the order of the commission, and for an order granting the application.

Thereupon, the commission recites that every contention made for a rehearing was presented and considered at the time of the hearing of the cause; and that the same contentions were presented to the commission at the time exceptions were filed to the report and recommended order of the hearing commission, 2 July, 1952, and overruled by the order of 9 September, 1952; and that upon consideration of the contentions now presented as grounds for a rehearing: "The commission refers to, adopts and re-affirms said order dated July 2, 1952," and "for reasons stated, the petition filed in this cause is hereby denied," under date 1 October, 1952.

Thereafter, the applicant, Atlantic Coast Line Railroad Company, in conformity with and pursuant to the provisions of Section 62-26.6 of the General Statutes of North Carolina, gave notice of appeal, and appealed

to the Superior Court in term time and to the Judge thereof from (1) the order of the commission of 2 July, 1952, denying its application, (2) the order of 9 September, 1952, overruling applicant's exceptions to, and adopting the order of 2 July, 1952, and (3) the order of the commission of 1 October, 1952, denying applicant's petition to rehear.

The appeal came on for hearing before the judge presiding at the April Term of the Superior Court of Wayne County, and the court having heard arguments of counsel, and "it appearing that there was a voluminous record of the cause," it was agreed in open court by counsel for the parties that judgment in the cause might be made by the judge outside of the district with the same force and effect as if in the district, and "the court having fully examined and considered the record in this cause, the briefs and arguments by counsel, and . . . being of the opinion that the order of the North Carolina Utilities Commission should be affirmed," entered judgment—affirming in all respects the order of 2 July, 1952, denying the application of the Atlantic Coast Line Railroad Company for permission to change Fremont, North Carolina, from a regular stop to a flag stop for its passenger trains 48 and 49, and further ordering that the application for permission to do so is denied.

Defendant, applicant, Atlantic Coast Line Railroad Company, excepted to the judgment so rendered, upon grounds stated, and appeals to Supreme Court.

B. F. Aycock, J. Russell Kirby, and Dees & Dees for Town of Fremont, appellee.

Murray Allen and R. P. Upchurch for defendant, appellant.

WINBORNE, J. The appellant, Atlantic Coast Line Railroad Company, in excepting to the judgment of the Superior Court from which this appeal is taken, enumerates and sets forth several grounds upon which it contends that error occurred in the court below. All of them come to this, that, upon consideration of the whole record, the orders of the Utilities Commission are unreasonable, and are unsupported by competent, material and substantial evidence.

The statutes governing procedure before the Utilities Commission prescribe the rules and extent of review on appeal from an order of the Commission. The statute, G.S. 62-26.10 provides that, on such appeal to Superior Court, the court shall review the proceeding without a jury; that such review shall be confined to the record as certified by the Commission to the court; and that the court may reverse or modify the decision of the Commission if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclu-

sions or decisions are unsupported by competent, material and substantial evidence in view of the entire record as submitted.

And this statute also provides that "Upon an appeal to the Superior Court . . . any . . . finding, determination, or order made by the Commission under the provisions of this chapter, shall be *prima facie* just and reasonable." See *Utilities Comm. v. R. R.*, 235 N.C. 273, 69 S.E. 2d 502.

Moreover, it is provided by statute G.S. 62-39 that the Utilities Commission has power to require all transportation companies to establish and maintain all such public service facilities and conveniences as may be reasonable and just. And in *Utilities Comm. v. R. R., supra,* this Court said that "the determination and order of the Commission in the performance of this duty must be considered *prima facie* as reasonable and just," but that this "does not preclude the transportation company affected from showing that the order was unsupported by competent, material and substantial evidence," citing *Utilities Comm. v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201.

In this connection it is stated in *Utilities Comm. v. R. R.*, 233 N.C. 365, 64 S.E. 2d 272, a case treating the subject of an application of the railroad to discontinue service at a certain station, this Court in opinion by *Devin, J.*, now *Chief Justice,* made this observation: "No absolute rule can be set up and applied to all cases. The facts in each case must be considered to determine whether public convenience and necessity require the service to be maintained or permit its discontinuance. The benefit to the one of the abandonment must be weighed against the inconvenience to which the other may be subjected."

Applying these provisions of the statute, as so interpreted by this Court, to the case in hand, the findings and conclusions and orders of the Commission, *prima facie* reasonable and just, appear to be supported by competent, material and substantial evidence. Hence, the judgment of the lower court affirming the order of the North Carolina Utilities Commission denying the application of the Atlantic Coast Line Railroad Company for permission to change Fremont, North Carolina, from a regular stop to a flag stop for its passenger trains numbers 48 and 49, is hereby

Affirmed.

JACK M. CHILDRESS AND WIFE, MARY B. CHILDRESS, v. RICHARD W. NORDMAN AND WIFE, VIRGINIA P. NORDMAN, AND CAROLINA REALTY COMPANY OF CHARLOTTE, INC.

(Filed 2 December, 1953.)

1. **Evidence §§ 6, 26—**

As a general rule, mere proof of the existence of a condition or state of facts at a given time does not raise an inference or presumption that the same condition or state of facts existed on a former occasion.

2. **Fraud § 2—**

In order for a misrepresentation to constitute the basis of an action for fraud it must be shown that the representation was untrue at the time it was made or at the time it was acted upon.

3. **Fraud § 12—Evidence held insufficient to show that representation of absence of termites was false at the time made or acted upon.**

Plaintiffs' evidence tended to show that in reliance upon the representation by the broker's agent that the house in question was free of termites, plaintiffs contracted for the purchase of the house and lot on 10 September and that deed pursuant to the contract was executed 15 October of that year. Plaintiffs' evidence further tended to show that termite damage was found in the house the last week of October, and plaintiffs introduced the testimony of an expert that, from his inspection of the premises some time in December, termites were present in the house the previous October. *Held:* Plaintiffs' evidence fails to show that the representation as to the absence of termites was untrue either on the date of the execution of the contract to convey or the date of the execution of the deed, and therefore nonsuit should have been allowed for failure to show that the representation was false at the time it was made and acted upon, since in the nature of things the representation was not a continuing one and there was no evidence that either the sellers or the broker acquired knowledge that the representation had been rendered untrue by a change in conditions at the time it was acted upon.

4. **Fraud § 2—**

Unless a representation is a continuing one, a subsequent change in conditions or state of facts cannot render the person making the representation liable unless he learns that the statement has become false before it is acted upon and is under duty to disclose the change in condition.

APPEAL by defendants from *Sharp, Special Judge*, and a jury, at February Term, 1953, of MECKLENBURG.

Civil action to recover damages allegedly caused by fraud inducing the purchase of a dwelling.

For ease of statement, Jack M. Childress and wife, Mary B. Childress, are called the plaintiffs; Richard W. Nordman and wife, Virginia P. Nordman, are characterized as the natural defendants; and Carolina Realty Company of Charlotte, Inc., is designated as the corporate defendant.

The salient facts are summarized in the numbered paragraphs set forth below.

1. The natural defendants owned a dwelling at 608 Marsh Road in Charlotte, which they listed with the corporate defendant, a real estate broker, for sale on a commission basis.

2. The corporate defendant entrusted the task of selling the dwelling to its sales manager, one Wyman.

3. Wyman interested the plaintiffs in the dwelling, and negotiated its sale to them.

4. The negotiations between Wyman and the plaintiffs ended on 10 September, 1951. On that day, the results of their negotiations were incorporated in a written contract between the plaintiffs and the natural defendants, which contained these stipulations: "Richard Nordham has this day sold and Jack M. Childress has this day purchased that certain parcel of property known as 608 Marsh Road, house and lot, at the price of $9,200.00. Upon the following terms: By cash to bind sale $200.00. G. I. Loan to be obtained $8,800.00. Balance cash by purchaser at closing $200.00. Sale of home contingent upon purchaser securing above loan . . . Deed to be made as directed." For practical purposes, the stipulation relating to the securing of the G. I. Loan was a formality. The Veterans Administration had already had the dwelling examined by one of its appraisers, and had issued an outstanding certificate stating that the dwelling and its site had an established reasonable value of $10,023.00 and that the dwelling needed no repairs.

5. The plaintiffs obtained the G. I. Loan and completed the payment of the purchase price by 15 October, 1951. On that day, the natural defendants deeded the dwelling and its site to the plaintiffs, who have possessed the property ever since.

6. This action was begun on 6 May, 1952. The complaint alleges in detail that the corporate defendant, which was acting as agent for the natural defendants, falsely and fraudulently represented to the plaintiffs that the dwelling was free from termites, and in that way induced the plaintiffs to purchase it for a price exceeding its true market value. It prays for judgment against all the defendants for the resultant damages. The answers deny the material averments of the complaint. The natural defendants pray for indemnity from the corporate defendant in the event of an adverse verdict.

7. Both sides offered evidence before Judge Sharp and the jury revealing the facts enumerated in paragraphs 1, 2, 3, 4, and 5.

8. The testimony adduced by the plaintiffs tended to show these additional facts: During the negotiations culminating in the contract of 10 September, 1951, Wyman inspected the dwelling with the plaintiffs and assured them that it was free from termites. The plaintiffs believed

this representation, and were induced by it to enter into the contract with the natural defendants for the purchase of the dwelling. The plaintiffs did not observe any manifestations of termites in the house until the last week in October, 1951, when they caused a linoleum rug to be removed from a bedroom floor and saw some indications of termites under the rug. Some weeks later, to wit, in December, 1951, the plaintiffs discovered substantial signs of the presence of termites in the house by examining the woodwork underneath the house, and concluded for the first time that "the termite problem . . . was serious." Thereafter, to wit, in March, 1952, William Ivey, who was an expert in termite eradication, inspected the woodwork underneath the house, found it infested with termites, and calculated that it would require a substantial outlay to eradicate them.

9. The plaintiffs undertook to show the presence of termites in the dwelling at the time at issue by certain testimony given by the plaintiff Jack M. Childress and the termite eradicator William Ivey. This specific testimony is not narrated in this statement of facts because it is quoted at length in the ensuing opinion.

10. The evidence presented by the defendants tended to show these things: Wyman did not make any representation to the plaintiffs that the dwelling was free from termites. In purchasing the building, the plaintiffs relied upon their own inspection of the premises, and upon truthful statements made to them by Wyman in respect to the contents of the outstanding certificate of the Veterans Administration. Nothing was known or observed by Wyman or any other person until after the purchase price had been paid in full and the deed had been delivered, indicating the presence of termites in the house.

11. These issues were submitted to the jury: (1) Did the defendant Carolina Realty Company falsely and fraudulently represent to the plaintiffs that the house described in the complaint was free of termites? (2) If so, did the plaintiffs reasonably rely upon said false and fraudulent representations? (3) What damages, if any, are the plaintiffs entitled to recover on account of such representation? (4) In selling the house to the plaintiffs, did the defendant Carolina Realty Company act as the agent of the defendants Richard W. Nordman and Virginia P. Nordman, and within the scope of its employment? The jury answered the first issue "Yes," the second issue "Yes," the third issue "$1,200.00," and the fourth issue "Yes."

12. The trial judge adjudged "that the plaintiffs have and recover of Carolina Realty Company, primarily, and Richard W. Nordman and Virginia P. Nordman, secondarily, the sum of $1,200.00, and . . . the cost of this action." The defendants excepted to this judgment and appealed, assigning errors.

Bell, Horn, Bradley & Gebhardt for plaintiffs, appellees.

H. L. Strickland for defendants Richard W. Nordman and Virginia P. Nordman, appellants.

Brock Barkley for defendant Carolina Realty Company of Charlotte, appellant.

ERVIN, J. The chief question raised by the assignments of error is this: Did the trial judge err in refusing to dismiss the action upon a compulsory nonsuit after all the evidence on both sides was in?

This question must be answered in the affirmative. This is so simply because there was no evidence at the trial sufficient to show that the representation concerning the state of the dwelling was false either at the time it was made by Wyman or at the time it was acted on by the plaintiffs. *Cofield v. Griffin, ante,* 377, 78 S.E. 2d 131; *Whitmire v. Heath,* 155 N.C. 304, 71 S.E. 313; *Cash Register Company v. Townsend,* 137 N.C. 652, 50 S.E. 306, 70 L.R.A. 349; *Ramsey v. Wallace,* 100 N.C. 75, 6 S.E. 638; *Lunn v. Shermer,* 93 N.C. 164; 37 C.J.S., Fraud, section 17.

An analysis of the testimony invoked by the plaintiffs on this phase of the case demonstrates the soundness of this conclusion.

Wyman made the representation that the house was free from termites early in September, 1951, and the plaintiffs acted upon the representation on 10 September, 1951, by contracting for the purchase of the property. They merely performed the obligations of their contract when they subsequently completed the payment of the purchase price and accepted the deed.

The plaintiffs did not attempt to prove the probable time of the entry of the termites into the dwelling by evidence of the habits or propensities of these insects in respect to forsaking old haunts and invading new ones. They undertook to establish this crucial date by calling the plaintiff Jack M. Childress and the termite eradicator William Ivey to the witness stand.

Childress deposed that this event occurred during the last week of October, 1951: "After the painting and tile work was completed, I had the floors refinished. I called in Mr. Simpson to do the work, and that was when I discovered about the termites. In one of the rooms there was a linoleum rug nailed down to the floor, and when the sanding man tore the rug up, he called me and said he thought I had termites. I went out there. From all indications, I would say it was termites. I told him to replace the floors that was needed and I would call some exterminating company to come out and inspect the house. He replaced the floorboards that needed to be replaced in that bedroom."

This testimony appears at first glance to be fraught with much evidential light. But when its vague generalities are reduced to their specific

probative proportions, it leaves everything to uncertain conjecture except the naked fact that during the last week of October, 1951, Childress observed upon a bedroom floor in the dwelling indications of some termite damage whose character and extent he did not reveal. This interpretation of his evidence is corroborated by his own frank admission that he did not deem "the termite problem in the house" to be serious until sometime in December, 1951, when he "went underneath the house" and discovered other indications of termite injury.

Ivey gave this evidence in response to a hypothetical question put to him by counsel for the plaintiffs: "From my experience in that business (*i.e.*, termite eradication), I would definitely say that in my opinion those termites were present in that building in the previous October. It would not necessarily take them that period of time to do the damage they had done. We have replaced sills, in some instances, where termites had eaten them out in three and a half months. But through our experience in the field, we can detect where it is rather new damage, or where it is an old damage; and in this particular case, it really indicated that it had been active and going on for quite some time."

When all is said, the testimony of Childress and Ivey merely shows the presence of termites in the dwelling during the last week of October, 1951. This being true, the case falls within the purview of the general rule that mere proof of the existence of a condition or state of facts at a given time does not raise an inference or presumption that the same condition or state of facts existed on a former occasion. *Jarvis v. Vanderford,* 116 N.C. 147, 21 S.E. 302; *Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses,* 96 F. 2d 30; *Andresen v. Kaercher,* 38 F. 2d 462; *W. F. Corbin & Co. v. U. S.,* 104 C. C. A. 278, 181 F. 296; *Killoren Elec. Co. v. Hon,* 211 Ark. 403, 200 S.W. 2d 403; *Eudora Motor Co. v. Womack,* 195 Ark. 74, 111 S.W. 2d 530; *In re Dolbeer,* 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795; *Glenn v. Tankersley,* 187 Ga. 129, 200 S.E. 709; *Erskine v. Davis,* 25 Ill. 251; *Blank v. Township of Livonia,* 79 Mich. 1, 44 N.W. 157; *Snowwhite v. Metropolitan Life Ins. Co.,* 344 Mo. 705, 127 S.W. 2d 718; *Conduitt v. Trenton Gas & Electric Co.,* 326 Mo. 133, 31 S.W. 2d 21; *Doran v. U. S. Building & Loan Ass'n,* 94 Mont. 73, 20 P. 2d 835; *Slone-Carter Grain Co. v. Jones,* 56 N.M. 712, 248 P. 2d 1065; *Niehoff-Schultze Grocery Co. v. Gross,* 205 App. Div. 67, 199 N.Y.S. 196, affirmed in 237 N.Y. 509, 143 N.E. 722, and reargument denied in 237 N.Y. 563, 143 N.E. 743; *Shupp v. Farrar,* 85 Ohio App. 366, 88 N.E. 924; *Champlin Refining Co. v. Smith,* 190 Okl. 287, 123 P. 2d 253; *Vacuum Oil Co. v. Quigg,* 127 Okl. 61, 259 P. 858; *Cloutier v. Lapane,* 64 R.I. 181, 11 A. 2d 620; *Hentz v. Wallace's Adm'r,* 153 Va. 437, 150 S.E. 389; *Pierce v. Stolhand,* 141 Wis. 286, 124 N.W. 259. This general rule is based on the sound concept that inferences or presumptions of fact

do not ordinarily run backward. *Beacon Trust Co. v. Wright,* 288 Mass. 1, 192 N.E. 70; *Blodgett v. Springfield St. Ry. Co.,* 261 Mass. 333, 158 N.E. 660; *Hanna v. Stedman,* 230 N.Y. 326, 130 N.E. 566; *Daniff v. Charles R. McCormick & Co.,* 105 Or. 697, 210 P. 703; *McDaniel v. Crabtree,* 143 Wash. 168, 254 P. 168; 31 C.J.S., Evidence, section 140.

The legal standing of the plaintiffs would not be strengthened on the present record if the evidence were interpreted to show that they acted on Wyman's representation on 15 October, 1951, when they completed the payment of the purchase price and accepted the deed, and that the termites were present in the dwelling as early as that day. The case would be controlled in that event by this rule of law: "Except where it may be regarded as continuing in character, the truth or falsity of a representation is generally to be determined as of the time when it was made, and subsequent changes in the condition of affairs cannot affect the liability of the person who made it. One who knows, however, that a statement true when made has become false has a duty to disclose the change in conditions." 23 Am. Jur., Fraud and Deceit, section 114.

We must indulge the assumptions on the present record that Wyman made his representation on or about 10 September, 1951, and that it was true when he made it.

Under the evidence adduced at the trial, there is no basis whatever for the view that when Wyman assured the plaintiffs in express terms on or about 10 September, 1951, that the dwelling was then free from termites. he impliedly represented to them that it would be in the same happy state on 15 October, 1951. As a consequence, Wyman's representation cannot be regarded as a continuing one, and its truth or falsity must be determined as of 10 September, 1951, rather than as of 15 October, 1951. It is to be noted, moreover, that the evidence offered at the trial does not indicate that any of the defendants or any of their agents acquired any knowledge at any time before the final consummation of the sale on 15 October, 1951, that Wyman's representation of 10 September, 1951, had been rendered untrue by a change in conditions.

The judgment is

Reversed.

THOMAS W. MOSES, GUARDIAN FOR FRANCES JEAN B. MOSES, DAUGHTER AND NEXT OF KIN OF GEORGE W. BOONE, DECEASED, LOUISBURG, NORTH CAROLINA, v. E. M. BARTHOLOMEW, AND W. E. BARTHOLOMEW, DOING BUSINESS AS HOME OIL COMPANY; E. M. BARTHOLOMEW, INDIVIDUALLY, DOING BUSINESS AS BARTHOLOMEW OIL TRANSPORTATION COMPANY, EMPLOYER; TEXTILE INSURANCE COMPANY, CARRIER.

(Filed 2 December, 1953.)

1. Master and Servant § 52—

In exercising its authority to find the facts in a proceeding before it, the Industrial Commission is the sole judge of the credibility and weight of the evidence, and may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves same. G.S. 97-84.

2. Master and Servant § 55d—

Upon appeal from an award of the Industrial Commission, the courts do not retry the facts, but merely determine whether there was sufficient competent evidence before the commission to support its findings. G.S. 97-86.

3. Master and Servant § 39f—Evidence held to support finding that partnership was employer and not separate business owned by one partner alone.

The evidence tended to show that a fuel oil company had its name on the tractor-tank deceased was employed to drive, that it filed tax returns reciting that deceased was employed by it and paid Federal income and social security taxes deductible from his wages, and furnished deceased a statement thereof. *Held:* The evidence is sufficient to support the finding of the Industrial Commission that deceased was employed by the oil company, notwithstanding evidence offered by defendants that the oil company was a partnership dealing only in the retail of fuel oil and that the tractor-tank was owned and operated as a separate transportation business by one of the partners alone.

APPEAL by defendants E. M. Bartholomew and W. E. Bartholomew, doing business as Home Oil Company, and the defendant Textile Insurance Company, from *Burney, J.*, at April Term, 1953, of FRANKLIN.

Proceeding under the North Carolina Workmen's Compensation Act.

For ease of narration, George W. Boone is called the deceased; Frances Jean B. Moses is characterized as the plaintiff; E. M. Bartholomew and W. E. Bartholomew, Partners, doing business as Home Oil Company, are described as the Home Oil Company; and E. M. Bartholomew, individually, doing business as Bartholomew Oil Transportation Company, is designated as the Transportation Company. For like reason the Home Oil Company and its insurance carrier, the Textile Insurance Company, are referred to jointly as the defendants.

Certain matters are not in dispute. They are recounted in the numbered paragraphs set forth below.

1. The Home Oil Company, which dealt in petroleum products, maintained its office at Louisburg in Franklin County, North Carolina, where it constantly employed some fifteen persons.

2. The Home Oil Company and its employees were subject to the provisions of the North Carolina Workmen's Compensation Act.

3. The Home Oil Company purchased the petroleum products in which it dealt from the Atlantic Refining Company at Wilmington, North Carolina.

4. The petroleum products so purchased by the Home Oil Company were transported from Wilmington to distribution centers in Greenville, Jacksonville, Louisburg, Smithfield, Washington, and Wilson, North Carolina, in three tractor-tank combinations, which were not used for any other purpose. Each combination was regularly driven by the same driver.

5. The deceased, who resided in Louisburg, was the regular driver of one of the tractor-tank combinations for a period of at least a year next preceding his fatal accident.

6. On 19 October, 1951, the deceased undertook to haul a load of gasoline bought by the Home Oil Company from the Atlantic Refining Company from Wilmington to the distribution center at Jacksonville in the tractor-tank combination of which he was the regular driver.

7. While en route from Wilmington to Jacksonville, the tractor-tank combination was accidentally overturned and burned. As a consequence, the deceased suffered horrible burns, which produced his death about ten hours later.

8. The deceased left neither whole nor partial dependents. He was survived, however, by the plaintiff, a minor daughter, who is his sole next of kin within the purview of the statute embodied in G.S. 97-40.

The plaintiff, acting through her general guardian, Thomas W. Moses, brought this proceeding before the North Carolina Industrial Commission to obtain compensation from the defendants for the death of the deceased. She alleged in her claim that the deceased was employed by the Home Oil Company to drive the tractor-tank combination, and that he died as the result of personal injuries sustained by him by reason of an accident arising out of and in the course of his employment by it.

The defendants did not gainsay that the deceased died as the result of personal injuries sustained by him by reason of an accident arising out of and in the course of his employment. They denied liability for compensation on account of his death upon the theory that at the time he received the injuries from which he died, the deceased was an employee

of the Transportation Company, and not an employee of the Home Oil Company.

Both sides offered testimony before the hearing commissioner consistent with the matters stated in the numbered paragraphs.

The plaintiff was a witness in her own behalf. She also put two of the brothers of the deceased on the stand. These three witnesses testified in express terms that the Home Oil Company hired the deceased to drive the tractor-tank combination involved in the fatal accident during all the times in controversy in this proceeding.

The plaintiff presented additional evidence before the hearing commissioner tending to establish these facts: The tractor driven by the deceased had the name "Home Oil Company" on its left door, and the tank pulled by it bore the words "Home Oil Company, Louisburg, North Carolina," on its rear. While the deceased was the regular driver of the tractor-tank combination, the Home Oil Company kept records in compliance with Federal tax laws, reciting that the deceased was employed by it, and showing the amount of wages paid by it to him for his services. During the same time, the Home Oil Company filed with the United States Collector of Internal Revenue for the District of North Carolina tax returns reciting that the deceased was employed by it and showing the sums withheld by it from his wages for federal income and social security tax purposes, and paid these sums together with the amounts of federal social security taxes for which it was liable as the employer of the deceased to such Collector of Internal Revenue by means of checks bearing these notations: "For Home Oil Co. S. S. & W. H. Taxes." On or before 31 January, 1951, the Home Oil Company furnished to the deceased for his use in filing his Federal income tax return copies of a statement on Form W-2 showing that the Home Oil Company employed the deceased during 1950, that it paid him wages totaling $1,124.50 for his services to it during 1950, and that it withheld $40.00 from such wages for income tax purposes during 1950. As the deceased lay dying of his burns in a hospital at Wilmington, his attending physician "asked him who he was driving for, and he said Home Oil Company, of Louisburg." Although the Transportation Company allegedly maintained its headquarters in the office of the Home Oil Company at Louisburg, witnesses for the plaintiff, who possessed familiarity with the affairs and office of the Home Oil Company, "didn't know there was a company in Louisburg by the name of Bartholomew Oil Transportation Company." Moreover, the Transportation Company did not return any property for taxation in Franklin County, and did not pay any taxes to the Town of Louisburg or Franklin County.

The only avowed witness for the defendants was E. M. Bartholomew, a partner in the Home Oil Company. They had, however, the benefit of

the testimony of B. S. Downey, the bookkeeper of the Home Oil Company, whom the plaintiff was compelled to call to the stand to identify certain tax returns.

These two witnesses gave testimony to this effect: The Home Oil Company was a partnership conducted by E. M. Bartholomew and W. E. Bartholomew, and the Transportation Company was an individual business operated by E. M. Bartholomew alone. The Transportation Company owned the three tractor-tank combinations, and hired the deceased and the other two regular drivers to operate them. Pursuant to oral contracts between it and the Home Oil Company, the Transportation Company used the tractor-tank combinations solely to haul the petroleum products bought by the Home Oil Company from the Atlantic Refining Company from Wilmington to the distribution centers at Greenville, Jacksonville, Louisburg, Smithfield, Washington, and Wilson. Although there was no external indication of such fact, the Transportation Company maintained its headquarters in the office of the Home Oil Company at Louisburg, and employed B. S. Downey, the bookkeeper of the Home Oil Company, to keep its records. Since the deceased was the employee of the Transportation Company, the plaintiff was not entitled to compensation from the Home Oil Company and its insurance carrier; and since the Transportation Company had only four employees, the plaintiff was not entitled to compensation from it.

E. M. Bartholomew denied that the Transportation Company was a mere fictitious bookkeeping scheme designed to enable the Home Oil Company to circumvent the workmen's compensation law, and evade the payment of the high premiums charged for workmen's compensation insurance coverage for employees engaged in the hazardous occupation of transporting gasoline. He conceded, however, that there was no way in which "the average individual" could tell the Transportation Company from the Home Oil Company, and that the Home Oil Company declared in its tax returns to the Federal Government that the deceased and the other two drivers were employees of the Home Oil Company. He explained that the Transportation Company was established after the Home Oil Company, and that "the Revenue Agent" advised the Home Oil Company to include the names of the Transportation Company's employees in its tax returns "rather than start up a new company in the Revenue Department."

The hearing commissioner made findings of fact in specific detail to the effect that the deceased was an employee of the Home Oil Company at the time in controversy, and that he died as the result of personal injuries received by him by reason of an accident arising out of and in the course of his employment by the Home Oil Company. The hearing commissioner concluded as a matter of law that the plaintiff was entitled to com-

pensation from the Home Oil Company and its insurance carrier on account of the death of the deceased, and entered an award accordingly. An application was then made by the defendants for a review by the full commission. Upon its review, the full commission adopted as its own the findings of fact and conclusions of law of the hearing commissioner, and entered a corresponding award in favor of the plaintiff. The defendants thereupon appealed from the full commission to the Superior Court, and the Superior Court rendered a judgment affirming the decision of the full commission. The defendants excepted to this judgment and appealed from it to the Supreme Court, assigning errors.

Hamilton Hobgood and Yarborough & Yarborough for plaintiff, appellee.

Charles P. Green and Smith, Sapp, Moore & Smith for defendants, appellants.

ERVIN, J. The assignments of error present this question for decision: Is the finding of fact of the full commission that the deceased was an employee of the Home Oil Company at the time he received the personal injuries from which he died supported by competent evidence?

The following rules are well settled in respect to proceedings coming within the purview of the North Carolina Workmen's Compensation Act:

1. Full fact-finding authority is vested in the industrial commission. G.S. 97-84. In exercising this authority, the industrial commission, like any other trier of facts, is the sole judge of the credibility and weight of the evidence. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515. As a consequence, it may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same. *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265.

2. When the party aggrieved appeals to court from a decision of the full commission on the theory that the underlying findings of fact of the full commission are not supported by competent evidence, the court does not retry the facts. The court merely determines from the proceedings had before the commission whether there was sufficient competent evidence before the commission to support the findings of fact of the full commission. This is necessarily so because under the statute codified as G.S. 97-86, the findings of fact of the full commission are conclusive on appeal, both in the Superior Court and in the Supreme Court, if they are supported by competent evidence. *Henry v. Leather Co., supra; Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668; *Fox v. Mills, Inc.*, 225 N.C. 580, 35 S.E. 2d 869.

When all is said, the case comes to this: The evidence invoked by the plaintiff and that relied on by the defendants are irreconcilable. The industrial commission accepted the testimony invoked by the plaintiff and rejected that relied on by the defendants because it believed the former and disbelieved the latter. In so doing, the industrial commission merely fulfilled its fact-finding function.

The evidence invoked by the plaintiff and accepted by the industrial commission amply supports the findings of fact of the full commission. This would be true even if the dying declaration of the deceased and the testimony given by the plaintiff in person should be adjudged incompetent and eliminated from consideration for that reason. Moreover, the findings of fact justify and require the conclusions of law and the award of the full commission.

For these reasons, the judgment of the Superior Court affirming the decision of the full commission is

Affirmed.

CALVINE COTTON MILLS, INC., v. TEXTILE WORKERS UNION OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, LOCAL NO. 677; DRAPER D. WOOD, J. D. COSTNER AND ANY AND ALL OTHER MEMBERS OF THE AFORESAID LABOR UNION.

(Filed 2 December, 1953.)

1. Appeal and Error § 6c (2)—

Upon appeal from judgment affirming an arbitration award, exceptive assignments of error to the refusal of the court to grant the relief prayed for by plaintiff and to the signing of the judgment present only whether the award and the facts found by the court are sufficient to support the judgment.

2. Arbitration and Award §§ 5, 10—

Where the dispute submitted to arbitration grows out of a written contract, interpretation of the contract is necessary to the settlement of the controversy and is within the arbitrator's authority, and his award is conclusive and binding on the parties if the award is based on a permissible construction of the contract.

3. Same—

An arbitrator must act within the scope of the authority conferred on him by the arbitration agreement, and his award is subject to attack if he, acting under a mistake of law, exceeds his authority. G.S. 1-559, 560.

4. Arbitration and Award § 6—

An arbitration is an extrajudicial proceeding, and the arbitrator is not bound by the rules of procedure and evidence which prevail in a court of law.

5. Arbitration and Award § 5—

An agreement to arbitrate any dispute between the parties arising out of the contract between them concerning wages gives the arbitrator authority to hear a dispute as to the interpretation of the agreement in respect to vacation pay, since vacation pay is a part of an employee's wages.

6. Arbitration and Award § 6—

Contract between the parties in this case in regard to the payment of *pro rata* vacation pay based on a minimum of six months' service *is held* susceptible to the interpretation that an employee discharged through no fault of his own is entitled to *pro rata* vacation pay even though his employment is terminated prior to the annual calculation date, provided he has been in the employment of the company for a period of six months or longer.

APPEAL by plaintiff from *Godwin, Special J.*, May Extra Term 1953, MECKLENBURG. Affirmed.

Civil action to vacate an arbitration award and for a decree construing the vacation pay agreement between plaintiff and defendant Local No. 677.

On 12 September 1949, plaintiff and the Textile Workers Union of America (C.I.O.), Local 677, whose members were employed by plaintiff, entered into a collective bargaining agreement concerning working conditions at plaintiff's Calvine Plant No. 1, and providing for vacation pay for the employees.

On 8 January 1952, plaintiff notified said Local and its members that plaintiff would cease all operations at Calvine Plant No. 1 on 14 January 1952. On said date the employment of all employees at said plant was permanently terminated except such as were needed to complete work on hand on that day. The employment of the employees who were retained was terminated as such work was completed.

On 4 February 1952, defendant Local filed with plaintiff a claim for *pro rata* vacation pay (1 June being the year end for that purpose) for each and every one of its members who were employed at said plant on 14 January, and demanded arbitration. An arbitrator was appointed. He heard the parties and on 4 April 1952 made his award allowing the employees "*pro rata* vacation pay up to the date of termination based upon such employee's length of service, as provided in Section X of the contract." An opinion setting forth the arbitrator's reasons for the award accompanied the award.

On 19 April 1952, plaintiff instituted this proceeding under G.S. 95-36.9 (c) and G.S. 1-559. In its complaint it attacks the award for that (1) the arbitrator admitted and considered "grossly irrelevant and grossly immaterial" testimony, (2) the award is not supported by the evidence submitted, and (3) the arbitrator exceeded his powers and dis-

regarded express provisions of the collective bargaining contract which denies him the right to change, add to, delete, or modify any part of said contract.

When the cause came on for hearing, the court below, being of the opinion that the arbitrator had proceeded in accord with the arbitration agreement and in so doing had not committed any error in law, entered judgment (1) denying the relief prayed by plaintiff, (2) affirming the award, and (3) ordering plaintiff to make the payments of *pro rata* vacation pay as directed in the award. Plaintiff excepted and appealed.

Maurice A. Weinstein for plaintiff appellant.
Carl E. Gaddy, Jr., for defendant appellees.

BARNHILL, J. The only exceptive assignments of error contained in the record are these: (1) "The plaintiff assigns as error the refusal of the Court to grant the relief prayed for by the plaintiff," and (2) "the plaintiff further assigns as error the action of the Court in rendering and signing the judgment appearing in the record."

These exceptive assignments of error are most general in terms and constitute a broadside attack on the judgment. *Vestal v. Vending Machine Co.*, 219 N.C. 468, 14 S.E. 2d 427. The exception to the judgment in effect asserts that the award and the facts found by the court are insufficient to support the judgment entered. *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351; *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E. 2d 128; *Redwine v. Clodfelter*, 226 N.C. 366, 38 S.E. 2d 203; *Hoover v. Crotts*, 232 N.C. 617, 61 S.E. 2d 705. It is doubtful whether it goes behind the award so as to present the question whether the arbitrator acted under a misapprehension of the law as argued by plaintiff. In any event, that is the full extent of the assignments of error. We will resolve the doubt in favor of plaintiff so as to discuss and decide that question. If the arbitrator, under the guise of construction, read into the collective bargaining agreement a material provision no reasonable construction will permit, he acted under a mistake of law as to his authority and the award should be vacated. On the other hand, if the award is bottomed on a permissible construction of the contract, then the judgment should be sustained.

An arbitration is an extrajudicial proceeding and the arbitrator is not bound by the rules of procedure and evidence which prevail in a court of law. When the dispute submitted to him grows out of a written contract, and settlement of the controversy requires an interpretation of that contract, interpretation thereof is within his authority. *Chair Co. v. Furniture Workers*, 233 N.C. 46, 62 S.E. 2d 535. Once made, the award is, ordinarily, conclusive and binding upon the parties. 3 A.J. 938, 951.

From it there is no appeal.

Even so, an arbitrator must act within the scope of the authority conferred on him by the arbitration agreement, and his award is subject to attack for that he, acting under a mistake of law, exceeded his authority, *Chair Co. v. Furniture Workers, supra,* and upon other grounds which are not material here. G.S. 1-559, 560.

Here the collective bargaining agreement expressly provides in Section V for the submission of a dispute respecting the proper interpretation of the agreement. Section V of the collective bargaining agreement reads in part as follows:

"(a) Any grievance, disagreement or dispute between the company and the Union, arising from the operation or interpretation of this Agreement or concerning wages, hours of employment . . . shall, at the request of the Company or the Union, be settled by arbitration . . .

"(b) . . . The arbitrator shall not have the authority to change in any respect any provision of this Agreement nor add to, delete or modify any of its provisions. The arbitrator's award shall be in writing and shall be binding on the Company and the Union and conclusive of the Controversy submitted."

Vacation pay is part of an employee's wages, and plaintiff's employees had earned a *pro rata* portion of their vacation pay from 1 June 1951 to the time their employment was terminated. *In re Publishing Co.,* 231 N.C. 395. So then, the matter in dispute concerns the wages due the employees—and arbitration of grievances concerning wages, except for general wage increases and decreases, is expressly provided for in the contract.

But plaintiff stressfully contends that the contract, when correctly construed, provides that only those who were employees of plaintiff on 1 June of each year were entitled to vacation pay.

The contract is somewhat ambiguous in this respect. While it is not expressly so provided, there are a number of expressions in the contract which tend to support this contention. Plaintiff relies in particular on the provision that "termination of any employee's employment for any reason after June 1st shall not affect the employee's right to vacation pay." The vacation pay calculation day under the contract was 1 June. No employee could demand such pay prior to that date. Consequently we consider the quoted provision as nothing more than a declaration that if an employee continued with the company up until 1 June of any year, but his employment was terminated after that date and before he received his vacation pay, the company had no defense and could not, for any cause whatsoever, refuse to pay him.

Contrariwise, there are provisions and expressions in the contract which indicate it was contemplated that an employee should receive *pro rata*

vacation pay when his employment was terminated prior to 1 June. "Vacation pay shall be a percentage amount of each individual employee's total earnings, as established by the Social Security records for the year immediately preceding the June 1st and shall be based on length of service as follows:

"6 months to 5 years' service . . . 2%"

This clearly permits and requires *pro rata* pay provided the employee had been employed six months or more. And there is no limitation, here or elsewhere in the contract, to the effect that the time of service—less than one year—shall be the six months ending on 1 June.

Likewise an employee who had entered military service and returned to his job at any time prior to 1 June was entitled to *pro rata* vacation pay irrespective of the length of time of his service.

Vacation pay constitutes wages. There are provisions in the contract—both those mentioned and others—which may be construed to mean that an employee who remained in the employment any six months or more during the year, prior to the vacation pay calculation date, should receive his *pro rata* part of one year's vacation pay. The parties could have—but did not—write into the contract any limiting provision such as the one plaintiff now contends should be implied from the other language used. In view of these facts we are of the opinion the necessity for an interpretation of the contract, in the process of settling the controversy submitted to the arbitrator, is clearly indicated.

In making his award the arbitrator construed the contract, as it was his right and duty to do. He added nothing to the agreement. Instead, he based his conclusions on a permissible construction of the written instrument.

The award provides that the plaintiff shall pay the employees there "*pro rata* vacation pay up to the date of termination based upon such employee's length of service, as provided in Section X of the contract." In this connection we direct attention to the fact that only those employees who were employed six months or more between the preceding 1 June and the date of termination are entitled to vacation pay under Section X of the collective bargaining agreement. This should be spelled out in the judgment so there can be no mistake as to the meaning of the award.

On this record, the employment of the members of Local No. 677 was terminated without cause on their part. They were innocent victims of the decision of plaintiff to cease operations at its Calvine Plant No. 1. Homespun honesty and simple justice demand that they should receive that part of their vacation pay they had earned when their employment was terminated. The arbitrator, under a permissible interpretation of the contract, has determined that they are entitled thereto under the collective bargaining agreement. While it is not our prerogative to

review or reverse his interpretation, so long as it is interpretation and not interpolation of provisions not contained in the contract, we are inclined to concur in his conclusion.

There are questions discussed in the brief of appellant which are not raised by the exceptive assignments of error. As those questions are not before the Court, we refrain from any discussion thereof.

The award is confined to the question submitted to the arbitrator. In making his award, the arbitrator did not act under a mistake of law. Nor did he exceed his authority. Therefore, the judgment entered in the court below is

Affirmed.

LARRY O. SHIVES v. JAMES M. SAMPLE AND W. W. WINTERS, TRADING AS S & W TRUCKING COMPANY.

(Filed 2 December, 1953.)

1. Pleadings § 3a—

The complaint must allege the facts constituting the cause of action so as to disclose the issuable facts determinative of plaintiff's right to relief. G.S. 1-122.

2. Pleadings § 19c—

Upon demurrer, only facts properly pleaded are to be considered, and legal inferences and conclusions of the pleader are to be disregarded.

3. Negligence § 16—

Negligence is not a fact in itself but is a legal conclusion from the facts, and therefore plaintiff in an action based on negligence must allege the facts upon which the legal conclusion of negligence and proximate cause may be drawn, and mere allegation of the happening of an event causing injury, together with the pleader's conclusion that the adverse party was negligent, is insufficient.

4. Master and Servant § 15—Allegations held insufficient to allege cause of action against employer for failure to provide safe place to work.

Allegations to the effect that plaintiff was employed to drive a truck hauling stone to a stock pile and that he was injured while unloading his truck on the stock pile when the stock pile caved in, and that defendant knew or should have known that the pile of stone was hollow underneath and was likely to cave in and cause injury but failed to warn plaintiff of such condition, is insufficient to withstand demurrer, there being no allegation of facts supporting the conclusion that the stock pile was under the direction or control of defendant or any factual allegation supporting the conclusion that defendant had knowledge of the dangerous conditions any more than plaintiff.

5. Same—

The duty of a master to exercise ordinary care to provide a servant a reasonably safe place in which to work does not apply when the servant is

working on the premises of a third person and the master has neither possession nor control over the premises.

APPEAL by defendants from *Nettles, J.*, at May Term, 1953, of IREDELL.

Civil action to recover damages for personal injuries, heard below on demurrer to the complaint for failure to state facts sufficient to constitute a cause of action.

These in summary are the pertinent allegations of the complaint:

1. That the plaintiff and the defendants are all residents of Iredell County, but the defendants "were engaged in hauling and placing crushed stone or gravel on a stock pile in Alexander County, North Carolina.

"2. That on the 10th day of October, 1950 the plaintiff was employed by the defendants; and was operating one of their trucks under their control and direction, hauling and unloading crushed stone or gravel on said stock pile, under the direction and control of the defendants.

"3. That without any fault on the part of the plaintiff, said stock pile which was hollow underneath, caved in and threw the plaintiff against said truck or stock pile of gravel, severely injuring and damaging him on or about his back, breaking two vertebrae of his back."

4. (Allegations showing that the Superior Court, rather than the Industrial Commission, has jurisdiction. These allegations are omitted as not being material to the statement of a cause of action by the plaintiff or pertinent to the appeal.)

"5. That without any fault on the part of the plaintiff, who was engaged in hauling and unloading crushed stone or gravel on said stock pile, under the direction and control of the defendants, the defendants were negligent in that:

"(a) They failed and neglected to furnish a safe and suitable place for the plaintiff to work in unloading said crushed stone or gravel on said stock pile, under their direction and control.

"(b) That said defendants knew, or by the exercise of ordinary care should have known, that said stock pile was hollow, under the point where the crushed stone or gravel was being unloaded by the plaintiff, and was likely to cave in and injure the plaintiff.

"(c) That said defendants failed and neglected to inform or notify plaintiff that said stock pile was hollow underneath and very likely to cave in and injure the plaintiff.

"6. That by reason of the negligence of the defendants, as aforesaid, and as the proximate cause thereof, the plaintiff was severely and painfully injured and bruised on or about his body . . ." (Then follows a detailed statement of the nature and extent of plaintiff's injuries and his prayer for relief.)

The defendants demurred to the complaint for failure to state facts sufficient to constitute a cause of action (G.S. 1-127 (6)).

The trial court overruled the demurrer, and from the judgment based on such ruling, the defendants appealed.

J. G. Lewis for plaintiff, appellee.

Adams, Dearman & Winberry for defendants, appellants.

JOHNSON, J. The complaint, when tested by established principles of Code pleading, fails to allege a cause of action.

G.S. 1-122, which is an integral part of our Code of Civil Procedure, provides that "The complaint must contain—2. A plain and concise *statement of the facts* constituting a cause of action, . . ." (Italics added.)

The cardinal requirement of this statute, as emphasized by numerous authoritative decisions of this Court, is that the facts constituting a cause of action, rather than the conclusions of the pleader, must be set out in the complaint, so as to disclose the issuable facts determinative of the plaintiff's right to relief. *Gillis v. Transit Corporation,* 193 N.C. 346, 137 S.E. 153; *Griggs v. Griggs,* 213 N.C. 624, 197 S.E. 165; *Lassiter v. Roper,* 114 N.C. 17, 18 S.E. 946; *Moore v. Hobbs,* 79 N.C. 535.

It is fundamental that on demurrer only facts properly pleaded are to be considered, with legal inferences and conclusions of the pleader to be disregarded. *Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32; *Bank v. Gahagan,* 210 N.C. 464, 187 S.E. 580; *Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800; *Bank v. Bank,* 183 N.C. 463, 112 S.E. 11.

In an action or defense based upon negligence, it is not sufficient to allege the mere happening of an event of an injurious nature and call it negligence on the part of the party sought to be charged. This is necessarily so because negligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged. *Daniels v. Montgomery Ward & Co.,* 217 N.C. 768, 9 S.E. 2d 388; *Furtick v. Cotton Mills,* 217 N.C. 516, 8 S.E. 2d 597; *Moss v. Bowers,* 216 N.C. 546, 5 S.E. 2d 826. See also *Baker v. R. R.,* 232 N.C. 523, 61 S.E. 2d 621.

As stated by *Connor, J.,* in *Thomason v. Railroad,* 142 N.C. 318, 324, 55 S.E. 205, 207, a pleading "which alleges negligence in a general way, without setting forth with some reasonable degree of particularity the things done, or omitted to be done, by which the court can see that there has been a breach of duty, is defective and open to demurrer." See also McIntosh, North Carolina Practice and Procedure, Sec. 359.

In the case at hand the plaintiff predicates his right of recovery on failure of the defendants to exercise due care to provide him a reasonably safe place in which to work. *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Baker v. R. R., supra* (232 N.C. 523).

However, in testing the sufficiency of the complaint it must be kept in mind that the general rule which imposes liability upon a master for injury resulting from unsafety of the place where the servant works does not ordinarily apply where the servant is working on premises of a third person and the master neither has possession nor control over the premises. This is so for the reason that this general rule of liability, resting as it does upon the theory of failure on the part of the master to exercise due care to make and keep the place of work reasonably safe, necessarily flows from, and is dependent upon, possession or control of the premises. *Crawford v. Michael & Birens, Inc.*, 199 N.C. 224, 154 S.E. 58; *Atkinson v. Corriher Mills Co.*, 201 N.C. 5, 158 S.E. 554; *Hughes v. Malden & Melrose Gaslight Co.* (Mass.), 47 N.E. 125; 35 Am. Jur., Master and Servant, Sections 174 and 186.

Here no facts are alleged tending to show that the defendants had possession or control of the stock pile of crushed stone and gravel where the injury occurred. If anything, the implication is that the stock pile was in the possession and under the control of a third party. The allegations are that the defendants are residents of Iredell County, engaged in the trucking business, and that the stock pile was located in Alexander County; that the plaintiff, as employee of the defendants, "was operating one of their trucks under their control and direction, hauling and unloading crushed stone and gravel on said stock pile, under the direction and control of the defendants." The expression "under the direction and control of the defendants," we interpret as meaning that the plaintiff was operating the truck "under the direction and control of the defendants," rather than that the stock pile was "under the direction and control of the defendants." But this is not important, for if the expression should be interpreted as being referable to the stock pile, clearly it would be a mere conclusion of the pleader, unsupported by factual allegations, and therefore to be disregarded. *Development Co. v. Bearden*, 227 N.C. 124, 41 S.E. 2d 85; *Mills v. Mfg. Co.*, 218 N.C. 560, 11 S.E. 2d 550; *Whitehead v. Telephone Co.*, 190 N.C. 197, 129 S.E. 602; *Baker v. R. R.*, 205 N.C. 329, 171 S.E. 342.

It is also noted that no particular facts are stated concerning the condition of the stock pile—nothing is alleged in respect to its general layout, its shape, its size, or the manner in which the rock and gravel were being deposited thereon. No facts are stated descriptive of the nature and extent of the hollow place in or underneath the stock pile where the alleged cave-in occurred. Nothing is alleged respecting how or when the stock

pile became hollow underneath. All this is left to conjecture. Nor is there any factual allegation upon which to predicate a showing that the plaintiff did not have the same knowledge, or means of knowledge, of the danger as did the defendants. It is merely alleged that the defendants "knew, or . . . should have known, that the stock pile was hollow . . . and was likely to cave in . . ." In the absence of supporting factual allegations, this is a conclusion of the pleader to be disregarded. *Development Co. v. Bearden, supra* (227 N.C. 124).

We conclude that the judgment below should be reversed and the demurrer sustained. It is so ordered. This, of course, is without prejudice to the plaintiff's right to move in the court below for leave to amend his complaint under the provisions of G.S. 1-131.

Reversed.

STATE v. MARSHALL "CAM" POPLIN.

(Filed 2 December, 1953.)

Homicide § 27f—Evidence held to require instruction on defendant's right to defend himself in his home and eject trespassers.

The evidence favorable to defendant disclosed that defendant occupied a bedroom in a certain house, that defendant, deceased and others, got into an altercation in the kitchen of the house, and that defendant went to his bedroom and got his pistol and shot his assailant who continued to approach him with an upraised chair notwithstanding that defendant had ordered him from the house and told him not to come into the room. *Held:* It was incumbent upon the trial court, even in the absence of prayer for special instructions, to define a home within the meaning of the law of self-defense and to charge upon defendant's legal right to defend himself in his home, to defend his home from attack and to eject trespassers therefrom, as substantive features of the case arising upon the evidence. G.S. 1-180.

APPEAL by defendant from *Whitmire, Special Judge,* at Extra 10 August, 1953, Criminal Term of MECKLENBURG.

Criminal prosecution upon a bill of indictment charging defendant with the murder of one Wade D. Philemon.

Plea of defendant was not guilty.

The Solicitor for the State announced in open court that the State would not seek the capital verdict but would seek a conviction of second degree murder or manslaughter as the evidence would warrant.

Upon the trial in Superior Court the State offered evidence tending to show that about 11 o'clock on the night of 11 July, 1953, Wade Philemon came to his death as the result of pistol shot received while he was in the

house where defendant Poplin was; that in this house there was a hallway leading from the front to the rear; that there were two bedrooms up front, and another room and kitchen and bath in the back; that one of these bedrooms was the bedroom of defendant,—he lived there; that one Douglas Haygood McDonald (a witness for the State), and Wade Philemon went to this house, entered the front door without speaking to anyone, and walked through the hall to the kitchen; that one George H. Bowles was back there, and defendant came in with them; that McDonald and Philemon asked Bowles for a pint of whiskey, and defendant went and got it,—McDonald asking "How much?", defendant replying "Four dollars"; that McDonald asked if three dollars and fifty cents would do, and defendant said "No." Whereupon McDonald handed him four dollars; that Bowles came over at McDonald with a roofing knife, and McDonald hit him in the mouth; that then Bowles started at Philemon and took him into the other room; that defendant had a pistol on McDonald and told him to get out, and he, McDonald, said "OK, Cam," and started out, and got to the front door and heard the shot,—and Philemon said "He got me,"—he grabbed his side; that when defendant drew the pistol on McDonald he was standing in his bedroom, up front from the kitchen, and McDonald was in the hall at the kitchen about six feet away, and Philemon was back in the other room; that it was necessary to go by the bedroom door where defendant was standing to get out of the kitchen and out of the house; that McDonald did not see the shooting, and does not know what Philemon was doing; but that there was a broken chair in the hall, when the sheriff came. McDonald testified that "As far as I know no one was mad about an argument over the whiskey. Mr. Poplin did not tell me to get out of the house because I was raising a disturbance. The fight started before we could get out of the house. Bowles came at me with a knife . . . he had said nothing to me . . ." The State rested.

Thereupon defendant, reserving exception to the denial of his motion for judgment as of nonsuit, offered the testimony of George H. Bowles, and also testified in his own behalf. Their testimony tended to show that defendant and Bowles each rented a bedroom in the house where the shooting took place,—defendant the one on the left as one enters the house, and Bowles the one on the right; that they both were sitting on the front porch when Philemon and McDonald came to the house, walked in, and went back to the kitchen; that defendant got up and walked in behind them, and Bowles followed; and that in the kitchen, there was a whiskey transaction; that Philemon and McDonald were drinking "pretty heavily": that they started the disturbance; that as Philemon came up with a chair he knocked out a light over his head; that defendant went toward his bedroom—Philemon chasing him up the hall—with the chair; and that the shot was fired by defendant as he stood in his bedroom.

Bowles testified, in part: "I went into the kitchen and then into the bathroom. When I came out . . . McDonald and Bud (Philemon) were talking. I heard Bud tell McDonald: 'I'm a s.o.b. if I don't do it.' McDonald turned to me and said: 'I'll get this big fat s.o.b.' About this time Bud picked up the chair. Cam (defendant) said, 'Let's go.' He . . . ran out into the hall that leads up to his room to the front. When Bud came up with the chair he knocked out a light over his head. McDonald ran into me and hit at me. I came up with my flashlight and McDonald jumped back and said 'Wait until I get my knife.' I heard Cam say 'Get out! get out!' About that time the gun fired . . . I heard Poplin tell the two men to get out three times . . . Poplin was standing inside his room when the shooting took place. The chair that deceased had and used was right in front of Cam's door. A leg was broken as was a piece of the plank bottom. I never assaulted McDonald. I never spoke to him. I'd never seen him before. The only conversation I heard was that Bud said: 'I'm a s.o.b. if I don't get him,' and McDonald saying, 'I'll get this fat one.' At this time Poplin didn't have his pistol. He kept it in his bedroom. I saw Mr. Poplin go into the hall and into his bedroom. The deceased chased Poplin up the hall. He ran right up behind him with the chair . . . When the gun fired McDonald and I were in the kitchen."

And defendant testified, in pertinent part: "I am around 66 years of age . . . I didn't know McDonald or Philemon, but I had seen them a couple of times before that . . . I tried to deny I had any whiskey. They were getting louder . . . I got a pint and told McDonald to pick up his money. He took the pint of whiskey. Philemon hadn't spoken up to this time. Philemon said: 'I'm going to kill that damned old man. He wouldn't cash a check for me.' I told Philemon I had never done anything to him. I asked McDonald to go out on the porch with me. I stepped into the hall. I heard that awful lick and it knocked out that light in the kitchen. It was dark. I made it to my room. I was hollering every step, 'Come on out of there, the police are coming, come on out of there' . . . By the time I got to my door I saw Philemon coming down the hall with a chair in his hand. He got right at the door. I saw the chair up here about my head. I saw the chair hit the door. My bed was just inside the door of my room in the corner. I didn't have my pistol at this time. It was under the pillow. I only had to push the door a little bit back and reach and get it. I hollered, 'Don't you come into this room, don't you come into this room.' He was standing directly in front of my door. He got the chair up. I told him not to pick the chair up. I showed him the gun. I stepped back middleways of the door. He could have hit me. He got the chair up. I waited and wished he wouldn't do it, but he came, le'nt that way and when he did, I shot at his arm. I

was trying to stop him. I was afraid of him. I shot because he was coming on me with a chair. I was asking him to stop . . . He dropped the chair, kicked it out of the way, grabbed his arm and went out of the door . . . I wasn't drinking . . . I wasn't mad at Philemon. He and two fellows came to the house a week or so before this and wanted me to cash a twenty-five dollar check. I told them I didn't have the money . . ."

Then defendant rested, and the State put up as a witness a police officer, who testified, in part: That Wade Philemon was shot in the left shoulder, about three inches below the shoulder; that apparently the bullet had gone straight in; that he questioned Poplin at the station; and he was apparently sober, and that Poplin said that the deceased approached him with an upraised chair,—that he was standing in his room at the time he shot,—that he had repeatedly asked Philemon and McDonald to leave his home.

The State then rested, and defendant renewed his motion for judgment as of nonsuit. The motion was denied and defendant excepted.

Verdict: Guilty of manslaughter.

Judgment: Confinement in the State's Prison for not less than fifteen (15) years nor more than eighteen (18) years to perform such labor as he is able to do in the discretion of the prison authorities.

Defendant appeals therefrom to Supreme Court and assigns error.

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

Ray S. Farris and James B. Ledford for defendant, appellant.

WINBORNE, J. While defendant, appellant, brings forward and presents in his brief several exceptions to the charge as given by the trial court to the jury, particularly in respect to the burden of proof, some of which may have merit, the assignments of error chiefly relied upon, and rightly so, are based upon exceptions to the failure of the trial court to declare and explain the law arising upon the evidence in the case as it relates to defendant's legal right to defend himself in his home, and to defend his home from attack, and to evict trespassers therefrom. See *S. v. Spruill*, 225 N.C. 356, 34 S.E. 2d 142, and cases there cited; also *S. v. Goodson*, 235 N.C. 177, 69 S.E. 2d 242, and cases cited.

And the conduct of defendant is to be judged in the light of these rights. Hence what is a home, in the light of the evidence in the case, is a salient element of the right.

These are substantive features of the case, as to which defendant is entitled to have the trial court declare and explain the law arising thereon, G.S. 1-180, as amended by 1949 Session Laws, Chap. 107, even in the

absence of special prayer for instruction in respect thereto. *S. v. Spruill, supra,* and cases cited.

Other assignments of error need not be considered, as the matters to which they relate may not recur on another trial.

For error pointed out, let there be a

New trial.

DR. JAMES P. PRESSLY, E. P. BARRON, GEORGE H. DAVIS, DR. E. A. SLOAN, R. G. ELLIS AND D. O. DUNLAP, TRUSTEES OF THE ASSOCIATE REFORMED PRESBYTERIAN SYNOD, AND JOHN M. HUNTER, JR., PARKS WELCH, HARRY BAKER, BOYD BEARD, HENRY DAVIS AND PAUL MILLER, TRUSTEES OF THE SARDIS ASSOCIATE REFORMED PRESBYTERIAN CHURCH, v. E. H. WALKER, C. B. BAIRD, J. M. WALLACE, JR., TRUSTEES OF THE SARDIS PRESBYTERIAN CHURCH.

(Filed 2 December, 1953.)

1. Pleadings § 19c—

A pleading will be liberally construed in favor of the pleader and will not be overthrown by demurrer unless it be fatally defective.

2. Same—

A demurrer admits the truth of all relevant facts well pleaded but does not admit conclusions of law asserted by the pleader.

3. Quieting Title § 1—

The owner of realty may maintain an action against another claiming an adverse interest to determine and quiet title, even though the owner is not in possession and might maintain an action in ejectment. G.S. 41-10.

4. Same: Religious Societies § 3—

The trustees of a religious denomination holding title to church property for the benefit of local congregations which are members of its denomination may maintain an action to quiet title against the trustees of a local congregation claiming to hold title in trust for a different denomination or schism, and may join with them as plaintiffs the trustees of such local congregation holding title for the benefit of the local congregation who are members of plaintiffs' denomination. G.S. 61-1, G.S. 61-2, G.S. 61-3.

APPEAL by defendants from *Pless, J.,* April Term, 1953, of MECKLENBURG. Affirmed.

Action by plaintiffs, trustees of Associate Reformed Presbyterian Church, to remove cloud on title to church property.

The defendants demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that there is a defect of parties plaintiff or defendant.

From judgment overruling the demurrer, the defendants appealed.

G. T. Carswell and Henry E. Fisher for plaintiffs, appellees.

Helms & Mulliss, John D. Hicks, McDougle, Ervin, Horack & Snepp for defendants, appellants.

DEVIN, C. J. It is a familiar rule that pleadings are to be given liberal construction in favor of the pleader, and that a complaint may not be overthrown by a demurrer unless it be fatally defective. *Hollifield v. Everhart,* 237 N.C. 313, 74 S.E. 2d 706; *Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32; *Blackmore v. Winders,* 144 N.C. 212, 56 S.E. 874.

A demurrer admits the truth of all relevant facts well pleaded but does not admit conclusions of law asserted by the pleader. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440; *Mills Co. v. Shaw,* 233 N.C. 71, 62 S.E. 2d 487.

It is alleged that Dr. Pressly and others are trustees of the Associate Reformed Presbyterian Synod and under the rules of the church, as the governing board, hold real estate for the benefit of local congregations which are members of that denomination; and that John M. Hunter, Jr., and others are trustees of Sardis Associate Reformed Presbyterian Church, and said trustees hold title to certain described real property for the benefit of the local church and for the trustees of Associate Reformed Presbyterian Church. For convenience the name of the church body represented by plaintiffs as trustees will be referred to as the ARP Church.

It is alleged that defendants E. H. Walker and others are trustees of Sardis Presbyterian Church.

It is alleged that the real property described has been owned and used by ARP Church and its congregation for many years, until July, 1952, when some of the members of Sardis ARP Church transferred their membership to Sardis Presbyterian Church and sought to transfer the property belonging to plaintiffs by appointing the defendants trustees of Sardis Presbyterian Church and occupying and using the property of plaintiffs.

Plaintiffs allege that the defendants are contending that title to the property followed the transfer of Membership to the Sardis Presbyterian Church, and have laid claim to the property and to the ownership and control thereof as if they had title to the same.

It is alleged that the defendants are wrongfully in possession of said property; that a number of the members of the church did not transfer their membership but remained loyal to the denomination known as ARP; that defendants' claim of title to said property for the congregation of said Sardis Presbyterian Church is wrongful and the possession of said church property and use thereof is wrongful and illegal, for that title

to this property is in the plaintiffs, trustees of ARP Church and of Sardis ARP Church; that this action is to remove cloud on the title of plaintiffs to this property and for the possession of the property which belongs to the loyal members of Sardis ARP Church, the title thereto being held by plaintiffs, trustees.

While the plaintiffs allege title and right of possession and use of the property in themselves as trustees, and that the defendants acting as trustees of a different denomination or schism, are in possession of the property and claim ownership and right to control and use the property, the statute seems to authorize one owning real property though not in possession to maintain an action against another claiming an adverse interest to determine and quiet the title. G.S. 41-10 provides that "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims." This statute is broad enough to cover an action to quiet the title to real property though the person sued may be wrongfully in possession, and plaintiff might have maintained ejectment. *Ely v. New Mexico and Arizona Railroad Co.*, 129 U.S. 291, where a statute in the same language as ours was construed. The complaint would not be demurrable merely for the reason that the allegations might be sufficient to support a possessory action. *Maynard v. Holder*, 216 N.C. 524, 5 S.E. 2d 535; *Satterwhite v. Gallagher*, 173 N.C. 525, 92 S.E. 369.

But the chief point of attack made by the demurrer upon the complaint is that the complaint deals only with trustees and does not make parties the members of the church for whose benefit the plaintiffs hold the legal title.

The statute G.S. 61-1 recognizes that religious bodies must act through and must appoint trustees, and G.S. 61-2 makes the following provisions in respect thereto: "Trustees may hold property. The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for and on account of the donations and property so held or claimed by them, and for and on account of any matters relating thereto. They shall be accountable to the churches, denominations, societies and congregations for the use and management of such property, and shall surrender it to any person authorized to demand it."

And G.S. 61-3 provides that all church lands and property given, granted or devised to any religious denomination shall remain forever to the use of that church or denomination; "and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto,

in the trustees respectively of such churches, denominations, societies and congregations, for their several use."

While there is no allegation that the trustees of ARP Synod are entitled to the possession of the particular property described in the complaint, it is alleged that those composing this board, under the rules of the church, as trustees of the governing board of the Synod, hold real property for the benefit of local congregations who are members of the ARP Church. Hence, it would seem the defendants cannot successfully complain of their inclusion as parties plaintiff in an action respecting the title of a local congregation of ARP Church.

We think the plaintiffs have alleged facts sufficient to survive a demurrer on the grounds set forth.

Judgment affirmed.

STATE v. KENNETH PORTER.

(Filed 2 December, 1953.)

1. Criminal Law § 79—

Exceptive assignments of error not discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Assault §§ 9a, 14b—

Where the evidence is to the effect that defendant entered upon the premises of prosecutrix in a drunken condition, refused on demand to leave, and used language calculated to provoke an assault, defendant may not rely upon the plea of self-defense even though prosecutrix struck the first blow, there being no evidence he quitted the combat or retreated, and therefore the court is not required to instruct the jury on this defense.

3. Criminal Law § 81c (2)—

When the charge, construed contextually, is without error, an exception thereto cannot be sustained.

APPEAL by defendant from *Whitmire, Special J.*, 31 August 1953 Term, MECKLENBURG. No error.

Criminal prosecution heard on appeal under a warrant which charges that defendant, a male person over eighteen years of age, did unlawfully assault one Rosa Wilkes, a female.

Rosa Wilkes occupies Apartment 1 in a building located on East First Street in Charlotte. On 18 July 1953, about 8:00 p.m., defendant, while under the influence of intoxicating liquor, walked up on her porch and took a seat. He began to curse and call her vile names. She repeatedly asked him not to curse in the presence of her little girl (nine years old) and to leave her premises. He consistently refused to leave, and said,

"I'm not going no damn where," and grabbed the little girl by the hair and snatched it to the extent that she screamed. Rosa Wilkes then said she would go call "the law." He then "whipped off the porch and stood at the corner." When she started to call officers, he grabbed her with his left hand and struck her with his right fist. A general affray resulted. "We fought and fought until the police came."

Rosa Wilkes testified: "He hit me with his fist and he kind of addled me. He hit me here and that's the time I started fighting and fending for myself. We fought and fought" until an officer arrived.

The defendant admitted that he had been drinking and that he went on the porch of the apartment occupied by the prosecutrix. He testified he went to pay for some whiskey he bought during the week and to get some more; that he cursed and she asked him not to curse any more; that she had a Nehi bottle and she struck him with it; and that he did not strike her, but only held her to keep her from striking him again.

The jury returned a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

Welling & Welling for defendant appellant.

BARNHILL, J. Defendant assigns as error "the failure of the Judge to charge the jury in accordance with the provisions of G.S. 1-180 as amended by Chapter 107 of the General Sessions Laws of 1949; as shown by EXCEPTION 5." Exception 5 specifies (1) a failure to fully instruct the jury on the elements constituting a battery, (2) a failure to instruct the jury that in view of the dangerous and violent assault with a deadly weapon being made on him by the prosecutrix, the defendant had a right to defend himself, and (3) a failure to charge the law on the evidence offered by him on this aspect of his defense.

These are the only assignments of error discussed in the brief. The others are deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562; *Bank v. Snow,* 221 N.C. 14, 18 S.E. 2d 711; *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785; *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700.

The exceptive assignments of error relied on by defendant are without substantial merit. We may concede that the prosecutrix struck the first blow as testified by defendant and his witnesses. Even so, on his own statement, he is not in position to rely on the plea of self-defense. He entered upon the premises of prosecutrix in a drunken condition, he refused on demand to leave, and he used language which was calculated to provoke an assault, and there is no evidence he quitted the combat or

retreated. *S. v. Crisp,* 170 N.C. 785, 87 S.E. 511, and cases cited; *S. v. Robinson,* 213 N.C. 273, 195 S.E. 824; *S. v. DeMai,* 227 N.C. 657, 44 S.E. 2d 218. Even then the court fully and accurately reviewed defendant's version of the occurrence and instructed the jury in effect that if they found the facts to be as testified by defendant and his witnesses, or if such testimony, when considered along with the other evidence, raised a reasonable doubt in their minds, they should return a verdict of not guilty. The court's charge on this aspect of the case was as favorable to defendant as he had any right to expect or demand.

The first clause in the court's definition of an assault and battery, standing alone, is erroneous. When, however, the charge as to what constitutes an assault and battery is considered contextually, it correctly defines the offense. *Vincent v. Woody, ante,* p. 118; *In re Humphrey,* 236 N.C. 142; *Macon v. Murray,* 236 N.C. 484.

Essentially, this case is a case of controverted facts. The jury heard the evidence and, upon the facts found therefrom, returned a verdict of guilty. No substantial error appears in the charge of the court, and the record fails to disclose sufficient cause for disturbing the verdict rendered. We must, therefore, sustain the trial.

No error.

C. C. BANKS, LYNN BANKS AND W. N. HARRIS v. W. M. NOWELL AND BLANCHE U. NOWELL.

(Filed 2 December, 1953.)

1. Brokers § 10—

In his action to recover commission, the broker must prove not only his contract to sell upon commission and that he procured a purchaser ready, able and willing to buy, but also that the purchaser was willing to buy upon the terms stipulated by the vendor, and where there is controversy as to whether the purchaser offered the price stipulated by the vendor the failure of the court to charge on this phase must be held for prejudicial error.

2. Trial § 31 (b)—

It is incumbent upon the trial court to instruct the jury on all substantial features of the case arising on the evidence, whether requested or not.

APPEAL by defendants from *Harris, J.,* February Term, 1953, of WAKE. New trial.

This was an action to recover broker's commissions alleged to be due for negotiating sale of certain real property described in the pleadings.

From judgment on the verdict in favor of plaintiffs, the defendants appealed.

Brassfield & Maupin for plaintiffs, appellees.
Howard E. Manning for defendants, appellants.

DEVIN, C. J. The plaintiffs' evidence was sufficient to carry the case to the jury, and the motion for judgment of nonsuit was properly denied.

However, the defendants' assignments of error relating to the instructions given the jury by the trial judge require further consideration. The defendants excepted to the following portions of the judge's charge.

". . . the burden is on the plaintiffs to satisfy you that at all times there was a contract between W. N. Harris (one of plaintiffs) and Mr. and Mrs. Nowell, and that that contract was that Mr. Harris was to sell the land and receive 5% commission; if you are so satisfied, as I have already charged you, and again charge you, then the plaintiff should recover." . . . "It was the duty of the plaintiff Harris to present a purchaser for this timber and pulpwood who was ready, able, and willing to purchase the property from these defendants." . . . "If you are satisfied from the evidence and by its greater weight that there was a contract, and that Mr. Harris did present a purchaser who was ready, able, and willing to purchase this timber, then he fulfilled his contract and he ought to recover." ". . . the plaintiffs must satisfy you from the evidence and by its greater weight that there was a contract between Mr. W. N. Harris and these defendants to sell this timber; that he, Mr. Harris, did sell the timber, and that they, the defendants, received the money, and if you are satisfied from the evidence and by its greater weight that that is true, then the plaintiffs are entitled to recover."

Thus it appears that in giving instructions for the guidance of the jury on the issue submitted, the court charged the jury if they were satisfied there was a contract and that the plaintiff "did present a purchaser ready, able and willing to purchase this timber, then he fulfilled his contract and he ought to recover." In this instruction the court overlooked a material element necessary to be shown to entitle the plaintiffs to a favorable verdict, and that was to procure a purchaser not only ready, able and willing to buy but also to buy upon the terms agreed upon between the broker and the vendor. *Mallonee v. Young,* 119 N.C. 549, 26 S.E. 141; *Trust Co. v. Adams,* 145 N.C. 161, 58 S.E. 1008; *Lindsey v. Speight,* 224 N.C. 453, 31 S.E. 2d 371; *White v. Pleasants,* 225 N.C. 760, 36 S.E. 2d 227.

As there was controversy on this point, we think the failure to charge adequately as to a substantial phase of the case must be held for error. The defendants offered evidence tending to show lack of agreement as to the terms and that the only offer plaintiffs obtained and submitted from the purchaser was for less than half the defendants' price and the amount they afterward secured by advertising for sealed bids. It was incumbent

upon the court to instruct the jury on all substantial features of the case arising on the evidence, whether requested or not.

As there must be a new trial for the reason pointed out, other exceptions noted and brought forward in defendants' assignments of error need not be considered as they may not arise on another hearing.

New trial.

STATE v. BURT GRAINGER.

(Filed 2 December, 1953.)

1. Intoxicating Liquor § 9d—

Evidence tending to show that defendant is a married woman and was living in a house with a man, and that nontax-paid liquor was found 30 or 45 yards from the house, is insufficient to be submitted to the jury in a prosecution for unlawful possession of the nontax-paid liquor and possession of such liquor for sale, even though such liquor was in the constructive possession of the occupants of the house, since the evidence leaves in speculation whether defendant or the other occupant of the house was in possession of the liquor.

2. Criminal Law § 52a (3)—

A defendant may not be convicted of an offense upon proof of facts consistent with guilt, but the circumstances must be inconsistent with his innocence.

APPEAL by defendant from *Burney, J.*, September Term, 1953, of COLUMBUS.

The defendant was tried and convicted in the Recorder's Court of Columbus County upon a warrant charging her with the unlawful possession of nontax-paid intoxicating liquor and of having such liquor for the purpose of sale. From the judgment imposed the defendant appealed to the Superior Court where she was tried *de novo* upon the original warrant.

The evidence tends to show the following facts:

1. That on 11 April, 1953, the defendant, Burt Grainger, was living in a house on a dirt road about a mile and a half from Tabor City and about two or three hundred yards from the hard surfaced highway. Three families lived on this neighborhood road. The dirt road in front of defendant's house is approximately fifteen feet wide. The house is located about fifteen or sixteen feet from the road. The nearest dwelling house to that of defendant is located about one hundred to one hundred and fifty yards away.

2. That on the above date two deputies sheriff of Columbus County went to the home of the defendant armed with a search warrant. No one

was at the house but defendant and two small girls. The officers searched the house and found eight or ten fruit jar cases in the house. There were cases for pints, quarts and half-gallon jars. There were jars in some of them. Some of the empty cases were found in a bedroom; one or two cases contained canned fruit and possibly some string beans. No whiskey was found in the house nor upon her side of the road.

3. The officers then went outside the house and followed a path that led across the road to a toilet and found two pint jars containing nontax-paid whiskey about two or three feet from the path and about four or five feet from the road. The officers then followed a path or paths that led from the road into a wooded area and found fourteen half-gallon fruit jars of intoxicating nontax-paid liquor. These jars were found about thirty to forty-five yards from the defendant's house; that when defendant was told about the liquor she said she didn't know whose it was.

4. The officers testified that they did not know at the time they searched the defendant's home that she was married; that they did see a marriage certificate later and that a man was living in the house at the time the search was made but was not present at the time.

From a verdict of guilty on both counts and the judgment imposed thereon, the defendant appeals and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Irvin B. Tucker, Jr., for defendant, appellant.

DENNY, J. The sole exception and assignment of error is to the refusal of the court below to sustain her motion for judgment as of nonsuit.

The evidence does not disclose who owned the premises where the liquor was found as it did in *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600. Neither does it show that the defendant had been seen in the area across the road from her home where the liquor was found as was the case in *S. v. Shinn, ante,* 535, 78 S.E. 2d 388. The evidence with respect to the location of the privy or toilet tends to show, however, that the area upon which it was located was in the possession of the occupants of the home. Even so, the facts here are distinguishable from those in *S. v. Medlin,* 230 N.C. 302, 52 S.E. 2d 875; *S. v. Weston,* 197 N.C. 25, 147 S.E. 618; *S. v. Clark,* 183 N.C. 733, 110 S.E. 641; and *S. v. Crouse,* 182 N.C. 835, 108 S.E. 911, cited and relied upon by the State.

The State's evidence tends to show that the defendant was married and living with her husband, or at least that a man was living in the home at the time the whiskey was discovered. Did the whiskey belong to the defendant or to this man, whoever he was? Doubtless, the officers had a reason for charging the defendant with the possession of the whiskey but

the evidence presented for our review does not disclose it. Therefore, on this record we do not think the evidence goes any further than to raise a suspicion or conjecture with respect to the defendant's guilt. *S. v. Prince*, 182 N.C. 788, 108 S.E. 330. "The guilt of a person charged with the commission of a crime is not to be inferred merely from facts consistent with his guilt. They must be inconsistent with his innocence." *S. v. Webb*, 233 N.C. 382, 64 S.E. 2d 268.

The judgment of the court below is

Reversed.

VIOLA J. HAMILTON v. TOWN OF HAMLET.

(Filed 2 December, 1953.)

1. Pleadings § 19c—

Upon demurrer, the facts alleged in the complaint and relevant inferences of fact necessarily deducible therefrom will be taken as true.

2. Municipal Corporations § 12—

A municipal corporation may be held liable for negligence of its officers and agents in the exercise of its private corporate powers, but is not so liable in the exercise of its police power or its judicial, discretionary or legislative authority in discharging a duty imposed solely for the public benefit.

3. Same—

In the installation and maintenance of traffic light signals, a city exercises a discretionary governmental function solely for the benefit of the public, and may not be held liable for negligence of its officers and agents in respect thereto. G.S. 160-200 (11) (31).

APPEAL by plaintiff from *Rousseau, J.*, at March Term, 1953, of RICHMOND.

Civil action for recovery of damages resulting from alleged actionable negligence of defendant, "a municipal corporation, created, organized and existing under and by virtue of the laws of the State of North Carolina . . ."

The negligence charged against defendant, as alleged in the complaint, is in connection with the installation and maintenance and timing of traffic signals for the regulation of traffic at the intersection of U. S. Highway No. 74 with Hamlet Avenue and N. C. Highway No. 38 in the town of Hamlet.

Defendant demurred to the complaint filed by plaintiff upon several grounds, among which the 6th is, "that it appears from the complaint and the allegations contained therein that the defendant was exercising

governmental and police regulations with regard to traffic, and not to the building and maintenance of streets and highways and that the defendant is not liable in civil damages for any accident occurring while operating as a governmental unit, and in a governmental capacity and function."

The demurrer was sustained by the judge presiding, and from judgment signed in accordance therewith, plaintiff appeals to Supreme Court and assigns error.

Pittman & Webb for plaintiff, appellant.
Z. V. Morgan for defendant, appellee.

WINBORNE, J. This appeal challenges only the ruling of the judge below in sustaining demurrer to the complaint. In passing upon a demurrer the facts alleged in the complaint and relevant inferences of fact necessarily deducible therefrom will be taken to be true.

The decisions of this Court uniformly hold that, in the absence of some statute which subjects them to liability therefor, cities, when acting in their corporate character, or in the exercise of powers for their own advantage, may be liable for the negligent acts of their officers and agents; but when acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit, they are not liable for the tortious acts of their officers or agents. See *Hodges v. City of Charlotte,* 214 N.C. 737, 200 S.E. 889, and numerous cases there cited. See also *Parks v. Princeton,* 217 N.C. 361, 8 S.E. 2d 217; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42; *Stephenson v. Raleigh,* 232 N.C. 42. 59 S.E. 2d 195.

In the *Hodges case, supra,* this Court posed this question: Is the installing and maintaining of traffic light system in and by a city, in the exercise of governmental function, or in proprietary or corporate capacity? The Court ruled that it is in the exercise of a discretionary governmental function—saying that a traffic light system is in the interest of safety to the users of the streets and is installed solely for the public benefit. The Court went on to say that such a system is in effect the substituting of a signal for a policeman in regulating traffic in the use of streets; and that while the cities are not required to install such system, there is statutory authority for the exercise of such police power, citing C.S. 2787 (11) and (31)—which are now G.S. 160-200 (11) and (31). See also *Beach v. Tarboro,* 225 N.C. 26, 33 S.E. 2d 64.

In the light of this principle, and on authority of *Hodges v. City of Charlotte, supra,* the judgment sustaining the demurrer to the complaint is

Affirmed.

STATE v. WALTER MOORE.

(Filed 2 December, 1953.)

Bastards § 4: Criminal Law § 56—

Where an indictment under G.S. 49-2 fails to charge that defendant's failure to support his illegitimate child was willful, the indictment fails to charge an essential element of the offense and defendant's motion in arrest of judgment must be allowed.

APPEAL by defendant from *Burney, J.*, and a jury, at February Term, 1953, of NEW HANOVER.

Criminal prosecution upon a warrant which was supposed to charge the defendant with the willful nonsupport of his illegitimate child.

This criminal action originated in the Recorder's Court of New Hanover County, and was carried thence to the Superior Court of New Hanover County by the appeal of the defendant.

Trial was had *de novo* in the Superior Court upon the original warrant, which was based on a criminal complaint alleging that the defendant "has failed or refused and neglected to provide adequate support for . . . a bastard child" begotten by him upon the body of the prosecuting witness.

The only evidence at the trial was that of the State, which was ample to make out a case against the defendant under G.S. 49-2. The jury returned a verdict of guilty, and the defendant moved in arrest of judgment. The court denied the motion, and the defendant reserved an exception to the ruling. The court sentenced the defendant to imprisonment as a misdemeanant, and suspended the sentence on condition that the defendant pay a specific sum each month for the support of the child mentioned in the criminal complaint. The defendant appealed.

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

McClelland & Burney for defendant, appellant.

ERVIN, J. The Attorney-General correctly concedes that the court erred in denying the motion in arrest of judgment.

Under G.S. 49-2, the neglect or the refusal of a parent to support his illegitimate child is not a crime unless it is willful. As a consequence, the State must both allege and prove a willful nonsupport in a prosecution under the statute. *S. v. McDay*, 232 N.C. 388, 61 S.E. 2d 86; *S. v. Morgan*, 226 N.C. 414, 38 S.E. 2d 166; *S. v. Hayden*, 224 N.C. 779, 32 S.E. 2d 333; *S. v. Allen*, 224 N.C. 530, 31 S.E. 2d 530. The criminal complaint underlying the warrant in the instant case does not charge the

defendant with the essential element of willfulness. This omission renders the warrant fatally defective, and necessitates an arrest of the judgment. *S. v. Morgan, supra; S. v. Vanderlip,* 225 N.C. 610, 35 S.E. 2d 885; *S. v. Moore,* 220 N.C. 535, 17 S.E. 2d 660; *S. v. Clarke,* 220 N.C. 392, 17 S.E. 2d 468; *S. v. McLamb,* 214 N.C. 322, 199 S.E. 81; *S. v. Tarlton,* 208 N.C. 734, 182 S.E. 481.

Judgment arrested.

APPENDIX.

WILKINS v. FINANCE CO.

(Filed 12 June, 1953.)

PETITION by plaintiffs to rehear this case, reported in 237 N.C. 396.

The Justices to whom the petition was referred filed the following memorandum in passing upon the petition.

Eugene H. Phillips for petitioners.

DEVIN, C. J., and BARNHILL, J., considering the petition to rehear.

In the opinion of the Court in this case, reported in 237 N.C. 396, it was held that the evidence was insufficient to support the cause of action then pleaded; and that certain written instruments, admitted to have been signed by plaintiffs and set up by defendants to defeat plaintiffs' claims, were not attacked for fraud or other invalidating cause. The judgment of nonsuit below was affirmed.

However, it was also stated that the evidence tended to show a meritorious cause of action against the defendant, if sufficiently pleaded; and it was suggested that plaintiffs, if so advised, might bring a new action upon pleadings conforming to the evidence.

As the way is still open to the plaintiffs to institute another action to remedy and redress any wrongs they may have suffered at the hands of the defendant, the petition to rehear is denied.

APPENDIX.

IN THE MATTER OF SAM DAVID HODGES.

(Filed 5 November, 1953.)

Petition for a Writ of *Certiorari* Denied. At the August Term 1951 of the Superior Court of Durham County, the petitioner entered a plea of *nolo contendere* to an indictment charging him with embezlement. The court sentenced him to serve 8 months in jail to be assigned to work under the supervision of the State Highway and Public Works Commission of North Carolina for a period of 8 months. This 8 months sentence was suspended, and the defendant was placed on probation for a period of 2 years: the conditions of probation being set forth with particularity in the sentence. On 2 February 1953, in Cumberland County Recorder's Court, petitioner was found guilty of Public Drunkenness and Assault With a Deadly Weapon and was sentenced to 30 days: which sentence was suspended for 6 months upon good behavior and upon the payment of costs. On 4 March 1953 the petitioner, in the Cumberland County Superior Court, was convicted of Forgery, and was sentenced to serve 1 to 3 years in the State's Prison in Raleigh. At the May Term 1953 of the Superior Court of Durham County, the presiding judge revoked the judgment of probation entered at the August Term 1951 of that court. In revoking the probation the court found as facts that the petitioner had wilfully violated the conditions of probation by being convicted of Public Drunkenness and Assault With a Deadly Weapon in the Recorder's Court of Cumberland County, as set forth above; and further by being convicted of Forgery in the Superior Court of Cumberland County, as set forth above. And the presiding judge ordered that the 8 months sentence given this petitioner at the August Term 1951 of the Durham Superior Court be put into effect "to begin at the expiration of a sentence of not less than 1 year and no more than 3 years in State's Prison imposed on 4 March 1953, in Cumberland County Superior Court under Docket No. 7386." The provision that this 8 months sentence should begin at the expiration of his sentence for Forgery passed against him in Cumberland County Superior Court is irregular. It is adjudged by the court that this 8 months sentence runs concurrently with the sentence that he is now serving for Forgery as aforesaid.

PARKER, J., *For the Court.*
November 5, 1953.

APPENDIX.

AMENDMENT TO RULES OF COURT.

At a conference of the Court held on 17 December, 1953, Rule 2 of Rules of Practice in the Superior Courts, as promulgated in 221 N.C., at page 574, was amended to read as follows:

"2. Surety on Prosecution Bond and Bail.

"No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace. All prosecution bonds for any suit must be justified before the clerk of the Superior Court, or other officer authorized to administer oaths, in a sum double the amount of the bond, and the justification must show that the surety is a resident of North Carolina, and must also show the county wherein the surety resides."

BARNHILL, J., *for the Court.*

ADDRESS OF HONORABLE FRED B. HELMS

OF THE CHARLOTTE BAR

PRESENTING THE PORTRAIT

OF

CHIEF JUSTICE WALTER PARKER STACY

TO

THE SUPREME COURT

NOVEMBER 10, 1953

Mr. Chief Justice and Associate Justices of the Supreme Court of North Carolina:

The family of our late Chief Justice, Walter Parker Stacy, has asked that I present his portrait to this Court. I do so, humbly conscious that neither the gifted brush of the artist, nor the English language in my inexpert hands can adequately portray either the man or the jurist. I am confident, however, that his portrait will be a constant inspiration to all members of the Bench, Bar and public who shall hereafter come into this Court which he graced with his presence for thirty years and which he distinguished by his illustrious career as Chief Justice for more than a quarter of a century.

Walter Parker Stacy was a great Chief Justice. As a jurist, he was a John Marshall. As an administrator and executive, he was a Charles E. Hughes. His profound and extensive knowledge of law and procedure was the marvel of all who knew him. His familiarity with North Carolina decisions was unparalleled. Frequently, during oral argument by the ablest attorneys on unusual points he would interrupt the argument to ask: "Why doesn't the case of (naming the case and the volume of the reports) decide this case?" In many such instances, the case to which he referred had not been mentioned in the argument nor cited in the briefs, and yet it was decisive of the point at issue. His intimate knowledge of and his retentive memory concerning the decisions of his own court were far more reliable than the best digests. No jurist ever had a more extensive or better stocked tool chest and no master craftsman in the annals of jurisprudence ever used his tools with greater knowledge, skill or effectiveness.

He was and is one of the immortal chief priests in the temple of justice. The sacrifice which he placed upon the altar was not that which was bought or sold in the marketplace. He placed himself upon the altar and gave his own life as his supreme sacrifice in order that he might make his maximum contribution toward the continuation of the blessings of liberty under law for his fellowmen. He will forever occupy high

position in the immortal Hall of Fame of the Goddess of Justice as one who served her with fidelity and effectiveness.

As Chief Justice, he personified and exemplified the majesty and the glory of the law and the inherent dignity of the courts. The stature and greatness of the man were such as to engender a spontaneous respect for law and a willing obedience to the statutes and the decrees of the courts. He looked like a Chief Justice should look.

No wearer of the judicial ermine ever held the scales of justice with a firmer or more sensitive hand. No power and no combination of powers, however great, could influence him to make the slightest deviation from his fidelity to the principles of our Constitution and laws and to truth and justice. Yet he was keenly sensitive and immediately responsive to the protection of the rights and liberties of the humblest. He jealously guarded and zealously protected the innocent at all times. If there was reasonable doubt as to the guilt of a defendant, he was quick to throw the protective cloak of the law and justice around such a one.

In his concept of his office and in the performance of his duties, his was the positive, aggressive impartiality of the great leader and jurist. He moved with undaunted courage, with unwavering faith and with rare foresight in the administration of equal justice under law for all people. A timorous, expedient neutrality merely seeking to be on the side of, and to please, the majority was utterly foreign and distasteful to both his character and his intellect. His greatness was molded for and flourished in leadership. As a leader, he never hesitated, no matter how difficult or perplexing the obstacle or problem.

The essentials for a sound judiciary were tersely stated by him when he said:

> "A fair jury in jury cases and an impartial judge in all cases are the prime requisites of due process. . . . It is important that the judgments of the court should be respected. To insure this, however, the court must first make sure that they merit respect . . ."

For himself, Chief Justice Stacy deliberately set the highest standards of the best in the judiciary and in jurisprudence, and he exacted from himself the strictest observance of these high principles. He likewise required strict adherence to these principles by all members of the Bench. Instances of any departure of even a minor nature from high standards by any of the members of the Bench in North Carolina have been exceedingly rare, but any case involving even a slight deviation by anyone holding judicial office was certain to bring prompt, positive and severe condemnation from the Chief Justice. Nor were his views in this respect limited to the Bench. They extended to the members of the Bar as officers

of the courts. Perhaps his most scathing opinions were reserved for those who had been admitted to the high profession of the law and who had been unfaithful to the trusts reposed in them as members of the profession. Of both lawyers and litigants he demanded alertness and diligence in their cases before the courts, and he was unwilling to gloss over or whitewash with the brush of "surprise or excusable neglect" the carelessness or lack of attention of either lawyers or litigants in their business with the courts.

As Chief Justice, he directed the argument in and the hearing of cases before the Court with such expedition as to amaze all and frequently irritate some of the attorneys who appeared in the Supreme Court. He had the superb faculty of being able to go immediately to the heart of the case or the questions before the Court. His analytical powers in this respect were nothing short of remarkable. He likewise believed that in oral argument of cases before the Supreme Court that "the case was properly before the court" when the attorney had stated the facts and the questions involved in the appeal. He would sometimes remark that the members of the court "either knew the law, or could and would read the printed briefs." He held firmly to the view that it was a waste of time of both court and counsel for an attorney to read the cases or texts from the briefs in his oral argument.

In presiding over the sessions of the Supreme Court and in directing the oral argument, he displayed a surprising familiarity with and a thoroughly effective use of the terminologies of the gridiron, the baseball diamond and the hunt, although he seldom, if ever, attended or listened over the radio to any game or sporting event. Perhaps the explanation of his familiarity with such terms is traceable to the fact that while he was a student at Carolina he was a member of the sophomore football team. When an attorney had failed in the trial court to enter an objection or make a necessary motion, the Chief Justice would ask: "Well, didn't you fumble the ball?" If counsel in oral argument before the Court were evading the real issue in the case, he was quickly brought back to the point by the admonition from the Chief Justice: "Let's put the ball over the plate." Or, if the argument strayed from the decisive issue, the Chief Justice would quickly direct it back on the right course with the remark: "The other side jumped that rabbit but you started chasing it. Let's get back on the track, let's catch the fox." When an attorney would complain that the trial judge had been against him, the Chief Justice would aptly summarize his predicament for him by saying: "What you say is that you were behind the eight-ball and the eight-ball was the trial judge." Nothing in the lexicon of the law could have been as brief or as effective as such comments, suggestions or summaries.

When confronted with new or troublesome questions or cases, the Chief Justice was frequently up and at work when most of the world 'round about him was still wrapped in peaceful slumber. When queried as to the reason for his early rising, he would often reply that he had a case in which he was "up a tree," or in which he "didn't know whether he was coming or going," or that he was "up in the air," but he never abandoned his search until he had explored every branch of law and procedure in order to find the right answer. He would then write the decision and would remark to those around him: "Now I feel the rock under my feet."

His discipline and devotion to his duties are well illustrated by an incident which occurred a few years before his death. He was asked to deliver an address on the improvement of the administration of justice at the annual meeting of the North Carolina State Bar. He replied that the Bar had the right to expect him to make the address and that he would like to do so, but that a speech on such an important question would entail a study of our own and other judicial systems as well as other preparatory work. He then said to the President of the Bar: "Two of my Associate Justices are sick. One has not been able to write an opinion in eighteen months. I am doing everything in my power to keep up the work and the standards of this Court. I know you and the other attorneys do not want to see this Court behind with its work or with its standards lowered. Which do you think I should do, make the address or do my work here? I will do whichever you say." The correct answer was obvious. He continued with the pressing, even though less spectacular, work of writing opinions for the Court.

He did not regard it as either necessary or becoming for the chief judicial officer of the State to frequent the legislative halls as a lobbyist in behalf of legislation affecting the judiciary. He consistently refused to go, hat in hand, as a beggar to the Exchequer for the modest and conservative budgetary requirements which he presented from time to time for his department of the government.

As Chief Justice, he presided over the Supreme Court of North Carolina from 1925 to 1951, a period of upheaval and transition—a period which profoundly touched and deeply disturbed every community and state in America. During this epochal era he directed our courts with a steady hand. There was never a question as to the safety or sufficiency of our judicial processes or as to the reasonable interpretation and application by our courts of new and untried legislative enactments affecting our social welfare, our economic order and our governmental structures.

His wide range of knowledge, his familiarity with the classics, and his own literary genius are permanently expressed in the fifteen hundred opinions written by him. His opinion in the case of *State v. Wingler*

(184 N.C. 747) is not only one of the literary gems of all time, but is also a classic example of his literary genius, his deep understanding of human nature, his abiding faith in the Eternal, and his complete mastery of the English language which he used so superbly as his obedient servant in both the beauty and the clarity of his decisions. He wrote:

"Three decades ago, Ves Wingler, with axe in hand, cut from the virgin forests of Wilkes County the logs and the timbers with which he built upon the mountainside a crude and humble hut for himself and Candace Wingler, his wife. Here this couple started life together in a rough, rugged, mountain home—a log cabin, in fact—but to the deceased it was at least a stable and a manger. The only means of getting in and out of this country at that time was by a wagon road and by walkways which led across ridges and hollows and creeks. In winter there was a scene of leafless branches, snow-covered peaks, and frozen brooks; and that was poverty. But the defendant and his wife were not daunted by the dangers of the inaccessible hills, nor by the frightful stories of the mountain coves. They started life with high hopes and with a faith that knew no fears, waiting and praying for the dawn of a better day.

"It matters not on what plane of life one labors, nor how large or small the number of his acquaintances, the man who toils and yet knows that in the circle of his influence there is at least one life in which there is sunshine where but for him there would have been shadow; that there is at least one home in which there is cheer where but for him there would have been gloom; that there is at least one heart in which there is hope where but for him there would have been despair, that man carries with him as he goes one of the richest treasures on this earth. This was the goal for which Ves Wingler was striving thirty years ago. But, alas, another story is told. He soon grew weary of his wife, and for some reason, not clearly disclosed by the record, he took her life in a cruel and heartless manner. Evidence of the crime was concealed at the time; he married again, raised another family, and, after the lapse of twenty-nine years was arrested, tried, convicted, and sentenced to the State's Prison. Though justice sometimes treads with leaden feet, if need be, she strikes with an iron hand. Verily, the wages of sin is death, and sin pays its wages.

"The supreme tragedy of life is in the immolation of woman. With a heavy hand, nature exacts from her a high tax of blood and tears. The age of knighthood has passed and is gone, but let us hope that the spirit of chivalry may never die. No civilization can last where women are permitted to be butchered like sheep in the shambles. Surely there is no pleasure to be derived from the punishment of the wicked, but it would seem that this defendant ought to welcome an opportunity to expiate his crime and to make some atonement for it. No doubt, in his own con-

science, he has already suffered the agony of remorse. How, through the many years, has it been possible for him to banish from his mind the vision of the woman who, in the days of her youth, put her hand in his, with a promise to forsake all others and to follow him? At the altar she vowed, in substance, that 'whither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God.' Can the defendant ever forget that momentous hour when this woman, with heroic courage, took immortality by the hand and went down into the valley of the shadow of death that his child might live? And then, can he for a moment cease to hear her screams of terror as she fled from his murderous hand?

"The fates decreed for Candace Miller a hard lot, and a cruel death, but—

> " 'Oh, can it be the gates ajar
> Wait not her humble quest?'

"There is no error appearing on the record, except the great error of the defendant in murdering his wife; but this is a mistake which is beyond our province or power to correct.

> " 'Repose upon her soulless face,
> Dig the grave and leave her;
> But breathe a prayer that, in His grace,
> He who so loved this toiling race
> To endless rest receive her.' "

To Walter Parker Stacy, the law was far more than a jealous mistress. She was a noble mistress, worthy of the deepest devotion and the fullest sacrifice.

He believed that law is a vibrant, pulsating, living organism, permeating and giving life to the very blood stream and body of our democratic institutions and liberties; that law is not merely a set of negative, archaic rules designed primarily to restrict and restrain the activities of those who would transgress the rights of others, but, that the law in its positive and permissive provisions is the guarantor of the security of the liberties and the progress of humankind.

He had an abiding faith in our Constitutions as being sound in principle and workable in practice, but held that constitutional limitations must not be permitted to become a millstone around the neck of our youthful and healthy but struggling civilization. If constitutional provisions, properly and intelligently interpreted by the courts, restrict social, economic and governmental progress, then he held that the remedy was by amendment to and not by disregard or destruction of constitutional foundations. He was unalterably opposed to the usurpation of the

functions of the legislative branch of the government by the judicial. When enactments or lack of enactments by the Legislature were criticised or attacked in argument before the Court, the Chief Justice would observe: "You have appealed to the wrong forum. It is our function to interpret and apply the law as it is enacted but not make it."

He fully recognized and believed in the soundness of the great triumvirate in our republican form of government—the legislative, the executive and the judicial. He yielded to no one in his championship of the equality of the judicial with the other two coordinate branches of government. Indeed, he believed that the very security and effectiveness of the legislative and executive departments of government were dependent upon our system of jurisprudence and the proper interpretation and administration of our fundamental laws by the judiciary.

He understood fully that the real foundation of government as well as the court of last resort resided in the people. His fundamental theory of government and his political philosophy were summed up and stated by him with his usual aptness and brevity when he wrote:

"The voice of the people is the voice of finality."

Walter Parker Stacy was a statesman and not a politician in the commonly accepted term. He carefully shunned the political limelight and he scrupulously avoided political alliances or entanglements. By party affiliation he was a Democrat, but his personal and judicial bearing were such that he was never suspected of partisanship in the performance of his official duties. He was repeatedly called to high service by four Presidents of the United States, two of whom were Democrats and two of whom were Republicans. In the administration of justice, he knew no political lines. His personal and judicial stature and statesmanship were such that he was renominated without opposition for Chief Justice for four consecutive terms and he was overwhelmingly approved by the people in each election.

Walter Parker Stacy was born, reared and moved in the atmosphere of revealed truth and the immutable laws of the Eternal. He early planted and he always kept his feet firmly on this rock. His character was fashioned and molded from the same type of enduring materials. Though the rains descended, the floods came, the winds blew and the storms broke about him, the house of his habitation was unshaken and each test not only left him the stronger but added luster to his life.

He first saw the light of day in Ansonville, North Carolina, on December 26, 1884, the son of a Methodist minister, Rev. L. E. Stacy, and Mrs. Rosa Johnson Stacy. There were twelve children in the family as there were twelve tribes in the House of Israel. His father, as a Methodist

minister, moved from place to place under assignments by the Bishop. Early in life, young Stacy *ex necessitate* learned the virtue of thrift in matters material. *A fortiori* he learned the eternal values of the resources of time, life and talents entrusted to him, and he so lived as to be prepared at any time to render a strict accounting of his stewardship. He was a member of, and for many years he taught a large class of men in, the Edenton Street Methodist Church in Raleigh.

He was elected to represent New Hanover County in the 1915 General Assembly. He was appointed a regular Superior Court Judge at the age of thirty-one. He was nominated and elected an Associate Justice of the North Carolina Supreme Court in 1920, and served in this office until March, 1925, when he was appointed Chief Justice to succeed Chief Justice Hoke (resigned), and he served as Chief Justice continuously until his death, having been nominated without opposition in each primary and elected overwhelmingly in each election.

Chief Justice Stacy remained a bachelor until 1929. On June 15 of that year he married Mrs. Maude DeGan Graff of Lake Placid, New York. Mrs. Stacy died in 1933. There were no children born of this marriage. He never remarried.

In his ideals and principles, he lived in the clear sunlight and the rarefied atmosphere of the peaks thus far achieved by humankind and as revealed by the Eternal. While he kept his head above the uncertainties and the confusions of the obscuring clouds, yet in his practices and work no valley was so deep or so dark and no human life was so degraded by crime or sordidness as to be lost to the clear light and the warmth of justice as it was reflected in him and applied in his high office.

His wit was both keen and subtle. Indeed, it was often difficult to determine which were the more delightful, his witticisms or his subtleties. Both cropped out spontaneously and frequently to brighten the monotony of court routine or to break the tension of argument at the Bar. If an unsound principle of law were advanced in oral argument as the answer to a given question before the court, he would sometimes comment: "Interesting, if true." After lengthy argument by some of those who knew him well, who were his devoted admirers, and who appreciated the laughter in his soul, he would sometimes inquire with a twinkle in his eye: "Now do you have anything important to say to us?" Where unusually lengthy briefs had been filed in a case before the court, with characteristic good humor and subtlety he wrote: "We have concluded to affirm the judgment without lengthy opinions, which the briefs would seem to invite."

His obvious brilliance was always kept under proper rein by his keen, massive intellect, his powers of logic and his indomitable will; so that

his brilliance was his faithful and obedient servant and was never allowed to lead him into devious paths or tangent decisions.

His intellect, brilliance and greatness were matched if not exceeded by his innate modesty.

Included as addenda hereto are three articles by some of his long-time friends and close associates which portray the character, friendliness, greatness and the illustrious career of Walter Parker Stacy as a man, as a judge, and as a Chief Justice, as a friend and as a Christian nobleman with unmatched fidelity, tenderness and beauty. The first is a revealing and philosophical insight by Chief Justice William A. Devin. The second, by Justice Emery B. Denny, not only reveals the Chief Justice from the standpoint of his associates, but also embodies a comprehensive biographical sketch, including the varied and high duties in other fields of activities to which the Chief Justice was called and in which he rendered distinguished service to his country. The third is a beautiful and spontaneous tribute by Honorable Dillard S. Gardner, Marshal-Librarian of the North Carolina Supreme Court.

To his associates and to devoted friends and admirers Chief Justice Stacy was and always will be known affectionately as "The Chief." This was no empty or chance phrase. He was in fact "The Chief." The Encyclopaedia Britannica might well have had him in mind in this description:

> "The chief is not merely the representative and leader of the community; he is also frequently the symbol of its corporate unity."

He not only symbolized the unity of the judiciary but he was also its leader and representative.

As "The Chief," and like any great leader, he often walked alone and he was frequently misunderstood. Of him we would say with James Russell Lowell:

"Count me o'er earth's chosen heroes,—they were souls that stood alone,
While the men they agonized for hurled the contumelious stone;
Stood serene and down the future, saw the golden beam inclined
To the side of perfect justice mastered by their faith divine
By one man's plain truth to manhood and to God's supreme design."

On September 13, 1951, Chief Justice Walter Parker Stacy was advanced to higher position in that Eternal Court of the Great Lawgiver where justice and mercy are forever merged. While we mourn our loss, we hail his advance. In this spirit his portrait is presented to the Court, and, with Scott, we say:

"Hail to The Chief who in triumph advances!"

CHIEF JUSTICE WALTER PARKER STACY

By HON. WILLIAM A. DEVIN

The death of Chief Justice Walter Parker Stacy September 13, 1951, closed a service of more than thirty years as a member of the Supreme Court of North Carolina, over which he presided as Chief Justice for twenty-six years, the longest in the annals of the Court. And now in the lengthening shadow of his great life, we pause to contemplate the magnitude of the man who served the State so long in this high office, and to pay deserved tribute to his memory.

His roots were typically American. Born in a parsonage, the son of a Methodist minister, one of twelve children, he grew up in a home purified by piety and faith. Early struggles to gain an education and to achieve strengthened and developed his character. He pursued his studies at the University of North Carolina where he earned degrees both in letters and in law. His fame as a student still lingers in Chapel Hill where he excelled as a debater and in student councils. There he was honored by being tapped for the Golden Fleece. Coming to the bar in 1909, he chose to practice his profession in Wilmington. He served in the Legislature of 1915, where his poise, good judgment and ability to state a question clearly and pointedly singled him out, and won him appointment as Superior Court Judge at the age of 31. Five years later he was chosen by a vote of the people of the State to serve as a member of the Supreme Court, thus beginning a career which has illumined the judicial annals of the State and in which he rendered to the State a service in the administration of justice unsurpassed in its history.

Those who knew Judge Stacy best and who have observed the development of his powers through the years, who have had opportunity to perceive the unusual coordination of legal learning and sound judgment in its application, with the gift of clear and accurate statement of the law, who have studied his opinions written in flawless English, and noted the manner in which with the hand of a master craftsman he has disposed of causes wisely and justly, without waste of time, must conclude with me that no greater Chief Justice in North Carolina has ever held unshaken the balances of human justice in this high office.

So well balanced was his mind, so diversified his gifts, so much did he excel in all that makes a great judge, that it is difficult to seize upon any one quality or excellence that outshone the rest as typical of the man.

His legal opinions written for the Court will constitute his most enduring monument. He wrote 1,500 opinions and they extend through fifty-four volumes of the North Carolina Supreme Court reports. These opinions give the measure and the quality of his thoughts and reveal as

nothing else could do the strength and variety of his powers in the field in which he truly served the State. It may be said of him as was said of another great Chief Justice, "He had the gift to state in terms of law the meaning of life in action." His choice of words in stating the decisions of the Court demonstrated the extensiveness of the vocabulary which his wide reading had made available for his use. His many apt expressions show his understanding of the springs of human action. He had the happy faculty of choosing the right word to express the exact meaning he wished to convey, and he could puncture an unsound argument with a single phrase. But always he fashioned the forms of judicial decision to achieve the ends of justice. All else, in his words, was *brutum fulmen*.

There were those who considered him to be conservative, but, if so, his was the conservatism that builds on sure foundation, and refuses to be led astray in search of false gods. He had few diversions and no hobbies. To him the law was a jealous mistress and to her he paid constant court. He loved books. He lived with them and in them. They were the tools with which he fashioned the rules of justice according to law.

His extrajudicial services in the field of national labor disputes earned for him the grateful commendation of four Presidents of the United States.

For thirty years Chief Justice Stacy seemed to personify the Supreme Court, in dignity, in character, in learning, in human sympathy. No embryo lawyer with shaking knees ever addressed the Court for the first time without a kindly smile of encouragement from the Chief.

He was a staunch defender of the Constitution as the basis upon which democratic action must find support. When a proposed amendment to the Constitution was defeated by vote of the people, and an attempt was later made to accomplish the same result by legislative action, he adjudicated the controversy in a single sentence: "The voice of the people is the voice of finality." This dictum expressed his political philosophy.

Characteristically he was reserved in personal expression, but for sixteen years I had the privilege of sitting beside him on the bench and in conference, and felt the warmth of his feeling for his associates, his respect for their views, his kindly helpfulness, and the value of his judgment on difficult problems. He won and held the affectionate regard and sincere loyalty of those who served with him. Beneath his reserve his feelings ran deep.

Chief Justice Stacy's influence on law and the procedure for the administration of justice while not spectacular was profound and will endure. A hundred years from now his words will still be quoted as the most concise and accurate statements of the law, and will serve as the basis for sound judicial thinking. The labors which will give him enduring

fame were rendered within the circumference of the Supreme Court of which for a quarter of a century he was the leader and spokesman. These have served to strengthen respect for the judicial powers conferred upon the Court by the Constitution.

To his associates he was a friend, a companion, a great judge, but he was more. He seemed in our eyes the symbol of the supremacy of law, of the dignity of obedience, of the calm neutrality of justice, but always with an underlying touch of sympathy and human kindness.

We shall see his like no more.

WALTER PARKER STACY

By EMERY B. DENNY

Walter Parker Stacy was born in Ansonville, North Carolina, December 26, 1884. He died in Raleigh, September 13, 1951. Chief Justice Stacy was the son of the Reverend L. E. and Rosa (Johnson) Stacy. His father was a Methodist minister, and the Chief Justice was one of twelve children.

His father being a Methodist minister, it was necessary for the Stacy family to move from place to place wherever the Reverend Mr. Stacy was assigned a pastorate by the Bishop of his church. As a consequence, the Stacy children were, as a rule, not privileged to attend the same school for more than four years. When Judge Stacy was eleven, he entered what was known as Weaverville College, Weaverville, North Carolina, and remained a student in that institution until 1898. He finished his preparatory training in the high school at Morven, North Carolina, in 1902. He entered the University of North Carolina in the fall of 1902 where he remained a student for two years. Not being financially able to continue his studies at the University, he accepted a position as principal of the Ingold school for the school years of 1904-05 and 1905-06.

He returned to the University in the fall of 1906 and was graduated in 1908 with the degree of Bachelor of Arts. While at Chapel Hill, Judge Stacy was not only an outstanding student but enjoyed the confidence and respect of both the faculty and students. He was active in the student government and other campus activities. In his senior year he was assistant in physics, winner of the Wiley P. Mangum medal for oratory, and appeared in his second intercollegiate debate. In recognition of his outstanding qualities, he was tapped for the Golden Fleece.

After graduation, Judge Stacy remained with the University for one year as an assistant in history, during which time he studied Law. He was admitted to the bar in 1909. In the fall of 1909 he accepted a posi-

tion as principal of Murphey School in Raleigh. He resigned this position in 1910 to enter his chosen profession, locating in Wilmington and forming a partnership with Mr. Graham Kenan under the firm name of Kenan and Stacy. This partnership continued until December 31, 1915.

Judge Stacy was elected to represent New Hanover County in the 1915 General Assembly. He made such a fine impression as a member of the General Assembly that on November 30, 1915, Governor Locke Craig appointed him Superior Court Judge of the Eighth Judicial District to succeed the Honorable George Rountree who had resigned. He assumed his duties on the bench January 1, 1916, at the age of thirty-one. He was the nominee of the Democratic Party to fill out the unexpired term of Judge Rountree and was duly elected in the general election that fall.

On February 14, 1920, Judge Stacy resigned as Superior Court Judge, effective as of March 1, 1920, to resume the practice of law with his former partner, Mr. Graham Kenan. However, his career as a practitioner at the bar was of short duration. On April 17, 1920, the Honorable George H. Brown, Associate Justice of the Supreme Court, announced he would not be a candidate to succeed himself. Judge O. H. Guion, resident judge of the Eighth Judicial District, Judge William J. Adams, resident judge of the Thirteenth Judicial District, Judge Benjamin F. Long, resident judge of the Fifteenth Judicial District, Dean N. Y. Gulley of the Wake Forest School of Law, the Honorable N. J. Rouse of Kinston, and Judge Stacy became candidates in the Democratic primary in June, 1920, for the nomination for Associate Justice of the Supreme Court. Judge Stacy received the highest vote in this contest, and Judge Long the second highest vote. In the second primary, Judge Stacy received the nomination of his party and was duly elected in November, 1920. He assumed his duties as Associate Justice of the Supreme Court on January 1, 1921, which position he held until March 16, 1925, when he was appointed by Governor A. W. McLean to succeed Chief Justice Hoke (resigned). In 1926, in 1934, in 1942, and again in 1950, Judge Stacy was nominated without opposition in the primaries and elected Chief Justice of the Supreme Court for eight-year terms.

Judge Stacy did not confine his services and activities solely to his work as an Associate Justice or as Chief Justice of the Supreme Court. He retained his membership in the North Carolina and American Bar Associations and in the General Alumni Association of the University of North Carolina, serving it as president in 1925-26. He was a member of the Edenton Street Methodist Church in Raleigh, and for many years taught a large class of men in the Sunday School of that church. He lectured during the summers of 1922-25, inclusive, in the Law School of the University of North Carolina, and was tendered, but declined, the deanship of the school in 1923. He lectured in Northwestern University

School of Law in the summers of 1926 and 1927. In recognition of his outstanding ability and service to his State, his Alma Mater conferred upon him the degree of Doctor of Laws in 1923.

On June 15, 1929, Judge Stacy and Mrs. Maude DeGan Graff, of Lake Placid, New York, were married. Mrs. Stacy died June 8, 1933. No children were born of this union.

The reputation of Judge Stacy as Chief Justice of the North Carolina Supreme Court became so well and favorably known that he was called upon to render many additional services, especially to aid in the settlement of numerous controversies between labor and management. He was named by the U. S. Board of Mediation, under the Railway Labor Act, as neutral arbitrator to serve on the Board of Arbitration, and later was elected chairman of the board, to settle a wage controversy between the Brotherhood of Locomotive Engineers and certain railroads in the Southeastern Territory of the U. S. in 1927 and '28. In 1928, President Coolidge appointed him a member of an Emergency Board, under the Railway Labor Act, to investigate and report respecting a dispute between officers and members of the Order of Railway Conductors and the Brotherhood of Railway Trainmen and certain railroads west of the Mississippi River. Pursuant to the provisions of a resolution of the General Assembly of North Carolina, in 1929, Judge Stacy was appointed by Governor O. Max Gardner as chairman of a Commission to redraft the Constitution of North Carolina. The U. S. Board of Mediation appointed him in January, 1931, to serve as neutral arbitrator in a controversy between the Brotherhood of Railway Trainmen and the N. Y. Central, the "Big Four," and the P. & L. E. Railroads, and again in November, 1931, to serve as neutral arbitrator between the Brotherhood of Railway and Steamship Clerks, and Railway Express Agency. In 1932, President Hoover appointed him a member of an Emergency Board of three, which board elected him as its chairman, to investigate and report concerning a number of disputes existing between the L. & A. and L. A. & T. Railroads and certain of their employees. The U. S. Board of Mediation appointed him, in 1933, to serve as neutral arbitrator in several controversies between the Boston & Maine Railroad and certain of its employees. In 1933, he was appointed by the President as a member of a board to investigate a labor dispute involving the Texas & New Orleans Railroad, and in 1934 to investigate a labor dispute involving the Delaware & Hudson Railroad. President Roosevelt appointed him chairman of the National Steel & Textile Labor Relations Boards in 1934. In 1938, the President appointed him chairman of an Emergency Board of three, to investigate and report on a threatened strike of railroad employees due to a wage reduction controversy on Class I railroads. He was again appointed by the President as an alternate member of the National

Defense Mediation Board, in 1941, and also a member of the National War Labor Board. He was appointed by President Roosevelt, in 1942, as a member of the National Railway Labor Panel. Again President Roosevelt appointed him, in 1944, as chairman of the President's Committee on Racial Discrimination in Railroad Employment. President Truman appointed him chairman of the President's National Labor Management Conference in 1945. He was urged to accept many additional assignments to serve as arbitrator in labor disputes or as a member of mediation boards; but in deference to his duties as Chief Justice, he found it necessary to decline such additional requests.

While Judge Stacy accepted many assignments at the hands of four Presidents of the United States his greatest service was rendered as Chief Justice of our Supreme Court. He was a member of the Court for more than thirty years, and presided as Chief Justice for twenty-six years. He served the Court as Chief Justice longer than any other man. His opinions appear in fifty-four volumes of our Reports, beginning with the 181st and ending with the 234th. In these opinions will be found the written words of his wisdom, the imprint of his scholarly mind, and his clear and comprehensive knowledge of the law. He never wrote for the mere sake of writing; he never used language merely to adorn or embellish his opinions. He selected words with care; he wrote concisely and discerningly to express the exact meaning he wished to convey. As a jurist, others may have been his equal, but among all those who have held judicial office in the annals of this commonwealth, none has been his superior. And as long as men seek to administer justice, his influence on our jurisprudence will abide.

I was privileged to serve as a member of the Court for nearly ten years while Judge Stacy was Chief Justice. In Court conferences, and in conferences with individual members of the Court, he never tried to coerce or influence our views. He was never too busy to confer with an associate or to give him the benefit of his judgment on difficult questions. As our present Chief Justice, W. A. Devin, recently said of him, "To his associates he was a friend, a companion, a great judge, but he was more. He seemed in our eyes the symbol of the supremacy of law, of the dignity of obedience, of the calm neutrality of justice, but always with an underlying touch of sympathy and human kindness."[1] Holland must have had in mind such a man as Chief Justice Walter Parker Stacy, when he wrote:

> "God give us men! . . .
> Tall men, sun-crowned, who live above the fog
> In public duty, and in private thinking . . ."

[1]North Carolina Law Review, December 1951.

CHIEF JUSTICE WALTER PARKER STACY

By DILLARD S. GARDNER

A year has passed, and nature with a carpet of green has softened the raw contrast of a new-made grave. The alchemy of time has transmuted the sharp pangs of grief into a dull sense of loss.

All that was mortal of a great Chief Justice lies at rest on a sunny knoll at Hamlet. An era in our law has ended. For three decades he sat on the Supreme Court. For more than a quarter of a century, he was the presiding officer. In some fifteen hundred opinions, found in fifty-four volumes of the Reports, he spoke for the Court. His life was the law. His legal opinions were the lengthened shadow of the man. The work of a great public servant sometimes overshadows the man. So it was with him. He was not merely the Chief Justice; he was a living institution. The life of the law is its interpreters. Particular controversies give life-or-death—to the enacted words; to the just interpretation of those words he dedicated his life. He was no abstract philosopher dreaming of an ideal system of jurisprudence. Neither was he a crusading reformer, white-hot in his zeal for some cause. His achievement was the greater and more lasting, if the less spectacular, because of this. Within the frame of everyday life, and within the periphery of the living law, he applied himself to the accomplishment of justice among named men in specific controversies. Let other men write about the law; he wrote the law.

Few men in our time have applied such full talents and energies with such singleness of purpose. To accomplish this fearlessly and completely, he willingly paid the demanded price of an impersonal detachment from the social world about him. He held himself apart from men that all might respect him equally. Save for a few brief years of marriage, he lived alone. He had no hobbies. He severely limited and circumscribed his social contacts, especially in his later years of impaired health. With whole-souled devotion, he gave himself to the law and in it found his full recompense. As he once said of another, "We shall not see his like again." Even if one with his rare talents should appear, it is inconceivable that he would, for so long a time, so completely consecrate himself to the law in such self-denial and self-discipline. He was a thinker, and he who lives with thought must take loneliness by the hand. He who walks ahead must often be content to walk alone. He who leads must risk being misunderstood. He knew all this and accepted it. In return he gained what Justice Holmes described as "the secret isolated joy of the thinker who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of

his thought. . . ." Like Holmes, too, he proved that "a man may live greatly in the law. . . . there as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable."

One evening at Chapel Hill, I heard Dr. Frank Graham ask the honorman in the Law School whom the students regarded as North Carolina's ablest judge. Instantly, the student answered, "Undoubtedly, Chief Justice Stacy." "Why?" shot back Dr. Graham, ever the teacher. Deliberately, the student answered, "He unerringly goes straight to the crucial question involved, then states the law concisely." Dr. Graham was satisfied and turned away. He did not hear the student add, in an undertone, "Sometimes he states it too concisely—for a student." The student's appraisal was so apt that I could not resist telling the story to the "Chief." He chuckled heartily over it, then lapsed into one of his rare moods of intimacy. He observed, "What is not properly before us, we should not decide. My own opinions are as important for what is left unsaid as for what is said." Then, with a twinkle, he observed from long experience, "What you do not say, you don't have to take back."

He wrote as he talked—with measured deliberation. He weighed his words—and was frugal in their use. He rode the English language with a tight bridle, making it do his every command. His written opinions are incisive, brief, terse. In content and word, his search was ever critical and selective. He often examined a dozen synonyms to find the one word with just the shade of meaning wanted. With the sure touch of the master, confident of his command of his field, he bored deliberately into the heart of the problem. In his constant search for the significant and the crucial, he brushed aside the incidental and the superfluous. He never flinched or faltered as he moved in on the problem. There was never any doubt that the problem would be solved; an air of inevitability hovered over him as he worked. His old philosophy teacher, Horace Williams, had trained him in the philosophy of Hegel. A fundamental assumption of Hegel was that all that is actual is rational and all that is rational is actual. Out of this belief flowed the firm conviction that all problems presented to man are capable of solution; the work of the Chief Justice continually demonstrated this truth. In the writing of opinions, he was anxious to come to grips with the basic question, sure of his capacity to solve it. He often remarked that he was "up a tree." He climbed most of the trees in the orchard of the law—and he always came down with fruit. He liked to use the expression "boring for oil," implying as it does that truth lies hidden deep and is found only by the discerning and the industrious. Yet, the long, labored and elaborate opinion found no favor with him. On one occasion when a colleague, new to

appellate duties, filed an opinion extensively surveying a field of law, he gently chided him by referring to it as a "treatise."

A thwarted poet is imprisoned in the heart of every truly great judge. In his chambers, when he died, was a well-thumbed copy of essays on the English poets; the critique of Wordsworth had been read again and again—and many passages were underlined. Now and then the poet would speak in his opinion (as in *State v. Wingler*), but usually the artistic touch was confined to a happy phrase or a chiseled sentence, the final and expert touch of the master craftsman. To the world he often presented the austere countenance of the judge who placed the sense of duty above all else, but his infrequent moments of intimacy revealed a profoundly sensitive nature and a warm sense of humanity. Busy as he was, I never knew him (and I have found no one else who ever knew him) to betray the least impatience when interrupted in his work. He was always a wise, helpful and sympathetic consultant. He wore the office of Chief Justice with a profound sense of personal responsibility. He always seemed mature beyond his years. He came to the bench as a young man and steeled himself early in the stern discipline of judicial propriety. Schooled in the often severe university of hard knocks, there was more than a touch of granite in the man. In personal matters and matters of conviction, he was aloof and self-contained. He did not wear his soul upon his shoulder. Only in his will do we find this fleeting flash of self-revelation, "In looking backward over the journey, the road seems strewn with victories and defeats. I have never consciously tread the path of the cynic. I face the future with confident faith in the purposefulness of life." As Edna St. Vincent Millay observed, "What a man believes, he lives with quietly." He who was an enigma in life, in death has become a legend.

Justice Holmes once observed that the high court of each jurisdiction restates its law every generation and Chief Justice Vanderbilt has more recently observed that this happens every thirty years. It is a striking coincidence that this is just the period covering Chief Justice Stacy's service on the Supreme Court of North Carolina. Though his body has returned to the earth from which our common parents sprung, already we know the immortality of his spirit, for four million citizens of his beloved state live and move and have their being under a body of law in no small measure shaped by his hands. He built not alone for the day when he was with us. He built also for that future which is the present, and beyond it for that future which is yet to be. To him was granted that unique power vouchsafed to few men, an immortal authority which projects into the future beyond his own day and time. One day he read to me from a dissent he had just written, then turned and said, "You are a young man and will probably be here when I am gone"; then, with a

smile he added, "Tell them to put on my tombstone, 'He knew what he was about.'" He knew that all life is expendable, to be frittered away or dedicated to a high purpose. His life was a calculated sacrifice to a noble end deemed worthy. Within the ambit of the law he found the opportunity to burgeon out to the fullest those rare talents which were his. Much of the warp and woof, which is the tapestry of North Carolina law, is his handiwork. In a confused age which can say it rarely and with hushed tones of abiding respect and unconcealed admiration, we repeat his own requiem,

"He knew what he was about."

REMARKS OF CHIEF JUSTICE DEVIN, UPON ACCEPTING THE PORTRAIT OF THE LATE CHIEF JUSTICE WALTER PARKER STACY IN THE SUPREME COURTROOM, 10 NOVEMBER, 1953.

This Court is pleased to have this portrait of its late Chief Justice, and it has heard with interest and appreciation the thoughtful and discriminating address on his life and character delivered by Mr. Helms.

Chief Justice Stacy served the State in this high office for a longer period than any other in the history of the State. As a member of this Court he wrote approximately 1,500 opinions, and they extend through 54 Volumes of the North Carolina Supreme Court reports. These opinions give the measure and the quality of his thoughts and the strength and variety of his powers. His choice of words in writing the decisions of the Court demonstrated the extensiveness of the vocabulary which his wide reading had made available for his use. He had the happy faculty of choosing the right word to express the exact meaning he wished to convey. But always he fashioned the forms of judicial decision to achieve the ends of justice. All else, in his words, was *brutum fulmen*.

He possessed the unusual coordination of legal learning and sound judgment in its application, and to this was added the gift of clear and accurate statement of the principles of law. To him the law was ever a jealous mistress and to her he paid constant court. He loved books. He lived with them. They were the tools with which he sought to establish the rules of justice according to law.

For 30 years Chief Justice Stacy seemed to personify the Supreme Court, in dignity, in character, in learning, in human sympathy. We shall see his like no more. But the vigor and strength he gave to judicial pronouncements have contributed greatly to the traditions of this Court.

There is a space reserved for his portrait on the walls of this chamber. The Marshal will see that it is hung in its proper place.

The proceedings on this occasion will be published in the forthcoming volume of our reports.

WORD AND PHRASE INDEX.

ANALYTICAL INDEX

ADVERSE POSSESSION—*Continued.*

Where plaintiff in an action to quiet title testifies that he was in possession under his deed up to a period less than twenty years from the institution of his action, his testimony shows possession within the twenty year period prescribed by G.S. 1-39, and defendant is not entitled to nonsuit upon his plea of that statute. *Ibid.*

§ 17. Burden of Proof.

Defendant claiming title by adverse possession as defense has burden of proving such title. *Barbee v. Edwards*, 215.

§ 18. Relevancy and Competency of Evidence.

In an action to establish title to lands by adverse possession for twenty years, evidence indicating that claimants' grantor claimed the *locus in quo* during the statutory period is competent to show that he occupied the land under claim of right or title. *Everett v. Sanderson*, 564.

Whether evidence of general reputation that plaintiff was owner is competent to show notoriety of possession, *quaere? Ibid.*

Evidence that a tax foreclosure was instituted solely against the tenant in common in possession of the lands who had no record paper title at the time is competent upon his claim of title by adverse possession, since even though general reputation is incompetent to prove paper title it is competent to show notoriety of possession. *Brewer v. Brewer*, 607.

An admission that the tenant in common in possession made improvements upon the property under *bona fide* claim of title, even though made solely for the purpose of settling the question of betterments in the event he establishes title by adverse possession, is competent to be considered on the question of the character of his possession. *Ibid.*

An offer by claimant to purchase a quitclaim deed from the adverse party after title had ripened in claimant by adverse possession is not an acknowledgment of title in such adverse party, nor does it break claimant's continuity of possession or affect the validity of claimant's perfected title. *Ibid.*

§ 19. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Where defendant claims by adverse possession under color, and plaintiff admits that he gave possession to certain person more than seven years prior to institution of action, *held*, defendant is not entitled to nonsuit on ground that plaintiff's evidence established affirmative defense, since plaintiff's admission does not establish that possession was adverse in law, that it was under color, or that defendant's claim was derived from person to whom plaintiff gave possession. *Barbee v. Edwards*, 215.

Evidence tending to show that defendants' grantor used the entire tract of land in question under definite boundaries for more than twenty years by putting the land to appropriate uses in keeping hogs thereon throughout the year and pasturing cattle and renting it to others for the operation of fisheries during the entire appropriate season each year, and that such use was open and notorious and under claim of right, *is held* sufficient to overrule nonsuit in plaintiffs' action to establish title to the *locus* by adverse possession. *Everett v. Sanderson*, 564.

Evidence tending to show that a tenant in common obtained deed from all of his cotenants except one, and possessed the land openly, notoriously, and exclusively under claim of right for over twenty years, taking the rents and profits, paying the taxes and making improvements under claim of title, *is held*

ADVERSE POSSESSION—*Continued.*

sufficient to be submitted to the jury on the question of his acquisition of the entire title by adverse possession under the theory of presumptive ouster. *Brewer v. Brewer*, 607.

ANIMALS.

§ 2. Liability for Damages Inflicted by Domestic Animals.

A person who knowingly or negligently permits his livestock to roam at large in stock-law territory may be held liable in damages for injuries proximately sustained by reason of the fact that the animal was running loose. *Kelly v. Willis*, 637.

That owner knowingly or negligently permitted mule to run at large may be inferred from fact that it repeatedly ran loose. *Ibid.*

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction of Supreme Court in General.

The Supreme Court will not discuss or decide questions not presented by the facts agreed, since to do so would be to render an advisory opinion. *Wilson v. High Point*, 14.

Where a person adjudged incompetent is a party to the action, the Supreme Court on appeal, in the exercise of its supervisory power, will assume jurisdiction on her behalf and treat errors committed against her as being before the Court and duly presented for review notwithstanding that she has not appealed. *Elledge v. Welch*, 61.

The function of the Supreme Court is to review alleged errors and rulings of the trial court and not to chart the course of trial in the lower court in advance of its rulings. *Perry v. Doub*, 233.

Where the constitutionality of a statute is not raised in the lower court, it may not be raised for the first time in the Supreme Court. *Phillips v. Shaw, Comr. of Revenue*, 518.

§ 2. Judgments Appealable—Premature Appeals.

Appeal from order granting motion for examination of adverse party as matter of right is premature and will be dismissed. *Tillis v. Cotton Mills*, 124.

An appeal will not lie from the denial of a motion to strike made after demurrer has been filed and overruled. *Purvis v. Whitaker*, 262.

§ 5. Moot and Academic Questions.

Where the relief sought by *mandamus* has been granted pending the appeal, the appeal will be dismissed, since the question has become academic. *Savage v. Kinston*, 551.

Where the disposition of respondent's appeal renders academic the questions presented on petitioners' appeal, petitioners' appeal will be dismissed. *Sale v. Highway Com.*, 599.

§ 6c (1). Necessity for, Form and Sufficiency of Objections and Exceptions, and Matters Cognizable Ex Mero Motu.

The Supreme Court will enforce *ex mero motu* the rule requiring that the evidence be set out in the record in narrative form. *Anderson v. Heating Co.*, 138.

Where there is no exception in the lower court to the submission of an issue, its submission cannot be challenged for the first time on appeal. *Walker v. Walker*, 299.

APPEAL AND ERROR—*Continued.*

Court will take cognizance of want of jurisdiction *ex mero motu*. *Lewis v. Harris*, 642.

§ 6c (2). Exception to Judgment.

An exception to the signing and entering of the judgment presents only the face of the record for review, and when the judgment is supported by the record the appeal must fail. *Bourne v. Edwards*, 261.

An appeal from the judgment is insufficient to bring up for review the findings of fact. *In re Custody of Allen*, 367.

An exception that the findings of fact are not sufficient to support the judgment presents for review whether the court's conclusions of law from the findings of fact are unwarranted and erroneous. *Winborne v. Stokes*, 414.

Upon appeal from judgment affirming an arbitration award, exceptive assignments of error to the refusal of the court to grant the relief prayed for by plaintiff and to the signing of the judgment present only whether the award and the facts found by the court are sufficient to support the judgment. *Cotton Mills v. Textile Workers Union*, 719.

§ 6c (3). Exceptions to Findings of Fact.

Where respondent fails to request the court to make any particular findings, respondent may not complain on appeal of the failure of the court to make such findings. *In re Custody of Allen*, 367.

An assignment of error for that the findings of the court are not supported by evidence is ineffectual unless the specific findings objected to are pointed out. *Winborne v. Stokes*, 414.

§ 6c (5). Exceptions to Charge.

An assignment of error for that the court failed to properly charge the jury as to the law in the case and to apply the law to the facts in the case, is ineffectual as a broadside assignment of error. *Walker v. Walker*, 299.

An assignment of error that the charge of the court failed to comply with G.S. 1-180 cannot be sustained. *R. R. v. Trucking Co.*, 422.

§ 6c (6). Requirement That Inadvertence Be Brought to Trial Court's Attention to Support Exception to Charge.

While ordinarily a misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contentions presents an erroneous view of the law or an incorrect application of it. *Blanton v. Dairy*, 382.

An inadvertence in the charge in stating the evidence should be called to the trial court's attention in time to afford opportunity for correction. *Brewer v. Brewer*, 607.

§ 8. Theory of Trial.

Where the question of the constitutionality of an act is not raised in the court below, it may not be raised for the first time in the Supreme Court upon appeal. *Phillips v. Shaw, Comr. of Revenue*, 518.

§ 9. Requisites for Appeal—Appeal and Appeal Entries.

Where person adjudged an incompetent is a party, the Supreme Court will assume jurisdiction on her behalf and treat errors against her as being before the Court notwithstanding she has not appealed. *Elledge v. Welch*, 61.

APPEAL AND ERROR—*Continued.*

§ 10a. Necessity for Case on Appeal.

Where the error relied upon by appellant is presented by the record proper, the record constitutes the case to be filed in the Supreme Court and appellant is not required to serve it on appellee or his counsel. Therefore, appellee's motion to dismiss on the ground that appellants failed to make up and serve the case on appeal is without merit. *Wilson v. Chandler*, 401.

When appellant relies solely upon his exception to the judgment entered, the record proper constitutes the case on appeal, and therefore appellee's motion to dismiss for failure of appellant to serve a case on appeal will be denied. *Rouse v. Rouse*, 568.

§ 12. Pauper Appeals.

When application to the clerk of the Superior Court, supported by affidavit and certificate, for leave to appeal *in forma pauperis* is not made until more than ten days after expiration of the term of court at which the judgment was rendered, the appeal must be dismissed, the requirements of the statute being mandatory and jurisdictional. *Anderson v. Worthington*, 577.

§ 16. Term of Supreme Court to Which Appeal Must Be Taken.

A cause tried prior to the convening of the Spring Term of the Supreme Court must be docketed in the Supreme Court at that term twenty-one days prior to the call of the docket for the District to which it belongs, and failure to docket it at the proper term compels dismissal notwithstanding any agreement of the parties or allowance of time by the trial judge for perfecting the appeal. Rule of Practice in the Supreme Court No. 5. *In re Sugg*, 413.

An appeal must be taken to the next succeeding term of the Supreme Court beginning after the rendition of the judgment, and when this is not done the appeal will be dismissed, it being incumbent upon appellant to apply for a writ of *certiorari* if he is unable to effect his appeal in time. *Ins. Co. v. Stafford, Inc.*, 678.

§ 20a. Form and Requisites of Transcript.

On appeal to the Supreme Court, the record must contain the evidence in narrative form, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. *Anderson v. Heating Co.*, 138.

The rule requiring a narrative statement of the evidence in the case on appeal is mandatory and may not be waived by the parties, and a record containing in an "agreed statement of facts" a mere summary of the evidence, largely in the form of conclusions, is not a compliance with the rule and requires a dismissal of the appeal, and a statement of the evidence in question and answer form in the brief does not alter this result. *S. v. Powell*, 550.

§ 22. Conclusiveness of Record.

The Supreme Court is bound by the record as filed. *S. v. Ham*, 94.

§ 29. Abandonment of Exceptions by Failure to Discuss in the Brief.

Exceptive assignments of error not discussed in the brief are deemed abandoned. *S. v. Porter*, 735; *S. v. Smith*, 82.

§ 31g. Dismissal for Defect or Insufficiency of Record.

The rule requiring that the evidence be set out in narrative form in the record on appeal to the Supreme Court is mandatory, and the failure to comply with the rule requires dismissal of the appeal. *Anderson v. Heating Co.*, 138.

APPEAL AND ERROR—*Continued.*

Dismissal for failure to make out and serve statement of case on appeal will not be allowed when the error relied on is presented by the record proper. *Wilson v. Chandler*, 401.

§ 37½. Motions for New Trial in Supreme Court.

Motion for new trial for newly discovered evidence granted in this case, appellant having met all the requirements for such relief. *Harris v. Chapman*, 308.

§ 38. Presumptions and Burden of Showing Error.

The presumption is in favor of the correctness of the judgment of the lower court, and the burden is upon appellant to show error amounting to a denial of some substantial right. *Beaman v. R. R.*, 418.

The burden is upon appellant to show error clearly and that such error was material, as the presumption is against him. *Goode v. Barton*, 492; *S. v. Bridgers*, 677.

§ 39a. Harmless and Prejudicial Error in General.

A new trial will not be awarded for mere technical error, but appellant must show that the error complained of was material so that there is a reasonable probability that the result of the trial was prejudicially affected. *Goode v. Barton*, 492.

§ 39c. Error Harmless Because Appellant Not Entitled to Relief on Any Aspect.

Where appellant is not entitled to the relief sought on any aspect of the case, any error in the trial is perforce harmless. *Justice v. Mitchell*, 364.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

In order to be entitled to a new trial for the admission of evidence, appellant must show, ordinarily, that he objected to its admission, that the evidence was inadmissible because incompetent or irrelevant, and that the evidence was prejudicial to his cause of action or defense. *Hunt v. Wooten*, 42.

In an action to recover for permanent injuries, the admission in evidence of the annuity tables will not be held prejudicial when it is apparent from the record that plaintiff intended to offer in evidence only the mortuary tables and that the reference to G.S. 8-47 was a mere inadvertence, and that the jury was not advised at any time as to the contents of the annuity tables and did not consider them in any way in reaching their verdict. *Ibid.*

The admission of testimony over objection cannot be held prejudicial when the record discloses that testimony of the same import was admitted during the trial without objection. *Ibid.; Elledge v. Welch*, 61; *Everett v. Sanderson*, 564.

The admission of testimony not pertinent to the determinative issues in the cause *is held* harmless in this case. *Elledge v. Welch*, 61.

The admission of testimony as to a certain fact cannot be prejudicial when the existence of such fact is admitted in the pleadings. *Whitley v. Jones*, 332.

Upon appeal from judgment as of nonsuit, the admission of incompetent secondary evidence will not be held harmless on the ground that the same matter would be established by competent evidence upon a second trial when it is not apparent from the record that the best evidence would be of the same import, or, if it were, that it would establish a defense as a matter of law. *Winkler v. Amusement Co.*, 589.

APPEAL AND ERROR—*Continued.*

§ 39f. Harmless and Prejudicial Error in Instructions.

The charge of the trial court will be read contextually, and an excerpt from the charge will not be held prejudicial, even though it be erroneous when considered out of context, if the charge when considered as a whole presents the law of the case to the jury in such manner as to leave no reasonable cause to believe that the jury was misled or misinformed. *Vincent v. Woody*, 118; *Goode v. Barton*, 492.

An erroneous instruction on a material aspect of the case is not rendered harmless by the fact that in another portion of the charge the court may have given correct instructions to the jury on such phase, since it cannot be determined on appeal that the jury did not follow the erroneous instruction. *Morgan v. Oil Co.*, 185; *Godwin v. Cotton Co.*, 627; *S. v. Stroupe*, 34.

An inadvertence in stating that certain evidence had been introduced by respondents, when in fact the evidence had been introduced by petitioners, will not be held for reversible error when upon the whole record it is apparent that petitioners could not have been prejudiced thereby. *Brewer v. Brewer*, 607.

Inadvertence in charge *held* not prejudicial when instructions are construed contextually. *R. R. v. Trucking Co.*, 422.

In condemnation case, charge that it is matter of common knowledge that building of highway brings certain benefits to property owners along highway *held* insufficient to warrant new trial. *Simmons v. Highway Com.*, 532.

Error in stating burden of proof must be held prejudicial. *S. v. Brady*, 404; *S. v. Brady*, 407.

§ 40c. Review of Injunction Proceedings.

While the Supreme Court is not bound by the findings of the lower court upon the hearing of an application for an interlocutory injunction, and may review the evidence and findings of fact for itself, the presumption is that the findings of the hearing judge are correct and the burden is upon appellant to assign and show error in them. *Huskins v. Hospital*, 357.

While the Supreme Court is not bound by the findings or ruling of the judge below in injunction cases, the presumption is in favor of the correctness of the judgment of the lower court with the burden upon appellant to assign and show error, and therefore when the record does not show affirmatively to the contrary it will be presumed that the order was based upon a proper exercise of discretionary power supported by the facts of the case. *Lance v. Cogdill*, 500.

§ 40d. Review of Judgments on Findings of Fact.

Supreme Court will not discuss or decide question not presented by findings of fact. *Wilson v. High Point*, 14.

Findings by court upon waiver of jury trial are conclusive when supported by evidence. *Trust Co. v. Finance Corp.*, 478.

§ 40g. Review of Rulings on Motion to Strike.

The denial of plaintiff's motion to strike certain paragraphs from the answer will not be held for error when the retention of such allegations can result in no substantial prejudice. *Soucers v. Chair Co.*, 576.

§ 40l. Review of Constitutional Questions.

Where the question of the constitutionality of an act is not raised in the court below, it may not be raised for the first time in the Supreme Court upon appeal. *Phillips v. Shaw, Comr. of Revenue*, 518.

APPEAL AND ERROR—*Continued.*

The courts will not pass upon a constitutional question until the necessity for doing so has arisen. *S. v. Albarty*, 130.

The Supreme Court will not decide the constitutionality of a statute when the appeal may be disposed of on other grounds. *Hyde County v. Bridgman*, 247.

§ 51a. Law of the Case.

Where the Supreme Court holds on appeal that the evidence was sufficient to overrule defendant's motions to nonsuit, in the subsequent trial upon substantially the same evidence the question of the sufficiency of the evidence is foreclosed. *Jernigan v. Jernigan*, 444.

Where the decision upon appeal points out the crucial facts upon which the rights of the parties depend, the decision is the law of the case in respect to the issues, and in a subsequent trial upon substantially the same evidence the cause is properly submitted upon issues presenting to the jury in an ample manner the crucial facts as pointed out in the former decision, and appellant may not contend on a subsequent appeal that the trial court erred in refusing to submit another issue tendered. *Motor Co. v. Wood*, 468.

After decision was rendered, the unsuccessful party petitioned for rehearing. The petition was denied. Thereafter judgment was entered in the lower court in accordance with the opinion, and an appeal therefrom was taken. *Held:* The denial of the petition to rehear put an end to the case, and the judgment appealed from is affirmed. *Rouse v. Rouse*, 568.

Where the Supreme Court holds on a former appeal that certain matters set up in bar or abatement of plaintiff's cause were insufficient in law to preclude plaintiff from prosecuting the action, and thereafter in the subsequent trial defendant again pleads substantially the same matters by way of estoppel and in bar, the order of the court striking such allegations from the pleadings will be upheld, the former decision being the law of the case. *Howle v. Express, Inc.*, 676.

§ 51c. Interpretation of Decisions.

An opinion of the Supreme Court must be considered in the light of the case in which it is delivered. *S. v. Wingler*, 485.

APPEARANCE.

§ 2. Acts Constituting General Appearance and Effect Thereof.

An appearance by a nonresident defendant in claim and delivery proceedings in which such defendant requests that the action be dismissed for want of jurisdiction and further prays that plaintiff be required to make restitution of the property retained under the claim and delivery or that defendant recover on plaintiff's bond for its retention, *is held* a general appearance notwithstanding defendant's denomination of the appearance as special, and such appearance waives any defect in the jurisdiction of the court for want of service of summons. *Dickson v. Transfer Co.*, 570.

ARBITRATION AND AWARD.

§ 5. Scope of Inquiry.

Where the dispute submitted to arbitration grows out of a written contract, interpretation of the contract is necessary to the settlement of the controversy and is within the arbitrator's authority, and his award is conclusive and bind-

ARBITRATION AND AWARD—*Continued.*

ing on the parties if the award is based on a permissible construction of the contract, but if, under the guise of construction, the arbitrator reads into the agreement a material provision no reasonable construction will permit, the arbitrator has acted under a mistake of law and his award is subject to attack on the ground that he exceeded his authority. *Cotton Mills v. Textile Workers Union*, 719.

An agreement to arbitrate any dispute between the parties arising out of the contract between them concerning wages gives the arbitrator authority to hear a dispute as to the interpretation of the agreement in respect to vacation pay, since vacation pay is a part of an employee's wages. *Ibid.*

§ 6. Hearings and Findings.

An arbitration is an extrajudicial proceeding, and the arbitrator is not bound by the rules of procedure and evidence which prevail in a court of law. *Cotton Mills v. Textile Workers Union*, 719.

Contract between the parties in this case in regard to the payment of *pro rata* vacation pay based on a minimum of six months' service *is held* susceptible to the interpretation that an employee discharged through no fault of his own is entitled to *pro rata* vacation pay even though his employment is terminated prior to the annual calculation date, provided he has been in the employment of the company for a period of six months or longer. *Ibid.*

ARREST.

§ 3. Resisting Arrest.

A warrant charging that defendant unlawfully and willfully violated the laws of North Carolina by resisting arrest is insufficient to charge the offense proscribed by G.S. 14-223. *S. v. Thorne*, 392; *S. v. Jenkins*, 396.

ASSAULT.

§ 9a. Self-Defense.

Where defendant enters upon premises of prosecutrix in drunken condition, refuses to leave on demand, and uses language calculated to provoke assault, he may not rely on plea of self-defense even though prosecutrix strikes first blow. *S. v. Porter*, 735.

§ 10. Warrant and Indictment.

A warrant charging that the defendant on a certain day in a named city did unlawfully and willfully violate the laws of North Carolina by an assault on a named person is sufficient to charge the offense of a simple assault. *S. v. Thorne*, 392.

§ 13. Sufficiency of Evidence and Nonsuit.

Evidence that defendant, who had been arrested by a police officer, intentionally struck the officer while on the way to the police station with the sole purpose of venting her spleen upon him, is sufficient to support a conviction of simple assault, and therefore when this is one of the offenses charged in the warrant, defendant's general motion for a compulsory nonsuit is properly denied. *S. v. Thorne*, 392.

§ 14b. Instructions on Self-Defense.

Where defendant introduces evidence supporting his contention that he was not the aggressor, that he shot his assailant as his assailant was advancing

ASSAULT—*Continued.*

on him with an open knife making an effort to cut him, and that defendant had no way of retreat and shot his assailant only to save himself from great bodily harm, defendant is entitled to have the court submit the question of self-defense to the jury, and an instruction that defendant had attempted to offer evidence of self-defense which was insufficient for that purpose as a matter of law, must be held for reversible error. *S. v. Satterwhite*, 674.

Where the evidence is to the effect that defendant entered upon the premises of prosecutrix in a drunken condition, refused on demand to leave, and used language calculated to provoke an assault, defendant may not rely upon the plea of self-defense even though prosecutrix struck the first blow, there being no evidence he quitted the combat or retreated, and therefore the court is not required to instruct the jury on this defense. *S. v. Porter*, 735.

AUTOMOBILES.

§ 5. Title, Certificates of Title and Transfer.

Our statutes regulating the registration of motor vehicles are designed to facilitate the enforcement of highway safety statutes, minimize the hazards of theft and provide safeguards against fraud and imposition, and they are mandatory and not merely directory and may not be circumvented or disregarded at the will or pleasure of the purchaser or seller of a motor vehicle. *Hawkins v. Finance Co.*, 174.

Fact that owner delivered certificates of title endorsed in blank to used car dealer does not estop owner from claiming title as against mortgagee of dealer. *Ibid.*

Mortgagee has priority of lien over subsequent mortgagee or purchaser when mortgagor dealer is not given authority to sell in usual course of business. *Trust Co. v. Finance Co.*, 478.

When check given in payment of cash sale is dishonored, title does not pass and dealer may recover car from *bona fide* purchaser. *Motor Co. v. Wood*, 468.

§ 8d. Stopping, Parking and Parking Lights.

Whether negligence in leaving vehicle parked without lights concurred in proximately causing collision of taxi therewith *held* for jury in action by personal representative of passenger in taxi killed in collision. *Bumgardner v. Allison*, 621.

Whether a driver colliding with the rear of an unlighted vehicle stopped on the highway at night is guilty of contributory negligence barring recovery as a matter of law must be determined in each case upon consideration of the concurrent circumstances, such as fog, smoke, rain, glaring lights, color of vehicles and road surface. *McClamrock v. Packing Co.*, 648.

The evidence tended to show that a car was stopped on the highway, that the driver of plaintiff's car, traveling in the same direction, slowed to a virtual stop some fifteen feet back of this car while giving the appropriate hand signal, and that as he did so the driver of a third car, traveling in the same direction, crashed into the rear of his car. *Held:* Any negligence of the driver of the car which had stopped on the highway was insulated by the intervening negligence of the car which crashed into the rear of plaintiff's car, and the original tort-feasor's motion to nonsuit on the ground of insulating negligence is properly denied. *Smith v. Grubb*, 665.

AUTOMOBILES—*Continued.*

§ 8i. Intersections.

Stop signs along a servient highway at an intersection with a dominant highway are placed for the purpose of giving drivers along the servient highway timely notice of the duty to stop before entering the intersection, but do not indicate that a motorist should stop at the sign, it being the duty of a motorist to stop at a place before entering the intersection from which his act of looking can be effective. *Edwards v. Vaughn*, 89.

Evidence *held* not to compel conclusion that driver attempted to pass preceding vehicle at intersection. *Ins. Co. v. Cline*, 134.

In this action to recover for the death of a motorcyclist, killed in a collision with a truck which turned across the highway in the path of the oncoming motorcycle to enter a private driveway to the truck driver's left, defendant's motion to nonsuit upon conflicting evidence *is held* properly denied. *Todd v. Smathers*, 140.

Driver first in intersection has right of way over vehicle approaching from the left. *Finch v. Ward*, 290.

A motorist turning to the left on the highway is required to give the statutory signal of his intention to turn only in those instances in which the surrounding circumstances afford him reasonable grounds for apprehending that his action may affect the operation of another vehicle. *Blanton v. Dairy*, 382.

Evidence *held* for jury in this action for collision at intersection of highway and driveway. *Horton v. Peterson*, 446.

The evidence favorable to plaintiff tended to show that she entered an intersection within a municipality at eight or ten miles an hour, that she saw a truck approaching the intersection from her right, but that since the truck was some 200 feet away at the time, she proceeded into the intersection, and that the truck, traveling at excessive speed, struck her right door after she had passed the center of the intersection. *Held:* Defendant's motion to nonsuit was properly denied. *Godwin v. Cotton Co.*, 627.

§ 8j. Sudden Emergency.

Doctrine is not limited to emergencies caused by negligence. *Goode v. Barton*, 492.

§ 14. Following and Passing Vehicles Traveling in Same Direction.

Evidence *held* not to compel conclusion that driver attempted to pass preceding vehicle at intersection. *Ins. Co. v. Cline*, 133.

The evidence tended to show that a car was stopped on the highway, that the driver of plaintiff's car, traveling in the same direction, slowed to a virtual stop some fifteen feet back of this car while giving the appropriate hand signal, and that as he did so the driver of a third car, traveling in the same direction, crashed into the rear of his car. *Held:* Any negligence of the driver of the car stopping on the highway was insulated by the intervening negligence of the car which crashed into the rear of plaintiff's car, and the original tortfeasor's motion to nonsuit on the ground of insulating negligence is properly allowed. *Smith v. Grubb*, 665.

Evidence favorable to plaintiff tending to show that both plaintiff's and defendant's cars were traveling in the same direction at nighttime, each with front and taillights burning, that defendant's car, following plaintiff's car, and traveling at a much faster speed, crashed into the rear of plaintiff's car and that defendant immediately admitted that he did not see plaintiff's car before his vehicle struck it, *is held* to support the trial court's refusal to nonsuit

plaintiff's cause, either on the issue of negligence or contributory negligence. *Simrel v. Meeler*, 668.

§ 18a. Pleadings and Parties in Auto Accident Cases.

Defendant is not entitled to have question of plaintiff's contributory negligence submitted to the jury on the theory that plaintiff's act in voluntarily kissing the driver caused the accident when there is no allegation in the answer setting forth this circumstance. *Hunt v. Wooten*, 42.

When insured driver has been paid loss in full by insurer, insured is not real party in interest and cannot maintain action for collision. *Dixie Lines v. Grannick*, 552.

Where the facts alleged in the complaint are sufficient to imply by a fair and reasonable intendment that defendant failed to keep a proper lookout, the court has the discretionary power even after judgment to permit plaintiff to amend to allege specifically such failure. Further, the court has the authority to allow such amendment even if the original complaint does not allege by necessary implication defendant's failure to keep a proper lookout. *Simrel v. Meeler*, 668.

§ 18d. Concurring and Intervening Negligence.

Evidence *held* to disclose intervening negligence insulating primary negligence as matter of law. *Smith v. Grubb*, 665.

Plaintiff alleged acts of negligence of one defendant proximately causing a collision at an intersection, that the collision knocked a high voltage wire from a pole across one of the cars, and that plaintiff's intestate was electrocuted when he attempted to rescue the occupants of the car. *Held:* Any negligence of the power company in the maintenance of the wires and poles preceded the alleged negligence of defendant driver and therefore could not insulate his negligence, and intestate will not be held guilty of contributory negligence as a matter of law in attempting to rescue the occupants of the car. *Alford v. Washington*, 694.

Whether negligence in leaving vehicle parked without lights concurred in proximately causing collision of taxi therewith *held* for jury in action by personal representative of passenger in taxi killed in the collision. *Bumgardner v. Allison*, 621.

§ 18g (4). Opinion Evidence.

Declaration by defendant shortly after the accident that he could have avoided the accident in several ways *held* competent as shorthand statement of fact. *Jernigan v. Jernigan*, 444.

§ 18g (5). Evidence—Physical Facts.

Testimony of a patrolman that he saw tire tracks on the shoulder of the road near the scene of the accident some ten or twelve days after the collision is properly excluded, especially where the evidence further tends to show that no such marks were seen immediately after the collision, since the evidence fails to connect the tire marks with the car in question. *McAbee v. Love*, 560.

§ 18h (2). Nonsuit on Issue of Negligence.

Evidence *held* for jury in action for collision when truck turned left in path of oncoming motorcycle to enter private drive on left. *Todd v. Smathers*, 140.

Evidence *held* for jury in this action for collision at intersection of highway and driveway. *Horton v. Peterson*, 446.

AUTOMOBILES—*Continued.*

The evidence favorable to plaintiff tended to show that she entered an intersection within a municipality at eight or ten miles an hour, that she saw a truck approaching the intersection from her right, but that since the truck was some 200 feet away at the time, she proceeded into the intersection, and that the truck, traveling at excessive speed, struck her right door after she had passed the center of the intersection. *Held:* Defendant's motion to nonsuit was properly denied. *Godwin v. Cotton Co.*, 627.

Evidence *held* for jury in this action to recover for rear-end collision between cars traveling in same direction. *Simrel v. Meeler*, 668.

§ 18h (3). Nonsuit for Contributory Negligence in Auto Accident Cases.

Evidence *held* to show contributory negligence in entering intersection with dominant highway without yielding right of way. *Edwards v. Vaughn*, 89.

Evidence *held* not to compel conclusion that plaintiff attempted to pass defendant's vehicle, traveling in same direction, at intersection, and nonsuit for contributory negligence was properly denied. *Ins. Co. v. Cline*, 133.

Evidence *held* not to disclose contributory negligence constituting proximate cause as matter of law in entering highway from driveway and stopping with front about three feet into highway when defendant had nine feet to his right to pass in safety. *Horton v. Peterson*, 446.

Whether plaintiff was guilty of contributory negligence in colliding with rear of unlighted vehicle on highway held for jury. *McClamrock v. Packing Co.*, 648.

Evidence favorable to plaintiff tending to show that both plaintiff's and defendant's cars were traveling in the same direction at nighttime, each with front and taillights burning, that defendant's car, following plaintiff's car, and traveling at a much faster speed, crashed into the rear of plaintiff's car and that defendant immediately admitted that he did not see plaintiff's car before his vehicle struck it, *is held* to support the trial court's refusal to nonsuit plaintiff's cause, either on the issue of negligence or contributory negligence. *Simrel v. Meeler*, 668.

§ 18h (4). Nonsuit on Ground of Intervening Negligence.

Whether negligence in leaving vehicle parked without lights concurred in proximately causing death to passenger in car colliding with the rear of truck *held* for jury. *Bumgardner v. Allison*, 621.

Evidence *held* to disclose intervening negligence insulating primary negligence as matter of law. *Smith v. Grubb*, 665.

§ 18i. Instructions in Auto Accident Cases.

Charge *held* erroneous for failure to charge law as to right of way at intersection. *Finch v. Ward*, 290.

Where there is testimony on the part of defendant supporting his contention that before turning to his left across the highway he ascertained that there was no vehicle in sight to his rear for a distance of some 200 or 300 yards, and no vehicle in front of him so that he had no reasonable ground for apprehending that his intended left turn might affect the operation of any other vehicle, an unqualified instruction to the effect that his failure to give the statutory signal during the last hundred feet traveled constituted negligence *per se*, must be held for reversible error even though given in stating the contentions of plaintiff. *Blanton v. Dairy*, 382.

Instruction on doctrine of sudden emergency *held* not prejudicial. *Goode v. Barton*, 492.

AUTOMOBILES—*Continued.*

Instruction that defendant contended plaintiff's intestate was guilty of contributory negligence in the same manner and fashion as plaintiff alleged against defendant *held* for error when the allegations and evidence of negligence against the respective parties differed in that only plaintiff alleged that the adverse party was driving drunk. *Darden v. Leemaster*, 573.

An instruction to the effect that contributory negligence is some act or omission of the plaintiff which constitutes the proximate cause of the injury, rather than a proximate cause or one of the proximate causes, must be held for prejudicial error. *Godwin v. Cotton Co.*, 627.

§ 20c. Guests and Passengers—Assumption of Risks.

In an action by the personal representative to recover for the wrongful death of his intestate, killed while a passenger in defendant's car, assumption of risk is not available as a defense, since there was no contractual relationship between the parties. *Goode v. Barton*, 492.

§ 20a. Negligence of Guest or Passenger.

Defendant driver, sued by a guest in his car for negligent injury sustained by her when the car hit a fire hydrant, is not entitled to have the issue of contributory negligence submitted to the jury upon the theory that he hit the hydrant because plaintiff was voluntarily kissing him at the time, in the absence of allegation in the answer setting forth this circumstance. *Hunt v. Wooten*, 42.

§ 21. Parties Liable to Guest or Passenger.

Whether negligence in leaving vehicle parked without lights concurred in proximately causing collision when taxi ran into its rear *held* for jury in action by personal representative of passenger in taxi killed in the collision. *Bumgardner v. Allison*, 621.

§ 25. Family Purpose Doctrine.

Liability under the family purpose doctrine in this State is not confined to the owner or driver but depends upon use and control, and therefore asserted error in the court's statement of the contentions that the car was bought with funds of the father, rather than funds of his son, is immaterial when the record shows that the license for the car was issued in the name of the father and that he had control of its use. *Goode v. Barton*, 492.

When accident occurs in another state, family purpose doctrine must be applied according to its laws. *Ibid.*

§ 28e. Manslaughter Prosecutions—Sufficiency of Evidence and Nonsuit.

The evidence tended to show that defendant was driving at a speed of some 75 to 85 miles per hour in a 35 mile per hour speed zone, and hit a boy riding a bicycle traveling in the opposite direction on defendant's right side of the street, resulting in fatal injury to the boy. *Held:* The evidence was sufficient to be submitted to the jury on the question of defendant's culpable negligence constituting the proximate cause of the boy's death. *S. v. Smith*, 82.

Where the State's evidence tends to show that defendant was traveling at a speed of some 75 to 85 miles per hour in a 35 mile per hour speed zone and struck a boy riding a bicycle traveling in the opposite direction on defendant's right side of the street, nonsuit may not be granted on the contention that the boy was riding the bicycle on his left side of the street in violation of G.S. 20-38 (ff), since contributory negligence as such has no place in the law of crimes. *Ibid.*

AUTOMOBILES—*Continued.*

Where the evidence tends to show that defendant driver could have seen the boy riding the bicycle for some 360 feet before his car collided with the bicycle, and that skid marks made by defendant's car did not commence until he was within 41 feet of the point of impact, the court is warranted in submitting to the jury the question of defendant's culpable negligence in failing to keep a proper lookout. *Ibid.*

BAILMENT.

§ 4. Care and Custody of Property by Bailee.

It is the duty of bailee to exercise ordinary care to protect the property bailed against damage and to return the property in as good condition as when he received it. *Vincent v. Woody*, 118.

A bailee is liable for damage to the property bailed proximately resulting from his negligence or the negligence of his agent while the property is in his possession. *Ibid.*

§ 7. Actions by Bailor for Wrongful Detention and Damage to Property.

Evidence tending to show that plaintiff delivered his car to defendant under an agreement that defendant was to have it repaired and sell it for plaintiff, that defendant refused to surrender the car voluntarily, and that when plaintiff obtained possession of the car by claim and delivery it was in a damaged condition, *is held* sufficient to make out a *prima facie* case and repel defendant's motion to dismiss as in case of nonsuit. *Vincent v. Woody*, 118.

In bailor's action to recover for damage to the property while in possession of bailee, a single excerpt from the charge to the effect that the bailee was liable as an insurer for any damage to the property while in his possession or the possession of his agent, will not be held for prejudicial error when the charge construed contextually unambiguously limits the bailee's liability to damage proximately resulting in the failure of the bailee or his agent to exercise due care. *Ibid.*

§ 10. Rights of Third Parties.

A bailor of personal property for sale by the bailee is not estopped to assert his title as against a third person merely because he entrusts the possession of the property to the bailee unless he further clothes the bailee with *indicia* of ownership, even though such third person be an innocent purchaser or encumbrancer. *Hawkins v. Finance Corp.*, 174.

BASTARDS.

§ 1. Nature and Elements of Offense of Willful Failure to Support.

Offense of willful failure to support illegitimate child may be committed in this State by out of state defendant. *S. v. Tickle*, 206. "Support" as used in this statute includes food, clothing, and other necessaries together with necessary medical assistance. *S. v. Love*, 283.

The offense proscribed by G.S. 49-2 is the willful neglect or refusal of a parent to support his illegitimate child, the mere begetting of the child not being the offense and the question of paternity being incidental to the prosecution. *S. v. Chambers*, 373.

The willful failure and refusal to support an illegitimate child is a continuing offense. *Ibid.*

BASTARDS—*Continued.*

§ 4. Prosecutions for Willful Failure to Support—Indictment.

Where an indictment under G.S. 49-2 fails to charge that defendant's failure to support his illegitimate child was willful, the indictment fails to charge an essential element of the offense and defendant's motion in arrest of judgment must be allowed. *S. v. Moore*, 743.

§ 5. Prosecutions for Willful Failure to Support—Evidence.

Trial of defendant for willful failure or refusal to support his illegitimate child was continued in order that blood tests might be made. The blood test was not made. *Held:* It was competent upon the trial for the solicitor to ask defendant upon cross-examination if the reason the blood test was not made was because defendant knew the baby was his, the matter being within the bounds of a fair cross-examination. The legal principles relating to the purpose and value of a blood test are not relevant upon objection to the cross-examination. *S. v. Chambers*, 373.

§ 6. Prosecutions for Willful Failure to Support—Sufficiency of Evidence and Nonsuit.

In a prosecution under G.S. 49-2, the burden is upon the State to show not only that defendant is the father of the child and that he has neglected or refused to support and maintain it after notice and request for such support, but further that such neglect or refusal is intentional, without just cause, excuse or justification, and such facts must be established as of the time the warrant or indictment was drawn. *S. v. Chambers*, 373.

In a prosecution under G.S. 49-2, testimony of prosecutrix that she wrote defendant after the baby was born demanding support for the child is sufficient upon that question without the introduction of the letter in evidence, since the testimony is sufficient to support the inference that the letter was written before the bill of indictment was laid. *Ibid.*

§ 7. Prosecutions for Willful Failure to Support—Issues, Verdict and Judgment.

While in a prosecution of defendant for willful failure and refusal to support his illegitimate child, the State has the burden of satisfying the jury beyond a reasonable doubt that defendant is the father of the child and that he has willfully neglected or refused to support the child, it is not required that the question of paternity should be determined in a separate and distinct action, but it may be determined in the main prosecution for the offense. *S. v. Love*, 283.

BILL OF DISCOVERY.

§ 1c. To Obtain Evidence to Be Used on Trial.

When motion for examination of the adverse party as a matter of right after the pleadings have been filed on both sides is supported by affidavit which meets statutory requirements, G.S. 1-568.9 (c), G.S. 1-568.11, an appeal from order allowing the motion is premature and will be dismissed. *Tullis v. Cotton Mills*, 124.

A bill of particulars and a bill of discovery are not inconsistent remedies, and therefore the denial of an application for a bill of particulars does not preclude the same party from thereafter moving for leave to examine the adverse party in regard to the same matters. *Ibid.*

BOUNDARIES.

§ 5a. Definiteness of Description and Admissibility of Evidence Aliunde.

A tenant in common, having an undivided interest in two tracts of land lying more than a quarter of a mile apart and separated by a public road and the lands of others, executed a mortgage on his interest describing the land as lying in a certain township, known as the "Evans" tract and adjoining the lands of named persons. *Held:* Upon the facts of this case the description was insufficient to identify the land and the mortgage was ineffectual. *Holloman v. Davis*, 386.

A deed or mortgage must contain a description of the land which is either certain in itself or capable of being reduced to certainty by reference to matters *aliunde* to which the description refers, and when the description is insufficient under this rule to identify the land so that it may be fitted to the description, the instrument must fail, since title to land may not be passed by parol, and in such instances G.S. 8-39 and G.S. 39-2 do not apply. *Ibid.*

§ 6. Processioning Proceedings—Nature and Grounds of Remedy.

In a processioning proceeding what constitutes the true dividing line between the respective tracts of the parties is a question of law for the court while the location of the line must be settled by the jury under correct instructions based upon competent evidence. *Welborn v. Lumber Co.*, 238.

§ 10. Processioning Proceedings—Nonsuit and Directed Verdict.

Where an action involving realty is converted into a processioning proceeding by stipulation of the parties, it is not thereafter subject to dismissal as in case of nonsuit. *Welborn v. Lumber Co.*, 238.

BRIBERY.

§ 1. Nature and Elements of the Offense.

Bribery is the voluntary offering, giving, receiving, or soliciting of any sum of money or thing of value with corrupt intent to influence the recipient's action as a public officer or official in the discharge of a public legal duty. *S. v. Greer*, 325.

§ 2. Prosecution and Punishment.

An indictment for offering a bribe or bribery must allege by definite and particular statement, and not as a mere conclusion, that the acts were done to influence the performance of some public legal duty, and it must further appear, at least as a reasonable inference, that defendant had knowledge of the official character of him to whom the bribe was offered. *S. v. Greer*, 325.

Where an indictment for bribing or offering a bribe to a State Highway Patrolman fails to allege the official act the accused intended to influence, defendant's motion to quash should be allowed. *Ibid.*

BROKERS.

§ 12. Actions for Commissions.

All the evidence in this case tended to show that the defendants listed their property for sale by plaintiff broker, signed an option and a contract to pay plaintiff upon consummation of the sale a stipulated commission, and that plaintiff procured a purchaser who bought the property in accordance with the option as later modified and extended. *Held:* The court was justified in

giving a peremptory instruction in favor of plaintiff in his action to recover the agreed commissions. *Cathey v. Shope*, 345.

In a broker's action for commissions it is competent for the broker to introduce testimony as to his efforts to sell defendants' land after it had been listed with him in corroboration of his testimony that defendants listed the land with him, and as tending to establish the relationship between the parties. *Ibid.*

In a broker's action to recover commissions it is competent for him to testify as to transactions with the defendants tending to show that he was acting as their agent in procuring a purchaser. *Ibid.*

Where, in a broker's action for commissions, there is no evidence to support the owners' contention that the broker was acting in a dual capacity or that he was acting as agent for the optionee in procuring an option on defendants' land, it is not error for the court to refuse to submit an issue in respect thereto. *Ibid.*

Where the owners executed an agreement to pay a broker a commission for selling their property, testimony of a statement thereafter made by the broker at a meeting with the optionee and others, to the effect that the broker was not getting anything out of the sale, *is held* incompetent in the broker's action to recover his commissions, since the statements are insufficient to constitute a rescission or abrogation of the brokerage contract. *Ibid.*

Testimony of vendor that broker stated no commissions would be charged if vendor sold at reduced price *held* incompetent when later written agreement stipulates different reason for agreement to sell at reduced price. *Ibid.*

In his action to recover commission, the broker must prove not only his contract to sell upon commission and that he procured a purchaser ready, able and willing to buy, but also that the purchaser was willing to buy upon the terms stipulated by the vendor, and where there is controversy as to whether the purchaser offered the price stipulated by the vendor the failure of the court to charge on this phase must be held for prejudicial error. *Banks v. Norcell*, 737.

CANCELLATION OF INSTRUMENTS.

§ 2. For Fraud.

Deed from grandchild to grandmother may be set aside for presumptive fraud when evidence establishes elements of coercion. *Batchelor v. Mitchell*, 351.

§ 9. Pleadings in Action to Cancel.

Allegation that deed was void for want of authority in grantor to convey is mere conclusion, and when other allegations fail to allege facts constituting fraud or undue influence, demurrer is properly sustained. *Stiles v. Turpin*, 245.

Allegations *held* sufficient to establish cause of action to rescind deed from grandchild to grandmother for presumptive fraud. *Batchelor v. Mitchell*, 351.

§ 12. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that the male defendant went to parties owning an undivided interest in property as tenants in common and procured them to execute a deed to him for their interest for a stipulated sum by falsely representing that other tenants in common had agreed to sell to defendant at a like price, when as a matter of fact such other tenants had advised the male defendant that they would not sell at all, *is held* sufficient to be submitted to the jury in this action to cancel the deed for fraud. *Cofield v. Griffin*, 378.

CARRIERS.

§ 1½. Duty to Operate and Furnish Facilities and Service.

Each application by a common carrier to be permitted to discontinue services or facilities must be determined in accordance with the facts and circumstances of the particular case, weighing the benefit to the carrier against the inconvenience to the public which would result from such discontinuance. *Utilities Com. v. R. R.*, 701.

In this application by a railroad company to change one of its two north and south bound trains operated through a particular municipality from regular stops to flag stops, *held* the evidence is sufficient to support the findings of the Utilities Commission that the slight advantage to the carrier and slight improvement in service which would result from the change was insufficient to outweigh the small amount of public convenience and necessity in having the trains stop regularly, and the order of the Utilities Commission denying the application was properly affirmed. *Ibid.*

CHATTEL MORTGAGES.

§ 10c. Notice and Lien—Waiver and Estoppel of Mortgagee.

Where the mortgagor is left in possession of goods to be disposed of by him in the ordinary course of trade pursuant to an understanding between the parties, the mortgagor is the agent of the mortgagee to the extent that he may pass title to the goods, free of the mortgage lien, to a purchaser in the usual course of trade. *Trust Co. v. Finance Corp.*, 478.

Where the evidence is conflicting as to whether the mortgagor in possession had authority or permission, in the course of dealings between the parties, to sell the chattels unless the mortgage debt was first paid off, or authority to collect any money for the mortgagee, an issue of fact is raised, and upon the determination of the issue as to estoppel by conduct in favor of the mortgagee, such mortgagee under his duly registered mortgage has priority of lien over a subsequent mortgagee or purchaser. *Ibid.*

COMPROMISE AND SETTLEMENT.

§ 1. Nature and Requisites of Agreement.

The law favors the settlement of controversies out of court. *Dixie Lines v. Grannick*, 552.

§ 2. Operation and Effect of Agreements.

An offer to compromise the controversy involved in a litigation is inadmissible in evidence. *Dixie Lines v. Grannick*, 552.

An extrajudicial compromise settlement made by a party with one person cannot be shown in evidence in a subsequent lawsuit arising out of the same transaction between such party and another person. *Ibid.*

A compromise agreement is conclusive between the parties as to the matters compromised, but it does not extend to matters not included within its terms. *Ibid.*

Settlement between drivers and guests does not preclude drivers from litigating between themselves liability for the collision. *Ibid.*

Compromise and settlement is affirmative defense upon which defendant has burden of proof, and therefore nonsuit for such defense is improper unless evidence establishes it as matter of law. *Winkler v. Amusement Co.*, 489.

COMPROMISE AND SETTLEMENT—*Continued.*

An offer by claimant to purchase a quitclaim deed from the adverse party after title had ripened in claimant by adverse possession is not an acknowledgment of title in such adverse party, nor does it break claimant's continuity of possession or affect the validity of claimant's perfected title. *Brewer v. Brewer*, 607.

CONCEALED WEAPONS.

§ 1. Elements of the Offense of Carrying Concealed Weapon.

In order to be guilty of violating G.S. 14-269 the accused must be off his premises, carrying a deadly weapon, and the weapon must be concealed about his person. *S. v. Williamson*, 652.

§ 5. Sufficiency of Evidence and Nonsuit.

Testimony to the effect that defendant was off his premises in full view of persons near enough to him to see a weapon if it were not concealed, and that the pistol carried by defendant was hidden from their observation, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution under G.S. 14-269. *S. v. Williamson*, 652.

CONSTITUTIONAL LAW.

§ 10b. Judicial Power—Power to Determine Constitutionality of Statutes.

While the Supreme Court will not hold an act of the General Assembly unconstitutional unless it clearly transgresses the fundamental law, it is its duty to declare an act unconstitutional if, after indulging every presumption in favor of constitutionality, the statute clearly contravenes the Constitution. *Wilson v. High Point*, 14.

§ 18. Equal Protection and Application of Laws.

Nonresident is entitled to provisions tolling statute of limitations on transitory cause of action to same extent as resident. *Bank v. Applegard*, 145.

§ 21. Due Process—Notice and Hearing.

A litigant in every kind of judicial proceeding has the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree. Constitution of N. C., Art. I, sec. 17. *In re Gupton*, 303.

Where a claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be appraised of all the evidence received by the court, and be given an opportunity to test, explain or rebut it. *Ibid.*

Therefore court may not base order on information obtained by private investigation by officers. *Ibid.*

§ 29. Burdens on Interstate Commerce.

Where the sale of second-hand automobiles by a resident wholesaler to out-of-state retailers takes place in this State, so that title and possession pass to the purchasers before the property enters the channels of interstate commerce, the sale is not an interstate transaction. *Phillips v. Shaw, Comr. of Revenue*, 518.

§ 31b. Constitutional Rights of Person Accused of Crime—Right to Counsel.

In a prosecution for a felony less than capital, it is not incumbent upon the court to assign defendant counsel in the absence of a request unless there are

CONSTITUTIONAL LAW—*Continued.*

exceptional circumstances which make it apparent that representation by counsel is necessary to insure defendant a fair trial. *S. v. Cruse*, 53.

§ 32. Constitutional Rights of Person Accused of Crime—Necessity for and Requisites of Indictment.

There can be no valid trial, conviction, or punishment for a crime without a formal and sufficient accusation. *S. v. Albarty*, 130.

A defendant convicted in a recorder's court having final jurisdiction of the offense charged may be tried in the Superior Court on appeal upon the original warrant without an indictment. *S. v. Doughtie*, 228.

Every person accused of crime has the right to be informed of the accusation against him by indictment, presentment or impeachment, except as otherwise provided by our Constitution, Art. I, secs. 11 and 12. *S. v. Greer*, 325.

The constitutional right of a defendant to be informed of the accusation against him requires that the indictment or warrant set out the offense with sufficient certainty to identify it and protect defendant from being twice put in jeopardy for the same offense, to enable him to prepare for trial, and to enable the court to proceed to judgment according to law in case of conviction. *S. v. Jenkins*, 396.

§ 40. Waiver of Constitutional Guarantees.

A defendant may waive a constitutional right relating to a matter of mere practice or procedure. *S. v. Doughtie*, 228.

CONTRACTS.

§ 7a. Contracts in Restraint of Trade.

An agreement not to carry on a particular business within a certain territory must be in writing and signed by the party to be bound. G.S. 75, sec. 4. *Ice Cream Co. v. Ice Cream Co.*, 317.

The owner of ice cream plants in two separate cities operated the plants with a division of territory serviced by each. Thereafter, he sold one of the plants with right in the purchaser to use the trade-name in the territory south of a specified town. *Held:* The seller or its successor may not enjoin the purchaser or its successor from thereafter engaging in the business under the trade-name in territory north of the specified town, since the agreement as to the division of territory would suppress and stifle competition and is, therefore, void. *Ibid.*

In the sale of a business with its goodwill, the test to determine the validity of a restrictive agreement that the purchaser should not engage in the same business in competition with the seller within certain territory, is whether the restraint is such as to afford a fair protection to the interest of the seller and not so large as to interfere with the interest of the public. *Ibid.*

An agreement by the purchaser of one of two ice cream plants that he would not engage in the business under the trade-name north of a specified town in the State, *is held* greater than required for the protection of the seller and void as detrimental to the public interest. *Ibid.*

§ 7e. Contracts Limiting or Absolving Liability for Negligence.

Contracts for exemption from liability for negligence are not favored by the law, and are strictly construed against exemption from liability. *Winkler v. Amusement Co.*, 589.

CONTRACTS—*Continued.*

§ 11½. Time and Duration of Agreement.

Where the parties to a contract calling for continuing performance fix no time for its duration and none can be implied from the nature of the contract or from the surrounding circumstances, the contract is terminable at will by either party on reasonable notice to the other. *Fulghum v. Selma*, 100.

§ 12. Modification, Rescission and Abandonment.

Rescission or abrogation of contract must be definite, and mere statement of broker in general meeting that he was to receive nothing from sale *held* not abrogation of written agreement for commissions between him and vendor. *Cathey v. Shope*, 345.

§ 19. Actions on Contract—Parties.

Owner is entitled to sue contractor without joining subcontractor performing defective work. *Gaither Corp. v. Skinner*, 254.

Even though a contract for repair of a dwelling damaged by fire is made in contemplation that the cost of the repairs would be paid out of the proceeds of a fire insurance policy on the dwelling, the owner is not absolved from liability to the contractor for such repairs even though she alleges that the insurance company is indebted to her and that the insurance contract was made for the benefit of the contractor, insurer not being a party to the contract and its failure to pay the amount of the policy not having the effect of discharging the liability of the owner to the contractor for the repairs. *McGee v. Ledford*, 269.

Under agreement for survivorship in partnership property upon payment of designated sum to widow of deceased partner, widow could maintain action as third person beneficiary. *Silverthorne v. Mayo*, 274.

COSTS.

§ 5. Items Chargeable as Costs—Attorneys' Fees.

Ordinarily, attorneys' fees are not recoverable as a part of the costs except in the types of action enumerated by G.S. 6-21. *Rider v. Lenoir County*, 632.

Taxpayers may not recover attorney fees in their suit against county when no money is restored to public treasury. *Ibid.*

COURTS.

§ 2. Jurisdiction in General.

Jurisdiction is the power of the court to decide a case on its merits and presupposes the existence of a duly constituted court with control over the subject matter and the parties. *Jones v. Brinson*, 506.

Jurisdiction of the subject matter cannot be conferred on a court by consent of the parties, waiver or estoppel. *Ibid.*

A court may obtain jurisdiction over the person of a party litigant by his consent since the constitutional right of a party litigant to be served with process in a legal manner is a personal privilege which he may waive. *Ibid.*

Objection to want of jurisdiction in the court may be made at any time, and in fact, immediately want of jurisdiction is made apparently the court should take cognizance thereof and stop the proceedings *ex mero motu*. *Lewis v. Harris*, 642.

Jurisdiction cannot be conferred by consent of parties. *Ibid.*

COURTS—*Continued.*

§ 11. Jurisdiction of County, City and Recorders' Courts.

Statutory provision that a county recorder's court should have exclusive original jurisdiction of all general misdemeanors committed in the county, and statutory provision that a municipal recorder's court in the county should likewise have original exclusive jurisdiction of such misdemeanors committed within the municipality, cannot be reconciled, and the two courts will be held to possess concurrent jurisdiction of such misdemeanors committed within the municipality. *S. v. Sloan*, 547.

§ 14. Conflict of Laws.

In a suit on a transitory cause of action arising in another state, the substantive rights of the parties are governed by the *lex loci*, while procedural matters are governed by the *lex fori*. *Bank v. Appleyard*, 145.

Statutes of limitations and tolling of statutes is governed by our laws as matter of procedure. *Ibid.*

Where, in an action instituted in this State, the rights of the parties depend upon the legal effect of a sale made in another state, the law of such other state controls the question. *Motor Co. v. Wood*, 468.

Where the accident causing the death of plaintiff's intestate occurs in this State, the court correctly applies the family purpose doctrine as enunciated here rather than as obtaining under the laws of the state of the residence of defendant, since the matter is governed by the *lex loci*. *Goode v. Barton*, 492.

CRIMINAL LAW.

§ 8b. Parties and Offenses—Aiders and Abettors.

An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. *S. v. Ham*, 94.

All who are present and either aid, abet, assist or advise in the commission of a crime or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. *Ibid.*

Mere presence at the scene of the crime without any actual participation in its commission is insufficient to constitute a person an aider and abettor in the absence of any evidence tending to show that such person by word or deed gave active encouragement to the perpetrator or by his conduct made it known that he was standing by to lend assistance to the perpetrator when and if such assistance should become necessary. *Ibid.*

Even though bystander is husband of one of perpetrators of crime. *Ibid.*

§ 11½. Preliminary Examination and Binding Defendant Over.

A municipal trial justice's court, given by statute jurisdiction of mayors, has jurisdiction to bind a defendant over to the recorder's court upon a warrant charging a general misdemeanor committed within the municipality. *S. v. Doughtie*, 228.

§ 12a. Jurisdiction of Person of Defendant.

A court must have jurisdiction of the subject matter and of the person of defendant in order to render a valid judgment in a criminal prosecution. *S. v. Tickle*, 206.

A nonresident voluntarily entered this State and was arrested here for reckless driving and hunting without a license. While in jail, he was arrested on the warrant in this case, and was present in person during his trial. *Held:* The court had jurisdiction of the person of defendant. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 12b. Jurisdiction—Place of Crime.

An act to be punishable as a crime in this State must be an act committed here and against this sovereignty. *S. v. Tickle*, 206.

Offense of willful failure to support illegitimate child may be committed in this State by out-of-state defendant. *Ibid.*

§ 12f. Jurisdiction as Between Two Courts Having Concurrent Jurisdiction.

Statutory provision that a county recorder's court should have exclusive original jurisdiction of all general misdemeanors committed in the county, and statutory provision that a municipal recorder's court in the county should likewise have original exclusive jurisdiction of such misdemeanors committed within the municipality, cannot be reconciled, and the two courts will be held to possess concurrent jurisdiction of such misdemeanors committed within the municipality. *S. v. Sloan*, 547.

§ 14. Appeals to Superior Court from Inferior Courts.

The bare statement by the trial court that the charges embraced in the warrants had been first tried in the recorder's court will not be held for error as prejudicing defendant by the former proceedings, G.S. 15-177.1, there being no intimation by the court as to what happened in the recorder's court and the jury being charged that they could not convict defendant on either charge unless they were satisfied beyond a reasonable doubt from the evidence produced before them that defendant was guilty of such charge. *S. v. Williamson*, 652.

It is not necessary for the transcript of the proceedings in an inferior court to show that the judgment entered in such court was signed by the judge. *S. v. Sloan*, 672.

§ 17c. Pleas of Nolo Contendere.

A plea of *nolo contendere* admits for the purposes of the particular prosecution all the elements of the offense charged against the accused and gives the court complete power to sentence the accused for such offense, and therefore defendant may not contend that the court should acquit him or at most find him guilty of a less degree of the offense on the ground that evidence heard by the court for the purpose of determining punishment was insufficient to support conviction of the offense charged. *S. v. Cooper*, 241.

Upon a plea of *nolo contendere*, the hearing of evidence by the court for the purpose of determining the punishment is not limited to evidence which would be competent upon a trial of the defendant for the offense charged, but the court may look anywhere, within reasonable limits, for facts calculated to enable it to act wisely in fixing punishment. *Ibid.*

A plea of *nolo contendere* is tantamount to a plea of guilty for the purpose of the particular prosecution, and gives the presiding judge full power to pronounce judgment against the defendant for the crime charged in the indictment. *S. v. McIntyre*, 305.

A plea of *nolo contendere* cannot be entered by a defendant as a matter of right, but is pleadable only by leave of the court. *Ibid.*

The law does not sanction a conditional plea of *nolo contendere*. *Ibid.*

The fact that the record discloses that upon defendant's tender of a plea of *nolo contendere* the court heard evidence and adjudged the defendant guilty, *held*, in the light of other facts appearing of record, not to support defendant's

CRIMINAL LAW—*Continued.*

contention that the court did not accept his plea and proceeded to hear evidence and pass upon the question of defendant's guilt or innocence, but only that the court heard evidence before determining whether the plea should be accepted. *Ibid.*

§ 23. Former Jeopardy—Prosecution Under Void Warrant or Indictment.

A prosecution under an indictment which is fatally defective because it fails to allege an essential element of the offense, will not bar a subsequent prosecution for such offense. *S. v. Greer*, 325.

§ 29b. Evidence of Guilt of Other Offenses.

Evidence of possession of gallon of tax-paid liquor on other occasions is not competent in prosecution for possession of more than one gallon at another time. *S. v. Brady*, 404.

§ 29c. Evidence That Offense Was or Could Have Been Committed by Another.

Evidence tending to cast a suspicion or conjecture that the crime may have been committed by another is incompetent. *S. v. Shinn*, 535.

§ 29f. Evidence of Similar Facts or Circumstances.

In prosecution for possession of more than one gallon of tax-paid liquor in dry county, evidence of defendant's possession of less than one gallon on other occasions is incompetent, since possession on other occasions within pale of law has no relevancy to possession beyond pale of law at another time. *S. v. Brady*, 404.

§ 31a. Medical Expert Testimony.

A medical expert testified as to the bullet wounds in, and powder burns on, the hand and head of deceased. *Held:* The medical expert is competent to testify from his examination as to the position of deceased's hand when the fatal shot was fired. *S. v. Powell*, 527.

The rule that an expert witness may not express an opinion on the very issue before the jury is subject to exceptions permitting the admission of evidence as to ultimate facts in regard to matters of science, art or skill. *Ibid.*

§ 40d. Character Evidence of Defendant—Cross-Examination of Witnesses.

While the State is entitled to cross-examine defendant's character witnesses as to particular vices or virtues, it is error to permit the solicitor to cross-examine the character witnesses of defendant as to particular acts of misconduct on the part of defendant, and in this case such repeated and extended cross-examination *is held* prejudicial. *S. v. Green*, 257.

§ 42b. Direct Examination of Witnesses.

The trial court has the discretionary power to permit leading questions, and upon defendant's failure to show prejudice such discretionary action of the trial court will not be disturbed. *S. v. Cranfield*, 110.

§ 42c. Cross-Examination of Witnesses.

Where continuance of bastardy prosecution was continued for blood test, which was not made, solicitor may ask on cross-examination if reason that test was not made was that defendant knew the baby was his. Purpose and value of blood test not presented on such questioning. *S. v. Chambers*, 373.

CRIMINAL LAW—*Continued.*

§ 50f. Argument of Counsel or Solicitor.

While counsel are entitled to wide latitude in making their arguments to the jury, counsel may not go outside the record and inject into their arguments facts not included in the evidence. *S. v. Dockery*, 222.

In a homicide prosecution, neither counsel for the private prosecution nor the solicitor is entitled to argue, in appealing to the jury not to recommend life imprisonment, that life sentences are always commuted in North Carolina, since such argument is not only outside the record, but also contrary to the spirit and purpose of G.S. 14-17. *Ibid.*

§ 52a (2). Nonsuit—Sufficiency of Evidence in General.

Conviction of a criminal offense may not rest upon surmise or conjecture or upon facts consistent with guilt but likewise consistent with innocence. *S. v. Ham*, 94.

Where evidence supports conviction of offense sufficiently charged in warrant, general motion to nonsuit is properly denied, notwithstanding that other offenses sought to be set out in warrant were insufficiently alleged or not supported by evidence. *S. v. Thorne*, 392.

§ 52a (3). Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

A defendant may not be convicted of an offense upon proof of facts consistent with guilt, but the circumstances must be inconsistent with his innocence. *S. v. Grainger*, 739.

§ 52a (8). Nonsuit—Necessity for, and Time of Motions.

Motion for nonsuit at the close of the State's evidence is waived when the defendant thereafter introduces evidence. *S. v. Tickle*, 206.

§ 53b. Instructions on Burden of Proof.

An instruction that the burden is upon the State to satisfy the jury of defendant's guilt must be held for reversible error. *S. v. Brady*, 407.

§ 53d. Instructions—Statement of Evidence and Application of Law Thereto.

The trial judge must charge the jury on every substantial and essential feature of the case embraced within the issues and arising on the evidence, and this without any prayer for special instructions. *S. v. Stroupe*, 34.

Where defendant introduces evidence supporting his contention that he was not the aggressor, that he shot his assailant as his assailant was advancing on him with an open knife making an effort to cut him, and that defendant had no way of retreat and shot his assailant only to save himself from great bodily harm, defendant is entitled to have the court submit the question of self-defense to the jury, and an instruction that defendant had attempted to offer evidence of self-defense which was insufficient for that purpose as a matter of law, must be held for reversible error. *S. v. Satterwhite*, 674.

§ 53f. Expression of Opinion by Court in Charge.

Where defendant offers no evidence but merely cross-examines each of the numerous witnesses for the State, the fact that the court necessarily consumes more time in stating the contentions of the State than it does those of defendant is not ground for exception. *S. v. Smith*, 82.

The charge in this case *held* to have stressed the contentions of the State and of the defendant equally and was not subject to exception on the ground that it violated G.S. 1-180. *S. v. Williamson*, 652.

§ 53i. Charge on Character Evidence.

Where the sole evidence as to the character of defendant is that elicited on cross-examination of the State's witnesses to the effect that so far as the witnesses knew defendant had not been previously accused of a like offense and had not had "any trouble," *held* there is no evidence of the general character of defendant in the community and the trial court properly omits any charge as to the effect of character evidence as substantive evidence and as corroborative of defendant's testimony. *S. v. Williamson*, 652.

§ 53n. Instructions on Right to Recommend Mercy.

In this prosecution for drunken driving, the jury several times reported disagreement, and on one of these occasions the foreman asked whether it would be within the jury's right to ask mercy in rendering the verdict. The court instructed the jury that the matter of judgment was the responsibility of the judge and that the jury should arrive at a verdict of guilty or not guilty according to how it found the facts from the evidence in applying the law as given it by the court. *Held:* The occurrence does not entitle defendant to a new trial upon his appeal from a verdict of guilty, and in fact any other instruction would have been improper as tending to influence the jury. *S. v. Davis*, 252.

§ 54b. Form, Sufficiency and Effect of Verdict.

A verdict which finds defendant guilty as charged must be interpreted in the light of the criminal complaint. *S. v. Albarty*, 130.

§ 56. Arrest of Judgment.

A motion in arrest of judgment must be based upon want of jurisdiction or fatal defect or insufficiency in the record. *S. v. Doughtie*, 228.

Motion in arrest of judgment will not lie on ground that officer issuing warrant was without authority to do so, since, by appearing, defendant waives any such defect. *Ibid.*

Where the warrant fails to charge essential elements of some of the offenses for which defendant was prosecuted, the Supreme Court will arrest the judgment on such offenses *ex mero motu* notwithstanding the want of a motion in arrest of judgment in the Superior Court or the Supreme Court. *S. v. Thorne*, 392.

Where the record shows that defendant was tried in a city court of competent jurisdiction upon a warrant charging a criminal offense returnable before the judge of that court, and that defendant was tried on the warrant, found guilty and judgment duly pronounced on the verdict, there is no fatal defect appearing on the face of the record, and defendant's motion in arrest of judgment on the ground that the record fails to show on its face that a trial was actually had before the judge of the city court and the transcript failed to show that the judgment was signed by the judge, is without merit. *S. v. Sloan*, 672.

Where an indictment under G.S. 49-2 fails to charge that defendant's failure to support his illegitimate child was willful, the warrant fails to charge an essential element of the offense and defendant's motion in arrest of judgment must be allowed. *S. v. Moore*, 743.

CRIMINAL LAW—*Continued.*

§ 60a. Form and Sufficiency of Judgment in General.

It is not essential to the validity of a judgment that it make reference to the trial or the crime of which the defendant was convicted. *S. v. Sloan*, 672.

§ 62a. Severity of Sentence—Cruel and Unusual Punishment.

Where the sentence imposed is within the discretionary limits fixed by statute, it cannot constitute a cruel or unusual punishment in the constitutional sense, and will not be disturbed in the absence of a showing of abuse of discretion. *S. v. Smith*, 82; *S. v. Cooper*, 241.

§ 62d. Conditional, Alternative or Indefinite Sentence.

A judgment which provides that the sentence imposed should commence at the expiration of sentences imposed in an unrelated former case, and further provides that in the event the former case, then on appeal, should result in a reversal or new trial, the sentence imposed should begin as provided by law, will not be held void as contingent. *S. v. Smith*, 82.

§ 77b. Form and Requisites of Transcript.

The rule requiring a narrative statement of the evidence in the case on appeal is mandatory and may not be waived by the parties, and a record containing in an "agreed statement of facts" a mere summary of the evidence, largely in the form of conclusions, is not a compliance with the rule and requires a dismissal of the appeal, and a statement of the evidence in question and answer form in the brief does not alter this result. *S. v. Powell*, 550.

§ 77d. Appeal—Conclusiveness and Effect of Record.

The Supreme Court is bound by the record and must assume that it is a correct transcript of the proceedings in the court below. *S. v. Ham*, 94.

§ 78. Appeal—Necessity for, Form and Sufficiency of Objections and Exceptions.

Where the jury returns a verdict of guilty as charged in the warrant, and the warrant charges the offense in the alternative, the verdict does not support the judgment, and therefore the verdict and judgment will be set aside upon defendant's exception to denial of his motion to set aside the verdict and exception to the judgment, notwithstanding the absence of a motion to quash the warrant or a motion in arrest of judgment. *S. v. Albarty*, 130.

Ordinarily, a new trial will not be awarded on appeal for improper argument of the solicitor or private prosecution unless an exception thereto has been timely entered and duly preserved, but when a sentence of death is mandatory upon the verdict, and statement disclosing an improper and prejudicial argument to the jury by the private prosecution appears of record by order of the trial court, a new trial will be awarded. *S. v. Dockery*, 222.

Where warrant fails to charge offense, Supreme Court will arrest judgment thereon *ex mero motu*. *S. v. Thorne*, 392.

The denial of a motion to strike out the testimony of a main witness for the State will not be held for error, since it would seem that the motion is too late and, in failing to point out any particular portion of the testimony, is too vague and general. *S. v. Cranfield*, 110.

In the absence of any exceptions in the record, the appeal will be taken as an exception to the judgment, and when the judgment is within the statutory limits and is predicated upon a verdict sufficient to support it, the appeal must fail. *S. v. Sloan*, 672.

CRIMINAL LAW—*Continued.*

§ 79. Appeal—Briefs.

Exceptions not brought forward in the brief are deemed abandoned. *S. v. Smith*, 82; *S. v. Porter*, 735.

§ 81b. Presumptions on Appeal and Burden of Showing Error.

The burden is on defendant not only to show error but also that the error complained of affected the result adversely to him. *S. v. Bridgers*, 677.

§ 81c (2). Appeal—Harmless and Prejudicial Error in Instructions.

Where the trial court gives a correct instruction on a material feature of the case in one part of the charge and an incorrect instruction on the same point in another part of the charge, a new trial must be awarded, since the jury may have acted upon the incorrect instruction. *S. v. Stroupe*, 34.

Where it is apparent from the record that an erroneous instruction probably influenced the verdict of the jury, such error cannot be held harmless. *S. v. Ham*, 94.

Where the charge of the court is without prejudicial error when construed as a whole, exceptions thereto cannot be sustained. *S. v. Chambers*, 373; *S. v. Porter*, 735.

An inadvertent error in stating the *quantum* of proof resting upon the State must be held prejudicial even though in other portions of the charge the burden of proof is properly stated, since the jury may have acted upon the incorrect statement. *S. v. Brady*, 404; *S. v. Brady*, 407.

An instruction limiting to one gallon the amount of tax-paid liquor a person may lawfully possess in his home in a "dry" county will not be held for prejudicial error on defendant's appeal from conviction of illegal possession of intoxicating liquor in and near his home when the State's evidence tends to show that less than one gallon of tax-paid liquor was found in defendant's home, defendant not being convicted of possession for the purpose of sale. *S. v. Shinn*, 535.

§ 81c (3). Appeal—Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Testimony of officers as to the condition of the house and the location of the *feme* defendant and her male companion when they arrived at the house at a time when other officers of the law and a number of people were outside, *held* not prejudicial on the ground that it tended to show adultery between the *feme* defendant and her companion, since under the circumstances the jury could not have been improperly influenced thereby. *S. v. Wingler*, 485.

The admission of testimony on examination and on cross-examination in regard to collateral matters which could not have influenced the jury in reaching its verdict will not be held for reversible error. *Ibid.*

§ 81c (4). Appeal—Harmless and Prejudicial Error—Error Relating to One Count Only.

Where concurrent equal sentences are imposed upon conviction on each of two warrants, consolidated for trial, error relating to one count only cannot be prejudicial. *S. v. Williamson*, 652.

§ 81i. Review of Constitutional Questions.

The courts do not pass on constitutional questions until the necessity for doing so has arisen. *S. v. Albarty*, 130.

CRIMINAL LAW—*Continued.*

§ 83. Remand.

Where judgment rendered in the trial upon one bill of indictment is upheld, but the sentence thereon provides that it should begin at the expiration of sentences imposed upon convictions under two other bills of indictment in each of which a new trial has been awarded, sentence in the judgment upheld becomes uncertain and indefinite, and the case will be remanded for proper sentence thereon. *S. v. Brady*, 407.

§ 85d. Interpretation of Decisions of Supreme Court.

An opinion of the Supreme Court must be considered in the light of the case in which it is delivered. *S. v. Wingler*, 485.

§ 87. Post-Conviction Hearing Act—Nature and Scope of Remedy.

The Post-Conviction Hearing Act provides a remedy by which a person convicted of crime may present for adjudication whether in the trial resulting in his conviction he was deprived of substantial constitutional rights which were not asserted during the trial because of factors beyond his control, but the Act is not in substitute for appeal, and a party is not entitled to assert as grounds for relief under the Act alleged errors in the admission or exclusion of evidence, rulings on motions, or other matters relating to procedure. *S. v. Cruse*, 53.

§ 89. Post-Conviction Hearing Act—Grounds for Relief, Hearing and Determination.

Where it appears that defendant was a man thirty-nine years old at the time of his trial for a felony less than capital, that he had completed six grades in school, and had had repeated experience as a defendant in criminal prosecutions, the trial court is not under duty to assign him counsel, in the absence of a request by him, and the failure of the court to do so does not deprive him of due process of law, and is not ground for relief under the Post-Conviction Hearing Act as a deprivation of his constitutional rights. *S. v. Cruse*, 53.

The failure to report the charge of the court cannot be made the basis for relief under the Post-Conviction Hearing Act, since in such instance the presumption is that the trial court charged the jury properly as to the law applicable to all phases of the eivdence. *Ibid.*

§ 90. Post-Conviction Hearing Act—Certiorari and Review.

Upon petition under the Post-Conviction Hearing Act, the findings of fact of the trial court, when supported by competent evidence, are binding upon the Supreme Court upon review by *certiorari*. *S. v. Cruse*, 53.

CUSTOMS AND USAGES.

§ 1. Commercial Customs and Usages in General.

A party may not assert a custom as a basis for estoppel when the custom is in direct conflict with law. *Hawkins v. Finance Corp.*, 174.

DAMAGES.

§ 11. Relevancy and Competency of Evidence on Issue.

Where there is evidence that the injuries suffered by plaintiff are permanent in character, the mortuary tables are competent as evidence on the question of plaintiff's life expectancy. *Hunt v. Wooten*, 42.

DAMAGES—*Continued.*

The annuity tables are incompetent in evidence in an action to recover for permanent injury negligently inflicted. *Ibid.*

While the measure of damages for a tortious injury to personal property is the difference in the market value of the property immediately before and immediately after the injury, evidence of the cost of repairs made necessary by the injury is competent to shed light upon the question of the difference in market value. *Simrel v. Meeler*, 668.

§ 13a. Instructions on Issue.

Where there is evidence that plaintiff suffered a permanent facial disfigurement impairing her earning capacity after majority, the court is warranted in instructing the jury that it should consider whether such impairment existed in passing upon the question of damages, limiting any award to the present net worth of any impairment of earning capacity after plaintiff's majority. *Hunt v. Wooten*, 42.

DEATH.

§ 3. Nature and Essentials of Cause of Action for Wrongful Death.

In an action for wrongful death, plaintiff must produce evidence sufficient to establish that defendant was guilty of a negligent act or omission and that such act or omission was the proximate cause of the death of decedent. *Davis v. Light Co.*, 106.

§ 8. Expectancy of Life and Damages.

In this action to recover for the wrongful death of intestate, *it is held* that no abuse of discretion is shown in the refusal of the trial court to set aside the award as excessive, there being evidence that intestate was a healthy girl eleven years old of more than average ability. *Bumgardner v. Allison*, 621.

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Extent of Remedy in General.

G.S. 105-267 provides the sole remedy of a taxpayer to determine his liability for a sales tax, and he may not maintain an action under the Declaratory Judgment Act to determine his liability therefor. *Buchan v. Shaw, Comr. of Revenue*, 522.

§ 2c. Necessity for Real Controversy.

An action for a declaratory judgment will lie only when there is an existing controversy between the parties. The remedy is unavailable for the purpose of submitting a theoretical problem or obtaining an advisory opinion. *Trust Co. v. Whitfield*, 69.

DEEDS.

§ 6. Deeds of Gift.

A deed of gift is valid as of the time of its execution without registration, but if not recorded within two years it becomes void *ab initio* and title to the premises revests in the grantor. *Justice v. Mitchell*, 364.

§ 13a. Construction of Instrument as to Estate Conveyed.

A provision, inserted in a deed in or following the description, which attempts to limit the quality of the estate conveyed and defined in the granting and *habendum* clauses is void for repugnancy, but a provision in or following the

DEEDS—*Continued.*

description which limits the quantity of the estate is not repugnant, and is effective. *Hardison v. Lilley*, 309.

§ 15. Reservations and Exceptions.

In a conveyance of lands in fee simple, grantors reserved and excepted from the operation of the deed certain timber of a specified size, with right in the male grantor, or his heirs or assigns, to enter and cut and remove such timber for a period of fifty years. *Held:* While the period of time is exceptional, the reservation in the grantors of the timber rights is valid, and the estate in the timber is not affected by the cultivation of the arable land by grantees nor the nonuse of the reserved right by grantors. *Hardison v. Lilley*, 309.

§ 16b. Restrictive Covenants.

Demurrer for misjoinder of parties and causes is properly sustained in an action for breach of restrictive covenants instituted by separate groups of owners of lots in a subdivision against the owner of another lot therein. *Chambers v. Dalton*, 142.

§ 22. Conveyance and Reservation of Timber Rights.

In this deed in fee simple to a tract of land, grantors reserved the right to cut and remove certain timber having a size of six inches in diameter or which "may attain to the size of six inches fifteen inches above the ground" for "the period of fifty years." *Held:* The reservation of the timber applied to all trees of the specified size then upon the land as well as all young trees or seedlings capable of reaching that size within the fifty year period, but the reservation could not apply to trees which were not in existence at the time of the execution of the deed. *Hardison v. Lilley*, 309.

A reservation in a deed of the right to cut and remove all timber of a specified size for a period of fifty years will not be held void on the ground that it cannot be determined with sufficient certainty which of the trees attaining the specified size were in existence at the time of the execution of the deed, since the matter is capable of proof by expert testimony as to the average annual growth of each kind of tree in the locality. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 2. Distinction Between Descent and Purchase.

Where heirs exchange deeds for purpose of partitioning land held by them as tenants in common, the deeds merely sever unity of possession, and each takes his part as heir and not as grantee even though deeds are in form of deeds of bargain and sale. *Elledge v. Welch*, 61.

§ 10d. Collateral Heirs of Blood of Ancestor.

Upon the death of an heir without lineal descendants, title to land inherited by him passes to his collateral heirs of the blood of the ancestor. *Elledge v. Welch*, 61.

DISORDERLY CONDUCT.

§ 2. Indictment and Warrant.

A warrant charging that defendant unlawfully and willfully violated the laws of North Carolina "by disorderly conduct by using profane and indecent language" is insufficient to charge the statutory crime proscribed by G.S. 14-197, since it fails to charge that defendant used the profane language (1) on a

DISORDERLY CONDUCT—*Continued.*

public road or highway, (2) in the hearing of two or more persons, or (3) in a loud and boisterous manner. *S. v. Thorne*, 392.

DIVORCE AND ALIMONY.

§ 2a. Divorce on Ground of Separation.

In an action for divorce on the ground of two years' separation an issue as to whether the separation was brought about by plaintiff's own misconduct towards defendant *is held* sufficient in form to present, under proper instructions from the court, defendant's affirmative defense of abandonment, and plaintiff's assignment of error to the submission of the issue is untenable. *Walker v. Walker*, 299.

Where, in an action for divorce on the ground of two years' separation, the court correctly places the burden of proof on the defendant upon the issue as to whether the separation was brought about by plaintiff's own misconduct, plaintiff's assignment of error to the charge in respect to the burden of proof on the issue cannot be sustained. *Ibid.*

§ 5a. Pleadings in General.

Since all material allegations of the complaint in a divorce action are denied by operation of law, G.S. 50-10, the discretionary action of the court in permitting the defendant to file a specific denial to a paragraph of the complaint cannot prejudice plaintiff. *Walker v. Walker*, 299.

§ 17. Jurisdiction and Procedure to Determine Custody of Children of Marriage.

The procedure for determining the right to custody of a child as between its parents who have been divorced by a decree of another state is governed by G.S. 50-13. *Finley v. Sapp*, 114.

§ 19. Findings and Decree Awarding Custody of Children of the Marriage.

Findings of the trial court, upon supporting evidence, that both the father and mother are of good character and fit and suitable persons to have the custody of their child, and further that the best interests of the child would be served by granting its custody to the mother, support judgment awarding the custody to the mother. The natural right of a father to the custody of his child does not limit the discretionary power of the court under the statute which makes the paramount consideration the best interests and the general welfare of the child. *Finley v. Sapp*, 114.

The fact that at the time of separation the wife agrees that the husband should have custody of their child is not binding upon the court in a subsequent contest between them for the custody of the child after divorce and the remarriage of each of them. *Ibid.*

DOWER.

§ 7. Dower Consummate—Nature and Incidents.

Where land of intestate is sold to make assets to pay debts of the estate, the dower claim of intestate's widow has priority in the proceeds of sale both as against the husband's debts and the cost and charges of administration. *Elledge v. Welch*, 61.

EASEMENTS.

§ ½. Creation of Easements in General.

As a general rule, an easement may be acquired by grant, dedication or prescription. *Green v. Barbee*, 77.

§ 1. Creation of Easements by Deed.

An easement may be created by deed by express language, reservation, or by implication from the language used. *Green v. Barbee*, 77.

Conveyance of lots, reserving an alleyway, referred to in the descriptions in the deeds, *held* not to convey easement appurtenant in absence of showing that alleyway was way of necessity for any of the lots, and upon quitclaim of alleyway to purchaser of one of the lots, the grantee had right to close alleyway. *Ibid.*

§ 2. Creation of Easements by Necessity or Implication.

In order for the division and sale of a tract of land by lot to create an easement by implication, it must appear that at the time of sale the easement had been so long continued and was so obvious as to show it was meant to be permanent, and that at that time the easement was necessary to the beneficial enjoyment of the land granted or retained. *Green v. Barbee*, 77.

Where the owner of a tract of land which has a road or cartway thereon which has been used so long and so obviously as to show that it was meant to be permanent, divides the tract into separate parcels by deed, and the use of the easement is necessary to the beneficial enjoyment of a portion of the land so divided, the grantee of such portion is entitled to an easement by implication of law. *Spruill v. Nixon*, 523.

§ 3. Creation of Easements by Prescription.

A party claiming a right of way by prescription has the burden of proving, among other things, that the way was used over defendant's land for the requisite period, and also that such use was adverse or under a claim of right. *Williams v. Foreman*, 301.

Where plaintiffs' evidence tends to show that they used a right of way over defendants' land for a period in excess of twenty years, but also shows that such use was by permission of the owners of the land, defendants' motion to nonsuit plaintiffs' action to establish a prescriptive right of way is properly sustained. *Ibid.*

Mere use of a way over another's land cannot ripen into an easement by prescription, no matter how long it may be continued, but claimant must show also that such use was adverse and under claim of right, since otherwise the law would presume that the use was permissive. *Henry v. Farlow*, 542.

Evidence tending to show that plaintiff and her tenants used the roadway across defendants' land for a period of 25 years, without asking permission of defendants or their predecessors in title, and that neither defendants nor their predecessors in title objected to such use during that time, although they knew of such use, *is held* insufficient to be submitted to the jury on the question of plaintiff's acquisition of a prescriptive right. *Ibid.*

EJECTMENT.

§ 17. Sufficiency of Evidence and Nonsuit.

Where plaintiffs claim through collateral heirs of the common ancestor but fail to introduce evidence that such ancestor died intestate or that he left no

intervening act of the driver of the car whose negligence proximately caused the accident, and demurrer was properly sustained. *Alford v. Washington*, 694.

The duty of a power company to keep its high voltage wires insulated applies only to places where people reasonably may be expected to come in contact with the wires. *Ibid.*

A power company is not required to anticipate that a motorist will negligently run into its poles and thus cause an uninsulated wire to fall and endanger persons at the scene. *Ibid.*

EMINENT DOMAIN.

§ 22. Purchase of Right of Way and Effect Thereof.

A release and accord and satisfaction executed by the owner of land to the Highway Commission for the taking of land for highway purposes and for damages to contiguous lands, is a good plea in bar of a subsequent proceeding by the owner to recover compensation for such taking. *Laughter v. Highway Com.*, 512.

Where, after pleading a release and accord and satisfaction executed by the owner of land in bar of the owner's proceeding to recover compensation for the taking of land for highway purposes, the Highway Commission participates without objection in proceedings in which commissioners of appraisal are appointed, and does not object or except to the order appointing the commissioners until after report has been filed, it waives its plea in bar, leaving for determination only the question of the amount of compensation to be paid. *Ibid.*

Where the State Highway and Public Works Commission purchases a right of way under authority of G.S. 136-19 it acquires the same rights as though it had acquired the land by condemnation. *Sale v. Highway Com.*, 599.

§ 22½. Actions by Owner to Recover Compensation—Pleadings and Procedure.

While neither the State nor its agencies can take private property for public use without just compensation, the State Highway and Public Works Commission cannot be sued in contract, and the sole remedy by the owner of lands to recover compensation for its taking by the Commission is by a proceeding in accordance with statute. *Sale v. Highway Com.*, 599.

Where petition seeks compensation for the taking of land and evidence supports recovery for failure to pay compensation as stipulated in right of way agreement, nonsuit for variance should be allowed. *Ibid.*

§ 23. Instructions in Condemnation Proceedings.

Charge that it is matter of common knowledge that building of highway brings certain benefits to property owners along highway *held* not sufficiently prejudicial to warrant new trial. *Simmons v. Highway Com.*, 532.

An instruction to the effect that the damages for the lands taken, together with damages resulting to the remaining lands from the taking, would amount to the difference between the fair market value of the entire tract before the taking and the fair market value of the remaining lands after the taking, *is held* without error. *Ibid.*

In a proceeding to recover compensation for the taking of lands, the failure of the court to define the meaning of general and special benefits, or to distinguish between them, will not be held for error in the absence of timely request for instructions. *Ibid.*

EQUITY.

§ 3. Laches.

Laches is an affirmative defense which must be pleaded and may not be taken advantage of by demurrer. *Queen v. Sisk*, 389.

ESTOPPEL.

§ 5. Nature and Essentials of Equitable Estoppel.

The doctrine of estoppel by conduct rests upon principles of equity, and is designed to aid the law in the administration of justice by precluding a party from asserting legal rights which in equity and good conscience he should not be allowed to assert. *Hawkins v. Finance Co.*, 174.

§ 6d. Estoppel by Conduct.

Equitable estoppel arises upon conduct of one party which amounts to a false representation or concealment of material facts or conduct reasonably calculated to mislead the other party as to the true facts, in respect to which facts the other party lacks knowledge or the means of ascertaining the truth; with intention or expectation that such conduct shall be acted on by the other party or conduct calculated to induce a reasonably prudent person to believe such conduct is intended or expected to be relied upon, and which is relied upon by the other party and induces him to change his position to his prejudice. *Hawkins v. Finance Corp.*, 174.

Owner not estopped to assert title because he merely entrusted possession to another, or because he entrusted it to bailee for sale without clothing bailee with *indicia* of title. *Ibid.*

Mortgagee not estopped when mortgagor is not given authority to sell cars in usual course of business. *Trust Co. v. Finance Corp.*, 478.

The mere fact that beneficiaries of a trust who are *sui juris* acquiesce in permitting the trustee to invest and reinvest the trust funds without sanction or approval of a court of equity does not estop them from invoking the rule of trust pursuit, it not being made to appear that anyone was misled to his hurt by reliance on the silence or acquiescence of the beneficiaries. *Trust Co. v. Barrett*, 579.

§ 11b. Burden of Proof.

Estoppel is affirmative defense upon which defendant has burden of proof. *Winkler v. Amusement Co.*, 589.

§ 11c. Actions—Nonsuit and Directed Verdict.

Where only one inference can reasonably be drawn from the undisputed facts, the question of estoppel is one of law for the court and the court may direct a verdict upon the issue. *Hawkins v. Finance Corp.*, 174.

EVIDENCE.

§ 2. Judicial Notice of Municipal Ordinances.

Courts will not take judicial notice of municipal ordinances. *Fulghum v. Selma*, 100.

§ 3. Judicial Notice of Laws of Other States.

G.S. 8-4 requires the courts of this State to take judicial notice of the applicable law of another state. *Motor Co. v. Wood*, 468.

EVIDENCE—*Continued.*

§ 6. Presumptions in General.

As a general rule, mere proof of the existence of a condition or state of facts at a given time does not raise an inference or presumption that the same condition or state of facts existed on a former occasion. *Childress v. Nordman*, 708.

§ 8. Burden of Proof on Defenses.

The burden of proving affirmative defenses is upon defendant. *Winkler v. Amusement Co.*, 589.

§ 26. Similar Facts and Transactions.

As a general rule, mere proof of the existence of a condition or state of facts at a given time does not raise an inference or presumption that the same condition or state of facts existed on a former occasion. *Childress v. Nordman*, 708.

§ 26½. Rebuttal of Evidence Adduced by Adverse Party.

When defendant introduces evidence that plaintiff was insured, plaintiff is entitled to introduce evidence that loss was not covered in full. *Winkler v. Amusement Co.*, 589.

§ 30a. Demonstrative Evidence—Photographs.

Where there is testimony that photographs taken of plaintiff before and after the injury were accurate likenesses at the time they were taken, the photographs are competent for the purpose of explaining the testimony of the witnesses. *Hunt v. Wooten*, 42.

Even though the hydrant struck by defendant's car was removed subsequent to the accident, a photograph of the scene is competent when the witness testifies that at the time the picture was taken the hydrant had been replaced in the identical position it had occupied immediately after the accident. *Ibid.*

§ 30d. Demonstrative Evidence—Physical Objects.

A fire hydrant struck by defendant's car may be introduced in evidence when there is testimony that it had not been altered in any way since the accident. *Hunt v. Wooten*, 42.

§ 37. Best and Secondary Evidence.

Where a written lease forms the basis of a defense asserted by defendant, it is not collateral, and therefore testimony as to its contents is inadmissible by reason of the best evidence rule. *Winkler v. Amusement Co.*, 589.

§ 39. Parol or Extrinsic Evidence Affecting Writings.

Parole evidence at variance with later written agreement *held* incompetent. *Cathey v. Shope*, 345.

§ 42c. Admissions by Parties.

Declaration of defendant shortly after accident that he could have avoided accident in several ways *held* competent as admission against interest. *Jernigan v. Jernigan*, 444.

§ 43a. Declarations.

Recitals contained in a deed in fee simple, as that grantor was unmarried, are mere self-serving declarations and are not evidence. *Skipper v. Yow*, 659.

EVIDENCE—*Continued.*

§ 45. Opinion Evidence—Shorthand Statement of Fact.

Declaration by defendant shortly after accident that he could have avoided accident in several ways *held* competent as shorthand statement of fact. *Jernigan v. Jernigan*, 444.

§ 47e. Opinion Evidence—As to Physical Appearance.

It is competent for a nonexpert to point out to the jury the places where implanted skin had been grafted upon plaintiff's face to minimize the disfigurement resulting from plaintiff's injuries, since such testimony is merely describing the physical appearance of the plaintiff as observed by a nonexpert. *Hunt v. Wooten*, 42.

§ 47f. Testimony of Medical Experts.

A medical expert may testify from his examination of plaintiff as to the character, extent and probable effect of plaintiff's disfigurement. *Hunt v. Wooten*, 42.

§ 51. Competency and Qualification of Experts.

The finding of the trial judge that a witness is an expert is conclusive on appeal when sustained by the evidence. *Hunt v. Wooten*, 42.

EXECUTORS AND ADMINISTRATORS.

§ 13f. Application and Distribution of Proceeds of Sale to Make Assets.

Dower claim of widow has priority in proceeds of sale over debts of husband and costs and charges of administration. *Elledge v. Welch*, 61.

§ 15d. Claims for Personal Services Rendered Deceased.

In an action against executors to recover on *quantum meruit* for services rendered their testate prior to his death, a check, not paid because of death of the maker prior to presentation, drawn payable to plaintiff's order, with notation in the corner "for home" is competent when plaintiff properly identifies the signature as that of testate, since the check tends to show that the services were rendered and received with mutual understanding that they were to be paid for. *Dills v. Cornwell*, 435.

Evidence of plaintiff to the effect that she was no kin to testate and that she lived in testate's house, with members of her own family, during the last three years of testate's life, and during that time looked after his house and nursed and took care of testate, and that several months before his death testate required constant attention, together with evidence that testate had executed a check to her in payment "for home," *is held* sufficient to be submitted to the jury in an action by plaintiff to recover upon *quantum meruit* for her services under the presumption that, in the absence of some express or implied gratuity, services rendered another which are knowingly and voluntarily accepted, are given and accepted in the expectation of payment. *Ibid.*

FORGERY.

§ 1. Elements and Essentials of Offense.

Where blank checks bearing forged signature are filled out at defendant's direction, they are indirectly uttered by defendant. *S. v. Cranfield*, 110.

FRAUD.

§ 1. Definition of Fraud.

Fraud is a material representation relating to a past or existing fact, which is false, made with knowledge of its falsity or in reckless disregard of the truth, with intention that the other party should act thereon, and which is reasonably relied and acted upon by the other party to his damage. *Cofield v. Griffin*, 377.

§ 2. Misrepresentation.

A false representation is material when it deceives a person and induces him to act. *Cofield v. Griffin*, 377.

In order for a misrepresentation to constitute the basis of an action for fraud it must be shown that the representation was untrue at the time it was made or at the time it was acted upon. *Childress v. Nordman*, 708.

Unless a representation is a continuing one, a subsequent change in conditions or state of facts cannot render the person making the representation liable unless he learns that the statement has become false before it is acted upon and is under duty to disclose the change in condition. *Ibid.*

§ 3. Past or Subsisting Fact.

The state of any person's mind at a given moment is as much a fact as the existence of any other thing, and therefore a knowing misrepresentation of the present intention of a third person to do a future act is a misrepresentation of a past or subsisting fact within the law of fraud. *Cofield v. Griffin*, 378.

§ 5. Deception and Reliance on Misrepresentation.

The fact that plaintiffs rely upon a positive misrepresentation made by defendant when they could have ascertained the falsity of the statement by inquiry of third persons is not fatal to an action for fraud when there is nothing which should have put plaintiffs upon inquiry. *Cofield v. Griffin*, 378.

GAMBLING.

§ 1. Nature and Elements of Offense.

Whether a game is a game of chance within the purview of G.S. 14-292, or a game of skill, depends upon whether the element of chance or the element of skill predominates in determining the results of the game. *S. v. Stroupe*, 34.

§ 4. Lotteries.

G.S. 14-291.1 proscribes four separate offenses: (1) the sale of lottery tickets, (2) the barter of lottery tickets, (3) causing another to sell lottery tickets, (4) causing another to barter lottery tickets. *S. v. Albarty*, 130.

§ 7. Warrant and Indictment.

A warrant charging in the alternative that defendant sold or bartered or caused another to sell or barter lottery tickets, is fatally defective in failing to specify the crime with which defendant is charged. The warrant should also describe the character of the lottery with definiteness. *S. v. Albarty*, 130.

§ 9. Sufficiency of Evidence and Nonsuit.

The evidence as to the rules and method of playing "Negro Pool" *is held* sufficient to be submitted to the jury on the question of whether the game is a game of chance within the purview of G.S. 14-292. *S. v. Stroupe*, 34.

GAMBLING—*Continued.*

Evidence that all defendants wagered money on the results of a game of chance played by some of them *is held* sufficient to overrule their motions to nonsuit in a prosecution under G.S. 14-292. *Ibid.*

§ 10. Instructions.

An instruction that "the object of the gambling statute (G.S. 14-292) is to prevent people from getting something for nothing" without defining the term "game of chance" constituting an essential element of the offense charged, *is held* reversible error. *S. v. Stroupe*, 34.

§ 11. Verdict and Judgment.

Where the warrant charges an offense disjunctively or alternatively, and the verdict finds the defendant guilty as charged, the verdict is invalid for uncertainty, since it fails to identify the crime of which the defendant is convicted. *S. v. Albarty*, 130.

GOODWILL.

§ 2. Sale and Assignment.

Goodwill may not be disposed of separately from the property right to which it is incident, such as a particular trade-name or trademark. *Ice Cream Co. v. Ice Cream Co.*, 317.

While the sale of a business with its goodwill carries an implied obligation that the seller will do nothing to impair the advantages and benefits incident to the business sold, ordinarily it does not preclude the seller from thereafter engaging in a similar business in the vicinity provided the seller does not engage in unfair competition or interfere with the purchaser's enjoyment of the premises sold. *Ibid.*

HABEAS CORPUS.

§ 3. To Obtain Custody of Minor Children.

In this contest between husband and wife, living in a state of separation without being divorced, to obtain custody of their minor child, it appeared that the court had an officer of the law make a private investigation of the parties, and that the court's findings and adjudication based thereon rested in large measure upon the secret information thus obtained. *Held:* The judgment must be set aside and the cause remanded for a hearing in accordance with the law of the land. *In re Gupton*, 303.

Upon granting a continuance of a hearing upon a writ of *habeas corpus* to determine the custody of a child as between its parents living in a state of separation, the court, without hearing evidence, awarded the custody of the child to its resident mother pending the hearing. The mother had the child present at the hearing and the record fails to disclose any harm to the child as a result of the temporary order. *Held:* The issuance of the order will not be held for error. *In re Custody of Allen*, 367.

Upon this hearing of a writ of *habeas corpus* for the custody of a minor child as between its parents living in a state of separation, respondent moved to dismiss on the ground that the petitioner herself was a minor. *Held:* Even conceding that G.S. 1-64 is applicable, failure of respondent to plead the infancy of petitioner as a defense constitutes a waiver. *Ibid.*

Where, upon the hearing of a writ of *habeas corpus* to determine the custody of a minor child as between its parents living in a state of separation, the court recites certain matters "appearing to the court" as the basis for the court's adjudication, the recitals are tantamount to saying that such matters were found by the court to be facts. *Ibid.*

HIGHWAYS.

§ 7. Control, Use and Maintenance of Rights of Way.

The evidence tended to show that defendants, with the permission of the State Highway and Public Works Commission, installed metal culverts in extending concrete culverts under the highway across the highway right of way in preparing their property for use as a filling station, and that authorized agents and employees of the Commission visited the job each day and observed the progress of the work without objection. The Commission sought a preliminary mandatory injunction to compel defendant to remove the metal culverts on the ground that they were of faulty design and not adequate to take care of the drainage needs, and that this resulted in an encroachment on the highway right of way. *Held:* Plaintiff Commission has failed to establish the preliminary equities necessary to the granting of the extraordinary remedy of a preliminary mandatory injunction. *Highway Com. v. Brown*, 293.

§ 8c. Highway Commission—Contracts.

State Highway Commission cannot be sued on contract, and sole remedy to recover for its failure to completely perform its right of way agreement is by petition to recover for taking. *Sale v. Highway Com.*, 599.

HOMESTEAD.

§ 4a. Nature and Extent of Right.

When a husband dies childless and in debt, his widow is entitled to a homestead in his lands. *Elledge v. Wells*, 61.

HOMICIDE.

§ 2. Parties and Offenses.

Mere fact that bystander was husband of one of perpetrators of crime is insufficient to constitute him aider and abettor. *S. v. Ham*, 94.

§ 16. Presumptions and Burden of Proof.

A pistol is a deadly weapon *per se*. *S. v. Powell*, 527.

An intentional killing of a human being with a deadly weapon implies malice, and, nothing else appearing, constitutes murder in the second degree, casting the burden upon defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the charge to manslaughter or excuse it. *Ibid.*

§§ 20, 21. Evidence of Motive and Malice, Premeditation and Deliberation.

In a homicide prosecution, testimony of a declaration made by defendant amounting to a general threat or showing a general malevolent spirit is incompetent on the question of malice, premeditation and deliberation, but if the other evidence gives defendant's statement individuation so that the jury may infer that such threat or statement referred to the deceased or to a class to which deceased belonged, the testimony is competent. *S. v. Dockery*, 222.

Testimony that defendant declared ". . . they are trying to make outlaws out of us and there will be plenty of trouble over this" *is held* competent in this prosecution of defendant for the fatal shooting of the sheriff of the county, in view of the fact that the other evidence adduced discloses that the statement was made in connection with defendant's attempt to have his son released on bail and was directed to the law enforcement officers of the county. *Ibid.*

HOMICIDE—*Continued.*

§ 25. Sufficiency of Evidence and Nonsuit.

The State's evidence tending to show that there had been previous trouble between deceased and the male defendant, that after an altercation they were approaching each other on the highway, the male defendant having a pistol in his hand, and that the *feme* defendant asked the male defendant for his pistol, stating that she would kill deceased, that he gave her the gun and that she shot and killed deceased, *is held* sufficient to take the case to the jury on the question of the *feme* defendant's guilt of murder in the second degree and the male defendant's guilt as a co-principal in aiding and betting the *feme* defendant. *S. v. Wingler*, 485.

The State's evidence tended to show that defendant got up from his bed, went to another room and procured a pistol which he put under his pillow to scare his wife and make her stop arguing, that as she continued to argue defendant raised up in bed and pointed the pistol at her, and that she grabbed it and the pistol went off inflicting fatal injury. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree. *S. v. Powell*, 527.

§ 27g. Instructions on Question of Degrees of Guilt.

Where defendants plead not guilty and contend throughout the trial that they fought only in their necessary self-defense, an instruction to the effect that defendants contended that upon a finding by the jury of certain facts beyond a reasonable doubt, they would be guilty of murder in the second degree, must be held for error. *S. v. Ham*, 74.

Where there is any substantial evidence of defendant's guilt of murder in the second degree, the trial court correctly submits the question to the jury. *S. v. Powell*, 527.

§ 27d. Instructions on Murder in Second Degree.

In this prosecution of defendants for murder in the second degree, the court defined murder in the second degree as the unlawful killing of a human being with malice but without premeditation and deliberation and correctly defined the terms. The court also correctly defined manslaughter and adequately charged the jury upon defendants' defense that the fatal pistol wound was accidentally inflicted, and correctly placed the burden of proof on the State. The court did not charge on the presumptions arising from an intentional killing with a deadly weapon. *Held:* In defining murder in the second degree it was not error for the court to fail to charge that the killing must not only be unlawful but must also be intentional in order to constitute murder in the second degree, defendants' defense of accidental killing having been fully presented to the jury. *S. v. Wingler*, 485.

§ 27f. Instructions on Defenses.

Defendants' contention that the court failed to adequately charge on the aspect of an accidental homicide, supported by defendants' evidence, *held* untenable, it appearing that the court clearly and adequately charged that defendants would not be guilty if the fatal injury was the result of an accident, and defined the terms. *S. v. Wingler*, 485.

The evidence favorable to defendant disclosed that defendant occupied a bedroom in a certain house, that defendant, deceased and others, got into an altercation in the kitchen of the house, and that defendant went to his bedroom and got his pistol and shot his assailant who continued to approach him with an upraised chair notwithstanding that defendant had ordered him from the

HOMICIDE—*Continued.*

house and told him not to come into the room. *Held:* It was incumbent upon the trial court, even in the absence of prayer for special instructions, to define a home within the meaning of the law of self-defense and to charge upon defendant's legal right to defend himself in his home, to defend his home from attack and to eject trespassers therefrom, as substantive features of the case arising upon the evidence. *S. v. Poplin*, 728.

§ 28. Verdict and Judgment.

In a homicide prosecution, the jury has the right, in its unbridled discretion, in all cases in which a verdict of guilty of murder in the first degree is reached, to recommend that the punishment shall be imprisonment for life. *S. v. Dockery*, 222.

HUSBAND AND WIFE.

§ 14. Creation and Existence of Estates by Entireties.

Where heirs exchange deeds for purpose of partitioning land inherited by them, deeds to one heir and his wife does not create estate by entireties even though the deeds are in form of deeds of bargain and sale, since the deeds convey no title but merely sever unity of possession. *Elledge v. Welch*, 61.

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

An accusation of crime must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed. *S. v. Albarty*, 130.

Where a statute specifies in the alternative several means or ways in which an offense may be committed, an indictment under the statute should not charge such means or ways in the alternative. *Ibid.*

An indictment or other accusation must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed. *S. v. Thorne*, 392; *S. v. Jenkins*, 396.

It is not necessary that an indictment for a statutory offense follow the language of the statute verbatim, but it is sufficient if it substantially follows the words of the statute. *S. v. Tickle*, 206.

While ordinarily an indictment for a statutory offense is sufficient if it charges the offense substantially in the words of the statute, where the statute does not define the offense, the statutory words must be supplemented by allegations which explicitly set forth every essential element of the crime. *S. v. Greer*, 325.

An indictment must charge the offense with certainty so as to identify the offense, protect the accused from being twice put in jeopardy for the same offense, enable the accused to prepare for trial, and support judgment upon conviction or plea. *Ibid.*

The rule that an indictment will not be quashed for mere informality or refinement does not obviate the necessity that the indictment allege each essential element of the offense. *Ibid.*

§ 11½. Waiver of Defects.

Where the warrant or indictment fails to charge an essential element of the offense a motion in arrest of judgment will lie, but when the indictment or warrant charges every essential element of the offense, defendant, by appearing

Plaintiff could assert the defense of estoppel by judgment and could move for consolidation of all the actions in the next pending action brought to trial, and therefore it may not maintain an independent suit in equity to restrain the prosecution of the actions. *Ibid.*

§ 8. Interlocutory Orders and Continuance, Modification and Dissolution of Temporary Orders.

Where it appears that at the time of the hearing the act sought to be restrained had already been done, plaintiff cannot be prejudiced by the dissolution of the temporary restraining order. *Highway Com. v. Brown*, 293.

The purpose of an interlocutory injunction is to preserve the *status quo* of the subject matter of the suit until a trial can be had on the merits. *Huskins v. Hospital*, 357.

An interlocutory injunction will not ordinarily issue to remedy a wrong committed before suit is brought. *Ibid.*

An interlocutory injunction will not lie to take land out of the possession of one party and place it in the possession of another, nor to prevent the party in possession from making a reasonable use of the land actually occupied by him under claim of right. *Ibid.*

While, upon the hearing to determine whether an interlocutory injunction should issue, the court may not decide the cause upon its merits, plaintiff must make out an apparent case as the basis for the writ. *Ibid.*

Even though plaintiff makes out an apparent case for the issuance of an interlocutory injunction by showing some recognized equity, the court must nevertheless exercise its sound discretion in determining whether the writ should issue, and to this end must weigh the conflicting affidavits and other evidence of the parties relative to the conveniences and inconveniences which would result from the issuance of the writ, and should refuse to grant the writ when it would cause great injury to defendant and confer little benefit in comparison upon plaintiff. *Ibid.*

The findings of fact and other proceedings of the judge who hears an application for an interlocutory injunction are not binding on the parties at the trial on the merits, and are indeed incompetent to be considered by the court or the jury upon the final hearing. *Ibid.*

Interlocutory order to compel defendant hospital to desist construction of driveway necessary to reasonable use of hospital *held* properly denied, even though plaintiff asserted it was on his property. *Ibid.*

Upon return of an order to show cause why the temporary restraining order issued in the cause should not be continued to the hearing, the action is before the court solely for the hearing on the order in the cause as constituted on the civil issue docket. *Lewis v. Harris*, 642.

Ordinarily, a temporary restraining order will be continued to the hearing if there is probable cause for supposing that plaintiff will be able to maintain his equity and there is reasonable apprehension of irreparable loss unless it remains in force or if it is reasonably necessary to protect plaintiff's rights until the controversy can be determined. *Lance v. Cogdill*, 500.

Where plaintiff seeks to restrain a continuing trespass, the temporary order will ordinarily be continued to the hearing when the facts are in dispute and can be determined only by a jury. *Ibid.*

Even when plaintiff establishes a recognized equity, the continuance of a temporary restraining order rests in the sound discretion of the judge, to be

INSURANCE—*Continued.*

§ 31a (1). Life Insurance—Misrepresentations as to Health.

Plaintiff's evidence *held* to disclose misrepresentation as to health by insured, participated in by agent, and therefore established affirmative defense warranting nonsuit. *Thomas-Yelverton Co. v. Ins. Co.*, 278.

§ 31c. Life Insurance—Knowledge of Agent and Waiver by Insurer.

Ordinarily, knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to insurer, G.S. 58-197, even though contrary to a direct stipulation in the policy or the application for same, but this rule of imputed knowledge does not apply when the agent participates in the fraud or the suppression of a material fact. *Thomas-Yelverton Co. v. Ins. Co.*, 278.

§ 32c. Cancellation of Certificates Under Group Policy.

Where the group policy and the individual certificate provide that upon notification to the insurer the certificate should terminate at the end of the policy month in which the employee's active employment should end, such provision must be given effect, notwithstanding that during the month the employee was discharged the employer deducted from his wages his part of the premium for a quarter in advance, and upon the death of the employee after termination of the certificate but prior to the expiration of the quarter for which his premium had been deducted, insurer may be held liable only for the return of the unearned premium. *Hancline v. Casket Co.*, 127.

§ 37. Life Insurance—Actions on Policies.

Ordinarily, in an action on a life insurance policy the burden of establishing affirmative defenses rests upon insurer. *Thomas-Yelverton Co. v. Ins. Co.*, 278.

But when plaintiff's own evidence establishes affirmative defense, insurer's motion to nonsuit is properly granted. *Ibid.*

§ 24e. Fire Insurance—Payment and Subrogation.

Insurer paying a loss is subrogated to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid, both by the provisions of G.S. 58-176 and under equitable principles. *Winkler v. Amusement Co.*, 589.

When defendant introduces evidence of insurance, plaintiff insured is entitled to introduce evidence that insurer had not paid loss in full to rebut defendant's evidence and to show that plaintiff is entitled to maintain the action. *Ibid.*

§ 43½. Auto Insurance—Collision and Upset.

A policy covering damage to an automobile caused by accidental collision will be construed to cover all such losses unless the policy itself excludes from its coverage losses occasioned while the vehicle is being used for specified hazardous purposes. *Suttles v. Ins. Co.*, 539.

The policy in suit covered damage to the insured vehicle caused by accidental collision while the vehicle was being used for business or pleasure, with the sole exception that coverage should not apply while the vehicle was being used as a public conveyance. *Held:* The policy covers damages to the vehicle sustained when it overturned while being driven in a stock car race with insured's permission, since such loss is "accidental" and the use was not excluded by the policy, and the use was for "business or pleasure" within the meaning of its terms. *Ibid.*

INSURANCE—*Continued.*

§ 45¾. Auto Insurance—Fire and Explosion.

The policy in suit covered direct and accidental damage to insured's car caused by explosion, with an exclusion of liability if the damage were due to mechanical or electrical breakdown or failure. Plaintiff's evidence was to the effect that after the car had been serviced with gas and oil, he stepped on the starter and there was an explosion with smoke and fire, and that thereafter a hole was found in the motor near one of the cylinders. Insurer offered evidence to the effect that the hole was caused by the connecting rod of the cylinder breaking loose and being driven through the block by the other cylinders. *Held:* The evidence was properly submitted to the jury upon the question of whether the damage was the "accidental" result of an "explosion." *Polansky v. Ins. Co.*, 427.

§ 50. Auto Insurance—Actions on Policies.

The policy in suit covered direct and accidental damage to insured's automobile caused by explosion, with later provision excluding liability for damage caused by mechanical or electrical breakdown or failure unless the result of other loss covered by the policy. *Held:* The burden of proof was upon insurer to show that the damages claimed fell within the exclusion and an instruction to this effect is not error. *Polansky v. Ins. Co.*, 427.

In this action to recover under a policy of insurance for damage to a car accidentally resulting from explosion, the court's instruction to the effect that the dealer who had sold the car to plaintiff insured and the dealer's mechanic who had worked on the car, were interested witnesses and that their testimony should be scrutinized by the jury, *is held* for prejudicial error, there being no evidence in the record that the witnesses were related to plaintiff or were in any legal respect interested. *Ibid.*

§ 51. Auto Insurance—Payment and Subrogation.

An insured who has been paid a part of the damage to his car by insurer can maintain an action in his own name against the tort-feasor for the entire damage, but insurer is a proper party and may be joined in the discretion of the court. *Lyon & Sons v. Board of Education*, 24.

Allegation of defendant that plaintiff had been paid in full for loss *held* relevant as bearing upon plaintiff's right to maintain action. *Dixie Lines v. Grannick*, 552.

When defendant introduces evidence of insurance, plaintiff insured is entitled to introduce evidence that loss had not been paid in full to show that plaintiff is entitled to maintain action. *Winkler v. Insurance Co.*, 589.

INTOXICATING LIQUOR.

§ 4a. Possession in General.

Possession of nontax-paid whiskey in any quantity anyhere in the State is unlawful. *S. v. Brown*, 260.

Possession of more than one gallon of tax-paid whiskey in one's home for personal consumption or consumption of members of family or *bona fide* guests is not unlawful, but possession of any quantity outside of home is unlawful unless it is being legally transported to home. *S. v. Shinn*, 535.

§ 4b. Constructive Possession.

Possession of intoxicating liquor within the meaning of the statute may be either actual or constructive. *S. v. Brown*, 260.

If defendant hides intoxicating liquor in the woods near his home, it is in his constructive possession at least, regardless of whether it is on his own property or that of another. *S. v. Shinn*, 535.

§ 9b. Presumptions and Burden of Proof.

The possession of any quantity of nontax-paid liquor raises the presumption that the possession is for the purpose of sale. *S. v. Gibbs*, 258.

The possession of one gallon or less of tax-paid liquor in possessor's private dwelling in a county in which sale of intoxicating liquor is not authorized under the Alcoholic Beverage Control Act raises no presumption, nothing else appearing, of possession for the purpose of sale. *S. v. Brady*, 404.

§ 9c. Competency and Relevancy of Evidence.

In a prosecution for the unlawful possession of liquor for the purpose of sale, based upon the possession by defendant of more than one gallon of tax-paid liquor, testimony that on other occasions tax-paid liquor in quantities less than one gallon had been found on defendant's premises is incompetent, since defendant's possession on other occasions of whiskey within the pale of the law has no relevancy to his possession of whiskey beyond the pale of the law at another time. *S. v. Brady*, 404.

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that nontax-paid liquor was found within the curtilage of defendant's home is sufficient to take the case to the jury on the charge of illegal possession of nontax-paid liquor, G.S. 18-48, and the charge of illegal possession of nontax-paid liquor for the purpose of sale. G.S. 18-50. *S. v. Gibbs*, 258.

Evidence that officers found a jug of nontax-paid whiskey under the house of defendant, that defendant's husband did not live there, and that defendant disappeared during the search and was not again seen by the officers until she appeared with her attorney the next day and posted bond, *is held* sufficient to be submitted to the jury upon the question of defendant's constructive possession of the nontax-paid whiskey. *S. v. Brown*, 260.

Evidence disclosing that nontax-paid intoxicating liquor was found unconcealed on the floor-board back of the front seat of the automobile is sufficient to be submitted to the jury as to the guilt of the driver and of the passenger in the car in whose name the vehicle was registered, but as to other passengers of the car it is insufficient in the absence of any evidence of joint possession or control over the car or the liquor. *S. v. Ferguson*, 656.

Evidence tending to show that defendant is a married woman and was living in a house with a man, and that nontax-paid liquor was found 30 or 45 yards from the house, is insufficient to be submitted to the jury in a prosecution for unlawful possession of the nontax-paid liquor and possession of such liquor for sale, even though such liquor was in the constructive possession of the occupants of the house, since the evidence leaves in speculation whether defendant or the other occupant of the house was in possession of the liquor. *S. v. Grainger*, 739.

§ 9f. Instructions.

The possession of any quantity of tax-paid liquor outside one's home is illegal unless it is being legally transported to one's home for the purpose of personal consumption or the consumption of the members of one's family or *bona fide* guests, and, therefore, upon evidence tending to show that defendant hid tax-

After the expiration of the term of court at which judgment is entered, a special judge is without jurisdiction to hear a motion to set aside the judgment for surprise or excusable neglect. *Jones v. Brinson*, 506.

§ 29. Parties Concluded.

One tenant in common is not bound by judgment in action to restrain trespass brought by cotenant. *Lance v. Cogdill*, 500.

§ 30. Matters Concluded by Judgment.

In an action to recover damages for trespass, in which there is no allegation in the complaint that defendants or any of them claimed title to plaintiffs' lands or any part thereof, a judgment by default against one of defendants establishes plaintiffs' cause of action for trespass against such defendant, entitling plaintiffs to such damages as may be ascertained by a jury upon the inquiry, G.S. 1-212, but recitals in the judgment that plaintiffs are owners of the lands in fee simple and entitled to possession thereof do not have any effect except in so far as they relate to the cause of action as alleged. *Wilson v. Chandler*, 401.

§ 32. Judgment as Bar to Subsequent Action in General.

Ordinarily, a judgment in a former action constitutes an estoppel as *res judicata* in a subsequent action only if there be identity of parties, of subject matter and of issues, and it is also required that the estoppel be mutual. *Light Co. v. Ins. Co.*, 679.

As an exception to the general rule that there must be identity of subject matter and issues in order for a former judgment to constitute an estoppel in a subsequent action, the former judgment may constitute an estoppel whenever it necessarily affirms the existence of a particular fact, and such fact is again in issue between the parties or their privies, even though such fact comes in question incidentally in relation to a different matter. *Ibid.*

The general rule that there must be identity of parties in order for a former judgment to constitute an estoppel in a subsequent action embraces not only the actual parties to the action but also parties in privity with them, and is subject to the further exception that a person not actually a party to the judgment will be bound thereby if he openly and actively assumes and manages the defense of the action and has a proprietary or financial interest in the judgment or in the determination of a question of fact or of law with reference to the same subject matter or transaction, provided plaintiff has knowledge thereof so that the estoppel will be mutual. *Ibid.*

§ 32. Operation of Judgments as Bar to Subsequent Actions in General.

Where one tenant in common obtains an order restraining a material continuing trespass by a stranger, such order does not preclude another tenant in common from thereafter instituting an action against the same stranger to restrain an asserted material trespass, since the second tenant in common, not being a party to the first action, is not bound by the judgment therein, and is not, therefore, relegated to the remedy of a motion in the original cause. *Lance v. Cogdill*, 500.

A judgment entered by consent of the owners of adjacent tracts of land in an action instituted solely for the purpose of establishing the boundary line between said tracts, without reference to an easement by implication of law existing in favor of the one party against the other, will not be construed as affecting the easement, and will not bar a subsequent proceeding to enjoin the

evidence and to show that plaintiff is entitled to maintain the action as the real party in interest. *Ibid.*

LARCENY.

§ 1. Elements and Essentials of the Offense.

The cutting and removing of growing timber from the land of another with felonious intent constitutes larceny by virture of G.S. 14-80, notwithstanding that the growing timber is realty. *S. v. Turner*, 411.

§ 5. Presumptions and Burden of Proof.

Testimony that defendant was paid for dogwood delivered to a woodyard, without evidence that defendant actually delivered the wood, with further evidence that dogwood taken from the yard fitted stumps on prosecuting witness' land from which the wood had been wrongfully taken, *is held* insufficient to be submitted to the jury in a prosecution under G.S. 14-80, the doctrine of recent possession against defendant, since the evidence does not disclose that defendant had been in possession of the wood. *S. v. Turner*, 411.

LIMITATION OF ACTIONS.

§ 1. Nature and Construction of Statutes of Limitation.

The provisions of G.S. 1-21 relating to tolling of statute of limitations for nonresidence until party "returns to this State" applies to nonresident coming into this State for first time. *Bank v. Appleyard*, 145.

§ 8. Absence and Nonresidence.

In action instituted here on cause arising in another state between nonresidents, G.S. 1-21 tolling statute of limitations applies. *Bank v. Appleyard*, 145.

§ 15. Pleading the Statute.

Except in those instances in which the limitation is annexed to the cause of action itself, the defense of the bar of a statute of limitations cannot be raised by demurrer. *Batchelor v. Mitchell*, 351.

§ 16. Burden of Proof.

Ordinarily, where a statute of limitations is properly pleaded, the burden is upon plaintiff to show that he has not brought a stale claim into court. *Barbee v. Edwards*, 215.

But when defendant sets up title by adverse possession as defense to plaintiff's cause of action, burden is on defendant to establish such title. *Ibid.*

MASTER AND SERVANT.

§ 6b. Termination of Employment Where Contract Does Not Provide Definite Term.

The complaint alleged that plaintiff was employed by defendant, given repeated promotions over a period of time, that plaintiff was asked if he meant to make a career of his employment and, upon an affirmative answer, was sent to a three week training school, but that five days thereafter defendant ordered plaintiff's return and summarily discharged him without cause. *Held:* Demurrer was properly entered in plaintiff's action for wrongful discharge, since upon the facts alleged the contract was not for any definite time and was terminable at the will of either party without cause. Plaintiff's position would

not be aided if the employment had been "upon a permanent basis" since the contract would still be for an indefinite period, terminable at will. *Howell v. Credit Co.*, 442.

§ 15. Liability of Master for Negligent Injury to Servant.

The duty of a master to exercise ordinary care to provide a servant a reasonably safe place in which to work does not apply when the servant is working on the premises of a third person and the master has neither possession nor control over the premises. *Shives v. Sample*, 724.

Allegations to the effect that plaintiff was employed to drive a truck hauling stone to a stock pile and that he was injured while unloading his truck on the stock pile when the stock pile caved in, and that defendant knew or should have known that the pile of stone was hollow underneath and was likely to cave in and cause injury but failed to warn plaintiff of such condition, is insufficient to withstand demurrer, there being no allegation of facts supporting the conclusion that the stock pile was under the direction or control of defendant or any factual allegation supporting the conclusion that defendant had knowledge of the dangerous conditions any more than plaintiff. *Ibid.*

§ 39f. Compensation Act—Determination of Which of Two Employers Is Liable.

The evidence tended to show that a fuel oil company had its name on the tractor-tank deceased was employed to drive, that it filed tax returns reciting that deceased was employed by it and paid Federal income and social security taxes deductible from his wages, and furnished deceased a statement thereof. *Held:* The evidence is sufficient to support the finding of the Industrial Commission that deceased was employed by the oil company, notwithstanding evidence offered by defendants that the oil company was a partnership dealing only in the retail of fuel oil and that the tractor-tank was owned and operated as a separate transportation business by one of the partners alone. *Moses v. Bartholomew*, 714.

§ 40g. Compensation Act—Injuries Compensable—Hernia.

Evidence tending to show that plaintiff employee felt a sharp pain his groin while exerting himself in the course of his employment on a Friday afternoon, that painful swelling shortly followed, and that on Wednesday of the following week the doctor found an impulse which he diagnosed as hernia, but waited several days for the development of the hernia to be absolutely sure, *is held* sufficient to sustain the finding of the Industrial Commission that the injury was compensable under G.S. 97-2 (r). *Rice v. Chair Co.*, 121.

§ 52. Hearings and Findings of Industrial Commission. (Findings conclusive, see hereunder § 55d.)

In exercising its authority to find the facts in a proceeding before it, the Industrial Commission is the sole judge of the credibility and weight of the evidence, and may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves same. *Moses v. Bartholomew*, 714.

§ 53d. Persons Entitled to Compensation.

A woman who was living with an employee as his common law wife at the time of his death and who was actually wholly dependent upon him for support for some years prior to his death by accident arising out of and in the course of his employment is not a dependent of the deceased employee within the

MASTER AND SERVANT—*Continued.*

purview of G.S. 97-39 and is not entitled to any part of the compensation payable under the provisions of the Workmen's Compensation Act. *Fields v. Hollowell*, 614.

§ 55c. Compensation Act—Prosecution of Appeals.

On appeal from Industrial Commission to Superior Court transcript of evidence must be in question and answer form, but on further appeal to Supreme Court evidence must be in narrative form. *Anderson v. Heating Co.*, 138.

§ 55d. Compensation Act—Review of Award.

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence even though the evidence might support contrary findings. *Rice v. Chair Co.*, 121.

The evidence in this case *is held* to support the finding of the Industrial Commission that plaintiff did not sustain an injury by accident within the meaning of the Workmen's Compensation Act, and judgment denying compensation is affirmed. *Anderson v. Heating Co.*, 138.

Upon appeal from an award of the Industrial Commission, the courts do not retry the facts, but merely determine whether there was sufficient competent evidence before the Commission to support its findings. *Moses v. Bartholomew*, 714.

§ 59b. Unemployment Compensation Taxes—Persons Liable.

Evidence that a municipal corporation sold certain standing timber to defendant at a stipulated price per thousand board feet and that in connection with the purchase, defendant agreed to remove all sawdust, to keep the bushes down and to pile no brush on the premises of the corporation, *is held* to support the finding of the Employment Security Commission that the defendant was not in the employ of the municipal corporation. *Employment Security Com. v. Simpson*, 296.

§ 62. Appeals from Employment Security Commission.

Findings of fact by the Employment Security Commission in a hearing before it are conclusive upon review when supported by any competent evidence. *Employment Security Com. v. Simpson*, 296.

MORTGAGES.

§ 17b. Redemption.

Where plaintiff asserts that debt was paid in full prior to foreclosure and that defendant was claiming by *mesne* conveyances from trustee, plaintiff's action is not one to redeem and G.S. 1-47 (4) is not applicable. *Barbee v. Edwards*, 215.

§ 27. Payment and Satisfaction of Debt.

When debt is paid prior to foreclosure, foreclosure is a nullity. *Barbee v. Edwards*, 215.

MUNICIPAL CORPORATIONS.

§ 8b (1). Public Utilities—Services Within City.

Defendant municipality sold water to an individual at a meter just inside its limits, and such individual resold the water through his own pipes to consumers outside the city limits. By amendment to its ordinances, the municipality greatly increased the rates charged such individual. *Held:* Such indi-

MUNICIPAL CORPORATIONS—*Continued.*

vidual, even though a resident of the municipality, may not maintain that the city is under duty to furnish him water at the same rate furnished consumers within the corporate limits, since the municipality owes no duty to supply water to a resident for resale to others either within or without its limits. *Fulghum v. Selma*, 100.

§ 8b (2). Public Utilities—Service Outside City.

A municipality executed a contract with a citizen under which the municipality was to furnish water to such citizen for distribution through his pipes to consumers in an adjacent village, and charge such citizen therefor the rate charged consumers within its corporate limits. The agreement fixed no time for the duration of the contract. *Held:* Either party could terminate the contract at will by giving reasonable notice to the other party. *Fulghum v. Selma*, 100.

A municipality which operates its own water works is under no duty to furnish water to persons outside its limits but has the discretionary power to do so. *Ibid.*

A municipality which undertakes to furnish water to persons outside its corporate limits does not assume the obligations of a public service corporation toward such nonresidents, but retains the authority to specify the terms under which they may obtain water and to fix rates different from those charged consumers within its limits. *Ibid.*

An amendment to an ordinance which substantially increases the rates charged for water supplied by a municipality for consumption outside its corporate limits cannot be held discriminatory in a legal sense when it applies alike to all nonresidents, and it is immaterial that a nonresident consumer deems such rates exorbitant or unreasonable. *Ibid.*

§ 12. Liability for Torts—Private and Governmental Functions.

A municipal corporation engaged in the business of supplying electricity for profit is liable as a private corporation for injuries to third parties proximately caused by its negligence in respect thereto. *Alford v. Washington*, 694.

A municipal corporation may be held liable for negligence of its officers and agents in the exercise of its private corporate powers, but is not so liable in the exercise of its police power or its judicial, discretionary or legislative authority in discharging a duty imposed solely for the public benefit. *Hamilton v. Hamlet*, 741.

In the installation and maintenance of traffic light signals, a city exercises a discretionary governmental function solely for the benefit of the public, and may not be held liable for negligence of its officers and agents in respect thereto. *Ibid.*

§ 41. Municipal Charges and Expenses.

A municipality cannot expend tax revenue without the explicit or implicit authority of a constitutional statute. *Wilson v. High Point*, 14.

NEGLIGENCE.

§ 4f (3). Licensees.

The owner of property owes the duty to a licensee upon his premises not to increase the hazard by active and affirmative negligence. *Wagoner v. R. R.*, 162.

Where public customarily uses freight yard as walkway, member of public is licensee in so using property. *Ibid.*

NEGLIGENCE—*Continued.*

§ 7. Intervening Negligence.

The test to determine whether the original negligence is insulated by the intervening act of a responsible third person is whether the original negligence had become passive and had ceased to be capable of causing any injury by any intervening act which could have been reasonably foreseen. *Smith v. Grubb*, 665; *Alford v. Washington*, 694.

Acts transpiring prior to the alleged negligent act of defendant cannot be relied upon by defendant to insulate his negligence, since the principle of insulating negligence refers to acts and conduct subsequently occurring. *Alford v. Washington*, 694.

§ 9. Proximate Cause—Anticipation of Injury; Foreseeability.

Foreseeability of injury is a requisite of proximate cause. *Davis v. Light Co.*, 106; *Whitley v. Jones*, 332.

It is not required that defendant should have been able to anticipate the precise injury which occurred in order for his negligent act or omission to be the proximate cause of the injury, but it is sufficient for this purpose if defendant, in the exercise of reasonable care, might have foreseen that some injury would probably result therefrom. *Hart v. Curry*, 448.

§ 9½. Anticipation of Negligence on Part of Others.

A person is not under duty to anticipate negligence on part of others. *Alford v. Washington*, 694.

§ 10. Last Clear Chance.

In order for plaintiff to invoke the doctrine of last clear chance, he must plead it. *Wagoner v. R. R.*, 162.

The doctrine of last clear chance does not apply if the party injured is guilty of contributory negligence as a matter of law. *Ibid.*

§ 11. Contributory Negligence. (Nonsuit for, see hereunder § 19c.)

Contributory negligence need not be the sole proximate cause in order to bar recovery, but is sufficient for this purpose if it constitutes a concurring cause proximately contributing to the injury. *Summerlin v. R. R.*, 438.

A person seeking to rescue others from serious and imminent peril will not be held contributorily negligent in risking serious injury or death in attempting to effect the rescue unless the attempt is recklessly or rashly made. *Alford v. Washington*, 694.

§ 14½. Sudden Emergency.

An instruction to the effect that if the conduct of defendant's driver brought about or created the peril, the doctrine of sudden emergency as theretofore explained would not be available to defendant, *held* not prejudicial error when immediately thereafter the court correctly charged to the effect that the conduct of defendant in placing himself in danger must have been negligent conduct in order to preclude the application of the doctrine, nor was the court under duty to repeat its previous instruction that if the sudden emergency was not created by defendant's negligent conduct the principle would be available to defendant. *R. R. v. Trucking Co.*, 422.

§ 16. Pleadings in Negligence Actions.

Where defendant relies upon contributory negligence, he is required specifically to plead in his answer the acts or omissions of plaintiff relied upon as

NEGLIGENCE—*Continued.*

constituting contributory negligence, and prove them at the trial. *Hunt v. Wooten*, 42.

Defendant must allege the facts relied on by him as constituting contributory negligence, and mere allegations that the death of plaintiff's intestate was caused by his own negligence and not any negligence on the part of defendant is not a sufficient plea of contributory negligence. *Darden v. Leemaster*, 573.

Negligence is not a fact in itself but is a legal conclusion from the facts, and therefore plaintiff in an action based on negligence must allege the facts upon which the legal conclusion of negligence and proximate cause may be drawn, and mere allegation of the happening of an event causing injury, together with the pleader's conclusion that the adverse party was negligent, is insufficient. *Shives v. Sample*, 724.

§ 18. Competency and Relevancy of Evidence of Negligence.

Evidence to the effect that after a collision at a grade crossing the defendant railroad company installed gates at the crossing, *held* properly excluded under the general rule that evidence of subsequent repairs or changes is not competent as tending to show negligence or a *quasi* admission of previous insufficiency. *R. R. v. Trucking Co.*, 422.

§ 19b (1). Nonsuit on Issue of Negligence in General.

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. *Whitley v. Jones*, 332.

Plaintiff's evidence tending to show that his boat was in good condition when it was taken from his premises by defendants or their agents and launched in the river and towed some one and one-half miles to plaintiff's boathouse, that the boat took on water while it was being towed and that when plaintiff saw his boat it was partially submerged and had a hole punched in the bottom apparently caused by a blow from underneath, *is held* sufficient to be submitted to the jury on the issue of defendants' negligence. *Ibid.*

§ 19b (4). Sufficiency of Circumstantial Evidence of Negligence to Overrule Nonsuit.

It is not necessary that negligence be established by direct evidence, but may be proved by circumstantial evidence. *Kelly v. Willis*, 637.

§ 19c. Nonsuit on Ground of Contributory Negligence.

When plaintiffs' own evidence establishes contributory negligence so clearly that no other conclusion may reasonably be drawn therefrom, nonsuit is proper. *Edwards v. Vaughn*, 89; *Summerlin v. R. R.*, 438.

On motion to nonsuit on the ground of contributory negligence, plaintiff's evidence must be considered in the light most favorable to it. *Ins. Co. v. Cline*, 133.

It is only when the evidence of contributory negligence is so clear that no other conclusion may reasonably be drawn therefrom that nonsuit on the ground of contributory negligence may be entered. *R. R. v. Trucking Co.*, 422; *Horton v. Peterson*, 446.

Since defendant has the burden of proof on the issue of contributory negligence, nonsuit for contributory negligence can be rendered only when but a

PARTIES—*Continued.*

§ 10a. Joinder of Additional Parties.

Where insured, who has been paid part of damage by insurer, institutes action against tort-feasor, insurer is a proper party and may be joined in discretion of court. *Lyon & Sons v. Board of Education*, 24.

Whether persons who would be proper but not necessary parties to the action should be joined, rests in the sound discretion of the court. *Gaither Corp. v. Skinner*, 254.

PARTITION.

§ 1a. Right to Partition in General.

The right to partition is a remedy provided exclusively for tenants in common. *Richardson v. Barnes*, 398.

Remaindermen may maintain a proceeding for partition, since for the purpose of partition they are by statutory provision deemed seized and possessed of the land as if no life estate existed. *Ibid.*

Life tenants are not tenants in common with remaindermen, and may not maintain partition proceedings against the tenants in common in the remainder. *Ibid.*

Life tenants and tenants in common in the remainder instituted this partition proceeding against the other tenants in common in remainder. *Held:* The joinder of the life tenants as petitioners does not invalidate the proceeding, G.S. 46-24, and since the tenants in common in the remainder are entitled to appropriate relief, G.S. 46-23, the dismissal of the petition upon demurrer on the ground that the petitioners are without legal right at law to demand the relief, is error. *Ibid.*

Where petitioners for partition are entitled to the relief as a matter of law, allegations of respondents as to the reasons which prompted petitioners to act are mere surplusage and may be disregarded. *Ibid.*

§ 8. Operation and Effect of Partition by Parties.

Where heirs at law exchange deeds for the purpose of partitioning land held by them as tenants in common, such deeds create no new title, even though in the regular form of deeds of bargain and sale, but merely sever the unity of possession so that each takes his share by descent from the ancestor, and therefore the deed to one heir and his wife under such partition does not create an estate by the entirety. *Elledge v. Welch*, 61.

PARTNERSHIP.

§ 10b. Death of Partner—Agreements for Survivorship in Partnership Property.

A partnership agreement that upon the death of one of the partners the interest of the deceased partner should become the property of the survivor upon the payment of a stipulated amount to the legal representatives of the deceased partner or to specified persons is supported by valuable consideration in the mutual promises contained therein, and is valid and enforceable when not made for any illegal purpose, subject only to the rights of the creditors of the deceased partner. *Silverthorne v. Mayo*, 274.

The partnership agreement in suit provided that upon the death of one of the partners the assets of the partnership should become the property of the survivor upon the payment by the survivor to the deceased's widow of a stipulated sum, payable in annual installments over a period of eight years. Upon

PARTNERSHIP—*Continued.*

the death of the partner, the survivor made the first annual payment to the widow, but the widow died before the second annual payment was due. *Held:* The widow was entitled to the funds as the third party beneficiary of the contract, and therefore her personal representative is entitled to receive payments of the balance due under the agreement and not the personal representative of the deceased partner, the agreement not being a testamentary disposition of property and it not being necessary that it be executed in accordance with the formalities required in the execution of a will. *Ibid.*

PAYMENT.

§ 2. Payment by Check or Draft.

Where an insurance company delivers its draft to the owners of property who endorse it over to the contractor who had made repairs to the property, the delivery of the draft is but conditional payment, and upon its dishonor by the bank on order of insurer, the owners and the contractor are relegated to their original debtor-creditor status. *McGee v. Ledford*, 269.

Where check given in payment of cash sale is dishonored, owner does not part with title and in absence of estoppel may claim chattel from *bona fide* purchaser. *Motor Co. v. Wood*, 468.

PHYSICIANS AND SURGEONS.

§ 14. Malpractice—Liability in General.

The rule that a physician or surgeon may not be held liable to a patient if he possesses the knowledge and skill ordinarily possessed by others of his profession and uses reasonable care, diligence and skill in the practice of his art, *is held* applicable to a physician practicing in the special field of dermatology in the use and manipulation of an X-ray machine. *Nance v. Hitch*, 1.

§ 19. Actions for Malpractice—Burden of Proof.

The burden is upon plaintiff in an action for malpractice to show that defendant physician was negligent as alleged in the complaint and also that such negligence was the proximate cause or one of the proximate causes of plaintiff's injury. *Nance v. Hitch*, 1.

§ 20. Actions for Malpractice—Sufficiency of Evidence and Nonsuit.

Evidence tending to show that plaintiff suffered a third degree burn to his heel following X-ray treatment administered by defendant physician to plaintiff's heel in removing a wart, *is held* insufficient to overrule nonsuit on the theory that such injury would not have resulted in the ordinary course of such treatment if proper care and skill had been used, when plaintiff's own expert testimony, together with expert testimony for defendant, is to the effect that such burns do occur at times notwithstanding the best care and skill and caution in the use of X-ray therapy. Such evidence negatives the applicability of *res ipsa loquitur*. *Nance v. Hitch*, 1.

The contention that defendant physician was negligent in permitting his nurse to administer X-ray therapy contrary to the accepted practice of the profession is not raised when there is positive testimony that the physician and not the nurse administered the treatment and the only evidence to the contrary is plaintiff's statement modified by his averment that he was not positive who gave him the X-ray treatment. *Ibid.*

PLEADINGS.

§ 2. Complaint—Joinder of Causes.

Causes of action for breach of agreement to lend stipulated sums of money, based upon allegations that sums less than those agreed upon were made available to plaintiffs, with allegations seeking special damages resulting from such breach, and a cause of action for forfeiture of interest for alleged usury, are all *ex contractu* relating to one agreement and may be properly joined. *Perry v. Doub*, 233.

Separate owners of lots may not join in one action for breach of restrictive covenants. *Chambers v. Dalton*, 142.

§ 3a. Complaint—Statement of Cause in General.

The complaint must allege the facts constituting the cause of action so as to disclose the issuable facts determinative of plaintiff's right to relief. *Shives v. Sample*, 724.

§ 15. Office and Effect of Demurrer.

Upon demurrer the complaint will be liberally construed with a view to substantial justice between the parties, giving the pleader every intendment in his favor. *Ice Cream Co. v. Ice Cream Co.*, 217.

A demurrer admits facts properly pleaded but not inferences or conclusions of law. *Ibid.; Howell v. Credit Co.*, 442; *Light Co. v. Ins. Co.*, 680; *Alford v. Washington*, 694; *Shives v. Sample*, 724; *Pressly v. Walker*, 732.

A demurrer on the ground that the complaint fails to state a cause of action admits, for the purpose of the demurrer, the truth of every material fact properly alleged in the complaint. *Batchelor v. Mitchell*, 351; *Hamilton v. Hamlet*, 741.

While a plaintiff may not demur to specific paragraphs of an answer, he may demur to a further defense as a whole, and may also move to strike the specific paragraphs in which such defense is pleaded. *Stone v. Coach Co.*, 662.

A demurrer or a motion to strike admits for its purpose the truth of the allegations challenged, and raises questions of law which must be determined upon the pleadings without hearing evidence or finding facts *dehors* the record. *Ibid.*

§ 17a. Statement of Grounds, Form and Requisites of Demurrer.

Where matter constituting an estoppel is shown on the face of a pleading, ordinarily the question of estoppel may be raised by demurrer, but even in such instance the demurrer must point out specifically the matter constituting the estoppel, and where only a general demurrer is interposed and the question of estoppel is not ruled upon in the lower court, the Supreme Court on appeal will not rule thereon. *Perry v. Doub*, 233.

A demurrer on the ground that the complaint fails to state a cause of action does not present for decision whether the complaint is objectionable for prolixity or misjoinder of parties and causes. *Batchelor v. Mitchell*, 351.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

Separate owners of lots may not join in one action for breach of restrictive covenants. *Chambers v. Dalton*, 142.

There must be a misjoinder of both parties and causes of action in order to work a dismissal upon demurrer, and a joinder of an unnecessary party defendant alone is insufficient ground for dismissal. *Perry v. Doub*, 233.

PLEADINGS—*Continued.*

Plaintiff's action was based on allegations that defendant cashed a check for him, that plaintiff put the money in his pocket without counting it, that several days later defendant, in company with the general manager of plaintiff's employer, accused plaintiff in a loud and threatening manner of getting a large sum of money from defendant. Plaintiff also alleged that the manager summarily discharged plaintiff because of the false accusations of defendant and that defendant thereafter had plaintiff arrested for false pretense. Plaintiff demanded damages for causing breach of plaintiff's contract of employment and also actual and punitive damages for malicious prosecution. *Held:* Defendant's demurrer for misjoinder of causes of action was properly sustained, with leave to plaintiff to file amended complaint. *Large v. Gardner*, 288.

§ 19c. Demurrer on Ground That Pleading Fails to State Cause of Action or Defense.

Where the complaint is sufficient to state a cause of action, it may not be overthrown upon demurrer on the ground that additional facts alleged as the basis for recovery of punitive or special damages were insufficient for this purpose, since a complaint which sufficiently states a cause of action in any respect or to any extent may not be overthrown by general demurrer, and further, demurrer is not the proper mode of testing the extent of recovery or determining the rule for the measurement of damages, nor may a demurrer *ore tenus* to the cause of action for special damages be sustained. *Perry v. Doub*, 233.

Complaint will be liberally construed upon demurrer. *Light Co. v. Ins. Co.*, 680.

The requirement that a complaint be liberally construed upon demurrer does not permit the court to construe into it that which it does not contain. *Ice Cream Co. v. Ice Cream Co.*, 317.

A complaint must be fatally defective before it will be overthrown by demurrer, and if the complaint is good in any respect or to any extent, the demurrer should be overruled. *Batchelor v. Mitchell*, 351; *Pressly v. Walker*, 732.

Allegations in answer of defendant that his employee had obtained judgment against plaintiff for same collision that plaintiff sought recovery against defendant on doctrine of *respondeat superior* held to state defense, and plaintiff's demurrer thereto should not have been allowed. *Stone v. Coach Co.*, 662.

§ 20. Time of Filing Demurrer and Waiver of Right to Demur.

The right to demur for failure of the complaint to state a cause of action is not waived by answering, but may be taken by demurrer *ore tenus*, or the Supreme Court may take notice thereof *ex mero motu*. *Ice Cream Co. v. Ice Cream Co.*, 317.

§ 22c. Amendment of Pleadings During Trial.

A motion to amend after time for answering has expired is addressed to the discretion of the trial court, and the court's ruling thereon will not be reviewed on appeal unless a prejudicial abuse of discretion is clearly shown. *Motor Co. v. Wood*, 468; *Goode v. Barton*, 492.

Where the facts alleged in the complaint are sufficient to imply by a fair and reasonable intendment that defendant failed to keep a proper lookout, the court has the discretionary power even after judgment to permit plaintiff to amend to allege specifically such failure. Further, the court has the authority to allow such amendment even if the original complaint does not allege by necessary implication defendant's failure to keep a proper lookout. G.S. 1-163. *Simrel v. Mecler*, 668.

PLEADINGS—*Continued.*

§ 24. Variance. (Nonsuit for variance, see Trial § 24.)

Allegation without proof and proof without allegation are equally unavailing. *Hunt v. Wooten*, 42.

A party must succeed, if at all, on the case as set up in his complaint, and the proof must correspond to the allegations. *Sale v. Highway Com.*, 599.

§ 26. Bill of Particulars.

Motion for bill of particulars and motion for examination of adverse party are not inconsistent remedies, and therefore denial of bill of particulars does not preclude same party from thereafter moving for examination of adverse party. *Tillis v. Cotton Mills*, 124.

§ 28. Motion for Judgment on Pleadings.

A motion for judgment on the pleadings is in effect a demurrer to the answer, and admits the truth of all the well pleaded facts in the answer and the untruth of plaintiff's own allegations in so far as they are converted in the answer. *McGee v. Ledford*, 269.

Where allegations of the answer have been stricken upon motion duly made prior to plaintiff's motion for judgment on the pleadings, the court in passing upon the motion for judgment on the pleadings must disregard all allegations of the answer which had been so stricken. *Ibid.*

§ 31. Motions to Strike.

An allegation of fact is irrelevant and ought to be stricken from the pleading on motion if the fact pleaded is not legally receivable in evidence on the trial. *Dixie Lines v. Grannick*, 552.

A motion to strike an allegation from a pleading for irrelevancy admits, for the purpose of the motion, the truth of all facts well pleaded in the allegation, and any inferences of fact deducible therefrom, but it does not admit conclusions of the pleader. *Ibid.*

Motion to strike from answer allegations setting up extrajudicial settlement between guest in car and drivers of vehicles involved in collision *held* properly allowed in action brought by one driver against the other to recover for same collision. *Ibid.*

Allegations that insurer had paid plaintiff full loss *held* relevant to plaintiff's right to maintain action and motion to strike same from answer should have been denied. *Ibid.*

Nor could the court strike such allegations as constituting sham defense in absence of evidence that they were made in bad faith. *Ibid.*

While a plaintiff may not demur to specific paragraphs of an answer, he may demur to a further defense as a whole, and may also move to strike the specific paragraphs in which such defense is pleaded. *Stone v. Coach Co.*, 662.

A demurrer or a motion to strike admits for its purpose the truth of the allegations challenged, and raises questions of law which must be determined upon the pleadings without hearing evidence or finding facts *dehors* the record. *Ibid.*

Held: It was error to allow motion to strike allegations of answer of defendant that his employee had obtained judgment against plaintiff for same collision that plaintiff sought recovery against defendant on doctrine of *respondeat superior*. *Ibid.*

Where the Supreme Court holds on a former appeal that certain matters set up in bar or abatement of plaintiff's cause were insufficient in law to preclude

PLEADINGS—*Continued.*

plaintiff from prosecuting the action, and thereafter in the subsequent trial defendant again pleads substantially the same matters by way of estoppel and in bar, the order of the court striking such allegations from the pleadings will be upheld, the former decision being the law of the case. *Howle v. Express, Inc.*, 676.

PRINCIPAL AND AGENT.

§ 7c. Apparent and Implied Authority.

An agent authorized to sell property of his principal has no implied authority to mortgage the property. *Hawkins v. Finance Corp.*, 174.

PRINCIPAL AND SURETY.

§ 5a. Bonds of Public Officers and Agents.

A bond executed to a county alcoholic beverage control board indemnifying insured against loss of money or personal property and covering the employees of the board, but not executed by any of such employees, cannot render the surety liable to a third person for a tort committed by an employee of the board in the discharge of his duties, and since the bond does not purport to be in any sense a peace officer's performance bond, G.S. 128-9, the provisions of that statute may not be incorporated into the contract under the doctrine of aider by statute. *Langley v. Patrick*, 250.

PROCESS.

§ 10. Service of Process on Nonresident Auto Owner.

G.S. 1-105 authorizes constructive service of process on a nonresident whose automobile is involved in a collision causing injury to persons or property in this State when the automobile is being operated by the nonresident, or for the nonresident, or under his control or direction, express or implied. *Winborne v. Stokes*, 414.

Findings *held* sufficient to support service of process upon nonresident auto owner under G.S. 1-105. *Ibid.*

PUBLIC OFFICERS.

§ 9. Validity and Attack of Official Acts.

In the absence of evidence to the contrary, it will be presumed that the acts of a public officer are in all respects regular. *S. v. Brady*, 407.

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

The owner of realty may maintain an action against another claiming an adverse interest to determine and quiet title, even though the owner is not in possession and might maintain an action in ejectment. G.S. 41-10. *Pressly v. Walker*, 732.

The trustees of a religious denomination holding title to church property for the benefit of local congregations which are members of its denomination may maintain an action to quiet title against the trustees of a local congregation claiming to hold title in trust for a different denomination or schism, and may join with them as plaintiffs the trustees of such local congregation holding

title for the benefit of the local congregation who are members of plaintiffs' denomination. *Ibid.*

§ 2. Actions to Quiet Title.

In an action to remove cloud upon title, plaintiff's testimony that he paid the debt secured by deed of trust executed by him on the property and that defendant was claiming under *mesne* conveyances from the trustee at a foreclosure sale, *is held* sufficient to make out a *prima facie* case entitling plaintiff to go to the jury, since it is sufficient to justify, though not necessarily to impel, the inference that the debt was paid prior to the foreclosure, and that therefore the foreclosure was void. *Barbee v. Edwards*, 215.

Where plaintiff in an action to quiet title establishes a *prima facie* case, defendant's plea of title by adverse possession under color for seven years does not justify nonsuit of plaintiff's cause, since the plea of adverse possession raises an issue of fact for the jury upon which defendant had the burden of proof. *Ibid.*

Where plaintiff, in an action to quiet title, makes out a *prima facie* case, and defendant sets up a plea of title by adverse possession under color of seven years, plaintiff's admission that he gave a certain person possession more than seven years prior to the institution of the action does not justify nonsuit of plaintiff's cause, since mere admission of possession without evidence in respect to the nature or character of such possession does not amount to an admission of adverse possession in law, even if defendant be given the benefit of presumptions arising from *mesne* conveyances from such person. *Ibid.*

Where plaintiff, in an action to quiet title, establishes a *prima facie* case that the debt secured by the deed of trust executed by him on the property was fully paid prior to foreclosure and that defendant claims under *mesne* conveyances from the trustee, the action is not one to redeem the property, and G.S. 1-47 (4) and G.S. 1-56 cannot bar plaintiff's cause. *Ibid.*

In an action to quiet title under G.S. 41-10, plaintiff is not required to show that he is either in or out of possession or that defendant is in possession, but only that plaintiff has title and that defendant asserts an adverse claim, and while defendant may defend the validity of his alleged claim on every relevant ground available in any type of action involving recovery of possession of real property, such defenses cannot change the nature of plaintiff's action or dilute the force of plaintiff's *prima facie* proofs so as to warrant nonsuit of plaintiff's cause. *Ibid.*

Where plaintiff in an action to quiet title establishes *prima facie* that he holds the legal title, he has the benefit of the presumption created by G.S. 1-42. *Ibid.*

RAILROADS.

§ 4. Accidents at Crossings.

The evidence in this case tended to show that plaintiff was thoroughly familiar with the crossing in question, that he stopped some thirteen feet before reaching the crossing, looked and listened and, seeing and hearing no train, proceeded forward and did not see defendant's train until his right front wheel crossed the first track, at which time the train was some 125 to 175 feet away, although from such place a train could have been seen approaching from that direction for a distance of some 300 feet, and that the train struck the left rear of his car before he could clear the crossing. The judgment of nonsuit entered by the trial court upon the issue of contributory negligence is upheld under the presumption in favor of the correctness of the trial court's decision. *Beaman v. R. R.*, 418.

RAILROADS—*Continued.*

In this action by a railroad company to recover damages resulting from a collision at a grade crossing, plaintiff's evidence to the effect that the driver of defendant's truck drove upon the crossing in front of plaintiff's oncoming train notwithstanding flashing automatic signals and warnings from the whistle, bell and lights of the locomotive, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence, and defendant's evidence in conflict therewith to the effect that one of the automatic signal lights was not working, that the view was partially obstructed, that no warning signals were given by the train in time to be of service, and that the train was being operated at excessive speed through a town, does not warrant nonsuit on the ground of contributory negligence. *R. R. v. Trucking Co.*, 422.

Evidence that after crossing accident, the railroad installed gates at the crossing *held* incompetent. *Ibid.*

Plaintiff's evidence tending to show that defendant's train approached a much used grade crossing in a municipality where no barricades, alarm system or flagmen were maintained, that the engineer did not ring the bell or blow the whistle and that the train struck plaintiff's car on the crossing, *is held* sufficient to be submitted to the jury on the question of negligence on the part of the railroad company. *Summerlin v. R. R.*, 438.

The failure of the employees of a railroad company to ring the bell or sound the whistle of the locomotive in warning in approaching a grade crossing, or to have the engine's headlight burning, if dark, does not relieve a motorist of the duty of exercising due care for his own safety in traversing the crossing or warrant the assumption by him that no train is approaching, the crossing itself being notice of danger. *Ibid.*

Plaintiff's own evidence tending to show that she stopped some forty-eight feet before a grade crossing, did not see or hear a train, and then traversed the forty-eight feet onto the track without again looking, although at any time before reaching the crossing she could have seen defendant's approaching train had she looked, *is held* to disclose contributory negligence on her part barring recovery as a matter of law for injuries sustained when her car was struck by the train on the crossing. *Ibid.*

§ 5. Injuries to Persons on or Near Tracks.

Where pedestrians walk up and down and across tracks in a railroad yard for a number of years, a pedestrian so using the yard is a licensee and not a trespasser. *Wagoner v. R. R.*, 162.

Evidence tending to show that an engineer made a flying switch, and that the coal car so shunted ran over and killed a licensee on a track at a place wholly within the railroad company's yard, near the center of a city, while sufficient to support an issue of negligence on the part of the railroad company, is insufficient to support an issue of wanton negligence on its part. The distinction between the act of a railroad company in making flying switches within its freight yard, and in making flying switches at public crossings, is pointed out. *Ibid.*

Where the evidence discloses that a licensee in defendant's freight yard was struck and killed by a shunted freight car on a fair day, and that the licensee's view was not obstructed when he walked upon the track, such licensee is guilty of contributory negligence as a matter of law barring recovery for his death even though the car which struck him was moving noiselessly so that he could not hear it. *Ibid.*

RAILROADS—*Continued.*

§ 7. Fires on Right of Way.

In an action against a railroad company to recover for damages to plaintiff's lands from a fire, plaintiff must show by reasonably affirmative evidence that the fire started on a foul right of way by act of defendant, and that the fire spread to plaintiff's lands. *Grinnan v. R. R.*, 432.

Evidence *held* insufficient to show that fire adjacent to right of way resulted from act of defendant. *Ibid.*

REFORMATION OF INSTRUMENTS.

§ 3. For Mutual Mistake.

Mistake in acreage of land conveyed out of larger track will not support action to reform deed, since the identity of the additional land to be conveyed is too indefinite. *Queen v. Sisk*, 389.

RELIGIOUS SOCIETIES.

§ 3. Actions.

The trustees of a religious denomination holding title to church property for the benefit of local congregations which are members of its denomination may maintain an action to quiet title against the trustees of a local congregation claiming to hold title in trust for a different denomination or schism, and may join with them as plaintiffs the trustees of such local congregation holding title for the benefit of the local congregation who are members of plaintiffs' denomination. *Pressly v. Walker*, 732.

SALES.

§ 1. Nature and Essentials and Distinctions.

"Barter" and "sale" are not synonymous, barter being the exchange of one commodity for another, and a sale being the transfer of goods for a specified price payable in money. *S. v. Albarty*, 130.

§ 12½. Transfer of Title by Person Not True Owner.

The owner is not estopped to assert title as against mortgagee of bailee merely because he entrusted possession to bailee unless he clothes bailee with *indicia* of title. *Hawkins v. Finance Corp.*, 174.

The automobile in question was purchased in Pennsylvania from plaintiff. The purchaser gave a check in payment of the purchase price, which check was dishonored upon presentation. The purchaser sold the car to another dealer, and defendants acquired possession through *mesne* purchases from such dealer. The verdict of the jury established that the original purchase of the car was a cash sale. *Held:* Under the law of Pennsylvania title did not pass from plaintiff, and in the absence of estoppel, plaintiff is entitled to reclaim the chattel from defendants notwithstanding that defendants are *bona fide* purchasers for value or claim from or under *bona fide* purchasers. The distinction obtaining when the owner is induced to part with title through fraud is pointed out. *Motor Co. v. Wood*, 468.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant.

Where enforcement officers, upon stopping a car in a routine check of drivers' licenses, see nontax-paid whiskey in the automobile, they thereupon have abso-

SEARCHES AND SEIZURES—*Continued.*

lute personal knowledge that there is intoxicating liquor in such vehicle which dispenses with the necessity of a search warrant, G.S. 18-6, G.S. 15-27, and evidence obtained by the search is competent. *S. v. Ferguson*, 656.

§ 2. Requisites and Validity of Warrant.

A warrant issued by a justice of the peace upon affidavit of an officer charged with the execution of the law, authorizing the search of the premises at a specified locality and the seizure of all intoxicating liquors, is governed by G.S. 18-13 and not G.S. 15 27, and the warrant is a sufficient compliance with the apposite statute to render competent evidence discovered by an officer at the premises designated. *S. v. Brady*, 404.

A warrant for the search of designated premises for intoxicating liquor, issued upon the sworn affidavit of the sheriff of the county by the clerk of the Superior Court acting as *ex officio* clerk of the county criminal court, G.S. 7-395, is valid under the provisions of G.S. 18-13. *S. v. Brady*, 407.

SPECIFIC PERFORMANCE.

§ 1. Contracts Enforceable Specifically.

Deficiency in acreage of land conveyed out of larger tract will not support specific performance, since identity of additional land is too uncertain. *Queen v. Sisk*, 389.

STATE.

§ 3a. Tort Claims Act—Nature and Scope of Remedy.

The State Tort Claims Act will be construed to effectuate its purpose to waive the sovereign immunity of the State in those instances in which injury is inflicted through the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured party the same right to sue as any other litigant, and the Act will not be given a strict or narrow construction which would defeat this purpose. *Lyon & Sons v. Board of Education*, 24.

In this proceeding under the State Tort Claims Act, the Industrial Commission found that plaintiff's car was damaged as a result of the negligence of the driver of a State school bus, that plaintiff was not guilty of contributory negligence, and that plaintiff had been paid a part of the damage under the provisions of a fifty dollar deductible collision policy. *Held:* Plaintiff is entitled to recover the total damage to his car for the benefit of himself and his insurer, and the State is not entitled to a deduction from the recovery of the amount paid by insurer. *Ibid.*

STATUTES.

§ 5a. General Rules of Construction.

When the language of a statute is unambiguous there is no room for judicial construction. *Phillips v. Shaw*, 518.

Where a particular provision of a statute is in conflict with a prior general provision, the particular provision will ordinarily be given effect as an exception to the general provision. *Ibid.*

SUBROGATION.

§ 1. Nature and Grounds of Remedy.

The doctrine of equitable subrogation will be broadly applied to compel a party primarily liable for an obligation to reimburse the person who has been compelled to pay the debt and who is, therefore, not a mere volunteer or intruder. *Lyon & Sons v. Board of Education*, 24.

TAXATION.

§ ½. Taxation and Debts Within Constitutional Restrictions.

The authority of a municipality to issue bonds is coextensive with its power to levy a tax, since the issuance of the bonds is but an incipient step in the exercise of its power of taxation. *Wilson v. High Point*, 14.

§ 1. Uniform Rule and Discrimination.

A contract under which property of a municipality within the county would be taxed for the purpose of raising revenue to pay the total initial cost of erecting a building to be used jointly by the city and county for their respective governmental functions, and then subsequently included in a county-wide tax to defray the county's obligation, would result in taxing the property in the city twice for the same purpose, and would violate the rule of uniformity. *Wilson v. High Point*, 14.

§ 3. Limitation on Increase in Debt.

The provisions of Art. V, sec. 4, authorizing the issuance of bonds by a municipality not to exceed two-thirds of the amount of bonds retired by it during the preceding fiscal year does not authorize a municipality to issue bonds, without a vote of the people, even within the limitation, if such bonds are not for a necessary municipal expense. *Wilson v. High Point*, 14.

§ 4. Necessary Expenses and Necessity for Vote.

What is a necessary municipal expense within the meaning of Art. VII, sec. 7, of the Constitution of N. C., is a question of law to be determined by the courts, and although legislative construction of this provision is entitled to great weight, it is not binding. *Wilson v. High Point*, 14.

Municipal bonds to pay total initial cost of county—municipal governmental building under contract by county to later reimburse city for its part, *held* not for necessary municipal expense, since county governmental function is not charge upon city. *Ibid.*

§ 9. Tax on One Community for Benefit of Another.

A municipality may not issue its bonds, without a vote of its people, for the purpose of providing revenue to pay the entire initial costs of a building to be used by the county and the municipality jointly in the discharge of their respective governmental functions, since the discharge of the governmental functions of the county touches no phase of the municipal government, and therefore is not a necessary expense of the municipality within the meaning of Art. VII, sec. 7, and further would amount to taxing one governmental unit for the benefit of another. *Wilson v. High Point*, 14.

§ 30. Sales Tax.

Under the provisions of G.S. 105-168 a sale by a wholesale merchant to anyone not taxable under the statute as a retail merchant is taxable as a retail sale, and this provision applies to a sale by a wholesale second-hand car dealer

TAXATION—*Continued.*

in this State to retail merchants of another state for the purpose of resale out of this State. *Phillips v. Shaw*, 518.

And such tax is not burden on interstate commerce, title and possession having passed to purchasers before the property enters the channels of interstate commerce. *Ibid.*

§ 38a. Actions to Enjoin Issuance of Bonds.

A taxpayer of a municipality has the right to maintain an action to test the authority of the municipality to issue proposed bonds. *Wilson v. High Point*, 14.

Where taxpayers are successful in their suit against a county to the extent of enjoining the expenditure of nontax funds by the county in addition to the amount stipulated in the bond order for the proposed project, but the entire proposed expenditure is for a public purpose and it appears that no part of the nontax funds had been expended and therefore no sum had been restored to the general fund of the county, *held*, while the costs of the action should be taxed against the county, plaintiffs are not entitled to recover expense money to the extent of reasonable attorneys' fees. This result is not affected by the fact that the delay caused by the suit enabled the county to let a new contract which effects a saving in the construction of the project. *Rider v. Lenoir County*, 632.

§ 38c. Actions to Determine Liability for Tax or to Recover Tax Paid.

G.S. 105-267 provides the sole remedy of a taxpayer to determine his liability for a sales tax, and he may not maintain an action under the Declaratory Judgment Act to determine his liability therefor. *Buchan v. Shaw*, 522.

§ 40b. Foreclosure of Tax Certificates.

In a county's action to foreclose tax lien certificates, the introduction in evidence by the county of the tax lien certificates for the years in question, with tax certificates attached, on one hundred fifty acres of land outstanding in the name of a certain person, but without evidence that the hundred and fifty acre tract listed in the name of such person and referred to in the tax lien certificates is the same land as that described in the deed executed to defendants by another, is insufficient to make out a *prima facie* case to sell the land of the defendants. *Hyde County v. Bridgman*, 247.

TENANTS IN COMMON.

§ 9. Actions by Tenant to Restrain Trespass.

Where one tenant in common obtains an order restraining a material continuing trespass by a stranger, such order does not preclude another tenant in common from thereafter instituting an action against the same stranger to restrain an asserted material trespass, since the second tenant in common, not being a party to the first action, is not bound by the judgment therein, and is not, therefore, relegated to the remedy of a motion in the original cause. *Lance v. Cogdill*, 500.

TORTS.

§ 4. Determination of Whether Tort Is Joint.

In owner's action against contractor to recover damages for defective roof, subcontractor constructing the roof is not joint tort-feasor. *Gaither Corp. v. Skinner*, 254.

TRADEMARKS AND TRADE-NAMES.

§ 3. Right to Use, Sale and Assignment.

The right of the purchaser of a business to use its trade-name or trademark may be made subject to any contractual restrictions agreed to by the parties which are not invalid as contrary to public policy. *Ice Cream Co. v. Ice Cream Co.*, 317.

Allegations by the owner of separate plants in two separate cities that he sold one of the plants with right to the purchaser to use the trade-name, but that he thereafter had the trade-name registered in his own name in the office of the Secretary of State, does not support his conclusion that he is now the absolute owner of such trade-name. *Ibid.*

TRESPASS.

§ 1a. Acts Constituting Trespass in General.

Evidence tending to show that defendants or their agents went upon plaintiff's property, without authorization, removed plaintiff's boat, which was resting on one of defendants' trailers, from his premises to the river and launched it, *is held* sufficient to overrule defendants' motion to nonsuit plaintiff's cause of action for wrongful removal of the boat, since every unauthorized entry into the close of another is a trespass, entitling the party aggrieved to nominal damages at least. *Whitley v. Jones*, 332.

§ 2. Pleadings.

In an action to recover damages resulting from trespass upon plaintiffs' lands, when there is no allegation to the effect that the defendants are in actual possession of any part of the lands, defendants are not required to post bond before answering. *Wilson v. Chandler*, 401.

§ 6. Issues, Verdict and Judgment.

In action to recover for trespass in cutting and removing timber, default judgment establishes cause of action entitling plaintiff to such damages as may be determined by the jury upon the inquiry, but the judgment adjudicates title only for this purpose, and its recitals that plaintiffs are the owners in fee simple and entitled to possession are surplusage. *Wilson v. Chandler*, 401.

TRESPASS TO TRY TITLE.

§ 1. Nature and Essentials of Right of Action.

Where, in an action in trespass, the parties stipulate that each has title to his respective tract and that the only controversy is as to the true location of the dividing line between the tracts, the action is converted into a processioning proceeding. *Welborn v. Lumber Co.*, 238.

TRIAL.

§ 7. Argument of Counsel.

Counsel may not go outside record and inject into argument facts not included in evidence. *S. v. Dockery*, 222.

§ 14. Objections and Exceptions to Evidence.

The statutory rule that where a party objects to the admission of evidence it shall be conclusively assumed that he duly excepted to its admission over his objection, does not obviate the necessity for an exception by the adverse

party to the court's ruling in those instances in which objection to the admission of the evidence is sustained. *Cathey v. Shope*, 345.

§ 17. Admission of Evidence for Restricted Purpose.

The general admission of evidence competent for a restricted purpose will not be held for error unless appellant, at the time of its admission, asks that its purpose be restricted. *Brewer v. Brewer*, 607.

§ 19. Province of Court and Jury in Respect to Evidence.

The weight and credibility of the testimony is for the jury and not the court. *Vincent v. Woody*, 118.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiffs are entitled to have their evidence considered in the light most favorable to them and to the benefit of every reasonable inference to be drawn therefrom. *Edwards v. Vaughn*, 89; *Todd v. Smathers*, 140; *Wagoner v. R. R.*, 162; *Polansky v. Ins. Co.*, 427; *Godwin v. Cotton Co.*, 627.

On motion to nonsuit, plaintiff's evidence and so much of defendant's evidence as is favorable to plaintiff or tends to explain or make clear that which has been offered by plaintiff, will be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable intendment and inference to be drawn therefrom. *Nance v. Hitch*, 1.

On motion to nonsuit, the court does not pass upon the credibility of the evidence but takes plaintiff's evidence as true and gives plaintiff the benefit of every fair inference which can be reasonably drawn therefrom. *Whitley v. Jones*, 332.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

Defendant's evidence which is not in conflict with that of plaintiff and which explains or makes clear the evidence offered by plaintiff may be considered on motion to nonsuit. *Nance v. Hitch*, 1; *Whitley v. Jones*, 332; *Polansky v. Ins. Co.*, 427; *Godwin v. Cotton Co.*, 627.

In passing upon defendant's motion to nonsuit, the court correctly ignores defendant's evidence which merely contradicts that offered by plaintiff. *Ins. Co. v. Cline*, 133; *Jernigan v. Jernigan*, 444.

§ 22c. Contradictions and Discrepancies in Plaintiff's Evidence on Motion to Nonsuit.

Contradictions even in plaintiff's own evidence do not justify nonsuit. *Whitley v. Jones*, 332.

It is the province of the jury and not the court to resolve discrepancies and contradictions in the evidence. *Bumgardner v. Allison*, 621.

§ 23f. Nonsuit for Variance.

Where allegations and proof are sufficient to establish cause of action, fact that other allegations asserting liability on still another theory are unsupported by evidence, does not justify nonsuit. *Morgan v. Oil Co.*, 185.

But when liability of one defendant is predicated upon one theory and proof is as to a different theory, nonsuit is proper. *Ibid.*

Where there is a material variance between the allegation and proof, nonsuit should be allowed. *Sale v. Highway Com.*, 599.

TRIAL—*Continued.*

§ 24a. Nonsuit for Affirmative Defenses.

Estoppel and compromise and settlement are affirmative defenses upon which defendant has the burden of proof, and therefore nonsuit upon such defenses is improper unless the evidence establishes them as a matter of law. *Winkler v. Amusement Co.*, 589.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

It is the duty of the trial court to instruct the jury on all substantial features of the case arising on the evidence whether there is a prayer for special instructions or not, and the court's failure to do so must be held for error. *Finch v. Ward*, 290; *Banks v. Nowell*, 737; *S. v. Stroupe*, 34.

An instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is error. *Blanton v. Dairy*, 382.

Instruction submitting material fact not alleged and shown in evidence is reversible. *Darden v. Leemaster*, 573.

§ 31d. Instructions on Burden of Proof.

The failure of the court to explain the phrase "greater weight of the evidence" will not be held for prejudicial error on plaintiff's appeal. *Simmons v. Highway Com.*, 532.

The failure of the trial court to define the term "greater weight of the evidence" will not be held for error in the absence of a request for special instructions. *McAbee v. Love*, 560.

§ 31e. Instructions—Expression of Opinion by Court on Weight or Credibility of Testimony.

Where the court, in charging the jury on the issue of damages, correctly instructs the jury to deduct general and special benefits accruing to petitioner from the construction of the highway, G.S. 136-19, and correctly leaves it to the jury to determine the amounts, the fact that the court also states that it is a matter of common knowledge that the building of a highway brings certain benefits to property owners along the highway, *is held* insufficient to constitute prejudicial error as an expression of opinion by the court on a fact in issue. *Simmons v. Highways Com.*, 532.

Fact that court necessarily consumes more time in stating the contentions of one party cannot be held for error. *S. v. Smith*, 82.

§ 31g. Charge on Credibility of Witnesses.

Where there is no evidence that witnesses were interested in event in legal aspect, charge that their testimony should be scrutinized is prejudicial. *Polansky v. Ins. Co.*, 427.

§ 36. Form and Sufficiency of Issues in General.

Only such issues as are raised by the pleadings and supported by competent evidence should be submitted to the jury. *Cathey v. Shope*, 345.

§ 37½. Motions for New Trial for Newly Discovered Evidence.

Appellant's motion in the Supreme Court for a new trial on the ground of evidence relating to the merits discovered after the cause was heard in the Superior Court is allowed, the appellant having met the requirements for a new trial for newly discovered evidence. *Harris v. Chapman*, 308.

TRIAL—*Continued.*

§ 49½. Motions for New Trial for Excessive or Inadequate Award of Damages.

A motion to set aside the verdict on the ground that the damages awarded were inadequate is addressed to the discretion of the trial court, and the denial of the motion will not be held for error when abuse of discretion does not appear. *Hinton v. Cline*, 136.

A motion to set aside the verdict on the ground of excessive award is addressed to the discretion of the trial court. *Bumgardner v. Allison*, 621.

§ 55. Trial by Court by Agreement—Findings of Court.

Where the parties agree that the court should find the facts, findings by the court have the force and effect of a verdict by a jury and are conclusive on appeal if they are supported by evidence. *Trust Co. v. Finance Co.*, 478.

TRUSTS.

§ 3a. Written Trusts in General.

A deed to land "for the purpose of school and religious worship" creates no trust in favor of particular group which had used property, in company with others, permissively for period of time. *Stiles v. Turpin*, 245.

§ 4c. Actions to Establish Resulting Trust.

Allegations to the effect that plaintiffs inherited a farm, subject to a deed of trust, from their father, that their mother qualified as administratrix and that she, at the instance of her mother and stepfather, who came to live on the premises, permitted default and foreclosure, although there were sufficient funds then on hand to pay the installment due, and thereafter repurchased the land from the *cestui que trust*, and transferred a part of the land to plaintiffs' grandmother, all pursuant to a design to deprive plaintiffs of their property, *is held* sufficient to state a cause of action to establish a trust *ex maleficio*, binding upon plaintiffs' grandmother who took with knowledge. *Batchelor v. Mitchell*, 351.

§ 19. Income and Profits.

Ordinarily, increases in the value of real estate and of securities, as well as profits made by purchase and sale of property, are *corpus* increments which go to the ultimate beneficiaries and not the life beneficiary of the trust. *Trust Co. v. Barrett*, 579.

§ 25. Right of Beneficiary to Follow Trust Property.

Ordinarily, property impressed with a trust may be followed through all changes in its state and form, and the beneficial owner may assert title thereto, except as against an innocent purchaser for value without notice, so long as the proceeds or product of the initial trust property may be traced and substantially identified. *Trust Co. v. Barrett*, 579.

The rule of trust pursuit is based upon a continuation of ownership in the *cestuis que trustent* and not on the theory of damages or compensation for the loss of the property. *Ibid.*

Ordinarily, the right of the beneficial owner to follow the trust property through changes of state and form embraces not only the trust property and its proceeds, but also any increase in value or profit realized from the management of the trust estate, since equity will not permit a fiduciary to make a profit out of funds committed to his custody. *Ibid.*

VENDOR AND PURCHASER.

§ 5a. Construction and Operation of Options.

An agreement which merely extends the time for performance under a prior option cannot otherwise affect the terms of the contract to sell, and therefore interrogations relating to the terms of sale upon the execution of the extension of time are improper. *Cathey v. Shope*, 345.

§ 26. Actions for Shortage in Acreage.

Where a specific tract of land is purchased in gross for a lump sum or stipulated amount the doctrine of *caveat emptor* applies in regard to the acreage in the absence of actual fraud or gross deficiency, and a clause in the deed specifying the number of acres will be considered simply as a part of the description controlled by the definite boundaries, monuments or courses and distances contained therein. *Queen v. Sisk*, 389.

Where the contract for the sale of land is for an agreed number of acres at a stipulated price per acre, so that the purchase price can be ascertained only by multiplying the number of acres by the agreed price per acre, quantity is of the essence, and where there is a deficiency in the quantity actually conveyed, the purchaser may recover the value of the deficiency at the agreed price per acre, as in *assumpsit* for money had and received, under the doctrine of unjust enrichment, irrespective of fraud. *Ibid.*

VENUE.

§ ½. Nature of Venue.

Venue refers to the county in which the action is to be tried. Constitution of North Carolina, Art. IV, secs. 2 and 10. *Jones v. Brinson*, 506.

Venue is not jurisdictional and may be waived by the parties or changed by their consent, express or implied. *Ibid.*

§ 4f. Effect of Change of Venue and Subsequent Proceedings.

Where order for change of venue is entered, it is the duty of the party procuring the order, or either or both parties in case of removal by consent, to have the transcript of the record transferred to and deposited in the court to which the cause is ordered removed within the time limited, or, if no time is set forth in the order of the removal, within a reasonable time. *Jones v. Brinson*, 506.

Upon entering of an order for change of venue, the court to which the cause is ordered removed does not acquire jurisdiction until the transcript, or at least enough thereof to allow the court to determine what is in controversy and what is to be adjudicated by it, is filed in the county of removal, but *eo instante* it obtains jurisdiction the court of original venue loses jurisdiction except for the purposes set out in G.S. 1-87 and G.S. 8-62. *Ibid.*

Upon the entering of an order for change of venue, the jurisdiction of the court of original venue becomes dormant and that court is *functus officio* to deal with substantive rights of the parties during the interval for filing the transcript in the court to which the case is ordered removed. *Ibid.*

In the event the transcript is not filed in the court to which the cause is ordered removed within the time limited by the order of removal or within a reasonable time if the order of removal fixes no time, the dormant jurisdiction of the court of original venue, on proper notice, may be reactivated for exclusive control of the cause. *Ibid.*

This cause was ordered removed to another county, but no part of the transcript was ever certified to or filed in the court of removal. After seven regu-

VENUE—*Continued.*

lar terms of court had intervened in the county of removal, defendants issued notice to plaintiffs that they would move in the court of original venue for a hearing of the cause. Plaintiffs' counsel accepted service of this notice without objection or protest. *Held:* Plaintiffs waived their right to object to further proceedings in the court of original venue, and its dormant jurisdiction was reactivated. *Ibid.*

WILLS.

§ 1. Distinction Between Wills and Other Instruments.

Agreement for survivorship in partnership property upon payment of certain sum to person designated is not testamentary disposition of property. *Silverthorne v. Mayo*, 274.

§ 31. General Rules of Construction.

Where the intent of testator is expressed in clear and unambiguous language there is no room for construction, and the intent of testator will be effectuated unless contrary to some rule of law or at variance with public policy. *Trust Co. v. Whitfield*, 69; *Trust Co. v. Green*, 339.

The intent of testator is the polar star that must guide the courts in the interpretation of a will. *Trust Co. v. Green*, 339.

Ordinarily the intent of the testator must be ascertained from a consideration of the will from its four corners, and such intent must be given effect unless contrary to some rule of law or at variance with public policy. *Ibid.*

Where the language of a will is ambiguous the court may take into consideration testator's circumstances, his relation to the objects of his bounty and what effect known forces may have had upon him at the time the will was executed in order to ascertain testator's intent. *Ibid.*

The cardinal principle in the interpretation of wills is to discover the intent of testator. *Marks v. Thomas*, 544.

The intent of testator must be ascertained if possible from the language used, considered in the light of attendant circumstances and giving its terms their legal significance. *Ibid.*

§ 33e. Construction of Wills—Annuities.

An annuity to testator's daughter "to be used by her for the support and maintenance of herself and my granddaughter . . . during the time of her natural life and until my said granddaughter shall have reached the age of 25 years" *is held*, construing the language contextually with other portions of the instrument to ascertain the testator's intent, to provide the annuity to testator's daughter for life, the arrival of the granddaughter at the age of 25 years having the effect of terminating the daughter's obligation to use part of the income for her support but not the daughter's right to receive the annuity. *Cansler v. McLaughlin*, 197.

§ 33g. Construction of Wills—Fee or Life Estate.

Testatrix left all of her real and personal property to her sister "excepting the following bequests." Testatrix then devised the sister a life estate in certain realty with provision that at her sister's death it should go to named nieces for life and at their death "back to my estate." *Held:* The sister did not take the fee in the realty even though the first clause be construed as a residuary clause, since the realty was excepted from that clause, and the term "back to my estate," in the context, means heirs general of testatrix. This

SECTIONS OF CONSTITUTION OF NORTH CAROLINA CONSTRUED.

ART.

I, sec. 11. In prosecution for felony less than capital, it is not necessary for court to appoint counsel for defendant except in exceptional circumstances. *S. v. Cruse*, 53.

I, sec. 11. Indictment must charge offense with sufficient certainty to enable defendant to prepare for trial and protect him from double jeopardy. *S. v. Greer*, 325; *S. v. Jenkins*, 396.

I, secs. 12 and 13. Upon appeal from conviction in recorder's court, defendant may be tried upon original warrant. *S. v. Doughtie*, 228.

I, sec. 14. Sentence within statutory maximum not cruel. *S. v. Smith*, 82.

I, sec. 17. Court may not base adjudication on information obtained from private investigation. *In re Custody of Gupton*, 303.

IV, secs. 2 and 10. Venue refers to county in which action is to be tried and not to jurisdiction. *Jones v. Brinson*, 506.

IV, sec. 11. Jurisdiction of emergency judge to hear chambers matters terminates with court he is assigned to hold. *Lewis v. Harris*, 642.

V, sec. 4. Does not authorize issuance of bonds without vote even within the limitation if bonds are not for necessary expense. *Wilson v. High Point*, 14.

VII, sec. 7. What is necessary municipal expense is question of law; city may not issue bonds without vote to pay entire initial cost of city-county building. *Wilson v. High Point*, 14.

X, sec. 5. Widow entitled to homestead. *Elledge v. Welch*, 61.

SECTION OF CONSTITUTION OF THE UNITED STATES CONSTRUED.

ART.

IV, sec. 2. Nonresident plaintiff is entitled to benefit of statute tolling statute of limitations. *Bank v. Appleyard*, 145.

GENERAL STATUTES CONSTRUED.

G.S.

1-16. Incompetent will be deemed to have pleaded all relevant defenses even though represented by guardian. *Elledge v. Welch*, 61.

1-21. In action instituted here on cause arising in another state between nonresidents, this statute applies. *Bank v. Appleyard*, 145.

1-38. In action in ejectment, defendant's evidence of title by adverse possession cannot justify nonsuit. *Barbee v. Edwards*, 215.

1-39; 1-42. Where plaintiff in action to quiet title establishes *prima facie* title he is entitled to presumptions created by statute. *Barbee v. Edwards*, 215.

1-40. Evidence of adverse possession *held* sufficient for jury. *Everett v. Sanderson*, 564.

1-47 (4); 1-56. Action attacking foreclosure on ground that debt had been paid prior to foreclosure is not action to redeem, and statutes do not apply. *Barbee v. Edwards*, 215.

1-64. Failure of respondent to plead infancy of petitioner constitutes waiver. *In re Custody of Allen*, 367.

1-87. Upon order changing venue, party procuring order must have transcript transferred, but when this is not done the dormant jurisdiction of court of original jurisdiction becomes reactivated. *Jones v. Brinson*, 506.

1-105. Findings *held* sufficient to support service upon nonresident auto owner. *Winborne v. Stokes*, 414.

1-111; 1-211. In action for trespass when there is no allegation that defendant is in possession, bond is not required. *Wilson v. Chandler*, 401.

1-122. Complaint must allege facts disclosing issuable facts determinative of plaintiff's right to relief. *Shives v. Sample*, 724.

1-123 (2). Causes *held ex contractu* and properly joined. *Perry v. Doub*, 233.

1-126. Where record does not indicate that defense was sham, order striking same will be held for error. *Dixie Lines v. Grannick*, 552.

1-139. Defendant must allege facts relied upon as constituting contributory negligence. *Hunt v. Wooten*, 42.

1-150; 1-156.1. Bill of discovery and bill of particulars are not inconsistent remedies. *Tillis v. Cotton Mills*, 124.

1-163. Power of court to allow amendment. *Simrel v. Meeler*, 668.

1-153. Appeal will not lie from denial of motion to strike made after demurrer. *Purvis v. Whitaker*, 262.

1-180. Court must charge on every essential feature of case with request. *Finch v. Ward*, 290; *Blanton v. Dairy*, 382; *S. v. Stroupe*, 34. Evidence *held* to require instruction on defendant's right to defend himself in his home and eject trespassers. *S. v. Poplin*, 728. Evidence *held* not to require charge on character evidence as substantive proof. *S. v. Williamson*, 652. Statement of court *held* not prejudicial as expression of opinion. *Simmons v. Highway Com.*, 532. Assignment of error for that charge failed to comply with statute is ineffectual as broadside exception. *R. R. v. Trucking Co.*, 422.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

1-183. Defendant's evidence favorable to plaintiff may be considered. *Nance v. Hitch*, 1.

1-184. Findings of fact of court has force of verdict of jury when supported by evidence. *Trust Co. v. Finance Corp.*, 478.

1-206. When objection to admission of evidence is sustained, adverse party must except. *Cathey v. Shope*, 345.

1-220. After expiration of term, special judge is without jurisdiction to hear motion to set aside judgment. *Jones v. Brinson*, 506.

1-212. Judgment by default establishes plaintiff's cause for trespass entitling him to such damages as may be ascertained on inquiry, but does not adjudicate title. *Wilson v. Chandler*, 401.

1-240. Owner is entitled to sue contractor without joinder of subcontractor performing defective work. *Gaither Corp. v. Skinner*, 254.

1-253. Parties *held* entitled to present determination as to persons entitled to share in *corpus* of estate after termination of trust. *Trust Co. v. Green*, 339.

1-288. When application is not made within ten days after expiration of term, appeal will be dismissed. *Anderson v. Worthington*, 577.

1-568.9 (c); 1-568.11. Appeal from order allowing examination of adverse party *held* premature. *Tillis v. Cotton Mills*, 124.

1-559; 1-560. Award is reviewable if arbitrator acts under mistake of law or exceeds his authority. *Cotton Mills v. Textile Workers Union*, 719.

6-21. Taxpayers may not recover attorney fees in their action against county when no money is restored to public treasury. *Rider v. Lenoir County*, 632.

7-52. Jurisdiction of emergency judge to hear chambers matters terminates with court he is assigned to hold. *Lewis v. Harris*, 642.

7-190; 7-222. County recorder's court and municipal recorder's court *held* to have concurrent jurisdiction of misdemeanors committed within city. *S. v. Sloan*, 547.

8-4. Requires courts to take judicial notice of applicable laws of another state. *Motor Co. v. Wood*, 468.

8-46. In action for permanent injuries, mortuary tables are competent. *Hunt v. Wooten*, 42. Annuity tables incompetent. *Ibid.*

9-39; 39-2. Where description is insufficient in itself and incapable of being reduced to certainty to matters *aliunde* to which it refers, statutes do not apply. *Holloman v. Davis*, 386.

14-17. Jury has unbridled discretion to recommend life imprisonment upon conviction of first degree murder, and neither solicitor nor private prosecution may argue that life sentences are always commuted. *S. v. Dockery*, 222.

14-32; 14-42; 148-26. Judgment of confinement in State's Prison at hard labor for term of two to five years *held* not excessive upon plea of *nolo contendere* to charge of assault with deadly weapon with intent to kill inflicting serious injury. *S. v. Cooper*, 241.

14-80. Cutting growing timber and removing same constitutes larceny. *S. v. Turner*, 411. Evidence *held* insufficient for jury. *Ibid.*

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

14-120. Where blank checks bearing forged signature are filled out at defendant's direction, they are uttered by defendant. *S. v. Cranfield*, 110.

14-197. Warrant *held* insufficient to charge offense. *S. v. Thorne*, 392.

14-218. Indictment must allege official act defendant sought to influence. *S. v. Greer*, 325.

14-223. Warrant *held* insufficient to charge offense. *S. v. Thorne*, 392; *S. v. Jenkins*, 396.

14-269. Evidence *held* sufficient to sustain conviction. *S. v. Williamson*, 652.

14-291.1. Statute proscribes four separate offenses, and indictment or warrant should not charge them alternative. *S. v. Albarty*, 130.

14-292. Whether "Negro pool" is game of chance or skill *held* for jury; person not playing but merely betting on game of chance is guilty. *S. v. Stroupe*, 34.

15-143. Bill of particulars cannot cure fatal deficiency in bill of indictment. *S. v. Greer*, 325.

15-153. Does not obviate necessity of indictment charging each essential element of the offense. *S. v. Greer*, 325.

15-177.1. Mere statement of trial judge that charges had been first tried in recorder's court *held* not prejudicial. *S. v. Williamson*, 652.

15-218. May not be used as substitute for appeal to correct alleged error in conduct of trial. *S. v. Cruse*, 53.

18-6; 15-27. When officer sees liquor in car search warrant is not necessary. *S. v. Ferguson*, 656.

18-11. Possession of any quantity of nontax-paid liquor raises presumption of possession for sale. *S. v. Gibbs*, 258.

18-13. This statute and not 15-27 governs warrant issued for search for illicit liquor. *S. v. Brady*, 404. Warrant issued by clerk on sworn affidavit of sheriff is valid. *S. v. Brady*, 407.

18-48. Possession within meaning of statute may be either actual or constructive. *S. v. Brown*, 260.

18-48; 18-50. Evidence tending to show that any quantity of nontax-paid liquor was found within curtilage of defendant's home is sufficient to take case to jury on charge of possession and possession for sale. *S. v. Gibbs*, 258.

20-38 (ff). Fact that deceased was riding bicycle on left side of street no defense to manslaughter prosecution. *S. v. Smith*, 82.

20-56; 20-57; 20-72 (b); 20-73; 20-78. Certificates of title endorsed in blank are not *indicia* of title so as to estop owner. *Hawkins v. Finance Co.*, 174.

20-134; 20-117; 20-141. Whether negligence in leaving vehicle parked without lights concurred in proximately causing death to passenger in car colliding with rear of truck *held* for jury. *Bumgardner v. Allison*, 621.

20-146; 20-164. Evidence *held* for jury on negligence and contributory negligence in this action for collision at intersection of highway and driveway. *Horton v. Peterson*, 446.

20-150 (c). Evidence *held* not to compel conclusion that driver attempted to pass at intersection. *Insurance Co. v. Cline*, 133.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

20-154. Motorist is required to give signal only when circumstances afford him grounds to believe his action may affect another vehicle. *Blanton v. Dairy*, 382.

20-155. Charge *held* for error in failing to charge law as to right of way at intersection. *Finch v. Ward*, 290.

20-158. Motorist should not stop at sign but at place enabling his act of stopping and looking effective. *Edwards v. Vaughn*, 89.

29-1, Rule 4. Upon death of heir without lineal descendants, title to land inherited passes to heirs of blood of ancestor. *Elledge v. Welch*, 61.

40-12; 136-19. Highway Commission cannot be sued in tort for taking, sole remedy being statutory. *Sale v. Highway Com.*, 599.

41-10. In action to quiet title plaintiff is not required to show that either he or defendant were in or out of possession. *Barbee v. Edwards*, 215. Owner may maintain action to quiet title even though he is not in possession and might maintain action in ejectment. *Pressly v. Walker*, 732.

46-23. Remaindermen may maintain proceeding for partition. *Richardson v. Barnes*, 399. Life tenant may join in partition. *Ibid.*

47-26. Deed of gift is valid without registration, but if not registered within two years it becomes void *ab initio*. *Justice v. Mitchell*, 364.

49-2. Offense of willful failure to support illegitimate child may be committed by out-of-state defendant. *S. v. Tickle*, 206. Disputed paternity may be determined in main action; "support" includes clothing and medical assistance. *S. v. Love*, 283. Indictment must charge that failure to support illegitimate child was willful. *S. v. Moore*, 743. Evidence *held* sufficient to sustain conviction. *S. v. Chambers*, 373.

50-10. Discretionary action of court in permitting defendant to file specific denial to paragraph of complaint not prejudicial. *Walker v. Walker*, 299.

50-13. Governs procedure to determine custody of child as between parents divorced in another state. *Finley v. Sapp*, 114. Natural right of father to custody does not limit discretion of court. *Ibid.*

58-176. Insurer paying loss is subrogated to insured's rights against tort-feasor. *Winkler v. Amusement Co.*, 589.

58-197. Knowledge of agent will not be imputed to insurer when agent participates in fraud. *Thomas-Yelverton Co. v. Ins. Co.*, 278.

61-1; 61-2; 61-3. Trustees of religious denomination may maintain action to quiet title to church property against members of congregation and trustee of the congregation. *Pressly v. Walker*, 632.

62-26.10. Findings of Utilities Commission conclusive when supported by evidence. *Utilities Commission v. R. R.*, 701. Trial court has no authority to make additional findings on appeal from Utilities Commission. *Utilities Com. v. Mead Corp.*, 451.

62-30; 160-256. City undertaking to furnish water outside of limits is not public service corporation and is not required to furnish service. *Fulghum v. Selma*, 100.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

62-39. Utilities Commission has authority to compel carrier to maintain public service facilities as may be reasonable and just. *Utilities Commission v. R. R.*, 701.

68-23; 68-39. That owner knowingly or negligently permitted mule to run at large may be inferred from fact that it repeatedly ran loose. *Kelly v. Willis*, 637.

75-4. Agreement not to carry on business within certain territory must be in writing and signed by party to be bound. *Ice Cream Co. v. Ice Cream Co.*, 317.

97-2 (r). Evidence *held* to show that hernia was compensable. *Rice v. Chair Co.*, 121,

97-39. Common law wife of deceased employee is not entitled to compensation. *Fields v. Hollowell*, 614.

97-84. Industrial Commission is sole judge of weight and credibility of evidence. *Moses v. Bartholomew*, 714.

97-86. Findings of Industrial Commission conclusive when supported by evidence. *Rice v. Chair Co.*, 121; *Moses v. Bartholomew*, 714. Transcript from Industrial Commission must be in question and answer form, but from Superior Court must be in narrative form. *Anderson v. Heating Co.*, 138.

105-267. Liability for tax cannot be determined in proceeding under declaratory judgment act. *Buchan v. Shaw*, 522.

105-168. Sale by wholesale second-hand car dealer to out-of-state retailers is taxable as retail sale. *Phillips v. Shaw*, 518.

128-9. Bond does not cover tort committed in prosecution of duties. *Langley v. Patrick*, 250.

136-19. Purchase of right of way by Commission gives it same rights as it would have by condemnation. *Sale v. Highway Com.*, 599. Statement of court that it is matter of common knowledge that construction of highway brings certain benefits to property owner along highway held not prejudicial. *Simmons v. Highway Com.*, 532.

143-291. Act will be liberally construed; fact that plaintiff's car was insured does not lessen recovery. *Lyon & Sons v. Board of Education*, 24.

160-13. Municipal trial justice's court may bind defendant over to recorder's court on charge of misdemeanor. *S. v. Doughtie*, 228.

160-200 (11) (31). Maintenance of traffic lights is governmental function of city. *Hamilton v. Hamlet*, 741.