NORTH CAROLINA REPORTS
VOL. 239

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1953
SPRING TERM, 1954

REPORTED BY
JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1954

CITATION OF REPORTS

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9 Iredell Law	as	31 N. C.
10 " "	"	32 "
11 " "	"	33 "
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13 " "	"	35 "
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1 Jones Law	"	46 "
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1 " Eq.	"	54 "
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5 " "	"	58 "
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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

FALL TERM, 1953—SPRING TERM, 1954

CHIEF JUSTICE:

W. A. DEVIN.[1]

ASSOCIATE JUSTICES:

M. V. BARNHILL,[2]
J. WALLACE WINBORNE,
EMERY B. DENNY,
S. J. ERVIN, JR.,[3]
JEFF. D. JOHNSON, JR.,
R. HUNT PARKER.

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

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

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE AND SUPREME COURT REPORTER

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

[1]Resigned 30 January, 1954.
[2]Appointed Chief Justice 1 February, 1954. Honorable William H. Bobbitt appointed Associate Justice upon the elevation of Honorable M. V. Barnhill to the Office of Chief Justice.
[3]Resigned 11 June, 1954. Honorable Carlisle Higgins appointed to succeed Justice Ervin.

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.
Clifton L. Moore	Eighth	Burgaw.
Q. K. Nimocks, Jr.	Ninth	Fayetteville.
Leo Carr	Tenth	Burlington.

SPECIAL JUDGES

Name	Address
George M. Fountain	Tarboro.
C. W. Hall	Durham.
Howard H. Hubbard	Clinton.
Grover A. Martin	Smithfield.
Malcolm C. Paul	Washington.

WESTERN DIVISION

Name	District	Address
John H. Clement[1]	Eleventh	Winston-Salem.
H. Hoyle Sink	Twelfth	Greensboro.
F. Donald Phillips	Thirteenth	Rockingham.
William H. Bobbitt[2]	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

Name	Address
George B. Patton	Franklin.
Susie Sharp	Reidsville.
Peyton McSwain	Shelby.
R. Lee Whitmire	Hendersonville.
W. A. Leland McKeithen[3]	Pinehurst.

EMERGENCY JUDGES

Name	Address
W. A. Devin	Oxford.
W. H. S. Burgwyn	Woodland.
Henry A. Grady	New Bern.
Felix E. Alley, Sr.	Waynesville.
John H. Clement	Walkertown.

[1]Resigned 10 March, 1954. Succeeded by Walter E. Johnston, Jr., who was appointed Resident Judge 11th Judicial District 4 June, 1954.

[2]Resigned as Judge of the Fourteenth Judicial District upon his appointment to the Supreme Court. Francis O. Clarkson appointed Judge of the Fourteenth Judicial District 1 February, 1954, to succeed Judge Bobbitt.

[3]Appointed 9 February, 1954.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. COHOON	First	Elizabeth City.
ELBERT S. PEEL	Second	Williamston.
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.
JOHN J. BURNEY, JR.	Eighth	Wilmington.
MALCOLM B. SEAWELL	Ninth	Lumberton.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

WALTER E. JOHNSTON, JR.[1]	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]Resigned upon being appointed Resident Judge 11th Judicial District. Succeeded by Harvey A. Lupton 4 June, 1954.

SUPERIOR COURTS, SPRING TERM, 1954

EASTERN DIVISION

FIRST JUDICIAL DISTRICT
Judge Carr

Beaufort—Jan. 11*; Jan. 18; Feb. 15† (2); Mar. 15* A; Apr. 5†; May 3† (2); June 21.
Camden—Mar. 8.
Chowan—Mar. 29; Apr. 26†.
Currituck—Mar. 1; April 5† S.
Dare—Feb. 1† S; May 24.
Gates—Mar. 22.
Hyde—May 17.
Pasquotank—Jan. 4†; Feb. 8†; Feb. 15* A (2); Mar. 15†; Apr. 26* S; May 10†; May 31*; June 7† (2).
Perquimans—Jan. 18† S; Jan. 25†; Apr. 12.
Tyrrell—Feb. 1†; Apr. 19.

SECOND JUDICIAL DISTRICT
Judge Morris

Edgecombe—Jan. 18; Mar. 1; Mar. 22* S; Mar. 29† (2); May 31 (2).
Martin—Mar. 15 (2); Apr. 12† A; June 14.
Nash—Jan. 25; Feb. 15† (2); Mar. 8; Apr. 19† (2); May 17* S; May 24.
Washington—Jan. 4 (2); Apr. 12†.
Wilson—Feb. 1†; Feb. 8*; Feb. 15* S (2); Mar. 29† (2); Apr. 19* S; May 3* (2); May 17†; June 21†.

THIRD JUDICIAL DISTRICT
Judge Bone

Bertie—Feb. 8 (2); May 10 (2).
Halifax—Jan. 25 (2); Mar. 8†; Mar. 15‡; Apr. 26; May 31†; June 7.
Hertford—Feb. 22; Apr. 12 (2).
Northampton—Mar. 29 (2).
Vance—Jan. 11*; Mar. 1*; Mar. 22†; June 14*; June 21†.
Warren—Jan. 4*; Jan. 18†; May 3†; May 24*.

FOURTH JUDICIAL DISTRICT
Judge Parker

Chatham—Jan. 11; Mar. 1†; Mar. 8† S; Mar. 15†; May 10.
Harnett—Jan. 4*; Feb. 1† (2); Mar. 15* A; Mar. 29† A; May 3†; May 17*; June 7† (2).
Johnston—Jan. 4† A (2); Jan. 18† S; Feb. 8 A; Feb. 15† (2); Mar. 1 A; Mar. 8; Apr. 12 A; Apr. 19† (2); June 21*.
Lee—Jan. 25† A (2); Mar. 22*; Mar. 29†; June 14† A.
Wayne—Jan. 18; Jan. 25†; Feb. 1† A; Mar. 1† A (2); Apr. 5; Apr. 12†; Apr. 19† A; May 24; May 31†; June 7† A.

FIFTH JUDICIAL DISTRICT
Judge Williams

Carteret—Mar. 8; June 7 (2).
Craven—Jan. 4; Jan. 25†; Feb. 1†; Feb. 8; Apr. 5; May 10†; May 31.
Greene—Feb. 22; Mar. 1; June 21.
Jones—Mar. 29.
Pamlico—Apr. 26 (2).
Pitt—Jan. 11†; Jan. 18; Feb. 15†; Mar. 15; Mar. 22; Apr. 12 (2); May 3† A; May 17†; May 24‡.

SIXTH JUDICIAL DISTRICT
Judge Frizzelle

Duplin—Jan. 4† (2); Jan. 25*; Mar. 8† (2); Apr. 5; Apr. 12†.
Lenoir—Jan. 18*; Feb. 15†; Feb. 22†; Mar. 15; Apr. 19; May 10†; May 17†; June 7†; June 14†; June 21*.
Onslow—Jan. 11 (2); Mar. 1; May 24 (2).
Sampson—Feb. 1 (2); Mar. 22† (2); Apr. 28; May 3†; June 7† A (2).

SEVENTH JUDICIAL DISTRICT
Judge Stevens

Franklin—Jan. 18† (2); Feb. 8*; Apr. 12*; Apr. 26† (2).
Wake—Jan. 4*; Jan. 4† A (2); Jan. 11†; Jan. 18† A; Feb. 1†; Feb. 8† A; Feb. 15† (2); Mar. 1* (2); Mar. 1† A (2); Mar. 15† (2); Mar. 29*; Mar. 29† A; Apr. 5†; Apr. 12† A; Apr. 19†; Apr. 26† A; May 3* A; May 10† (3); May 31* (2); May 31† A (2); June 14† (2).

EIGHTH JUDICIAL DISTRICT
Judge Harris

Brunswick—Jan. 18; Feb. 8†; Apr. 5†; May 10.
Columbus—Jan. 4† A (2); Jan. 25* (2); Feb. 15† (2); May 3*; June 14.
New Hanover—Jan. 11*; Feb. 1† A (2); Feb. 22*; Mar. 1*; Mar. 8† (2); Mar. 22† S (2); Apr. 12† (2); May 3† S (2); May 17*; May 24† (2); June 7*.
Pender—Jan. 4; Mar. 22†; Apr. 26.

NINTH JUDICIAL DISTRICT
Judge Burney

Bladen—Jan. 4; Mar. 15*; Mar. 22* S; Apr. 26†.
Cumberland—Jan. 4† S; Jan. 11*; Feb. 8† (2); Feb. 22* S; Mar. 1* A; Mar. 8*; Mar. 22† (2); Apr. 5* S; Apr. 12† S (2); Apr. 26* A; May 3† (2); May 17† S (2); May 31*.
Hoke—Jan. 18; Apr. 19.
Robeson—Jan. 11† A (2); Jan. 25* (2); Feb. 22† (2); Mar. 15* A; Apr. 5* (2); Apr. 19† A; Apr. 26† S; May 3* A (2); May 17† (2); June 7†; June 14*.

TENTH JUDICIAL DISTRICT
Judge Nimocks

Alamance—Jan. 18† A; Jan. 25† S; Feb. 22* A; Mar. 1* A; Mar. 22† A; Mar. 29†; Apr. 12* A; May 3* A; May 17† A; May 24†; June 7* A.
Durham—Jan. 4*; Jan. 11† (2); Jan. 25 A; Feb. 8* A; Feb. 15*; Feb. 22† (3); Mar. 15 A; Mar. 22*; Mar. 29* A; Apr. 5† A (2); Apr. 19 A; Apr. 26† (2); May 10* A; May 17*; May 24† A; May 31†; June 7 A; June 14* A; June 21*.
Granville—Feb. 1 (2); Apr. 5 (2).
Orange—Feb. 15† S; Mar. 15; Apr. 5† S; May 10†; June 7; June 14†.
Person—Jan. 25; Feb. 1† A; Apr. 19.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT
Judge Gwyn

Ashe—Apr. 12*; May 24† (2).
Alleghany—Jan. 25 A; Apr. 26.
Forsyth—Jan. 4 (2); Jan. 11† A; Jan. 18† (2); Feb. 1 (2); Feb. 15† (2); Mar. 1 (2); Mar. 8† A; Mar. 15† (2); Mar. 29 (2); Apr. 12† A; Apr. 19†; Apr. 26† A; May 3 (2); May 17†; May 24† A (2); June 7 (2); June 21† (2).

TWELFTH JUDICIAL DISTRICT
Judge Bobbitt

Davidson—Jan. 25; Feb. 15† (2); Apr. 5† A (2); May 3; May 24† A (2); June 21.
Guilford, Greensboro Division—Jan. 4† A; Jan. 4*; Jan. 11† (2); Feb. 1* (2); Feb. 1† A (2); Mar. 1* A; Mar. 1† (2); Mar. 15* (2); Mar. 29† A (2); Apr. 12† (2); Apr. 19* A; Apr. 26† A (2); May 10* A (2); May 31† (3); June 7* A (2).
Guilford, High Point Division—Jan. 11* A (2); Jan. 25† A; Feb. 15* A (2); Mar. 8*; Mar. 15† A (2); Mar. 29* (2); Apr. 26*; May 10† (2); May 24*; June 21† A.

THIRTEENTH JUDICIAL DISTRICT
Judge Armstrong

Anson—Jan. 11*; Mar. 1†; Apr. 12 (2); June 7†.
Moore—Jan. 18*; Feb. 8†; Mar. 22†; May 17*; May 24†.
Richmond—Jan. 4*; Feb. 1† A; Feb. 8† S; Mar. 15†; Apr. 5*; May 24† A; June 14† (2).
Scotland—Mar. 8; Apr. 26†.
Stanly—Feb. 1†; Feb. 8† A; Mar. 29; May 10†.
Union—Feb. 15 (2); May 3.

FOURTEENTH JUDICIAL DISTRICT
Judge Rudisill

Gaston—Jan. 11*; Jan. 18† (2); Mar. 8* A; Mar. 15† (2); Apr. 19*; May 17† A (2); May 31*.
Mecklenburg—Jan. 4*; Jan. 4† A (2); Jan. 18* A (2); Jan. 18† A (2); Feb. 1† (3); Feb. 1† A (2); Feb. 15† A (2); Feb. 22*; Mar. 1† (2); Mar. 1† A (2); Mar. 15* A (2); Mar. 15† A (2); Mar. 29† (2); Mar. 29† A (2); Apr. 12* A; Apr. 12†; Apr. 19† A; Apr. 26† (2); Apr. 26† A (2); May 10*; May 10† A (2); May 17† (2); May 24† A (2); June 7*; June 7† A (2); June 14†; June 21* (2).

FIFTEENTH JUDICIAL DISTRICT
Judge Rousseau

Alexander—Feb. 1 (2).
Cabarrus—Jan. 4 (2); Feb. 22†; Mar. 1† A; Apr. 19 (2); June 7† (2).
Iredell—Jan. 25 (2); Feb. 8† S; Mar. 8†; May 17 (2).
Montgomery—Jan. 18*; Apr. 5† (2).
Randolph—Jan. 25† A (2); Mar. 15† (2); Mar. 29*; June 21*.
Rowan—Feb. 8 (2); Mar. 1†; May 3 (2).

SIXTEENTH JUDICIAL DISTRICT
Judge Pless

Burke—Feb. 15; Mar. 8† S (2); May 31 (3).
Caldwell—Jan. 4† A (2); Feb. 22 (2); Apr. 26† A (2); May 17 (2); May 31† A (2).
Catawba—Jan. 11† (2); Feb. 1 (2); Apr. 5 (2); May 3† (2).
Cleveland—Jan. 4; Feb. 1† A (2); Mar. 22 (2); May 17† A (2).
Lincoln—Jan. 18 A; Jan. 25†; Apr. 26.
Watauga—Apr. 19*; June 7† A (2).

SEVENTEENTH JUDICIAL DISTRICT
Judge Nettles

Avery—Apr. 12 (2).
Davie—Feb. 15* S; Mar. 22; May 24†.
Mitchell—Mar. 29 (2).
Wilkes—Jan. 11† (3); Mar. 1 (3); Apr. 26† (2); May 31 (2); June 14† (2).
Yadkin—Jan. 4; Feb. 1 (3); May 10.

EIGHTEENTH JUDICIAL DISTRICT
Judge Moore

Henderson—Jan. 4† (2); Mar. 1 (2); Apr. 26† (2); May 24† (2).
McDowell—Jan. 11* A; Feb. 8† (2); June 7 (2).
Polk—Jan. 25 (2).
Rutherford—Feb. 22†; Apr. 12† (2); May 10 (2); June 21† (2).
Transylvania—Mar. 29 (2).
Yancey—Jan. 18†; Mar. 15 (2).

NINETEENTH JUDICIAL DISTRICT
Judge Clement

Buncombe—Jan. 4†* (2); Jan. 11 A (2); Jan. 18*†; Jan. 25; Feb. 1†* (2); Feb. 15*†; Feb. 15 A (2); Mar. 1†* (2); Mar. 15 A; Mar. 15*†; Mar. 22; Mar. 29†* (2); Apr. 12*†; Apr. 12 A; Apr. 19; Apr. 26; May 3†* (2); May 17*†; May 17 A (2); May 31†* (2); June 14*†; June 14 A (2).
Madison—Jan. 25† A; Feb. 22; Mar. 29 A (2); May 24; June 21.

TWENTIETH JUDICIAL DISTRICT
Judge Sink

Cherokee—Jan. 18† (2); Mar. 29 (2); June 14† (2).
Clay—Apr. 26.
Graham—Mar. 15 (2); May 31† (2).
Haywood—Jan. 4† (2); Feb. 1 (2); May 3† (2).
Jackson—Feb. 15 (2); May 17 (2); June 7† A.
Macon—Apr. 12 (2).
Swain—Mar. 1 (2).

TWENTY-FIRST JUDICIAL DISTRICT
Judge Phillips

Caswell—Mar. 15*; Mar. 29† S; Apr. 5† A.
Rockingham—Jan. 18* (2); Mar. 1†; Mar. 8*; Apr. 12†; May 3† (2); May 17* (2); June 7† (2).
Stokes—Jan. 4*; Mar. 29*; Apr. 5†; June 21*.
Surry—Jan. 4 A; Jan. 11; Feb. 8; Feb. 15 (2); Apr. 19; Apr. 26; May 31.

*For criminal cases only.
†For civil cases only.
‡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 A. PARKER, Assistant U. S. Attorney, Raleigh, N. C.
B. RAY COHOON, 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. NELSON B. CASSTEVENS, 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

EDWIN M. STANLEY, United States District Attorney, Greensboro.
LAFAYETTE WILLIAMS, Assistant U. S. District Attorney, Yadkinville.
ROBERT L. GAVIN, Assistant U. S. District Attorney, Sanford.
H. VERNON HART, Assistant U. S. District Attorney, Greensboro.
MISS EDITH HAWORTH, Assistant U. S. District Attorney, Greensboro.
WM. B. SOMERS, United States Marshal, Greensboro.
HENRY REYNOLDS, Clerk U. S. 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. SUE J. REDFERN, Deputy Clerk.

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

Shelby, third Monday in April and third Monday in October. THOS. E. RHODES, Clerk.

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

OFFICERS

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

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1953

ALFRED FLEET YANDELL, PLAINTIFF, v. NATIONAL FIREPROOFING CORPORATION; CHESAPEAKE & OHIO RAILWAY COMPANY, A CORPORATION; THE CLINCHFIELD RAILROAD COMPANY, AN UNINCORPORATED OPERATING ORGANIZATION AND PARTNERSHIP COMPOSED OF THE ATLANTIC COAST LINE RAILWAY COMPANY, A CORPORATION, AND THE LOUISVILLE & NASHVILLE RAILWAY COMPANY, A CORPORATION; SEABOARD AIR LINE RAILWAY COMPANY, A CORPORATION; PIEDMONT & NORTHERN RAILWAY COMPANY, A CORPORATION; AND S. P. KESTLER, DEFENDANTS; AND NATIONAL FIREPROOFING CORPORATION, DEFENDANT IN CROSS ACTION.

(Filed 16 December, 1953.)

1. Carriers § 8—

An initial carrier by rail furnishing a car for moving freight owes to the employees of the consignee, who are required to unload the car, the legal duty to exercise reasonable care to supply a car in reasonably safe condition, so that the employees of the consignee can unload the same with reasonable safety.

2. Same—

A carrier delivering to the consignee for unloading a car received by it from a connecting carrier owes to the employees of the consignee who are required to unload the car the legal duty to make reasonable inspection of the car to ascertain whether it is reasonably safe for unloading, and to repair or give warning of any dangerous condition in the car discoverable by such an inspection.

3. Same—

A shipper is under duty so to conduct its business as not negligently to injure another by any agency set in operation by it.

4. Same—

A shipper loading a car with actual or constructive knowledge that it is so defective as to be dangerous for unloading is liable to an employee of the consignee, who unloads the car, for injuries received by such employee as a result of such dangerous condition.

5. Same: Torts § 6—Answer of one defendant held to state cause of action against other defendant joined by it for contribution.

An employee of the consignee was injured while unloading a freight car as a result of a dangerous condition of the car. In his suit against the initial and delivering carriers and the agent of the delivering carrier charged with the duty of inspecting the car, the delivering carrier and its agent filed a cross action against the shipper for indemnity or contribution upon allegations that the defect in the car causing the injury was obvious to anyone entering it for the purpose of loading it, and that notwithstanding the shipper's actual or constructive knowledge of such defect, the shipper accepted, loaded and sealed the car, and thus authorized the use of a dangerous instrumentality to effect a business end. *Held:* The cross action sufficiently alleges negligence on the part of the shipper concurring with the negligence of the delivering carrier and its agent in failing to make proper inspection of the car and with the negligence of the initial carrier in furnishing the defective car, constituting the shipper a joint tort-feasor within the purview of G.S. 1-240, and therefore the demurrer of the shipper to the cross action was properly overruled.

6. Negligence § 6—

Concurrent negligence consists of negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence in producing a single, indivisible injury.

7. Negligence § 7—

Mere negligent omission of a person under duty of making inspection to discover and interrupt the result of a dangerous condition caused by the act of another does not constitute an intervening or superseding efficient cause relieving the original actor of liability.

8. Judgments § 32: Torts § 6—

Adjudication that plaintiff had failed to state a cause of action against one defendant as a joint tort-feasor does not preclude the other defendant from asserting a cross action against such defendant for contribution.

APPEAL by defendant National Fireproofing Corporation from *Pless, J.*, at March Term, 1953, of MECKLENBURG.

Civil action to recover damages for personal injuries suffered by the employee of the consignee while unloading an allegedly defective boxcar loaded by the consignor, heard upon the demurrer of the consignor to the cross action of the delivering carrier for indemnity or contribution.

The events resulting in this appeal are stated in chronological order and ultimate terms in the numbered paragraphs set forth below.

1. The National Fireproofing Corporation makes clay conduits at its factory in Haydenville, Ohio.

2. The National Fireproofing Corporation sold certain clay conduits to the Southern Bell Telephone & Telegraph Company.

3. Under the contract between them, the clay conduits were to be shipped in a railway boxcar of the closed type from Haydenville to Charlotte, North Carolina, where the boxcar was to be placed on a private siding for unloading by the employees of the Southern Bell Telephone & Telegraph Company.

4. Consequent to this contract, the Chesapeake & Ohio Railway Company, a common carrier by rail, delivered one of its boxcars to the National Fireproofing Corporation at the factory in Haydenville for loading and shipment to the Southern Bell Telephone & Telegraph Company.

5. The National Fireproofing Corporation loaded the boxcar with clay conduits weighing 67,100 pounds, and the boxcar was closed, sealed, and consigned to the Southern Bell Telephone & Telegraph Company at Charlotte.

6. After the boxcar was loaded, closed, sealed, and consigned, it was moved from Haydenville to Charlotte by the following common carriers by rail: Chesapeake & Ohio Railway Company, initial carrier; Clinchfield Railroad Company and Seaboard Air Line Railway Company, intermediate carriers; and Piedmont & Northern Railway Company, delivering carrier.

7. The Piedmont & Northern Railway Company placed the boxcar on the private siding in Charlotte for unloading by the employees of the Southern Bell Telephone & Telegraph Company.

8. The plaintiff Alfred Fleet Yandell and another employee of the Southern Bell Telephone & Telegraph Company broke the seal on the boxcar and attempted to open one of the car doors preparatory to unloading the boxcar for their employer. As they did so, the car door detached itself from the car and fell upon the plaintiff, inflicting upon him substantial personal injuries.

9. The plaintiff brought this action against the National Fireproofing Company, the Clinchfield Railroad Company, the Atlantic Coast Line Railway Company, the Louisville & Nashville Railway Company, the Seaboard Air Line Railway Company, the Piedmont & Northern Railway Company, and S. P. Kestler, the master mechanic of the Piedmont & Northern Railway Company, as defendants to recover the damages resulting from his personal injuries. The plaintiff made the Atlantic Coast Line Railway Company and the Louisville & Nashville Railway Company parties defendant on the theory that they operated the Clinchfield Rail-

road Company as partners. He joined Kestler as a party defendant upon the allegation that Kestler was employed by the Piedmont & Northern Railway Company to discharge the duties devolving upon it as the delivering carrier.

10. The pleadings in this case are numerous and voluminous. Limitations of space and time necessitate the statement of their purport in ultimate rather than specific terms.

11. The complaint undertook to state a single cause of action for negligence against all of the defendants as joint tort-feasors.

12. Each defendant filed a written demurrer challenging the sufficiency of the complaint to state a cause of action against the demurrant.

13. The hearing judge overruled the demurrers of the Chesapeake & Ohio Railway Company, the Piedmont & Northern Railway Company, and S. P. Kestler, and these three defendants filed answers to the complaint within the time appointed by law.

14. The hearing judge sustained the demurrers of the National Fireproofing Corporation, the Clinchfield Railway Company, the Atlantic Coast Line Railway Company, the Louisville & Nashville Railway Company, and the Seaboard Air Line Railway Company. The plaintiff did not move to amend his complaint, and judgments were entered dismissing the action as to these five defendants.

15. Subsequent to the dismissal of the plaintiff's action as to the National Fireproofing Corporation, the court, acting on the motion of the Piedmont & Northern Railway Company and S. P. Kestler, entered an order in the cause making the National Fireproofing Corporation an additional party defendant, directing the issuance of a new summons against it, and ordering it "to appear and answer the cross action of defendants Piedmont & Northern Railway Company and S. P. Kestler."

16. At the time of the entry of the order mentioned in the preceding paragraph, the Piedmont & Northern Railway Company and S. P. Kestler filed a joint answer in the cause, denying the validity of the cause of action asserted against them by the plaintiff, and pleading contributory negligence on the part of the plaintiff as an affirmative defense. They also incorporated in their answer a cross action against the National Fireproofing Corporation and the Chesapeake & Ohio Railway Company, which covers approximately ten pages of the record on this appeal and makes specific factual averments as the avowed basis for the prayers of the Piedmont & Northern Railway Company and S. P. Kestler for relief in the alternative over against the National Fireproofing Corporation and the Chesapeake & Ohio Railway Company by way of indemnity or contribution in case the plaintiff obtains judgment against the Piedmont & Northern Railway Company and S. P. Kestler on the cause of action pleaded against them in the complaint.

17. Pursuant to the order mentioned in paragraph 15, a new summons was issued and served upon the National Fireproofing Corporation, which appeared and demurred in writing to the cross action of the Piedmont & Northern Railway Company and S. P. Kestler against it.

18. The demurrer of the National Fireproofing Corporation asserts, in essence, that the allegations of the cross action do not state facts sufficient to subject it to liability to the Piedmont & Northern Railway Company and S. P. Kestler for either indemnity or contribution in case the plaintiff recovers judgment against the Piedmont & Northern Railway Company and S. P. Kestler on the cause of action stated against them in the complaint.

19. Judge Pless overruled the demurrer, and the National Fireproofing Corporation appealed, assigning that ruling as error. The only parties participating in the appeal are the Piedmont & Northern Railway Company, S. P. Kestler, and the National Fireproofing Corporation.

W. S. O'B. Robinson, Jr., and W. B. McGuire for defendants Piedmont & Northern Railway Company and S. P. Kestler, appellees.

Helms & Mulliss and Garland & Garland for defendant National Fireproofing Corporation, appellant.

ERVIN, J. The only question arising on this appeal is whether Judge Pless erred in overruling the demurrer of the National Fireproofing Corporation to the cross action of the Piedmont & Northern Railway Company and S. P. Kestler.

The National Fireproofing Corporation makes these assertions by this demurrer:

1. That the allegations of the cross action do not state facts sufficient to subject the National Fireproofing Corporation to liability to the Piedmont & Northern Railway Company and S. P. Kestler for either indemnity or contribution in case the plaintiff recovers judgment against the Piedmont & Northern Railway Company and S. P. Kestler upon the cause of action for actionable negligence alleged against them in the complaint.

2. That the former judgment sustaining the former demurrer of the National Fireproofing Corporation to the complaint constitutes an estoppel by judgment, barring the Piedmont & Northern Railway Company and S. P. Kestler from prosecuting their cross action against the National Fireproofing Corporation.

The demurrer rests its first assertion upon two theories, which are alternative in character. It asserts primarily that the allegations of the cross action do not disclose the breach of any duty owed by the National Fireproofing Corporation to the plaintiff, and that consequently they fail

to charge the National Fireproofing Corporation with any negligence whatever. It insists secondarily that although the allegations of the cross action may charge the National Fireproofing Corporation with negligence, they make it affirmatively to appear that negligence on the part of the Chesapeake & Ohio Railway Company, the Piedmont & Northern Railway Company and S. P. Kestler constituted intervening or superseding efficient causes, which insulated the negligence of the National Fireproofing Corporation and exempted it from all legal accountability, either direct or indirect, for the plaintiff's injuries.

In passing on the validity of the first assertion of the demurrer and the theories underlying it, we necessarily look to the relevant rules of law prescribing the duties of carriers and shippers by rail with respect to the employees of consignees who unload railroad cars, all of the factual allegations of the cross action, and such of the factual averments of the complaint as charge the Piedmont & Northern Railway Company and S. P. Kestler with actionable negligence.

An initial carrier by rail, which furnishes a car for moving freight, owes to the employees of the consignee, who are required to unload the car, the legal duty to exercise reasonable care to supply a car in reasonably safe condition, so that the employees of the consignee can unload the same with reasonable safety. *Copeland v. Chicago, B. & Q. R. Co.,* 293 F. 12; *Missouri Pac. R. Co. v. Armstrong,* 200 Ark. 719, 141 S.W. 2d 25; *Powell v. Pacific Naval Air Base Contractors,* 92 Cal. App. 2d 629, 209 P. 2d 631; *Atlanta & W. P. R. Co. v. Creel,* 77 Ga. App. 77, 47 S.E. 2d 762; *Jackson v. Chicago, M. St. P. & P. R. Co.,* 238 Iowa 1253, 30 N.W. 2d 97; *Louisville & N. R. Co. v. Freppon,* 134 Ky. 650, 121 S.W. 454; *Corbett v. New York C. & H. R. R. Co.,* 215 Mass. 435, 102 N.E. 648; *D'Almeida v. Boston & M. R. R.,* 209 Mass. 81, 95 N.E. 398, Ann. Cas. 1913C, 751; *Ladd v. New York, N. H. & H. R. Co.,* 193 Mass. 359, 79 N.E. 742, 9 L.R.A. (N.S.) 874, 9 Ann. Cas. 988; *Parker v. Grand Trunk Western R. Co.,* 261 Mich. 293, 246 N.W. 125; *Stoutimore v. Atchison, T. & S. F. Ry. Co.,* 338 Mo. 463, 92 S.W. 2d 658; *Allen v. Larafee Flour Mills Corporation,* 328 Mo. 226, 40 S.W. 2d 597; *Dominices v. Monongahela Connecting R. Co.,* 328 Pa. 203, 195 A. 747; 75 C.J.S., Railroads, section 924. See, also, the cases collected in this annotation: 152 A.L.R. 1313. A delivering carrier by rail, which delivers to the consignee for unloading a car received by it from a connecting carrier, owes to the employees of the consignee, who are required to unload the car, the legal duty to make a reasonable inspection of the car to ascertain whether it is reasonably safe for unloading, and to repair or give warning of any dangerous condition in the car discoverable by such an inspection. *Erie R. Co. v. Murphy,* 108 F. 2d 817, 126 A.L.R. 1093; *Missouri Pac. R. Co. v. Sellers,* 188 Ark. 218, 65 S.W. 2d 14; *Chicago, R. I. & P. Ry. Co. v.*

Lewis, 103 Ark. 99, 145 S.W. 898; *Butler v. Central of Ga. Ray Co.*, 87 Ga. App. 492, 74 S.E. 2d 395; *Atlanta & W. P. R. Co. v. Creel, supra*; *Roy v. Georgia R. & Banking Co.*, 17 Ga. App. 34, 86 S.E. 328; *Ruiz v. Midland Valley R. Co.*, 158 Kan. 524, 148 P. 2d 734, 152 A.L.R. 1307; *Folsom v. Lowden*, 157 Kan. 328, 139 P. 2d 822; *Willis v. Atchison, T. & S. F. Ry. Co.*, 352 Mo. 490, 178 S.W. 2d 341; *Markley v. Kansas City Southern Ry. Co.*, 338 Mo. 436, 90 S.W. 2d 409; *Griffin v. Payne*, 95 N. J. Law 490, 113 A. 247; *Spears v. New York Cent. R. Co.*, 61 Ohio App. 404, 22 N.E. 2d 634; *Ambrose v. Western Md. Ry. Co.*, 268 Pa. 1, 81 A. 2d 895; 75 C.J.S., Railroads, section 924. See, also, the cases collected in this annotation: 126 A.L.R. 1095.

Since it is not engaged in operating a railroad, the law does not put on the shipper of freight the specific duties owing by carriers by rail to the employees of a consignee who unload railroad cars. But it does lay on the shipper the general duty so to conduct its business as not negligently to injure another by any agency set in operation by it. *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551; 65 C.J.S., Negligence, section 4.

While diligent search by counsel and court fails to unearth a single decision dealing with the exact factual situation presented by the pleadings in this case, violations of its general duty not to injure another by a negligent act are adjudged sufficient under somewhat similar circumstances to impose legal liability upon shippers loading railroad cars for resultant personal injuries to others. It is held, for example, that where the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employee to be loaded, the carrier and the shipper are both liable to the injured employee; for the proximate cause of the injury is the defective car. *Chesapeake & O. Ry. Co. v. Cochran*, 22 F. 2d 22; *Waldron v. Director General*, 266 F. 196; *Markley v. Kansas City Southern R. Co., supra;* 44 Am. Jur., Railroads, section 433. It is settled, moreover, that where the carrier furnishes a proper car to the shipper for loading, and the shipper loads it in a negligent manner, the shipper is liable for injuries caused by his negligence to an employee of the consignee who undertakes to unload the negligently loaded car. *Wintersteen v. National Cooperage & Woodenware Co.*, 361 Ill. 95, 197 N.E. 578. See, also, in this connection: 74 C.J.S., Railroads, section 371.

In our judgment, there is no distinction in principle in so far as the shipper is concerned between these rulings and a case where the shipper loads a railroad car with actual or constructive knowledge that it is so defective as to be dangerous for unloading and in that way causes injury to an employee of the consignee who undertakes to unload it. Our opinion on this score is in harmony with that of the writers of the American Law Institute's Restatement of the Law of Torts, who give us this supposititious

case by way of illustration: "The A Coal Company sells coal to B. Company, a factory owner, to be delivered on the private siding of the B Company by the C Railroad Company. The cars are supplied by the C Company. A reasonably careful inspection made while the cars are being loaded by the A Company would have disclosed a defect which made the cars dangerous for unloading. D, an employee of the B Company, while unloading the cars on B's private siding is hurt because of this defect. The A Company is liable to D, although the B Company is regarded as under a duty, before turning the car over to its employees for unloading, to make an inspection which would have disclosed the defect." Am. Law Inst., Restatement of the Law of Torts, Vol. 2, Section 393.

It would unduly prolong this opinion without accomplishing any compensating good to analyze in detail all of the factual allegations of the cross action, and such of the factual allegations of the complaint as charge the Piedmont & Northern Railway Company and S. P. Kestler with actionable negligence. When these allegations are reduced to ultimate averments, they recount the events enumerated in paragraphs 1 to 9, both inclusive, of the statement of facts, and these additional matters:

1. From the time of its delivery to the National Fireproofing Corporation by the Chesapeake & Ohio Railway Company for loading until the plaintiff's injury, the boxcar involved in this litigation was defective in that a number of the vertical steel beams, which were designed to hold its wooden framework and parts in place, were broken. As a consequence, there was a likelihood that the doors of the boxcar would escape from their fastenings and fall upon anyone who attempted to open them when the framework and wooden parts of the boxcar were displaced in any degree by a heavy load. The defective condition of the boxcar was obvious to those who had occasion to enter the boxcar for the purpose of loading it, and to those who were experienced in operating freight trains.

2. At the times of handling and loading the boxcar, both the Chesapeake & Ohio Railway Company and the National Fireproofing Corporation either actually knew, or by the exercise of reasonable care would have known, that the boxcar was dangerous for unloading because of its defective state, and that in consequence any employee of the Southern Bell Telephone & Telegraph Company who undertook to open either of its doors preparatory to unloading it was likely to suffer personal injury.

3. Despite its actual or constructive knowledge of the danger to which its conduct in such respects exposed those who might be called upon to unload the defective boxcar, the Chesapeake & Ohio Railway Company furnished the defective boxcar to the National Fireproofing Corporation for loading with 67,100 pounds of clay conduits, and sealed, consigned, and moved the same after it had been so loaded to the line of the next connecting carrier to the end that the heavily laden boxcar should be

placed on the private siding in Charlotte for unloading by the employees of the Southern Bell Telephone & Telegraph Company.

4. Despite its actual or constructive knowledge of the danger to which its conduct in such respects exposed those who might be called on to unload the defective boxcar, the National Fireproofing Corporation accepted the defective boxcar from the Chesapeake & Ohio Railway Company, loaded it with 67,100 pounds of clay conduits, and authorized its use by the Chesapeake & Ohio Railway Company, the intermediate carriers, and the Piedmont & Northern Railway Company for conveying the clay conduits to the private siding in Charlotte so that the clay conduits could be removed from the defective boxcar at that place by the employees of the Southern Bell Telephone & Telegraph Company.

5. Although a reasonable inspection of the boxcar would have revealed its defective condition and enabled them to remedy the defects or give appropriate warning of their existence in time to have averted the subsequent injury to the plaintiff, the Piedmont & Northern Railway Company, as the delivering carrier, and its chief mechanic, S. P. Kestler, who was employed to perform the duties devolving upon it as delivering carrier, failed to make a reasonable inspection of the boxcar before placing it in its defective state on the private siding in Charlotte for unloading by the employees of the Southern Bell Telephone & Telegraph Company.

6. The act of the Chesapeake & Ohio Railway Company in furnishing the defective boxcar, the act of the National Fireproofing Corporation in loading and authorizing the use of the defective boxcar, and the failure of the Piedmont & Northern Railway Company and S. P. Kestler to make a reasonable inspection of the defective boxcar combined to cause the injury suffered by the plaintiff when he undertook to open one of the doors of the boxcar preparatory to unloading the clay conduits for his employer, the Southern Bell Telephone & Telegraph Company.

These allegations refute the first assertion of the demurrer. They charge that the National Fireproofing Corporation authorized the use of a dangerous instrumentality to effect a business end, and in that way negligently exposed the plaintiff to imminent peril. They aver, moreover, that concurrent negligence of the Chesapeake & Ohio Railway Company, the National Fireproofing Corporation, the Piedmont & Northern Railway Company, and S. P. Kestler combined proximately to cause a single, indivisible injury to the plaintiff. This being true, the claim of the Piedmont & Northern Railway Company and S. P. Kestler for contribution from the National Fireproofing Corporation finds full sanction in the provisions of the statute now codified as G.S. 1-240.

The soundness of our conclusion in respect to the sufficiency of the allegations to charge concurrent negligence becomes manifest when due heed is paid to the legal concept embodied in that term. Concurrent

negligence consists of negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence in producing a single, indivisible injury. *Garbe v. Halloran,* 150 Ohio St. 476, 83 N.E. 2d 217. According to the allegations, the plaintiff would not have suffered harm if the Chesapeake & Ohio Railway Company had not negligently furnished the defective boxcar, or if the National Fireproofing Corporation had not negligently loaded and authorized the use of the defective boxcar, or if the Piedmont & Northern Railway Company and S. P. Kestler had not negligently failed to make a reasonable inspection of the defective boxcar. *Miller v. Board of Education,* 291 N.Y. 25, 50 N.E. 2d 529; *Tawney v. Kirkhart,* 130 W. Va. 550, 44 S.E. 2d 634.

To be sure, the allegations warrant the inference that the negligence of the National Fireproofing Corporation in loading and authorizing the use of the defective boxcar would not have resulted in any harm to the plaintiff if the Piedmont & Northern Railway Company and S. P. Kestler had not failed to make a reasonable inspection of the defective boxcar. This circumstance does not impair the validity of our conclusion in respect to the sufficiency of the allegations to charge concurrent negligence. This is so because the mere negligent omission of the Piedmont & Northern Railway Company and S. P. Kestler to interrupt the result of the National Fireproofing Corporation's negligence did not amount to an intervening or superseding efficient cause relieving the National Fireproofing Corporation from liability. *Georgia Power Co. v. Kinard,* 47 Ga. App. 483, 170 S.E. 688; *Miller v. Board of Education, supra; Erie County United Bank v. Beck,* 73 Ohio App. 314, 56 N.E. 2d 285; 38 Am. Jur., Negligence, section 72; 65 C.J.S., Negligence, section 111. The writers of the American Law Institute's Restatement of the Law of Torts lay down the controlling rule on this aspect of the controversy in this wise: "Failure of a third person to perform a duty owing to another to protect him from harm threatened by the actor's negligent conduct is not a superseding cause of the other's harm." They add this comment: "The third person's failure to perform his duty in this respect makes him concurrently liable with the negligent actor for any harm which results from the actor's negligence and which would have been prevented by the performance of the third person's duty." Am. Law Inst., Restatement of the Law of Torts, Vol. 2, Section 452.

The second assertion of the demurrer lacks validity for reasons fully stated in the recent case of *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566.

For the reasons given, the judgment overruling the demurrer of the National Fireproofing Corporation is

Affirmed.

RICHARD D. GIBSON v. EARLE WHITTON.

(Filed 16 December, 1953.)

1. Negligence § 19c—

Nonsuit on the ground of contributory negligence may be properly entered only when plaintiff's own evidence establishes this defense as the sole reasonable inference deducible therefrom, and it may not be entered when it is necessary to rely in whole or in part on defendant's evidence or when diverse inferences upon the question are reasonably deducible from plaintiff's evidence.

2. Automobiles §§ 8i, 18h (3)—

Plaintiff's evidence in this case *held* not to show contributory negligence on his part as a matter of law in colliding with defendant's vehicle at an intersection within a municipality, it appearing upon plaintiff's evidence that he was traveling upon a through street, that defendant's vehicle approached the intersection along the servient highway from plaintiff's left, and that, as the vehicles approached the intersection at approximately the same time, plaintiff assumed that defendant would stop before entering the intersection, and acted on this assumption until too late to avoid the accident.

3. Compromise and Settlement § 2: Evidence § 42a—

Evidence of an offer to compromise, as such, is inadmissible as to the party making it.

4. Evidence § 42a—

Testimony of plaintiff to the effect that the day after the collision, while both he and defendant were in the hospital, defendant stated that if plaintiff would wait until defendant got out of the hospital defendant would take care of everything, *is held*, when considered in context, not an offer to compromise, but competent as an admission of liability on the part of defendant.

5. Evidence § 18—

Where it appears in the record that the credibility of plaintiff's testimony had been challenged by vigorous cross-examination, the ruling of the trial court in admitting testimony corroborating plaintiff will not be held for error.

6. Same—

The admission of corroborative evidence rests largely in the discretion of the trial court to keep its scope and volume within reasonable bounds.

7. Appeal and Error § 6c (4)—

Objection that portions of corroborative testimony did not in fact corroborate the witness cannot be sustained in the absence of a motion to strike that part deemed objectionable.

APPEAL by defendant from *Sharp, Special Judge,* and a jury, at 27 April Extra Regular Civil Term, 1953, of MECKLENBURG.

Civil action to recover for personal injuries and property damage resulting from a collision of two automobiles in a street intersection in the City of Charlotte.

The collision occurred at the intersection of East Seventh Street, which runs east and west, and Laurel Avenue, which runs north and south. Stop signs which face north and south on Laurel Avenue at the intersection make East Seventh Street the favored, through street, and Laurel Avenue the servient street.

The collision occurred in the nighttime. The plaintiff was operating his De Soto automobile eastwardly on East Seventh Street; the defendant was driving a Cadillac southwardly on Laurel Avenue. Therefore, as the two vehicles approached the intersection, the plaintiff was on the right. He was also on the through street as designated by the stop signs.

The plaintiff testified in part: "As I approached the intersection . . ., when I was about 100 feet from the intersection of Laurel and Seventh, I noticed the headlights of this automobile. . . . These lights that I observed were coming from the north side; from my left. . . . At the time I first observed these headlights I blew my horn and took my foot off the accelerator. . . . I went on and when I got up approximately 50 feet from the intersection, by then I knew that this automobile, I could see the front of it by then. . . . When I first observed the defendant's vehicle it was, I would say, approximately 25 feet from the intersection. On this occasion there was a stop sign on North Laurel Avenue. The defendant's automobile was north of the stop sign. The stop sign is located approximately 16 feet north of the intersection. His vehicle was, I would say, approximately 10 to 15 feet further from the stop sign. I would say that the defendant's vehicle was traveling between 15 and 20 miles an hour at that time. When I first observed the defendant's vehicle, I would say I was going between 30 and 35 miles an hour. That was when I first observed the lights. When I first observed the vehicle, I would say I was driving between 25 and 30. After I first observed his vehicle, I applied my brakes to stop. The defendant did not stop at the intersection before he entered. . . . The front of my vehicle and the right side of his collided. . . . approximately the middle of the right side of it. After the vehicles collided my vehicle did not travel any distance. . . . the defendant's traveled about 20 feet. It went on the southeast corner and hit this big tree." (Then follows a narrative of the nature and extent of his personal injuries and property damage.)

Cross-examination: ". . . East Seventh is about 50 feet wide . . . I would say that Seventh Street . . . is substantially wider than Laurel; . . . At the intersection of East Seventh and Laurel, East Seventh is downgrade some. The approach to East Seventh on Laurel going south is slightly upgrade. . . . I was on my right hand side of East 7th Street.

I was near the dividing line in the middle of the road. . . . I testified that when I first saw the lights of the Whitton car I estimated that I was about 100 feet west of the intersection. When I first saw the Whitton car, I stated that I was then between 40 and 50 feet west of the intersection. The first part of the Whitton car that I saw was the headlights, the front end of the automobile. Actually seeing the car itself the first I saw was the front end. It had not entered the intersection. When I first saw the headlights, not the beams, but the headlights, the front end of the Whitton car, the Whitton car was approximately 25 feet from the intersection. . . . When I saw the headlights of the other car, the beam itself, I took my foot off the accelerator. I did not put my foot on the brake pedal when I took it off the accelerator. I put my foot on the brake pedal when I was approximately, I'll say 40 or 50 feet from the intersection, when I knew that the car wasn't going to stop. . . . I put my brakes on as hard as I could. I skidded some. I would say I skidded approximately 25 feet, . . . I don't know whether or not I was skidding from the time I put on my brakes until the time of the collision; it happened so quick I couldn't say. I think I was skidding when I hit the Whitton car. . . . He did not enter the intersection before I did. He was driving slower than I was, . . . the Whitton car was on its right side of Laurel Avenue. . . . Whenever the impact, he had just crossed this center line; . . ."

With respect to plaintiff's Exhibit B, he testified on cross-examination as follows: "This is a photograph looking south on Laurel. That is the direction in which the Whitton car was traveling. There is a hedge on top of a brick wall in a yard that goes all the way up to the sidewalk. I would think that the top of that hedge is at least 5 feet higher than the level of the paved portion of North Laurel. Well, you can see the headlights, I don't care if this is 20 feet high. You can see the front end of the Whitton car before it enters the intersection. That hedge was there at that time. That wall was there at that time."

With respect to plaintiff's Exhibit C, he testified on cross-examination as follows: "Those two cars or similar cars were there in about that position. They were cars similar to these. I see on Plaintiff's Exhibit C the top of an automobile between the camera and the chimney on the house beyond Laurel Avenue. That is the top of an automobile. You could see the lights of Mr. Whitton's car there. You could not see the car itself. I saw the car before it entered the intersection."

Recalled: "I had my headlights on immediately before the collision. They were on dim."

Police Officer Wallace, after describing the position of the cars when he arrived at the scene, stated that in his conversation with the defendant at the hospital "He told me he did not stop, that he slowed down but did

not stop." On cross-examination this witness also said he had a conversation with the plaintiff at the hospital: "He did not tell me he was approximately 100 feet west of the intersection when he first saw the headlights or the reflection of the lights on the car. The question that I asked him was the distance the danger is first apparent, . . . and he told me approximately 50 feet. . . ; that he was about 50 feet back from the west of the intersection when he first noticed danger. He estimated he was going 30 to 40 miles per hour at the time. That was when he was about within 50 feet of the intersection . . ."

The defendant's version of the occurrence as related by him is in part: "We were going south on the right-hand side of the street. As I approached Seventh Street, I slowed up, . . . Then I entered the intersection. I slowed up, and to the best of my recollection I looked to the right and looked to the left, came to a practical stop, possibly not a complete stop; I did not see anything. I drove on . . . started across the street, maybe attained a speed of 10 or 15 miles an hour, then I was hit by the other car. . . . When my car was struck, it was struck just about the center post between the doors. In so far as my car was concerned, the result of the impact was it wrecked the car completely. . . . I was not knocked out of the car. . . . At the time of the impact I think I was slightly south of the intersection of the center lines of the two streets. I was on my right-hand side."

Cross-examination: "I was familiar with this intersection. I knew that Seventh Street was what they called a through street or an arterial street and one of the main highways leading out of Charlotte. I knew it was a heavily traveled street. I knew that there was a stop sign at Seventh and Laurel for traffic on Laurel Avenue. I said that I am not sure that I came to a dead stop. I have a clear recollection that I looked both ways. . . . Looking to the right I was looking west on Seventh Street. That street is straight for a number of blocks from that corner. . . . I did not see a car coming. I imagine there were some cars on the right, but I don't know, that would keep me from seeing a block away. I mean parked on the right. I looked to the right and saw nothing coming and to the left and saw nothing coming. There was nothing in the street or anything in the topography of the land, there was nothing on Seventh Street to keep me from seeing beyond the parked cars. . . . After looking to the right one time, I then looked to the left. I doubt if I ever looked back to the right. I don't recollect whether at the time I did look I had gotten up to where I had a good view of the street. . . . I never did see the Gibson car before the impact; I did not notice it after. I can't testify that I came to a full stop."

The following issues, raised by the pleadings, were submitted to the jury and answered as indicated:

"1. Was the plaintiff Richard D. Gibson injured, and his automobile damaged, by the negligence of the defendant Earle Whitton, as alleged in the Complaint? Answer: Yes.

"2. Did the plaintiff Richard D. Gibson contribute to his injury and damage by his own negligence, as alleged in the Answer? Answer: No.

"3. What amount, if any, is the plaintiff Richard D. Gibson entitled to recover of the defendant Earle Whitton for personal injuries to the plaintiff Richard D. Gibson? Answer: $500.00.

"4. What amount, if any, are the plaintiffs entitled to recover of the defendant Earle Whitton for damage to the automobile of Richard D. Gibson? Answer: $1250.00

"5. Was the defendant Earle Whitton injured by the negligence of the plaintiff Richard D. Gibson, as alleged in the counterclaim? Answer: ....

"6. What amount, if any, is the defendant Earle Whitton entitled to recover of the plaintiff Richard D. Gibson on the counterclaim for personal injuries to the defendant Earle Whitton? Answer: ...."

From judgment entered on the verdict, the defendant appeals, assigning errors.

Francis H. Fairley, William H. Booe, and Robinson & Jones for plaintiff, appellee.

Helms & Mulliss, John D. Hicks, and Cochran, McCleneghan & Miller for defendant, appellant.

JOHNSON, J. The defendant urges that his motion for judgment as of nonsuit should have been allowed upon the ground that the plaintiff's evidence establishes contributory negligence as a matter of law.

Contributory negligence is an affirmative defense which must be pleaded and proved. G.S. 1-139. Even so, nonsuit is proper when the plaintiff's own evidence establishes this defense (*Bundy v. Powell,* 229 N. C., 707, 51 S.E. 2d 307), but it may not be entered when it is necessary to rely in whole or in part upon the defendant's evidence, or when diverse inferences upon the question are reasonably deducible from plaintiff's evidence, the rule being that a motion for nonsuit on the ground of contributory negligence will be allowed only when the plaintiff's evidence is so clear that no other reasonable inference is deducible therefrom. *Bundy v. Powell, supra; Beck v. Hooks,* 218 N.C. 105, 10 S.E. 2d 608. See also *Mikeal v. Pendleton,* 237 N.C. 690, 75 S.E. 2d 756; *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538; *Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 121.

An examination of the record in the light of these principles of law leaves the impression that the plaintiff made out a clear case of actionable

negligence, free of facts and circumstances shown by his own evidence amounting to contributory negligence as a matter of law. The motion for judgment as of nonsuit was properly overruled.

The cases relied on by the defendant, *Morrisette v. Boone,* 235 N.C. 162, 69 S.E. 2d 239, and *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25, are factually distinguishable.

The next group of exceptions brought forward relate to rulings on the reception of evidence. In response to questions put to the plaintiff in respect to what the defendant said to him at the hospital the day after the collision, the trial court permitted the plaintiff to testify over objecion: "He said if I would wait until he got out of the hospital that he would take care of everything. . . . He said he would take care of everything and I didn't have anything to worry about."

The defendant insists that this line of testimony should have been excluded as amounting to an offer of compromise. It is elemental that evidence of an offer to compromise, as such, is inadmissible as an admission of the party making it. *Dixie Lines v. Grannick,* 238 N.C. 552, 555, 78 S.E. 2d 410; *Merchant v. Lassiter,* 224 N.C. 343, 30 S.E. 2d 217; Stansbury, N. C. Evidence, Sec. 180. Dean Wigmore says: "The true reason for excluding an offer of compromise is that it *does not* ordinarily proceed from and *imply a specific 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, Third Ed., Vol. III, Sec. 1061, p. 28.

But be this as it may, the challenged statement, when considered in context, appears not to have been made on the theory of an offer to compromise, but rather as tending to show an admission of liability on the part of the defendant. The evidence was competent and admissible for that purpose. *Wells v. Burton Lines,* 228 N.C. 422, 45 S.E. 2d 569; *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211. See also *Brown v. Wood,* 201 N.C. 309, 160 S.E. 281.

The defendant also assigns as error the rulings of the court in permitting the witness M. L. Kimbro to recount, over objections, the circumstances surrounding the wreck as told him by the plaintiff. The following is an illustrative portion of witness Kimbro's testimony to which the defendant excepted:

". . . He (the plaintiff) told me roughly, . . . how this collision came about.

"Q. What did he tell you?

"Objection.

"Mr. Fairley: I ask it for the purpose of corroboration, your Honor.

"COURT: OVERRULED. This is offered only for the purpose of corroborating Mr. Gibson, if you find it does corroborate.

"EXCEPTION No. 21.

"A. . . ., and he told me after he stopped at the red light at Pecan and Seventh, he was coming on down, he seen the headlights of the car coming up over the rise of Laurel Avenue. He thought he was going to stop. . . .

"Q. Did he say whether or not the car came to a stop at the stop sign?

"Objection. Overruled. EXCEPTION No. 22.

"A. He said it didn't stop; that it came on out in front of him."

The defendant seeks to invoke the rule that corroborative evidence of this kind—previous consistent statements—ordinarily is not admissible to bolster the testimony of a witness until the witness has been impeached in some way. Stansbury, N. C. Evidence, Sec. 50. The gist of defendant's contention is that the plaintiff had been cross-examined in mere routine fashion without impairment of his credibility. However, our examination of the record impels the other view. The general tenor of the cross-examination, covering 10 pages of the printed record, discloses an earnest and vigorous effort to discredit the plaintiff's testimony in chief. And it is manifest that the efforts of counsel were not without some measure of success. As to this, attention is directed to the plaintiff's admission of error in his drawing: "The first mark indicating the position of my automobile that I made was right here at the south curb. . . . That's the mark that I put on there. When I put that mark there, well, I just made a mistake; I meant to put it up closer to the center line. . . ." It is also noted that before the witness Kimbro testified as to his conversation with the plaintiff, the defendant had cross-examined plaintiff's witness Wallace in respect to the statements plaintiff had made to him about the collision. The application of the rules regulating the reception and exclusion of corroborative testimony of this kind, so as to keep its scope and volume within reasonable bounds, is necessarily a matter which rests in large measure in the discretion of the trial court. The rulings of Judge Sharp in admitting the corroborative testimony of the witness Kimbro have the sanction of authoritative decisions of this Court. *S. v. Exum,* 138 N.C. 599, 50 S.E. 283. Stansbury, N. C. Evidence, Sec. 31, footnotes, for collection of cases. For criticism of the rule which sanctions this kind of evidence, see Wigmore on Evidence, Third Ed., Sec. 1122 *et seq.*

As to the further contention that portions of the corroborative statements did not in fact corroborate the plaintiff's testimony (*S. v. Rollins,* 113 N.C. 722, 18 S.E. 394), it is enough to say that no motion was made to strike any part of the witness' answers. This renders the defendant's latter contention untenable. The rule is that where a question asked a witness is competent, exception to his answer, when incompetent in part,

should be taken by motion to strike out the part that is objectionable. *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *Luttrell v. Hardin,* 193 N.C. 266, 136 S.E. 726. See also *Cathey v. Shope,* 238 N.C. 345, 78 S.E. 2d 135.

The remaining exceptions brought forward, including some 13 which relate to the charge, have been examined. They are without substantial merit. The rulings and instructions to which these exceptions relate are either correct or nonprejudicial under the rule of contextual construction. Prejudicial error has not been made to appear. The verdict and judgment will be upheld.

No error.

ARTHUR W. BRYANT v. M. H. MURRAY.

(Filed 16 December, 1953.)

1. Malicious Prosecution § 3—

In an action for malicious prosecution the question of probable cause must be determined in accordance with whether the facts and circumstances within the knowledge of defendant at the time he instituted the criminal prosecution were sufficient to induce a reasonably prudent man to believe that plaintiff was guilty of the offense.

2. Malicious Prosecution § 9b—In this action for malicious prosecution, evidence of want of probable cause held sufficient for jury.

In an action for malicious prosecution based upon a nonsuited prosecution for larceny, evidence to the effect that plaintiff had taken stone from defendant's premises in defendant's absence, but that defendant had purchased the stone from plaintiff, making a part payment with the balance to be paid in cash upon delivery, and that defendant stopped payment on the check given for the balance because of dispute as to weight, and that before the warrant was sworn out plaintiff had advised defendant that he took the stone and was holding it in his yard pending settlement of the dispute, *is held* sufficient to be submitted to the jury upon the question of want of probable cause, since it shows that defendant had knowledge of facts negating felonious intent on plaintiff's part in taking the stone, irrespective of any contentions by defendant as to notation on the check, his right to direct payment, and right to possession of, or title to the stone.

3. Malicious Prosecution § 3—

The fact that defendant in an action for malicious prosecution, before instituting the criminal prosecution, was advised by a reputable attorney, who had been given full statement of the facts, that in his opinion the plaintiff was guilty of the offense, is not conclusive upon the question of probable cause.

4. Same—

The fact that plaintiff in an action for malicious prosecution had waived preliminary examination and given bond for his appearance in the Superior

Court on the charge constituting the basis for the action, and that the grand jury had returned a true bill against him in the Superior Court, makes out a *prima facie* case of probable cause only, and plaintiff is entitled to rebut the *prima facie* case.

5. Same—

The fact that in the first prosecution of the offense constituting the basis for an action for malicious prosecution, plaintiff's motion for judgment of nonsuit was denied at the close of the State's evidence, and a mistrial thereafter ordered for illness of the judge, is not conclusive on the question of probable cause.

6. Malicious Prosecution § 10: Trial § 29—

In an action for malicious prosecution an instruction to the effect that all the evidence tended to show that defendant had knowledge of facts negating probable cause and that the jury should answer the issue as to want of probable cause in the affirmative must be held for reversible error, since the instruction is tantamount to a directed verdict on the issue in favor of plaintiff upon whom rested the burden of proof.

APPEAL by defendant from *Sharp, Special Judge,* May Term, 1953, of MECKLENBURG.

This is a civil action to recover damages for malicious prosecution. The evidence pertinent to this appeal in substance is as follows:

1. Plaintiff was a partner with several of his brothers in a business in which they were engaged in cutting and selling stone at Charlotte, North Carolina, for building purposes. The defendant is a resident of Mocksville and at the time involved was engaged in building a residence for himself.

2. The defendant testified that on 14 May, 1951, he visited the plaintiff's plant in Charlotte and made an agreement for the purchase of three tons of cut stone at $60.00 per ton. According to plaintiff's evidence, the defendant placed an order for three tons of stone at $40.00 per ton and for labor at $20.00 per ton to cut the stone according to specifications; that the defendant was informed there would be some waste in cutting the stone and that he could have the waste if he wanted it. The defendant testified that he made a deposit of $50.00 on the purchase price of the stone. On the other hand, according to the evidence of the plaintiff, it was agreed that the $50.00 deposit was to apply on the cost of the labor in cutting the stone, the stone being held by the plaintiff on consignment. In any event, it was agreed that the balance would be paid when the stone was picked up. On the following day the defendant called the plaintiff and changed his order to three and one-fourth tons and also ordered certain special pieces of stone for a window sill, no price being fixed for these extra pieces of stone in this conversation.

3. On the following Thursday, 17 May, 1951, the defendant's truck driver picked up the stone in Charlotte, giving plaintiff a check for $145.00. This check had written on it: "For bal. for 3-¼ tons cut stone." At the time the stone was picked up, the plaintiff gave the defendant's driver an invoice and collected from him additional cash in the amount of $23.21. From this invoice it appears that instead of charging for three and one-fourth tons of stone, the plaintiff charged for three and one-third tons, and quoted the price of stone at $40.00 a ton and the labor at $1.00 per hundred pounds, and added $18.20 for the extra pieces of stone sold for a window sill. When the stone arrived in Mocksville the defendant weighed it and found that it did not weigh three and one-fourth tons. He then undertook to call the plaintiff, but being unable to get him he called the bank on which his check for $145.00 was drawn and stopped payment thereon. When he later got the plaintiff on the telephone, which was on 18 May, 1951, the plaintiff explained that the weight of the stone had reference to its weight before it was cut, and the defendant said he understood that it had reference to its weight after it was cut. It was agreed, however, that the defendant would keep the stone and that he would call the bank upon which his check was drawn and instruct it to pay the check. The defendant testified that he called the bank and directed it to pay the check. It developed, however, the bank made no record of the call and the stop-payment order which had been taken orally remained in effect and the check was dishonored upon presentation. After the check had been returned unpaid, the plaintiff tried to get in touch with the defendant but was unable to do so; thereupon, on 26 May, 1951, the plaintiff's brothers went to Mocksville while the defendant was out of town and took the stone from his property and carried it back to Charlotte.

4. The defendant discovered on Monday, 28 May, 1951, that the stone in question had been removed from his premises. He called the bank and was informed that the stop-payment order had not been removed and that his check had not been paid. Whereupon, the defendant called the plaintiff on long distance and was informed that he had sent for the stone and had it in his possession in Charlotte. According to the defendant's evidence, he offered to pay the amount of the check if the plaintiff would redeliver the stone to him in Mocksville but the plaintiff declined, informing him that the only way he could get the stone was to pay $25.00 more for his trouble in going after it, and that it would be necessary for him to send his own truck to Charlotte for the stone.

5. Thereafter, the defendant recited his version of the facts to an attorney, a reputable member of the North Carolina State Bar, who advised that in his opinion the plaintiff was guilty of larceny. Whereupon, the defendant swore out a warrant before a justice of the peace in

Davie County charging the plaintiff with larceny. The defendant (the plaintiff herein) was arrested on 7 June, 1951, and lodged in the jail of the City of Charlotte. He was never carried before the justice of the peace who issued the warrant, and, according to his evidence, never waived the preliminary hearing. Bond was fixed by the justice of the peace who issued the warrant, in an undated order, in the sum of $500.00 for his appearance in the Superior Court of Davie County to be held in Mocksville on 27 August, 1951. According to the record, the justice of the peace rendered the following judgment: "After hearing the evidence in this case, it is adjudged that the defendant is guilty." Bond was executed in Charlotte before a justice of the peace of Mecklenburg County on 7 June, 1951. A true bill was returned against the defendant (the present plaintiff), at the August Term, 1951, of the Superior Court of Davie County. The cause finally came on to be heard at the August Term, 1952, of the Superior Court of Davie County and the court, after hearing the evidence, sustained a motion for judgment as of nonsuit. In the trial below, issues were submitted to the jury and answered as herein set forth:

"1. Did the defendant procure the prosecution of the plaintiff for larceny in the Superior Court of Davie County as alleged in the complaint? Answer: Yes.

"2. If so, was such prosecution without probable cause? Answer: Yes.

"3. If so, was such prosecution with malice? Answer: Yes.

"4. What actual damages, if any, has the plaintiff sustained as a result of said prosecution? Answer: $5,500.00.

"5. Was the defendant motivated by actual malice in said prosecution? Answer: Yes.

"6. If so, what punitive damages, if any, is the plaintiff entitled to recover? Answer: None."

The defendant appeals from the judgment entered on the verdict and assigns error.

Robinson & Jones for appellant.
Thomas G. Lane, Jr., for appellee.

DENNY, J. The first assignment of error is based upon the defendant's exceptions to the refusal of the court below to sustain his motion for judgment as of nonsuit.

The appellant takes the position that the court should have sustained his motion on the ground that plaintiff's evidence was insufficient to show lack of probable cause. He bases his position on four propositions, which he insists should be considered in combination, as well as singly, as follows:

"(a) Upon the uncontradicted evidence plaintiff participated in the surreptitious taking of property of the defendant in such a manner as to create a reasonable inference that the taking was with a felonious intent.

"(b) The advice of a member of the North Carolina Bar, which is now a State agency, that on a given state of facts he was of the opinion that the person charged is guilty of a particular crime, as distinguished from mere advice to swear out a warrant, should be held to be conclusive on the question of law involved in the opinion as it relates to probable cause.

"(c) The plaintiff gave an appearance bond and waived preliminary hearing and later the grand jury returned a true bill. The *prima facie* case of probable cause thus made was not rebutted.

"(d) A Superior Court Judge presiding over a trial of the criminal charge held that the evidence was sufficient to sustain a conviction."

These propositions will be considered in the order in which they are presented.

The defendant contends that the controversy between the plaintiff and the defendant as to whether a part of the price of the cut stone was for labor and a part for the unfinished stone, has no material bearing on this case. In this conclusion we concur. He does contend, however, that he had the right to direct the application of the $145.00 represented by his check and that he did so by marking thereon: "For bal. 3-¼ tons cut stone," citing *Thomas v. Bank,* 183 N.C. 508, 112 S.E. 27. It is true that where a debtor owes two or more debts and makes a payment, it must be applied according to his direction made at or before the time the payment was made. *French v. Richardson,* 167 N.C. 41, 83 S.E. 31; *Stone v. Rich,* 160 N.C. 161, 75 S.E. 1077; *Young v. Alford,* 118 N.C. 215, 23 S.E. 973; *Moose v. Marks,* 116 N.C. 785, 21 S.E. 561. Even so, the notation on the defendant's check, in light of the facts and circumstances disclosed by the record, is of no particular significance. For, as we interpret the evidence, the plaintiff informed the defendant at the time the stone was purchased that it was held by him on consignment and could not be delivered except for cash.

Immediately after the stone was delivered in Mocksville the defendant weighed it and concluded there was a shortage, and stopped payment on his check before communicating with the plaintiff. After getting in touch with the plaintiff and having a discussion with him about the loss of weight in cutting the stone, the defendant agreed to keep it and to instruct the bank to pay the check. However, the check was dishonored when presented and the plaintiff thereupon, being unable to contact the defendant, sent to Mocksville for the stone. All of the stone, including the pieces for the window sill, was carried back to plaintiff's place of business. Thereafter, on Monday, 28 May, 1951, the defendant called the plaintiff and said to him: "Someone stole my stone up here. I went out there this

morning and it was gone." The plaintiff replied: "Yes, sir, it's here on the yard. . . . You stopped payment on the check and we couldn't find you anywhere, so we picked it up and brought it back until we can get this thing settled here one way or the other."

The defendant contends that when he agreed to keep the stone and to remove the stop-payment on his check, then the title thereto passed to him. Moreover, he submits that if the title to none of the stone passed, he had the right to retain the possession thereof until his cash payments were returned.

Ownership of the stone or the right to its possession, at the time the criminal prosecution was instituted, is not conclusive on the question of probable cause. However, the decisions of this Court support the view that title to the stone never passed to the defendant since his check for the balance of the purchase price was not paid. *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391; *S. c.,* 237 N.C. 318, 75 S.E. 2d 312; *Weddington v. Boshamer,* 237 N.C. 556, 75 S.E. 2d 530; *Parker v. Trust Co.,* 229 N.C. 527, 50 S.E. 2d 304; 46 Am. Jur., Sales, section 447, page 613. Furthermore, the fact that the defendant made a deposit with the plaintiff does not change the rule with respect to the passing of title. In the above cited case of *Motor Co. v. Wood, supra,* James P. Junghans, Jr., made a deposit of $50.00 in cash on the Ford car involved. A day or two later he gave a worthless check for the balance of the purchase price and obtained possession of the car. We held that since the check for the balance of the purchase price was not paid, the title to the car never passed to Junghans.

The question here is whether the facts and circumstances within the knowledge of the defendant, at the time he instituted the criminal prosecution, were sufficient to induce a reasonably prudent man to believe that the plaintiff took the stone with a felonious intent. Or, to put it another way, were the facts within his knowledge sufficient to induce a reasonably prudent man to suspect that the plaintiff was guilty of the offense charged? *Smith v. Deaver,* 49 N.C. 513; *Wilkinson v. Wilkinson,* 159 N.C. 265, 74 S.E. 740; *Humphries v. Edwards,* 164 N.C. 154, 80 S.E. 165; *Mooney v. Mull,* 216 N.C. 410, 5 S.E. 2d 122; *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609; 34 Am. Jur., Malicious Prosecution, section 47, page 731.

The second proposition or contention submitted by the defendant is that if the facts be conceded to be insufficient to show probable cause, the defendant ought to be exonerated as a matter of law, since, before instituting the criminal prosecution he consulted a reputable member of the North Carolina State Bar, which is a State agency, and such attorney after being given a full statement of the facts, advised that in his opinion the plaintiff was guilty of larceny.

This contention will not be upheld. It is contrary to the uniform decisions in this jurisdiction with respect to advice of counsel in such cases. *Davenport v. Lynch,* 51 N.C. 545; *Smith v. B. & L. Ass'n,* 116 N.C. 73, 20 S.E. 963; *Thurber v. B. & L. Ass'n,* 116 N.C. 75, 21 S.E. 193; *Downing v. Stone,* 152 N.C. 525, 68 S.E. 9. In the last cited case, *Hoke, J.,* in speaking for the Court, said: "The decisions of this State have uniformly held that advice of counsel, however learned, on a statement of facts, however full, does not of itself and as a matter of law afford protection to one who has instituted an unsuccessful prosecution against another; but such advice is only evidence to be submitted to the jury on the issue of malice. . . . And where it is proven that legal advice was taken by a prosecutor, this too is a relevant circumstance in connection with other facts, admitted or established, to be considered by the court in determining the question of probable cause. . . . This restriction as to the advice of counsel learned in the law on facts fully and fairly stated does not seem to be in accord with the weight of authority as it obtains in other jurisdictions, . . . but it has been too long accepted and acted on here to be now questioned, and we are of opinion, too, that ours is the safer position."

The third argument submitted on the motion for judgment as of nonsuit is to the effect that the plaintiff waived preliminary examination and gave bond for his appearance in the Superior Court, in which court the grand jury returned a true bill against him. Therefore, the defendant contends that a *prima facie* case of probable cause was made out and was not rebutted in the trial below. *Jones v. R. R.,* 125 N.C. 227, 34 S.E. 398; *S. c.,* 131 N.C. 133, 42 S.E. 559. Conceding all this to be true, except the contention that probable cause was not rebutted in the trial below, nothing more than a *prima facie* case as to probable cause was made out, but not a conclusive one, and it was still open to the plaintiff to prove there was no probable cause. *Bowen v. Pollard,* 173 N.C. 129, 91 S.E. 711; *Kelly v. Shoe Co.,* 190 N.C. 406, 130 S.E. 32; *Young v. Hardwood Co.,* 200 N.C. 310, 156 S.E. 501; *Hawkins v. Dallas,* 229 N.C. 561, 50 S.E. 2d 561.

The final contention on the motion for judgment as of nonsuit is that the plaintiff was tried in the Superior Court in Davie County on the bill of indictment returned by the grand jury, which resulted in a mistrial, but the court held the State's evidence was sufficient to sustain a conviction.

The record of such trial is not in evidence. However, it is apparent from the testimony of some of the witnesses that prior to the trial in which the criminal action against the plaintiff was dismissed, the case was called at a previous term and when the State rested the defendant (the plaintiff in this action), moved for judgment as of nonsuit. The

motion was overruled and the witnesses for the defendant (plaintiff herein) were sworn and the court was adjourned for the day. It further appears that when court convened the next morning, the presiding judge was suffering from a serious attack of laryngitis to such an extent that he withdrew a juror and ordered a mistrial.

The ruling in denying the motion for judgment as of nonsuit is not conclusive on the question of probable cause. If it were otherwise, then in all such criminal prosecutions, if the defendant's motion for judgment as of nonsuit was overruled, probable cause would be conclusively established even though the jury acquitted the defendant.

The defendant's exceptions to the refusal of the court below to sustain his motion for judgment as of nonsuit are overruled. We think the plaintiff's evidence sufficient to require its submission to the jury.

The defendant, however, assigns as error that portion of her Honor's charge on the second issue, reading as follows: "Now, members of the jury, when material facts are not in dispute, what constitutes probable cause constitutes a question of law for the Court. If the facts are in dispute, you would find the facts and the Court would tell you what effect the various findings you might make would have, that is, which one would constitute probable cause and which ones would not. Therefore, since all the evidence is that the defendant knew that the reason the plaintiff took the stone was because the check had been dishonored, the Court charges you you would answer this second issue YES."

We think this assignment of error must be upheld. It was tantamount to a directed verdict in favor of the plaintiff on this issue. The burden of proof on this issue was upon the plaintiff. A directed verdict in favor of a party having the burden of proof is error. *Shelby v. Lackey*, 236 N.C. 369, 72 S.E. 2d 757, and cited cases.

For the reasons stated, the defendant is entitled to a new trial and it is so ordered.

New trial.

STATE v. CLARENCE TURBERVILLE.

(Filed 16 December, 1953.)

1. Automobiles § 28d—

In this prosecution for homicide growing out of an automobile collision, testimony that defendant was staggering *is held* upon the record to refer to defendant's actions shortly before the collision and not to defendant's actions at the coroner's inquest some time after the accident, and therefore exception to the admission of the testimony is not sustained.

2. Criminal Law § 48c—

The general admission of evidence competent only for the purpose of corroboration will not be held for error in the absence of a request by defendant at the time of its admission that its purpose be restricted.

3. Automobiles § 28e—Evidence held sufficient to sustain verdict of guilty of manslaughter.

Evidence tending to show that shortly before the accident defendant was staggering and cursing, that he declared his intention to drive his car, and got in the driver's seat and drove off in a rapid manner in the direction of the scene of the collision, that the car was not stopped nor the driver changed, and that immediately before and at the point of collision the car was being driven on its left side of the center line of the highway at a speed of from 40 to 50 miles per hour approaching the crest of a hill, resulting in a collision with a car traveling in the opposite direction, in which several occupants of the cars were fatally injured, *is held* sufficient to sustain verdict of involuntary manslaughter.

4. Criminal Law § 52a (4)—

Defendant's evidence in conflict with that of the State cannot justify nonsuit, since conflict in the testimony is for the jury to resolve.

5. Automobiles §§ 28f, 30d—Instruction defining under the influence of intoxicating liquor held not prejudicial.

An instruction that a person is under the influence of intoxicating beverages if he has drunk such a quantity thereof as to cause him to lose the normal control of his bodily or mental "factors" or both to such an extent as to cause partial impairment of either or both of these "factors," *is held* insufficient to justify a new trial, it being apparent that "factors" was used for the word "faculties" and must have been so understood by the jury, and the term "partial impairment" being insufficient to constitute prejudicial error when read in connection with other portions of the charge.

6. Criminal Law § 81c (2)—

An excerpt from the charge will not be held for reversible error when the charge construed contextually is not prejudicial.

7. Criminal Law § 79—

Exceptions not set out in the brief and in support of which no argument is stated or authority cited, are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *McLean, Special Judge*, at May Criminal Term, 1953, of ROBESON.

Criminal prosecution upon a bill of indictment, containing three counts, charging that defendant "did unlawfully, willfully, and feloniously kill and slay" (1) "one Bristow Leggett," (2) "one Steve Leggett," and (3) "one L. K. Turberville," against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

The defendant pleaded not guilty.

The case on appeal discloses that upon trial in Superior Court these facts appear to be uncontroverted: Early Sunday night, 2 November, 1952, there was an automobile collision on Highway No. 41 at a point in the State of North Carolina about six and a half miles south of Fairmont, North Carolina, and north of Lake View, South Carolina. The collision was between a 1950 Ford, headed south and operated by one LeGrand Hardin, and a 1946 Ford, owned and occupied by defendant Clarence Turberville and others. And as a result of this collision Bristow Leggett, Steve Leggett and L. K. Turberville came to their deaths.

The State offered testimony of Willie James Wilson, tending to show that "a little after night" on 2 November, 1952, defendant was seen at Mayo's filling station located in South Carolina between Lake View and the North Carolina State line; that he was getting out of a car "on the driving side"; that he was heard to talk and seen to walk; that "he was staggering around the place cussing"; that someone was heard to make a statement to him, after which he said that "if they were going to get in and to go ahead," and "in reply to what they said, he said he drove the G— d— car there and he was going to drive the d— thing away"; that "he was talking about the car, and got in the car on the driving side"; that he left, and "when he drove off he patted the gas and spinned his wheels until he hit the highway"; and when he got on the road "he drove off fast" . . . headed the way the wreck happened.

And the State offered evidence tending to show that the wreck or collision occurred near and south of the crest of a hill about four miles north of Mayo's filling station, from which point the highway is paved and straight both north and south.

And LeGrand Hardin, as witness for the State, testified substantially as follows: That he was driving what is known as the Leggett car, "a '50 Ford," at the time of the collision; that Bristow Leggett and Steve Leggett were with him,—Bristow in the middle and Steve on the outside; that they left Fairmont, North Carolina, about 6:30, headed for South Robeson School house; that it was then dark; that as they were traveling along, about 7:30 o'clock, driving 45 and 50 miles an hour, on the right side of the road, upgrade after having crossed Ashpole Swamp, where the road is straight, he saw the lights of a car—quoting him, "I saw the lights coming up the hill; I couldn't tell what side of the road it was on; just as I climbed the hill I saw his bright lights ahead and the car on my side; . . . I whipped and turned the car over on his side of the road to try to miss him; he hit me; the car I was meeting was on the road at the time it hit me; it was on my side; all I know is that the front end hit my car; my opinion is that the other car was running pretty fast when I saw him coming on my side of the road; I do not know what happened when it struck my car. I do not know what happened after that. I came to after

a while . . . my ribs were crushed and some of them broken, my chin cut . . . and my left leg hurt. I stayed in the hospital from that night until Tuesday or Wednesday afternoon . . ."

And on cross-examination the witness Hardin said, among other things, "When I hit the crest of the hill the car was on my side right in my face . . . it was all the way across the line on my side of the road . . . almost on the shoulder of the road . . . I cut my wheels to the left . . . I had gotten my left wheel over the center line when the collision took place. It was not exactly a head-on. He hit me on my right side—the front fender . . ."

F. F. Bowen, a State Highway patrolman, testified that he went to the scene of the collision, and found the '50 Ford four-door sedan and a '46 Ford convertible coupe had collided in the middle of the road,—the '50 Ford headed south and the '46 Ford headed north—near the center of the highway; that there were signs on the left portion of the shoulder, coming north from Lake View; and, quoting, "I saw L. K. Turberville, the deceased, that was in the convertible; he was lying in the road near the convertible . . . unconscious and bleeding; I saw Bristow Leggett there, —he was in the ambulance; I saw Steve Leggett,—he was in the automobile dead . . . in the right front seat of the automobile and kind of pushed up on top of the seat from the impact; I saw LeGrand Hardin there,—he was in the ambulance; I did not see Clarence Turberville . . . the '50 Ford . . . was in the left ditch on the left-hand side of the road headed south . . . the '46 Ford was lying across the white line of the road with the front of it headed in a westward direction overturned on its side; it had been over on the top but it had been overturned to get someone out,—the right front of it was the point of impact . . . the hood . . . was mashed in considerably,—the right front headlight, the right front wheel and the right front were demolished."

And this witness, continuing his testimony, said: "I saw Clarence Turberville that night when I arrived at the hospital . . . some 30 or 40 minutes later . . . he was lying on a stretcher in the corridor . . . I talked with him . . . on two separate occasions that night, the first time at 8 o'clock; the next time was approximately 8:30 or 9 o'clock; with respect to the wreck he told me that he, in company with Lee King, L. K. Turberville and Lloyd Hill, had proceeded from Red Springs earlier in the day to visit some friends in the vicinity of Fairmont; that he left his friends' home and relatives' home and went to Mayo Bass' establishment in South Carolina . . . When I asked him if he stopped anywhere he told me that he stopped at T. Ivey's home which is located between Barnesville and Fairmont; in the company of T. Ivey they went to Mayo Bass' and that T. drove; after they got to Mayo's he stated that he had a drink; he did not say what kind of drink he had; I asked him if he drove the car

away from there and he said he did not—that he was in the back seat asleep. I asked him who did, and he said he did not know . . . he said, 'I didn't know anything until I woke up in the hospital' . . ."

And this witness testified: "At the time I saw Clarence Turberville in the hospital he had a very strong odor of intoxicant on his breath, and while he was in the X-ray room he vomited, and this had a strong odor of intoxicant; he vomited twice in my presence."

And this witness further testified to conversation with Willie James Wilson, and with LeGrand Hardin tending to corroborate testimony given by each of them as hereinabove set forth.

LeGrand Hardin, being recalled to the stand, testified that on the Sunday afternoon that the accident happened when the Leggett boys and he were in the car none of them was drinking at all; and that along there about the swamp he did not see another automobile headed in the same direction, saying "I did not overtake one or pass one in there anywhere."

Defendant, reserving exception to the denial of his motion for judgment as of nonsuit as to each count in the bill of indictment, made when the State first rested, offered testimony tending: (1) To contradict the testimony of the State's witness, Willie James Wilson, in respect to conduct and movements of defendant at Mayo's filling station, and as to defendant driving to, and away from this station; (2) To show that defendant was not intoxicated; and (3) To show that L. K. Turberville, brother of defendant who was killed in the collision, was driving the car from Mayo's, and was driving when the wreck happened; and that the car had not stopped, nor had the driver been changed from Mayo's to where the wreck occurred.

Also Lloyd Hill, testifying as witness for defendant, said that he was in the back seat of defendant's car, and was injured in his breast, ribs broken, lung punctured and arms and legs skinned; and that he was in hospital "one day short of two weeks."

And Lee King, testifying as witness for defendant, said that he was on right-hand side of front seat, that he too was injured in the collision, a fracture between his eyes, and that he was in hospital for a month. This witness also testified in part: "I did not see a car approaching until we got to the hill . . . a slight hill just as you come into the swamp. We had never quite reached it, and just as we got about fifty yards from the crest of the hill two sets of car lights came up over the hill running side by side . . . I said 'Look out, L. K.,' and that was all. We were right on them. The car in which I was riding was on the right-hand side of the highway heading north. The car was being driven approximately 40 to 50 miles an hour. It might have been 50 miles an hour . . ."

Defendant renewed his motion at close of all the evidence for judgment as of nonsuit as to each count contained in the bill of indictment, and excepted to denial of the motion.

Verdict: Guilty of involuntary manslaughter as charged in the first, second and third counts in the bill of indictment.

Judgment: On the first count: Confinement in the State's Prison at hard labor for a period of not less than 7 years nor more than 12 years.

On the second count: Confinement in the State's Prison at hard labor for a period of not less than 12 years nor more than 20 years, to commence at the expiration of the sentence pronounced on the first count,—not to run concurrently therewith, but suspended for a period of ten years upon conditions stated.

And the court, in its discretion, ordered the verdict on the third count in the bill of indictment be set aside, and directs a verdict of not guilty be entered as to said third count.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

F. D. Hackett, Jr., and Nance & Barrington for defendant, appellant.

WINBORNE, J. Defendant, in brief filed in this Court, brings forward assignments of error based upon exceptions to: (1) Matters of evidence, (2) denial of motions for judgment as of nonsuit, and (3) portions of the charge as given to the jury.

I. As to matters of evidence: (a) Exception No. 1 is taken to this question and answer: "How did he walk? A. He staggered." The witness had testified that he observed the defendant as he walked from the station out to the car. It is contended that this evidence coming in chronology of events as clearly shown in the record, referred to the condition of the defendant at the coroner's inquest in Fairmont, N. C., and does not come "within the rule that proof of the commission of other like offenses may be admitted to show the *scienter,* intent and motive when the crimes are so connected or associated that the evidence will throw light on the question under consideration," *S. v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609, and is prejudicial to defendant.

On the other hand, the State, in brief filed here, has a different, and we think a proper, interpretation of the connection in which the question was asked. The witness, Wilson, had testified that he saw defendant walk at Mayo's filling station; that "he was staggering around the place . . . that he went in the station," that he, the witness, heard defendant in the station, and, quoting, "I saw him walking and he was staggering." It, therefore, seems from reading the whole testimony of the witness that the inquiry as to how defendant was walking referred to how he walked at Mayo's filling station, and not at a station at the coroner's inquest.

(b) Exceptions 2 and 3. The State Highway Patrolman Bowen testified that he had talked with the witness Willie James Wilson, and that he, Wilson, had made a statement to him. Then the witness was asked "What was that?", to which he answered. The record shows that it was "offered for corroboration of Wilson only." And reference to the testimony of Wilson, as it appears in the case on appeal, shows that Mr. Bowen talked with him. Indeed, the record fails to show that defendant asked, at the time of the admission of the evidence, that the purpose be restricted. Therefore, these exceptions are untenable. See *S. v. Walker,* 226 N.C. 458, 38 S.E. 2d 531.

II. Exceptions 4 and 8: These relate to the denial of defendant's motions for judgment as in case of nonsuit. In this connection it appears from the case on appeal that the case was tried on the theory as contended by the State that the offenses charged against defendant were the proximate result of culpable negligence of defendant in that at the time of the collision involved he was violating these statutes: (1) G.S. 20-138 declaring "it shall be unlawful and punishable . . . for any person . . . who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon a highway within this State"; (2) G.S. 20-140 which declares that "Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving," and upon conviction shall be punished; and (3) G.S. 20-146 which declares that "upon all highways of sufficient width, except one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway . . . except when overtaking and passing another vehicle subject to the limitations in overtaking and passing set forth in Sections 20-149 and 20-150."

Defendant argues and contends that circumstantial evidence must point unerringly to the guilt of defendant, and that it must be so strong as to exclude every reasonable hypothesis except that of guilt. Even so, taking the evidence offered by the State, and so much of defendant's evidence as is favorable to the State, or tends to explain and make clear that which has been offered by the State, as is done in considering a motion for judgment as of nonsuit, this Court is of opinion and is impelled to hold that there is sufficient evidence to carry the case to the jury on the question of the guilt of defendant on each of the offenses with which defendant stands charged, and to support a verdict of guilty, beyond a reasonable doubt, as to each of the two offenses of which defendant stands convicted. See *S. v. Nall, post,* 60.

There is evidence that defendant was staggering and cursing at Mayo's filling station, that he declared his intention to drive his car, and got in

the driver's seat, and drove off in rapid manner, in the direction of the scene of the collision in which his car was involved, that his car was not stopped nor had the driver been changed between the Mayo's filling station and the point of collision, and that immediately before and at the point of collision his car was being driven on its left side of the center line of the highway at a speed of from 40 to 50 miles per hour—approaching the crest of a hill, and that death and destruction resulted.

True, there is conflict of evidence. However, this was a matter for the jury to solve. And the jury has accepted the version of the State.

III. (a) Exception 14 is directed to this portion of the charge: "A person is under the influence of intoxicating or narcotic drugs within the meaning and intent of this Section when he has drunk such a quantity of intoxicating beverages to cause him to lose the normal control of his bodily or mental factors or both to such an extent as to cause partial impairment of either or both of these factors." Like language used as a statement of contention of the State is the subject to which Exception 15 is directed. It will be assumed that the word "factors" was erroneously used for the word "faculties," and that the jury so understood it. But defendant says that he cannot say that the definition of "under the influence" is not error or that the error is a harmless one.

In this connection the statute G.S. 20-138 makes it unlawful and punishable for any person who is under the influence of intoxicating liquor to drive any vehicle upon the highways within the State.

And in *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688, in opinion by *Denny, J.*, this Court held to be erroneous a charge that: "Where a person has drunk a sufficient quantity of alcoholic liquor or beverage to affect, however slightly, his mind and his muscles, his mental and his physical faculties, then he is under the influence of intoxicating liquor or beverage." There, after discussing the subject, this Court held that "a person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is appreciable impairment of either or both of these faculties." The definition has since been the subject of exception, and decision in the cases of *S. v. Bowen,* 226 N.C. 601, 39 S.E. 2d 740; *S. v. Lee,* 237 N.C. 263, 74 S.E. 2d 654; and *S. v. Nall, post,* 60.

In the *Bowen case, supra,* the words "materially impaired" were used in lieu of "appreciable impairment." And this Court said that, while the language of the rule in the *Carroll case* is preferred, there is not sufficient difference in the meaning of the two terms for the rule given in the *Carroll case* to have been misunderstood by the jury.

In the *Lee case, supra,* the appellant contended that the use of the word "perceptibly" instead of the word "appreciable" in connection with "impairment" without explanation of what it means, was prejudicial error. But this Court said again that while the language of the rule in *Carroll case, supra,* is preferred, the Court fails to see in the word "perceptible" sufficient difference in meaning and common understanding for the rule given in the *Carroll case, supra,* to have been misunderstood by the jury.

And in the *Nall case,* the complaint was directed to the use of the words "any beverage containing alcohol," rather than "a sufficient quantity of intoxicating beverage." There it is stated that while this Court has commended and commends the definition enunciated by *Denny, J.,* in *S. v. Carroll, supra,* it is not deemed that the phraseology to which exception is taken is beyond the pale of the term, citing *S. v. Bowen, supra,* and *S. v. Lee, supra.*

Likewise in the present case this Court does not approve the use of the term "partial impairment" in defining what is meant by the term "under the influence of intoxicating beverage." Nevertheless, when the charge here given by the court is taken in connection with the evidence in this respect, and read in connection with the evidence as to, and charge on culpable negligence, it is not considered that harmful error appears.

III. (b) Exception 18 is to a portion of the charge in respect to the meaning of the word "recklessness." When, however, the definition is considered in the light of the charge read contextually prejudicial error is not shown.

Other exceptions in the record are not set out in appellant's brief, nor is reason or argument stated or authority cited in support of them. Hence they are taken as abandoned by him. Rule 28 of Rules of Practice in the Supreme Court. 221 N.C. 543, at 562.

Hence the decision here is

No error.

J. J. DULIN v. J. E. WILLIAMS AND WIFE, DESMONIA WILLIAMS; AND MRS. WILLIAM (MARTHA B.) SCOGGINS.

(Filed 16 December, 1953.)

1. Registration § 4—

The registration of a deed to an interest in land is essential to its validity as against a purchaser for a valuable consideration from the grantor.

2. Property § 2a—

Standing timber is an interest in land.

3. Registration § 3—

As between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title.

4. Registration § 4—

Actual knowledge on the part of the grantee of a registered deed of the existence of an unregistered deed will not defeat his title as a purchaser for value.

5. Same—

Allegations to the effect that plaintiff was the grantee in an unregistered timber deed and that during the term stipulated for the cutting of the timber, his grantor conveyed the fee simple title to the land to others, who took with knowledge of his timber interest, is insufficient to entitle plaintiff to cut and remove the timber as against the grantees of the fee, who registered their deed.

6. Pleadings § 32—

The want of allegations in the complaint necessary to state a cause of action against one defendant cannot be supplied by allegation in the cross action of a codefendant.

7. Appeal and Error § 51c—

The language of a judicial opinion must be read in the light of the circumstances under which it is used.

8. Registration § 4: Estoppel § 6h—

The grantee in a registered deed is not estopped to deny the validity of an outstanding interest evidenced by an unrecorded instrument previously executed by his grantor unless the registered deed contains an express recital making it subject to such outstanding interest, and such grantee cannot incur any liability to the owner of such outstanding interest by accepting the deed and asserting his rights thereunder, since he has the right to purchase as if the unregistered instrument did not exist and cannot incur liability by exercising such legal right.

9. Registration § 4: Vendor and Purchaser §§ 25a, 25b—

Plaintiff purchased the timber rights on a part of a tract of land and received deed therefor. During the term of the agreement for the cutting of the timber, the vendor executed deed to the land in fee simple to third persons, who had their deed registered. The purchaser of the timber then had his timber deed registered. *Held:* In the absence of allegation that the vendor bound herself by contract to insert in the later deed recitals that it was made subject to plaintiff's timber rights, plaintiff is not entitled to recover of the vendor for breach of such agreement, nor may he hold such third persons liable on the theory that they wrongfully interfered with his contractual relations with the vendor.

10. Appeal and Error § 6c (1): Pleadings § 19c—

When the failure of the complaint to state a cause of action appears upon the face of the record proper, the Supreme Court, even in the absence of objection to the complaint on this ground, will take notice of the defect and dismiss the action on its own accord when the defect is not readily remedial by amendment.

APPEAL by defendants J. E. Williams and wife, Desmonia Williams, from *Crisp, Special Judge,* and a jury, at February Term, 1953, of GUILFORD.

Civil action involving conflicting claims to standing timber.

For ease of narration, J. J. Dulin is called the plaintiff, J. E. Williams is characterized as the male defendant, Desmonia Williams is designated as the wife of the male defendant, and Mrs. William (Martha B.) Scoggins is referred to as the *feme* defendant.

The matters necessary to an understanding of the decision made on this appeal are summarized in the numbered paragraphs set forth below.

1. The *feme* defendant owned a farm of 132 acres in Bruce Township, Guilford County, North Carolina.

2. On 6 June, 1951, the plaintiff and the *feme* defendant entered into a contract whereby the plaintiff paid the *feme* defendant $800.00 for the timber standing on 25 of the 132 acres, and whereby the *feme* defendant executed to the plaintiff a timber deed, which was sufficient in form to convey such timber to the plaintiff and to require him to cut and remove the same within the period of two years then next ensuing. The plaintiff did not cause his timber deed to be registered in the office of the Register of Deeds of Guilford County until 2 April, 1952.

3. Meanwhile, to wit, on 16 January, 1952, the *feme* defendant executed to the male defendant and his wife for a consideration of $10,000.00 a deed of conveyance, which made no reference whatever to the timber deed mentioned in the preceding paragraph, and which was sufficient in form to vest the entire farm and all timber standing thereon in the male defendant and his wife in fee simple absolute. This deed of conveyance was registered in the office of the Register of Deeds of Guilford County on the day of its execution, to wit, on 16 January, 1952.

4. Subsequent to the execution and registration of the deed of conveyance mentioned in the preceding paragraph, the plaintiff got ready to cut the timber described in his still unrecorded timber deed. He was forbidden to enter upon the farm for this purpose by the male defendant and his wife, who insisted that their recorded deed of conveyance prevailed over the plaintiff's unregistered deed and gave them title to the timber standing on the 25 acres.

5. The plaintiff thereupon procured the registration of his timber deed, and brought this suit against the male defendant, the wife of the male defendant, and the *feme* defendant. The plaintiff's pleadings consist of the complaint and an amendment to it, which contain factual averments disclosing all the matters stated in numbered paragraphs 1, 2, 3, and 4, and the additional circumstance that the male defendant and his wife took their deed of conveyance with "actual notice" from the *feme* defendant and others of the prior sale to the plaintiff of the timber standing on the

25 acres described in the timber deed. The drafter of the plaintiff's pleadings concludes on the basis of these factual averments alone that the *feme* defendant breached her contract with the plaintiff by failing to incorporate in her conveyance to the male defendant and his wife an express recital "that said conveyance was made subject to said timber contract"; that the male defendant and his wife "knowingly participated in . . . (such) . . . breach"; and that the male defendant and his wife "purchased . . . (the) . . . land subject to . . . the timber contract" because they took their deed with "actual notice" from the *feme* defendant and others of the prior sale to the plaintiff of the timber standing on the 25 acres described in the timber deed. The plaintiff's pleadings pray for this relief: "That . . . he be allowed to enter upon the premises and cut the timber in accordance with the terms of the timber contract . . .; or . . . if it is the judgment of the court that the . . . plaintiff is not entitled to enter upon said property and remove said timber, then plaintiff prays . . . that plaintiff be awarded damages for the breach of the contract by said defendants Scoggins and Williams in the amount of $800.00."

6. The male defendant and his wife answered the complaint and its amendment, and replied to the further defenses and cross actions of the *feme* defendant. The pleadings of the male defendant and his wife deny all material allegations made against them by either the plaintiff or the *feme* defendant, and assert that the priority of the registration of their deed conferred upon them complete title to the entire farm and all timber standing upon it, including the timber standing on the 25 acres described in the plaintiff's timber deed. The male defendant and his wife plead, moreover, by way of cross action in specific factual averments that they are entitled to judgment against the *feme* defendant for damages totaling $1,500.00 on account of actionable fraud practiced upon them by agents of the *feme* defendant in pointing out certain boundaries of the farm. Neither the plaintiff nor the *feme* defendant questioned the right of the male defendant and his wife to assert their cross action against the *feme* defendant under the rules of practice which obtain in this jurisdiction.

7. The *feme* defendant answered the complaint and its amendment, and replied to the cross action of the male defendant and his wife. Her pleadings deny the validity of all claims made against her by the other parties to the action. She pleads, moreover, as a first further defense and cross action this matter in specific factual detail: Although she was under no contractual obligation to the plaintiff to put in her deed of conveyance a recital that the male defendant and his wife took title to the farm subject to the plaintiff's timber deed, the *feme* defendant is nevertheless entitled to a decree of reformation against the male defendant and his wife inserting a recital to that effect in their deed because it was agreed between her

and them before execution that such recital was to be included in the deed, and because such recital was omitted from the executed deed by reason of a mistake as to its contents on the part of the *feme* defendant, who was falsely and fraudulently assured by the male defendant and his wife that such recital appeared in the deed. The *feme* defendant also pleads these things as a second further defense and cross action: "That when the defendants J. E. Williams and wife, Desmonia Williams, accepted said deed of conveyance, they did so subject to said contract executed by this defendant to the said J. J. Dulin and thereby purchased said land burdened with and subject to the claim and interest of the said Dulin in and to the timber therein referred to, and that by their acceptance of said deed the defendants J. E. Williams and wife, Desmonia Williams, ratified the unrecorded timber contract executed by this defendant to said Dulin and agreed to stand seized subject thereto and thereby estopped themselves from asserting that said conveyance was not made subject to said timber contract and that they hold title thereto by virtue of the General Statutes of North Carolina of 1943, Chapter 47, Section 17, and this defendant pleads said estoppel against said defendants."

8. The action was heard by the presiding judge and a jury at the February Term, 1953, of the Superior Court of Guilford County. The several parties undertook to sustain their respective allegations of fact by offering evidence. After all the evidence was in, the presiding judge involuntarily nonsuited for insufficiency of proof the cross action for damages asserted by the male defendant and his wife against the *feme* defendant and the cross action for reformation of the deed pleaded by the *feme* defendant against the male defendant and his wife. The parties aggrieved thereby noted exceptions to these rulings.

9. The presiding judge submitted these issues to the jury: (1) Are the defendants, J. E. Williams and wife, Desmonia Williams, estopped from denying that said deed was made subject to the timber contract, as alleged in her further answer and cross action? (2) Is the plaintiff entitled to enter upon the premises and cut and remove the timber referred to, as alleged in the complaint of the plaintiff J. J. Dulin? (3) If not, what damages, if any, is the plaintiff entitled to recover against the defendant Mrs. William (Martha B.) Scoggins? The jury answered the first issue "yes" and the second issue "yes," and left the third issue unanswered. The presiding judge entered a judgment on the verdict, adjudging that the plaintiff had the legal right to enter upon the farm and cut and remove therefrom the timber standing upon the 25 acres described in the timber deed.

10. The male defendant and his wife excepted to the judgment and appealed, assigning error. The *feme* defendant has not participated in the appeal.

Claude Hicks for plaintiff, appellee.

Howerton & Howerton for defendants J. E. Williams and wife, Desmonia Williams, appellants.

ERVIN, J. The legal sufficiency of the complaint is not challenged by any of the parties. We nevertheless confront this reality at the threshold of the appeal: When the pleadings of the plaintiff are reduced to their factual averments, they do not state facts sufficient to constitute a cause of action in favor of the plaintiff against any of the defendants.

The plaintiff undertakes to plead for relief in the alternative. He prays primarily for a judgment against the male defendant and his wife establishing the validity of his claim to the timber standing on the 25 acres described in his timber deed. He prays in the alternative for a judgment against all of the defendants for money damages for a supposed breach of contract allegedly committed by the *feme* defendant with the concurrence of the other defendants.

When the factual allegations of the complaint and its amendment are taken at face value, they affirmatively disclose the invalidity of the plaintiff's claim to the timber. This is true for the reasons set forth below.

The Connor Act provides that "no conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lies." G.S. 47-18.

The decisions applying the Connor Act establish these propositions:

1. The registration of a deed to an interest in land is essential to its validity as against a purchaser for a valuable consideration from the grantor. *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316; *Eller v. Arnold,* 230 N.C. 418, 53 S.E. 2d 267; *Durham v. Pollard,* 219 N.C. 750, 14 S.E. 2d 818; *Gray v. Worthington,* 209 N.C. 582, 183 S.E. 731; *Bank v. Mitchell,* 203 N.C. 339, 166 S.E. 69; *Proffitt v. Insurance Co.,* 176 N.C. 680, 97 S.E. 635; *Warren v. Willeford,* 148 N.C. 474, 62 S.E. 697.

2. Standing timber is an interest in land. *Chandler v. Cameron,* 229 N.C. 62, 47 S.E. 2d 528; *Winston v. Lumber Co.,* 227 N.C. 339, 42 S.E. 2d 218.

3. As between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title. *Combes v. Adams,* 150 N.C. 64, 63 S.E. 186.

4. Actual knowledge on the part of the grantee in a registered deed of the existence of a prior unregistered deed will not defeat his title as a purchaser for value. *Eller v. Arnold, supra; Chandler v. Cameron, supra; Grimes v. Guion,* 220 N.C. 676, 18 S.E. 2d 170; *Turner v. Glenn* 220 N.C. 620, 18 S.E. 2d 197; *Dorman v. Goodman,* 213 N.C. 406, 196 S.E.

352; *Smith v. Turnage-Winslow Co.,* 212 N.C. 310, 193 S.E. 685; *Knowles v. Wallace,* 210 N.C. 603, 188 S.E. 195; *Eaton v. Doub,* 190 N.C. 14, 128 S.E. 494, 40 A.L.R. 273; *Moore v. Johnson,* 162 N.C. 266, 78 S.E. 158; *Wood v. Lewey,* 153 N.C. 401, 69 S.E. 268; *Smith v. Fuller,* 152 N.C. 7, 67 S.E. 48; *Wood v. Tinsley,* 138 N.C. 507, 51 S.E. 59; *Collins v. Davis,* 132 N.C. 106, 43 S.E. 579; *Maddox v. Arp,* 114 N.C. 585, 19 S.E. 665.

When the pleadings of the plaintiff are read in the light of these decisions, they show that under the Connor Act, the title to the timber standing on the 25 acres is in the male defendant and his wife, whose subsequent deed was registered before their grantor's prior deed to the plaintiff, even though the male defendant and his wife took their subsequent deed with actual knowledge of the prior deed to the plaintiff. *Lanier v. Lumber Co.,* 177 N.C. 200, 98 S.E. 593.

The presiding judge evidently came to a similar conclusion on this phase of the case. A reading of his charge shows that he forsook the allegations of the complaint and its amendment, and permitted the plaintiff to prevail over the male defendant and his wife with respect to the timber standing on the 25 acres solely upon the basis of a supposed estoppel, which is pleaded nowhere save in the portion of the answer of the *feme* defendant designated as her second further defense and cross action. The presiding judge utilized the second issue as a mere vehicle for the conveyance of his legal opinion that an affirmative answer to the first issue would entitle the plaintiff to the benefit of the standing timber claimed by him. For this reason, the answer of the jury to the second issue has no independent factual significance.

In permitting the plaintiff to prevail over the male defendant and his wife with respect to the standing timber in dispute upon the basis of averments appearing in the answer of the *feme* defendant, the presiding judge misapprehended and misapplied the doctrine that a pleading may be aided by the allegations of the adverse party. The doctrine of aider has no relevancy to this phase of the case for the very simple reason that the allegations relating to the supposed estoppel are incorporated in the answer of the *feme* defendant and not in the answer of the male defendant and his wife. "An affirmative allegation in the answer of one of two or more defendants of a necessary fact not alleged in the complaint or petition does not cure the omission as to the other defendants." 71 C.J.S., Pleading, Section 590. See, also, in this connection this illuminating decision: *Missouri, K., & T. Ry. Co. of Texas v. Kennon* (Tex. Civ. App.), 164 S.E. 867.

The plaintiff would not have bettered his claim to the timber standing on the 25 acres a single whit had he pleaded in his own behalf the supposed estoppel asserted in the *feme* defendant's second further defense and cross action.

The allegations relating to the supposed estoppel are based solely upon the following statement appearing in the opinion of this Court in *Trust Co. v. Braznell,* 227 N.C. 211, 41 S.E. 2d 744: "When a grantee accepts the conveyance of real property subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the estate burdened by such claim or interest. By his acceptance of the deed he ratifies the unrecorded instrument, agrees to stand seized subject thereto, and estops himself from asserting its invalidity."

The language of a judicial opinion must be read in the light of the circumstances under which it is used. *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10; *Styers v. Forsyth County,* 212 N.C. 558, 194 S.E. 305; *Barringer v. Ins. Co.,* 188 N.C. 117, 123 S.E. 305. The *Braznell case* involved the construction of a registered deed containing an express recital that the grantee took the property conveyed subject to a prior lease executed to the plaintiff by the grantor. The lease happened to be unrecorded. When the language of the opinion in the *Braznell case* is read in the light of these crucial circumstances, it says this and nothing more: The grantee in a registered deed is estopped to deny the validity of an outstanding interest evidenced by an unrecorded instrument executed by his grantor if the registered deed contains an express recital making the conveyance to the grantee subject to the outstanding interest.

This sound exposition of a sound principle of the law of estoppel by deed has no possible application to the instant case, where the registered deed does not refer in any way to the unrecorded instrument.

When the conclusion of the pleader and the prayer for relief in the alternative are laid aside, it is manifest that the complaint does not contain a single factual averment to the effect that the *feme* defendant bound herself by contract with the plaintiff to incorporate in her subsequent deed of conveyance a recital that the male defendant and his wife took the farm subject to the plaintiff's timber deed. In truth, the factual allegations of the complaint show that the *feme* defendant fully performed her contract with the plaintiff by executing the timber deed to him. 55 Am. Jur., Vendor and Purchaser, Section 415. These things being true, the complaint does not state a cause of action against the *feme* defendant for breach of contract.

Moreover, the factual averments of the complaint do not make out a case entitling the plaintiff to money damages from the male defendant and his wife on the theory that they wrongfully interfered with contractual relations between the plaintiff and the *feme* defendant by purchasing the farm from the latter. The plaintiff could have protected his rights under his timber deed against all persons by having that instrument recorded in the office of the register of deeds. Since the plaintiff did not have his timber deed registered, the male defendant and his wife, as third

persons, had the legal right under the Connor Act to purchase from the *feme* defendant the property embraced by the unregistered timber deed with the same freedom as if that instrument did not exist. They did not incur liability to the plaintiff by exercising their legal right. *Eller v. Arnold, supra; Bruton v. Smith,* 225 N.C. 584, 36 S.E. 2d 9.

We note at this point that the plaintiff does not charge the *feme* defendant with possessing knowledge of the unregistered state of his timber deed at the time of the execution of the subsequent conveyance. See: *Halligas v. Kuns,* 86 Neb. 68, 124 N.W. 925, 26 L.R.A. (N.S.) 284, 20 Ann. Cas. 1124; 66 C.J., Vendor and Purchaser, Section 1655.

The failure of a complaint to state a cause of action is a self-asserting defect, which appears upon the face of the record proper. Where a complaint fails to state a cause of action, and the defendant appeals from an adverse judgment of the Superior Court without objecting to the complaint on that ground, the Supreme Court should take notice of the defective state of the complaint and dismiss the action of its own accord, unless it deems the defective state of the complaint readily remediable by amendment in the Superior Court. *Lassiter v. Adams,* 196 N.C. 711, 146 S.E. 808; *Snipes v. Monds,* 190 N.C. 190, 129 S.E. 413; *Power Co. v. Elizabeth City,* 188 N.C. 278, 124 S.E. 611; *Garrison v. Williams,* 150 N.C. 674, 64 S.E. 783; *Cressler v. Asheville,* 138 N.C. 482, 51 S.E. 53; *Norris v. McLam,* 104 N.C. 159, 10 S.E. 140; 71 C.J.S., Pleading, Section 551.

The defective state of the complaint in the instant case is not readily remediable by amendment in the Superior Court. Consequently the action must be dismissed. *Power Co. v. Elizabeth City, supra; Norris v. McLam, supra;* McIntosh: North Carolina Practice and Procedure in Civil Cases, Section 448.

Action dismissed.

STATE v. JULIUS GRIFFIN.

(Filed 16 December, 1953.)

1. Larceny § 1—

Larceny is a common law offense and is the taking and carrying away of the personal property of another without his consent with felonious intent at the time of the taking to deprive the owner of his property and to appropriate it to the taker's use, and the act of taking must involve either an actual trespass or a constructive trespass in acquiring possession by fraud through some trick or artifice.

2. Embezzlement § 1—

Embezzlement is a statutory offense distinct from larceny in that possession of the property of another must have been lawfully acquired by virtue of some fiduciary relationship, and the person acquiring possession must thereafter with felonious intent fraudulently convert the property to his own use.

3. Indictment and Warrant § 8—

The indictments in this case charge defendant with larceny and with embezzlement of the same property from the same person by the same acts. Defendant moved that the solicitor be required to elect whether defendant should be put on trial for larceny or embezzlement. *Held:* Since defendant could not be guilty of both offenses upon the same facts, his motion should have been allowed.

4. Same: Criminal Law § 81c (4)—

Defendant was put on trial upon indictments charging larceny and embezzlement of the same property from the same person by the same acts, and was convicted by the jury on all counts. Judgment was entered imposing concurrent sentences on each count of larceny and embezzlement. *Held:* It not appearing that the sentences were augmented by the dual verdicts of larceny and embezzlement, defendant was not prejudiced by the failure of the court to require the solicitor to elect between prosecutions for larceny or for embezzlement.

BARNHILL, J., dissenting.

DENNY and ERVIN, JJ., concur in dissent.

APPEAL by defendant from *Pless, J.*, June Term, 1953, of MECKLENBURG. No error.

Eight bills of indictment charging the defendant with criminal offenses growing out of four similar transactions were consolidated for trial. In each of the four instances the bills charged (1) larceny by trick and (2) embezzlement with respect to the same person, the same property, the same acts. As typical two bills charging these criminal offenses are more specifically described as follows: (a) One bill charged that the defendant Julius Griffin on the 15th day of July, 1952, "did steal, take and carry away by trick, artifice and fraud" a sum of money, the property of L. N. Stallworth; (b) another bill charged that on the same day the defendant Julius Griffin "was the agent, consignee, clerk, employee and servant" of L. N. Stallworth, and as such agent, consignee, clerk, employee and servant of L. N. Stallworth received and took into his possession for the said Stallworth a sum of money, and afterward on that date did willfully and feloniously embezzle and fraudulently convert the same to his own use.

The other bills differed only in name of person from whom stolen or embezzled, the amount and date.

The evidence as to each of the four transactions was of the same pattern. For instance, Mrs. Stallworth testified as follows:

"I am employed by the County Health Department as a nurse. I know Julius Griffin. My husband and I turned over to Julius Griffin $350. I first saw Griffin when he came to my home. I learned through friends at the hospital that he was representing the Good Samaritan Waverly Hospital of Columbia, S. C., in getting money to help the building fund. I was employed there for 16 years, knowing the hospital and knowing that they were having this building fund to build a hospital, I took for granted that it was O. K., because he had identification papers stamped with the Good Samaritan Hospital signature on it, and I thought it was a clean-cut deal. The defendant told me and my husband that this $500, if we put this $500 up on this car to help buy this car to be raffled off for the hospital, after the car was sold a certain amount of this money was going to the hospital, and then the balance of the money would be paid back to us with 6% interest. He said the amount we put in would be paid back to us with interest. He said we had a choice of cars, Packard, or Chrysler, or Chevrolet, or Plymouth. We were supposed to receive our car on February 14. If the deal went over and the hospital got their share of the money and we paid $1.00 for this ticket, we were supposed to get this car, but we were to get the 6% interest on our money. I mean that we would get a chance to win the car and that he would guarantee that we would win it. I have never received any car or any chance on a car, and have never seen any raffle of the car. So far as I know there was no raffle. The paper you hand me is the paper signed by Julius Griffin and my husband. It was executed in my presence. I saw them sign it at my home."

AGREEMENT.

"This agreement made this 15th day of August by and between Julius Griffin party of the first part and Mr. L. N. Stallworth party of the second part. Whereas the party of the first part is engaged in the promotion of a Building Fund Campaign giving away cars for charitable organizations. Places of office set up are in North Carolina, Virginia and New Jersey. Whereas the party of the second part is willing to advance to the party of the first part the sum of $250.00 dollars to finance such promotion.

"Now therefore in consideration of the sum of $250.00 dollars paid to the party of the first part by the party of the second part receipt of which is hereby acknowledged said party of the first part agrees to do the following:

"1. Pay to the party of the second part the sum of $250.00 dollars with interest at the rate of 6% per annum on or before Aug. 15th 1952.

"2. At the climax of said promotion of the party of the first part, party agrees to do the completion of all business transacted between party of the second part.

"In event that the party of the first part should die the party of the second part can submit this agreement to said promotion of party of the first part." (An additional sum of $100 was received by defendant, making in all $350.)

The defendant excepted to the consolidation of the cases, and moved that the solicitor be required to elect whether the defendant should be put to trial for larceny or embezzlement. Motion denied. Exception.

The court charged the jury as to each of the eight bills of indictment, defining larceny by trick and embezzlement. The jury returned verdict of guilty as to each of the eight bills.

The court sentenced the defendant in the first case on charge of larceny by trick to State's prison for a term of not less than 3 nor more than 5 years. In the second case for embezzlement on same facts the court imposed the same sentence, to run concurrently with the sentence in the first case.

In the third and fourth cases the same judgment was rendered, sentences to run concurrently with the first case.

In the fifth case for larceny by trick the sentence was 5 to 7 years to begin at expiration of sentence in first case, but to be suspended on condition. In the sixth case, for embezzlement, sentence to run concurrently with sentence in fifth case.

In the seventh and eighth the sentences were suspended as in the fifth and sixth cases.

The defendant appealed, assigning errors.

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

Basil M. Boyd and J. F. Flowers for defendant, appellant.

DEVIN, C. J. The defendant in each of four instances was convicted of both larceny by trick and embezzlement with respect to the same transaction. He was found guilty of taking, stealing and carrying away the personal goods of L. N. Stallworth, and on the same testimony found guilty of fraudulently and feloniously converting to his own use the same property with which, according to the bill for embezzlement, he had been previously entrusted as agent, consignee, clerk, employee and servant of L. N. Stallworth.

The defendant moved that the solicitor be required to elect for which of these offenses the defendant should be put on trial.

While there is similarity in some respects between larceny and embezzlement, they are distinct offenses. Larceny is a common law offense not defined by statute; while embezzlement is a criminal offense created by

statute to cover fraudulent acts which did not contain all the elements of larceny. 21 Henry VII C. 7; G.S. 14-90.

Generally speaking, to constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently. It involves a trespass either actual or constructive. The taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass. Actual trespass, however, is not a necessary element when possession of the property is fraudulently obtained by some trick or artifice. The embezzlement statute makes criminal the fraudulent conversion of personal property by one occupying some position of trust or some fiduciary relationship as specified in the statute. The person accused must have been entrusted with and received into his possession lawfully the personal property of another, and thereafter with felonious intent must have fraudulently converted the property to his own use. Trespass is not a necessary element. In embezzlement the possession of the property is acquired lawfully by virtue of the fiduciary relationship and thereafter the felonious intent and fraudulent conversion enter in to make the act of appropriation a crime. *S. v. McDonald,* 133 N.C. 680, 45 S.E. 582; *S. v. Ruffin,* 164 N.C. 416, 79 S.E. 417; *S. v. Holder,* 188 N.C. 561, 125 S.E. 113; *S. v. Cameron,* 223 N.C. 449, 27 S.E. 2d 81; *S. v. Finnegean,* 127 Iowa 286; *Blackett v. People,* 98 Colo. 7; 18 A.J. 572; 32 A.J. 892, 914; 22 C.J.S. 436; 2 Burdick Law of Crime 339.

In the case at bar, according to the State's evidence, the defendant obtained the property of the witness Stallworth by a trick or fraudulent device. While in a sense it was with his consent, it was only by this trick or fraudulent device that the taking was accomplished, constituting in legal effect a constructive trespass. And the felonious intent necessary to constitute the crime of larceny must have been present and motivating the act at the time of the taking. To constitute embezzlement the defendant must have been the agent, employee or servant of Stallworth and as such entrusted by Stallworth with possession of Stallworth's property for Stallworth, and the defendant must have thereafter fraudulently and with felonious intent converted the property to his own use. Conceding, without deciding, that the evidence is susceptible of either view, it is apparent that both views could not exist at the same time. The defendant could not be guilty of both by the same act. Hence we think the defendant's motion that the solicitor be required to elect whether the defendant put to trial for larceny or embezzlement should have been allowed.

However, it appears that the able judge who presided at the trial of this case was careful to impose on the defendant sentences carrying pen-

alty or punishment only in the cases in which the jury had convicted him of larceny by trick. All the sentences for embezzlement were made to run concurrently with the sentences for larceny. So that the defendant will suffer nothing by reason of the several convictions for embezzlement; nor does it appear that the imposition of the term of 3 to 5 years in prison for all the eight cases was in any respect augmented by the verdicts in those cases. After all it was the same evidence whether tending to show larceny or embezzlement. Hence it would appear that the defendant has no cause for complaint that the court did not require an election.

We have examined the other exceptions noted by defendant during the trial and brought forward in his assignments of error, and find no sufficient ground upon which to disturb the result reached below.

No error.

BARNHILL, J., dissenting: The defendant has apparently committed very reprehensible crimes for which, no doubt, he will be punished, either under the former trial and sentence affirmed by this Court or upon a conviction on a new trial. For that reason it is with sincere regret that I enter my dissent to the majority opinion. However, I entertain a deep conviction that no man should suffer the loss of his liberty except upon his conviction in a trial free from substantial error.

To quote from the majority opinion: "While there is similarity in some respects between larceny and embezzlement, they are distinct offenses . . . to constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent . . . It involves a trespass either actual or constructive . . . The taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass . . . The embezzlement statute makes criminal the fraudulent conversion of personal property by one occupying some position of trust or some fiduciary relationship as specified in the statute. The person accused must have been entrusted with and received into his possession lawfully the personal property of another, and thereafter with felonious intent must have fraudulently converted the property to his own use . . . In embezzlement the possession of property is acquired lawfully by virtue of the fiduciary relationship and thereafter the felonious intent and fraudulent conversion enter in to make the act of appropriation a crime . . . To constitute embezzlement the defendant must have been the agent, employee or servant of Stallworth and as such entrusted by Stallworth with the possession of Stallworth's property for Stallworth, and the defendant must have *thereafter* fraudulently and with felonious intent converted the property to his own use."

Thus it appears that the jury by its verdicts on four of the bills of indictment has found that defendant acquired possession of the money involved in each of the four instances by an actual asportation, that he did actually take and carry away the personal property of another without his consent, with the felonious intent to deprive the owner of his property and to appropriate it to his own use, fraudulently. On the other four companion bills of indictment the jury has found that the defendant was the agent of the four prosecuting witnesses, and that he lawfully received the money from each and every one of them as agent, and that he thereafter, while acting in the capacity of an agent, feloniously appropriated the money to his own use.

If the defendant received the sums of money involved from the four prosecuting witnesses lawfully as their agent, he cannot be guilty of larceny. The jury has found that he did so receive it. If he feloniously took, stole, and carried away the property of the four prosecuting witnesses with felonious intent, as the jury said he did, he did not receive it lawfully as agent of the several prosecuting witnesses. Therefore, upon that finding, he cannot be guilty upon the finding of embezzlement.

It follows that we affirm the conviction of a defendant in a case where the jury has found facts which are irreconcilable with his guilt on the charge of larceny. He received the money lawfully. This being true, there could be no larceny.

The sentences were divided into four groups. In the first he was sentenced for larceny and embezzlement. In the second, an additional sentence was imposed on both bills, to start at the expiration of the first. The other two sentences were for both charges with like provision. So then, each day the defendant remains in the penitentiary he will be serving a sentence for larceny and a sentence for embezzlement.

In short, the jury found that defendant, in four instances, did steal by trick the property of another. It likewise found that in each of said instances he embezzled the identical property while it was committed to his care as an agent of the prosecuting witness. Thus the jury has found that in each instance the defendant came lawfully into possession of the property involved. At the same time it found that the acquisition of possession was unlawful. This produces an irreconcilable conflict in the verdicts, which, in my opinion, necessitates a new trial. I so vote.

DENNY and ERVIN, JJ., concur in dissent.

ALTON MEDLIN v. SPURRIER & CO., INC.

(Filed 16 December, 1953.)

1. Automobiles § 18e: Negligence §§ 10, 21—

Evidence tending to show that defendant was parked on the left side of the street and turned his car diagonally across the street to the right in plaintiff's lane of travel, that plaintiff immediately applied his brakes upon seeing defendant's car but was unable to avoid the collision, *is held* insufficient to support the submission of the issue of last clear chance.

2. Automobiles § 18h (2)—

Evidence tending to show that before pulling his car out from its parked position on the left side of the street defendant looked to his rear and saw no car coming and drove diagonally across the street into an intersection in the path of plaintiff's car which was approaching from his rear, together with evidence that plaintiff's car left skid marks for a distance of some forty feet, *is held* sufficient to be submitted to the jury on the issue of plaintiff's negligence in defendant's cross action.

3. Automobiles §§ 12a, 18i: Trial § 31b—Charge held for error in failing to instruct jury on material aspect presented by evidence.

Where the evidence tends to show that the collision occurred at an intersection within a city, an instruction to the effect that in the absence of evidence that the accident occurred in a business or residential district, the maximum statutory limit would be fifty-five miles per hour, without an instruction that the fact that the speed of a vehicle is lower than the statutory limit does not relieve the driver of the duty to decrease speed when approaching an intersection or when special hazards exist with respect to pedestrians or traffic, etc., must be held for reversible error. G.S. 1-180.

APPEAL by defendant from *Crisp, Special Judge,* and a jury, at May Civil Term, 1953, of GASTON.

Civil action to recover for property damage resulting from a collision of two motor vehicles on a street in the City of Gastonia.

The collision occurred in the daytime. The plaintiff was driving his 1949 Buick automobile; Paul Crawford, the defendant's pick-up delivery truck. Both vehicles were traveling eastwardly on Main Avenue, approaching the intersection of Whitesides Street, which runs north and south. As the plaintiff came around a slight curve in Main Avenue, the defendant's truck was parked in front of Siler's Wholesale Grocery store on the north side of Main Avenue, headed toward Whitesides Street. As the plaintiff approached the truck, it pulled out from its parked position and angled across the Avenue into the plaintiff's line of travel on the right, or south, side. The collision occurred in or near the intersection of Whitesides Street. From the place where the defendant's truck was parked, it is about 50 feet eastward to the intersection of Whitesides

Street. On the east side of Siler's Wholesale Grocery is a vacant lot, and just east of the vacant lot is a house which is located at the intersection. There is another grocery store just west of Siler's Wholesale Grocery, and "west of the grocery store there are two or three houses until you get to the Trenton Mill, then for the next 200 feet there is the Trenton Mill. Between 350 and 450 feet on the north side of Main (Avenue) is taken up by Trenton Mill, the grocery store, Siler's Grocery, and the residences." (Direct examination of Police Officer Bates.) Main Avenue is paved. The various witnesses estimated its width at from 18 to 24 feet, and the width of Whitesides Street at from 14 to 18 feet. Police Officer Hugh Bolick described the pick-up truck as being 1½ ton capacity, with "slatted body about 3½ to 4 feet high. . . . not higher than the cab . . . (and) from 6 to 8 feet long."

The plaintiff testified in part: "I was going east on Main Street along about 25 miles an hour, was coming around a little curve in the street and the Spurrier wholesale truck was parked on the left side of the road headed east. . . . As I got directly behind it, the truck pulled out in front of me from a 45 to a 60 degree angle, and I didn't have time to stop and avoid hitting it. . . . I was right on the truck when I saw it cut across the street. . . .; at the time I touched my brakes he was into the side of me. . . . The truck came from the curb at a normal rate of speed of around 10 miles an hour. My car collided with the right side . . . the door was bent in. The whole left front side of my car was damaged including the bumper, grill, hood, and radiator. . . . I would say it's 30 to 40 feet from the point of the curve I had just come around to the point of collision. As you approach this curve you can see around it from the edge of the Trenton Mill, about 50 yards away. . . . With reference to the Trenton Mill, the curve is on the easterly side and Trenton Mill is on the north side of the street. From the easterly end of the Trenton Mill it is 40 or 50 yards to the intersection. . . . There are no other business establishments near the point of accident, except I believe there is a little grocery store, then Siler Wholesale. There are houses on the right and on the left, too, . . . I applied my brakes prior to the collision. I wasn't over 5 feet from the truck when I applied them. It happened so quick, I was about 10 or 12 feet away from the truck before I applied my brakes." Cross-examination: "I would say . . . I slid about 5 feet, . . . The truck had started straightening back up when I hit him. . . . I was in my extreme right-hand lane. My skidmarks went right up to the edge of Whitesides Street and extended backward about 5 feet. I am supposed to have four-wheel brakes, and my brakes were in good condition. I guess I did slide my front tires as well as the rear tires. I couldn't have been going very fast when I passed the Trenton Mill. I had stopped at the intersection on the other side."

The defendant then offered the testimony of a number of witnesses.

Paul Crawford, the driver of the truck, testified: ". . . I was parked in front of the building (Siler's Wholesale Grocery store). . . . There is no curb there, but it was parked about where it would ordinarily be. I was in the bounds of the street, . . . From the eastern corner of Siler Grocery to Whitesides Street is around 40 feet. . . . I stopped at Siler Grocery to get a package. I put it on the truck. Got back in my truck, looked out of my right window to see if anyone were coming near. I saw no one, and I started off with the intention of going into Whitesides Street back to Franklin Avenue. All of a sudden I heard the screech of wheels, sound of a horn, and a crash all together. I tried to pull back to avoid it, and pulled across to the east side of Whiteside(s) Street. . . . The . . . collision took place just as I was about to turn in Whitesides Street. . . . I was in the intersection of Whitesides Street headed east on Main aiming to make a turn to the right down Whitesides Street. . . . My right hand door, the running-board, and the cab were about the worst damaged. The truck was struck just behind the door. When I pulled off from Siler Grocery, I was coming uphill with a load and making about five miles an hour." Cross-examination: ". . . I looked out of the right window before I left the curb, and didn't see Mr. Medlin. I could see all the way back to the Trenton Mill. . . . I had general merchandise on my truck, . . . The slats on my truck bed do not go over the cab. It goes to the top of it. . . . I couldn't see through the rear window, that's why I used the side window, the door window. . . . I leaned over to look out of the right window, I stuck my head out all of the way far enough to see back behind me. I had my motor running. I slid back into my seat, put it into gear and pulled out into the street at an angle." Redirect examination: "I saw two black marks on the pavement leading up to the rear of Mr. Medlin's car. . . . they were from 40 to 45 feet long." Recross-examination: "The marks . . . extended from about the center of Whitesides Street back to the westerly intersection of Main for a distance of approximately 40 or 45 feet. After the collision my truck traveled about 18 feet. I was hit just about the middle of Whitesides, knocked and pushed . . . you would say, to the curb. I had hydraulic brakes on the truck. I applied them as soon as I heard the screech of wheels."

Police Officer Hugh Bolick testified in substance: that he went to the scene of the collision; that the truck was sitting on the southeast corner of Whitesides and Main with the front wheels against the curb, and that the Buick was sitting right side of the truck. This witness said: "There was two black lines in the street . . . They ran right up to the back wheels of the Buick. Those marks were about 45 feet long." Cross-examination: ". . . Mr. Medlin said he was coming down Main Street

around 25 miles an hour and the truck pulled out and he hit the truck. . . . I asked him did his car skid that far at 25 miles an hour, and he said again that he was driving 25. . . . The skid marks were around 4 feet from the curb.

"Q. I'll ask you if you don't know that a vehicle will travel a total distance of 50.1 feet after the brakes are applied when it is traveling 25 miles an hour?

"A. No, it won't. We made a test on a '52 Pontiac. West Main Street has a slight incline going up from west to east. It's an asphalt street and the test we made with a Pontiac was on an asphalt road on level ground. I don't know what kind of tires were on the Pontiac. The Pontiac had four-wheel brakes. . . . and we found that you traveled only 15 feet at 25 miles an hour after you applied brakes."

Other defense witnesses estimated that the tire marks back of the plaintiff's Buick extended a distance of from 40 to 45 feet.

Police Officer G. S. Bates testified that "From the intersection of Whitesides and Main, looking back toward the Trenton Mill, you have a clear vision of around 250 feet."

C. A. Froneberger testified that "You can see 500 feet from the north side of Main at the intersection looking in a westerly direction down toward Trenton Mill. . . . There is not too much of a curve between Trenton Mill and Whitesides Street."

W. B. Armstrong testified: ". . . I looked westerly on Main Street from the front of Siler Grocery, and from that point I would say it is 200 yards down to the intersection of Main and Trenton which you can see. I was standing just about in front of Siler Grocery. I was on the sidewalk when we were looking that way. I believe it would be as good or better view looking from a truck 10 feet south of the curb."

The gravamen of the plaintiff's cause of action as alleged in his complaint is that the defendant's truck driver was negligent in that he operated the truck (1) without keeping a proper lookout, (2) in a careless and reckless manner, (3) that he drove the truck into the main-traveled portion of Main Avenue from a parked position on the left-hand side without first ascertaining that such movement could be made in safety, and (4) that he failed to yield one-half of the main-traveled portion of the street to the plaintiff.

The defendant denied generally the material allegations of the complaint, and by way of further answer alleged negligence on the part of the plaintiff in approaching the intersection of Whitesides Street and Main Avenue (1) at an unlawful and excessive rate of speed, (2) without keeping a proper lookout, and (3) without keeping his car under proper control. The defendant pleaded the foregoing negligence of the plaintiff both as the sole proximate cause of the collision and, alternately, as con-

tributory negligence barring recovery. And treating these alleged aspects of negligence as the sole proximate cause of the collision, the defendant set up a counterclaim for damage to the truck. The defendant also by further defense pleaded the doctrine of last clear chance.

At the close of all the evidence the plaintiff moved for judgment as of nonsuit on the defendant's counterclaim. The motion was allowed. Thereupon, the defendant tendered, and requested the court to submit, an issue of last clear chance. This was refused.

Issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiff.

From judgment on the verdict awarding the plaintiff damages, the defendant appeals, assigning errors.

Basil L. Whitener and Grady B. Stott for plaintiff, appellee.
Mullen, Holland & Cooke for defendant, appellant.

JOHNSON, J. The evidence was insufficient to require the submission of the defendant's tendered issue based on the doctrine of last clear chance. No error has been made to appear in respect to the court's refusal to submit this issue. *Aydlett v. Keim,* 232 N.C. 367, 61 S.E. 2d 109; *Ingram v. Smoky Mountain Stages,* 225 N.C. 444, 35 S.E. 2d 337. See also *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361. The cases relied on by the defendant, including *Newbern v. Leary,* 215 N.C. 134, 1 S.E. 2d 384, and *Morris v. Seashore Transportation Co.,* 208 N.C. 807, 182 S.E. 487, are factually distinguishable.

However, our examination of the record leaves the impression that the evidence relied on by the defendant is sufficient to justify, though not necessarily to impel, the inference that the defendant is entitled to recover on its counterclaim. This made it an issue for the jury. *Maddox v. Brown,* 232 N.C. 244, 59 S.E. 2d 791; *Deaton v. Deaton,* 234 N.C. 538, 67 S.E. 2d 626. See also *Blanton v. Dairy,* 238 N.C. 382, 77 S.E. 2d 922; *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115; *Stovall v. Ragland,* 211 N.C. 536, 190 S.E. 899. Therefore, the ruling of the trial court in allowing the plaintiff's demurrer to the evidence as to the counterclaim must be held for error.

Next, we note that in the charge the jury's attention was directed to these considerations:

"Gentlemen, we have a statute in North Carolina prescribing the various speeds at which we are permitted to drive automobiles. If you are in a business district you are limited to 20 miles an hour; if you are in a residential district the maximum speed is 35 miles per hour. (And out on the open highway where you are not in a business district or in a residential district the maximum speed is 55 miles per hour. Gentlemen,

the Court instructs you there is no evidence in this case to show that this collision occurred either in a residential section or in a business district under the requirements of the law. The law says in order for a district to be a business district that the territory contiguous to the highway for a distance of 300 feet or more, 75% of it would have to be occupied by business establishments being occupied and used for business purposes, and in a residential district the territory contiguous to the highway, or 75% of it for a distance of 300 feet, would have to be occupied by dwelling houses that were being occupied at the time and business establishments that were occupied at the time. There is not any evidence, gentlemen, in this case that this particular section of West Main Street would fall under either of those definitions as contained in the law. So the Court instructs you that the maximum speed,—I am not instructing you that's the speed this plaintiff had a right to drive at, but that the maximum speed would be 55 miles per hour.)"

To the foregoing portion of the charge appearing in parentheses, the defendant excepted.

Conceding, without deciding, that on the record as presented the evidence is not sufficient to justify the inference that the collision occurred in a residential district as defined by G.S. 20-38 (w) 1, nevertheless, in view of the trial court's positive instruction that the evidence is insufficient to show that the area is a residential district, we think the defendant was entitled to have the jury instructed as to the provisions of G.S. 20-141 (c), which reads as follows: "The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

The court neither read to the jury the language of the foregoing statute nor undertook to explain or apply its provisions to the evidence in the case. The failure to do so, made the subject of a specific exception and duly brought forward, must be held for error as a failure to comply with the requirements of G.S. 1-180, within the purview of the rule explained and applied by *Ervin, J.*, in *Lewis v. Watson*, 229 N.C. 20, 47 S.E. 2d 484.

Since the case goes back for a new trial, we refrain from discussing the rest of the defendant's assignments of error.

The verdict and judgment below will be set aside to the end that the defendant may have a new trial in accord with this opinion, and it is so ordered.

New trial.

LEO DANIELS, IN RE NORTH CAROLINA DEPARTMENT OF REVENUE, v. LEO DANIELS, T/A TERMINAL GRILL, v. H. PAUL YELVERTON.

(Filed 16 December, 1953.)

1. Pleadings § 16—

A defendant in a civil action may demur *ore tenus* at any time, in either the trial court or in the Supreme Court, upon the ground that the complaint does not state a cause of action, or the Supreme Court may take cognizance of such defect *ex mero motu*, since the failure to state a cause of action cannot be waived.

2. Pleadings § 15—

A demurrer admits the truth of the allegations of fact contained in the complaint and ordinarily relevant inferences of fact necessarily deducible therefrom, construing the complaint liberally, but the demurrer does not admit conclusions or inferences of law.

3. Execution § 6: Taxation § 39—

Where the Commissioner of Revenue has the clerk of a Superior Court to docket his certificate setting forth the tax due by a resident of the county pursuant to G.S. 105-242 (3), execution on such judgment directed to the sheriff of the county must be issued by the clerk of the Superior Court of the county, or in his name by a deputy or assistant clerk, and it cannot be issued by the Commissioner of Revenue, G.S. 1-307, G.S. 1-303.

4. Execution § 23½b—

The issuance of a proper writ of execution is an essential step in the sale of property under execution, and when the execution is not issued by the clerk of the court in which the judgment is docketed, or in his name by a deputy or assistant clerk, as required by law, the sale is a nullity.

5. Execution § 22—

Plaintiff tax debtor instituted this action against the last and highest bidder at a sale under execution of a certificate issued by the Commissioner of Revenue pursuant to G.S. 105-242 (3), to recover for failure of the bidder to comply with his bid, but the complaint alleged that the execution was issued by the Commissioner of Revenue. *Held:* Upon the allegations the sale was a nullity, since an execution to be valid must be issued by the clerk of the county in which the judgment is docketed, and therefore the complaint fails to state a cause of action.

6. Same: Estoppel § 5—

A bidder at an execution sale which is void is not estopped to deny the validity of the sale, since in such instance the doctrine of estoppel does not apply.

7. Execution § 23½a—

Where, from the allegations of the judgment debtor relative to the debts outstanding against him it is apparent that he could not be entitled to any part of the amount bid by the last and highest bidder, such allegations preclude any inference that he would be entitled to any part of the bid had it been paid, and therefore he is not entitled to maintain an action against the bidder to enforce payment. This result is not affected by the provisions of G.S. 1-399.69 (d).

APPEAL by the plaintiff from *Hatch, Special J.*, June Civil Term 1953. WAKE. Affirmed.

Civil action heard on demurrer *ore tenus*. The demurrer was sustained, and the plaintiff excepted and appealed.

Samuel Pretlow Winborne and Vaughan S. Winborne for plaintiff, appellant.

T. Lacy Williams for defendant, appellee.

PARKER, J. This is a summation of the allegations of the complaint. 1. The plaintiff was the defendant in an action entitled "North Carolina Department of Revenue *v.* Leo Daniels, trading as the Terminal Grill." 2. On or about 24 January 1950 an execution was issued by the North Carolina Department of Revenue to the Sheriff of Wake County, to levy on the property of Leo Daniels, trading as the Terminal Grill in Raleigh—the execution being issued upon a judgment properly recorded in Wake County in the Wake County Judgment Docket Book 56, p. 214, in favor of the Department of Revenue. 3. The Sheriff found no real property belonging to Daniels, but levied on personal property owned by him in the Terminal Grill. 4. On 18 February 1950 at noon, after proper advertisement according to law, a public sale was conducted by the Sheriff at the Terminal Grill. Before the bidding began the following terms and conditions for the sale were read: "The Sheriff's Office wants it very definitely understood by all bidders on this sale, that we are selling, by the order of the court, the interest or equity held by Leo Daniels in this property only. Be it further understood that the sale of this property is subject to all mortgages and liens which the court may hold valid against this property. The Sheriff's Office does not undertake nor try to decide who owns this property, nor can we make any decision as to who owns what. Now the sale opens and I will receive bids. Terms Cash." 5. The last and final bidder for the property was H. Paul Yelverton in the amount of $2,500.00. 6. On 20 February 1950 Yelverton notified the Sheriff of Wake County that he would not pay the amount of his bid, and still refuses to do so, though the Sheriff notified Yelverton in writing to make good his bid, and take title. 7. In accordance with law, and after

proper advertisement, the properties were resold at public sale on 14 March 1950, where and when the last and final bidder was H. Paul Yelverton in the amount of $25.00, which bid was paid to the Sheriff of Wake County, and Yelverton took title to the properties. 8. In accordance with G.S., Sec. 1-339.69 (c), a deficiency exists between the original sale price and the resale price in the amount of $2,475.00 and the cost of the resale, for which amounts the defendant Yelverton is liable. Wherefore, the plaintiff prays that the defendant be required to pay into the Clerk's Office the sum of $2,475.00 and the cost of the resale, that he recover his costs, etc.

The defendant filed an answer. The plaintiff filed a reply to certain paragraphs of the answer containing new allegations. The parts of the reply material for this appeal follow. One: The defendant knew of his own knowledge that a proper Notice of Sale of Personal Property under Execution was posted and published by the Sheriff of Wake County. Two: The plaintiff borrowed money from the Raleigh Industrial Bank; the defendant who was his landlord, endorsed his note; that he gave the defendant a chattel mortgage on his equipment and fixtures as security for his endorsement, which mortgage was of doubtful validity at the time of execution, and he still owed the bank at the time of the levy on the note. The plaintiff was and still is indebted to other persons, some of whom have secured judgments and liens against him. The defendant was aware of all these facts. The plaintiff prior to the levy attempted to sell his business as a going concern and had a prospective purchaser; but could not sell, because the defendant would not lease the building to the prospective buyer; that the defendant knew he could not obtain a fair price for his business unless a lease was granted. Three: The defendant knew he paid over $12,000.00 for his equipment and fixtures, which were appraised to have a fair market value of over $6,000.00 where placed, and over $3,500.00, if they had to be removed.

A defendant in a civil action in North Carolina may demur *ore tenus* at any time, in either the trial court, or in the Supreme Court, upon the ground that the complaint does not state a cause of action. If the question is not raised, we may do so *ex mero motu,* for the failure to state a cause of action cannot be waived. *Lamm v. Crumpler,* 233 N.C. 717, 65 S.E. 2d 336; *Watson v. Lee County,* 224 N.C. 508, 31 S.E. 2d 535; *Snipes v. Monds,* 190 N.C. 190, 129 S.E. 413. "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.

The plaintiff's pleadings must be liberally construed. The demurrer *ore tenus* admits the truth of the allegations of facts therein contained

and ordinarily relevant inferences of fact necessarily deducible therefrom, but not admissions of conclusions or inferences of law. *Bryant v. Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547; *Ferrell v. Worthington,* 226 N.C. 609, 39 S.E. 2d 812; *Alford v. Washington,* 238 N.C. p. 694.

The complaint alleges that on or about 24 January 1950 an execution was issued by the North Carolina Department of Revenue to the Sheriff of Wake County to levy on the property of Leo Daniels, trading as the Terminal Grill in Raleigh—the execution being issued upon a judgment properly recorded in Wake County in the Wake County Judgment Docket Book 56, p. 214, in favor of the North Carolina Department of Revenue. The necessary inference from this allegation is that the Commissioner of Revenue caused this judgment to be docketed with the Clerk of the Superior Court of Wake County, as provided for in G.S. 105-242, subsection 3. The plaintiff in his brief admits that the Commissioner of Revenue caused this judgment to be docketed with the Clerk of the Superior Court of Wake County as provided for in G.S. 105-242, subsection 3, and further admits that the Commissioner of Revenue issued an execution direct to the Sheriff of Wake County. The appellant contends in his brief "G.S. 105-242, subsection 3 states that when a judgment is docketed with the Clerk, 'Execution may issue thereon,' but no mandatory requirement is set forth. Therefore, an execution may issue from either source." The appellant cites no authority for this position.

The Commissioner of Revenue did not proceed under G.S. 105-242, subsection 1, by issuing an order under his hand and official seal, directed to the Sheriff of Wake County, commanding him to levy upon and sell the real and personal property of Leo Daniels found within his county for payment of the amount thereof, with added penalties, etc., and to return to the Commissioner of Revenue the money collected by virtue thereof.

Neither did the Commissioner of Revenue proceed under G.S. 105-242, subsection 2. That subsection states bank deposits, rents, salaries, wages and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment.

However, as alleged in the plaintiff's pleadings and admitted in his brief, the Commissioner of Revenue proceeded against this defendant under G.S. 105-242, subsection 3, the material part of which for the purposes of this appeal reads as follows: "In addition to the remedy herein provided, the Commissioner of Revenue is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due

and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court (said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon the execution thereon no homestead or personal property exemption shall be allowed)."

G.S. 105-242, subsection 4 states that the remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of taxes.

The question presented is this: When the Commissioner of Revenue pursuant to G.S. 105-242, subsection 3 has had the Clerk of the Superior Court of Wake County to docket his certificate setting forth the tax due by Leo Daniels trading as the Terminal Grill in the Wake County Judgment Docket Book 56, p. 214, can the Commissioner of Revenue issue a valid execution on said judgment direct to the Sheriff of Wake County, or must the execution on said judgment be issued by the Clerk of the Superior Court of Wake County? The answer is the execution must be issued by the Clerk, and that the Commissioner of Revenue himself cannot issue a valid execution on such judgment.

G.S. 1-307 provides that executions for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution was rendered, and the returns of executions shall be made to the court of the county from which it issued. *Hasty v. Simpson,* 77 N.C. 69. G.S. 1-303 provides that executions shall be signed by the clerk.

The general rule is that the issuance of a writ of execution is an essential step in the process by which title may be acquired at an execution sale, and that a writ of execution is issuable only out of the court which rendered the judgment. 21 Am. Jur., Executions, p. 29; 33 C.J.S., Executions, p. 188. The signature of the clerk is the testimonial by which the authenticity of the execution is to be known. "An officer making a sale under execution acts solely by virtue of the statutory authority conferred, which must be strictly pursued; and where such power does not exist nothing passes by the sale." 33 C.J.S., Executions, p. 434.

"The execution is issued by the clerk and subscribed by him, or in his name by a deputy, or by an assistant clerk, and is directed to the sheriff of the county to which it is issued . . ." McIntosh N. C. Practice and Procedure in Civil Cases, p. 832.

"An execution is a judicial writ issuing from the Court where the judgment is rendered, and in contemplation of law is issued under the order of the Court." *Gooch v. Gregory,* 65 N.C. 142.

In *Hooker v. Forbes,* 202 N.C. 364, p. 368, 162 S.E. 903, it is said: "It had previously been decided that a writ signed by an attorney under a verbal deputation of the clerk to all members of the bar was a nullity. *Shepherd v. Lane,* 13 N.C. 148; *Gardner v. Lane,* 14 N.C. 53."

Applying the principles of law above stated to the allegations of the plaintiff's pleadings it would seem that the execution issued by the North Carolina Department of Revenue to the Sheriff of Wake County upon a judgment in favor of the North Carolina Department of Revenue which was recorded in the Office of the Clerk of the Superior Court of Wake County in the Wake County Judgment Docket Book 56, p. 214, was a nullity, and conferred no power on the sheriff to sell, and Yelverton, the last and highest bidder at such purported sale, acquired no title; such purported sale being a nullity. "Nothing can come out of nothing, any more than a thing can go back to nothing." Marcus Aurelius Meditations IV, 4. The purported sale being a nullity, the plaintiff's pleadings totally fail to state a cause of action.

The plaintiff contends that the defendant is estopped to question the validity of the first sale. In 33 C.J.S., Executions, p. 485, it is said: "A chattel mortgagee, who bids in the equity of redemption at an execution sale, is not estopped to deny the validity of such sale, especially where the sale is void"—citing in support of the text *Rowland Hardware & Supply Co. v. Lewis,* 173 N.C. 290, 92 S.E. 13, wherein it is said "the sale being void, the doctrine of estoppel does not apply."

A further serious question is presented: Can the plaintiff maintain this action as alleged in plaintiff's pleadings? The answer is No. The Commissioner of Revenue did not bring this action, and is not a party to it. The Sheriff of Wake County did not bring this action, and is not a party to it. We have held that a sheriff selling land under execution may maintain an action in his name against the purchaser for the amount bid. *McKee v. Lineberger,* 69 N.C. 217; *Maynard v. Moore,* 76 N.C. 158; *Woodruff v. Trust Co.,* 173 N.C. 546, 92 S.E. 496. In *Rowland Hardware & Supply Co. v. Lewis, supra,* the action was brought by a judgment creditor against the Sheriff of Robeson County, C. T. Pate & Co., and C. T. Pate to recover the amount bid by C. T. Pate, acting for the firm of which he was a member, at a sale under execution.

In 21 Am. Jur., Executions, p. 121, it is said: "An action for breach of contract based upon a failure of the successful bidder at an execution sale to pay the bid may, as a rule, be maintained by the execution officer in his own name. It has been held that the plaintiff in execution, also, may sue and, furthermore, that the judgment debtor may maintain a suit

against the purchaser at execution sale to recover the excess of the bid over the amount of the judgment upon the neglect or refusal of the officer to bring the suit." 33 C.J.S., Executions, Sec. 222, p. 471, states: "However, if the amount bid is less than the amount of the debt, so that the execution debtor is entitled to no part of the price, the execution debtor clearly is not entitled to bring an action to enforce the bid, and the action is properly brought by the sheriff."

No inference can be drawn from the plaintiff's pleadings that if the bid at the first sale had been paid that the plaintiff would be entitled to any part of the bid paid, because the plaintiff alleges in his reply that he borrowed money from the Raleigh Industrial Bank, that the defendant endorsed this note, that he had given the defendant a chattel mortgage on his equipment and fixtures as security for his enforcement, which mortgage was of doubtful validity at the time of this execution, and that he owed the bank at the time of levy on this note; and further that he was, and still is, indebted to other persons and firms, some of whom have procured judgments and liens against him.

We are advertent to G.S. 1-339.69 (d). However, it would seem that this subsection would not permit the plaintiff to maintain this action according to the facts alleged in the plaintiff's pleadings.

Can it be said that plaintiff's pleadings allege a cause of action, when according to the pleadings the plaintiff cannot maintain the action?

The trial court was correct in sustaining the demurrer *ore tenus,* and it is so ordered.

Affirmed.

STATE v. WILLIAM NALL.

(Filed 16 December, 1953.)

1. Criminal Law § 52a (1)—

Upon defendant's motion to nonsuit in a criminal prosecution, defendant's evidence in conflict with that of the State is not to be considered, but defendant's evidence may be considered when it is favorable to the State or tends to explain or make clear that which has been offered by the State. G.S. 15-173.

2. Automobiles § 30b: Criminal Law § 8b—

The operation of a vehicle upon a highway within this State while under the influence of intoxicating liquor is a misdemeanor, and therefore all who participate therein as aiders or abettors or otherwise are guilty as principals.

3. Automobiles § 30d—

The evidence offered by the State in this case and so much of defendant's evidence as is favorable to the State or tends to explain or make

clear that offered by the State, *is held* sufficient to show that defendant was operating his truck upon a highway within this State while he was under the influence of intoxicating liquor, or that another, also in an intoxicated condition, was driving the truck under defendant's direction and control, defendant being in the vehicle, and therefore was sufficient to sustain a verdict of guilty in a prosecution of defendant under G.S. 20-138.

4. Automobiles § 31b—

The evidence in this case taken in the light most favorable to the State *is held* sufficient to support a finding by the jury beyond a reasonable doubt that after an accident between defendant's truck and an automobile on the highway, in which the driver of the other car was injured and his car damaged, defendant did not stop and comply with the provisions of G.S. 20-166 (c).

5. Automobiles § 30d—

The use of the term "any beverage containing alcohol" rather than the term "intoxicating beverage" in the court's charge defining the expression "under the influence of intoxicating liquor" in a prosecution for drunken driving, *is held* not prejudicial.

APPEAL by defendant from *Rousseau, J.*, at May Term, 1953, of MOORE.

Criminal prosecution upon a warrant issued by a justice of the peace of Carthage Township, Moore County, North Carolina, upon affidavit charging in two counts that on 8 January, 1953, defendant (1) operated a motor vehicle on the public roads of North Carolina, while under the influence of narcotic drugs or intoxicating liquor, to wit, "drunken driving," and (2) hit another motor vehicle and left the scene of the accident, returnable before recorder's court of said county. Upon trial in the recorder's court, defendant was found to be guilty, and from judgment pronounced defendant appealed to Superior Court.

From the evidence offered upon the trial in Superior Court these facts appear to be uncontroverted:

1. About 6 o'clock on a rainy, foggy night, 8 January, 1953, a car owned and operated by one Gilbert Frye, traveling on a paved State highway, No. 27, from the direction of Sanford toward Carthage, N. C., collided with a truck owned and occupied by defendant, William Nall.

2. The truck of defendant left the scene of the accident, and traveled up a dirt road six-tenths of a mile and stopped. There Frye and Police Chief Cameron found it. (Cameron is now dead.)

The evidence for the State tends to show this narrative: The truck came off a side road crossing the highway, in front of the car, and the rear of the truck hit the left rear of the car; the collision smashed the fender of the car "up against" the rear wheel, damaging the car extensively. By the impact Frye was thrown out of the car, landing on his shoulder. Defendant was in the truck going off. He did not wait to see

if Frye was hurt, and never came to Frye's car nor did he speak to Frye. Frye and Chief Cameron saw defendant at the truck where it had stopped as above stated. Defendant was in the truck. Nobody was with him at the time. And Frye testified: "He (defendant) was driving, and he got out when Chief Cameron told him to . . . He looked to me like he was under the influence pretty well. He could not talk very plain and he said there was nothing the matter with him . . . I did not get close enough to smell anything. I was there with him two or three minutes. He was then taken to jail . . ."

And State Highway Patrolman Lowrimore testified: "I went to the scene about 6:20 . . . The defendant was not there at the time . . . I saw him at the jail. He was highly intoxicated,—it was thirty or forty minutes after the collision . . . I went to the jail to see him and Mr. Nall staggered over to the bars and I got up close to him . . . and he had a strong odor of intoxicants upon his breath. I saw a wound on his head . . ."

Defendant, reserving exception to denial of his motion, aptly made when the State first rested, testified: "Gilbert Frye ran into the rear of my truck on January 8th, hit the right-hand back wheel bed . . . I was sitting on the right-hand side of the truck . . . My head hit the right-hand windshield and broke it out and knocked me addled. I had not had anything at all to drink on this day. I had worked all day . . . I left the place where I was working . . . at Vass . . . came back by Cameron . . . straight down Highway 27 toward Carthage . . . I was not driving at the time. June Lowe was driving . . . I did not drive the truck away. June Lowe drove it. When Mr. Frye came up I was not driving the truck. I did not drive it up there. Immediately after being hit I was addled and did not have any idea what I did . . . After I got bumped into I got out and went back and sat down. I had a sick headache. I was pretty sick. I went back to the car of Mr. Frye and opened the door on the left-hand side and he fell out. Mr. Frye told June to pull up and we drove off." Again, "How long was that after the collision?", defendant answered, "About five minutes" . . .

And defendant continued: "I remember the officer coming down in the jail, and he asked me for my driver's license . . . He stayed up there about five or ten minutes . . . I remember that when Mr. Frye came up there I told him I was sick and at the time I got in the truck when Mr. Frye and Mr. Cameron came up there I don't know what was taking place but I did recognize them . . . I was not drinking that night, neither of us were drinking. I did not drink any liquor that night . . . I didn't have any odor of intoxicants on my breath and I was not staggering . . . I was sitting on the bunk when Mr. Lowrimore came in and asked for my license. I didn't get up off the bunk. I knew what he said

. . . I did not see Mr. Frye thrown out of his car and get in my truck and drive off."

And June Lowe, as witness for defendant, testified that he drove the truck up to the wreck; that when it happened Mr. Nall went back to the car, and "Mr. Frye told us to pull off his car, and we pulled off up the road and stopped"; and that neither of them had had anything to drink that day; that they did not come out of any side road into Mr. Frye; that "Mr. Nall had hit . . . and busted the windshield and knocked a knot on his head."

And defendant offered testimony of others tending to show that he was not drinking the night of the wreck.

When defendant rested, the State recalled June Lowe for recross-examination. He said: ". . . Mr. Frye told me to pull off.

"I drove away from the scene of the collision. I didn't know which way I was going, it was foggy and dark . . . I pulled up this dirt road and stopped. I was driving . . ."

Then the State recalled Patrolman Lowrimore, and he stated: (without objection) "I went back to the truck and that was the first time I saw Lowe . . . I had a conversation with Lowe and he said he was drinking liquor Mr. Nall gave him. He had a strong odor on his breath . . . He said he could get home all right and we let him go. He denied driving the truck that night . . . Before the case came up he called me over to him in front of the courthouse and said that 'Mr. Will wants me to say that I was driving the truck' . . . and he denied he was driving the truck,—that was in Recorder's court . . . He told me at the truck that night that he was drinking liquor and in consequence of what he told me I had him indicted for driving under the influence . . . He pleaded guilty in that case . . . Every time the colored boy has been on the stand to testify he has sworn that he was the one operating the truck . . ."

Defendant, at the close of the evidence, renewed his motion for judgment as of nonsuit. The motion was denied and he excepted.

The court, before charging the jury, allowed this amendment to the warrant: "And the said William Nall did drive a motor vehicle while it was involved in an accident resulting in damage to the automobile of one Gilbert Frye, and he, the said William Nall, did unlawfully and willfully fail to immediately stop the motor vehicle he was then driving at the scene of the accident."

Verdict: Guilty as charged.

Judgment: (1) On the count of operating car under the influence of intoxicants: Confinement in the common jail of Moore County for a period of 90 days and assigned to work on the roads under the control and supervision of the State Highway and Public Works Commission, and that he surrender his driver's license to the Clerk and he is directed

to transmit same to the Safety Division of the Motor Vehicles Department at Raleigh to be revoked as provided by law; (2) "On the second count of doing injury to property"; a like sentence "to run concurrently with the sentence in the count of driving under the influence."

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Max O. Cogburn, Member of Staff, for the State.

H. F. Seawell, Jr., and Robert L. McMillan, Jr., for defendant, appellant.

WINBORNE, J. While the record on this appeal reveals that there are twenty-nine assignments of error based upon a like number of exceptions taken in the course of the trial, and to portions of the charge given by the court to the jury in the Superior Court, defendant, appellant, in his brief states only four questions as being involved.

The first question challenges the correctness of the rulings of the court in denying defendant's motions aptly made for judgment as of nonsuit, pursuant to provisions of G.S. 15-173.

It is appropriate to note that the statute, G.S. 15-173, provides, in pertinent part, that, when on the trial of any criminal action in the Superior Court, the State has introduced its evidence and rested its case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit; that if the motion is refused, and if defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal; but that the defendant may make such motion at the conclusion of all the evidence in the case, and if the motion is refused, the defendant may on appeal, after the jury has rendered its verdict, urge as ground for reversal the trial court's denial of his motion made at close of all the evidence.

Such a motion made under the provisions of G.S. 15-173 serves, and is intended to serve, the same purpose in criminal prosecutions as is accomplished by G.S. 1-183 in civil actions. Thus in considering such motion in a criminal prosecution, as in a civil action, the defendant's evidence, unless favorable to the State, is not to be taken into consideration, except, when not in conflict with the State's evidence, it may be used to explain or make clear that which has been offered by the State. See *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543, where the authorities are assembled. Also see *S. v. Bryant*, 235 N.C. 420, 70 S.E. 2d 186; *S. v. Sears*, 235 N.C. 623, 70 S.E. 2d 907.

Therefore, taking the evidence offered by the State and so much of defendant's evidence as is favorable to the State, or tends to explain and

make clear that which has been offered by the State, in the light most favorable to the State, this Court is of opinion, and is impelled to hold that there is sufficient evidence to take the case to the jury on the question of the guilt or innocence of defendant on each of the offenses with which he stands charged, and to support a verdict of guilty on each of the offenses of which defendant stands convicted.

Now as to the offenses charged against defendant:

(1) As to the first offense: The statute G.S. 20-138 declares that "it shall be unlawful and punishable, as provided in Section 20-179, for . . . any person who is under the influence of intoxicating liquor . . . to drive any vehicle upon the highways within the State." And G.S. 20-179, as rewritten by 1947 Session Laws of North Carolina, Chapter 1067, Sec. 18, declares that "every person who is convicted of violating Sec. 20-138, relating to . . . driving while under the influence of intoxicating liquor . . . shall for the first offense, be punished by a fine of not less than one hundred dollars ($100.00) or imprisonment for not less than thirty (30) days, or by both such fine and imprisonment, in the discretion of the court . . ."

And in *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688, in opinion by *Denny, J.,* this Court held that "before the State is entitled to a conviction under G.S. 20-138 . . . it must be shown beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of the State, while under the influence of intoxicating liquor or narcotic drugs." And, that "a person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is appreciable impairment of either or both of these faculties." See also *S. v. Bowen,* 226 N.C. 601, 39 S.E. 2d 740; *S. v. Blankenship,* 229 N.C. 589, 50 S.E. 2d 724; *S. v. Lee,* 237 N.C. 263, 74 S.E. 2d 654.

Moreover, the unlawful operation of a vehicle upon a highway within this State while under the influence of intoxicating liquor within the meaning of G.S. 20-138 is a misdemeanor and all who participate in the commission of a misdemeanor, as aiders and abettors or otherwise, are guilty as principals. See *S. v. Gibbs,* 227 N.C. 677, 44 S.E. 2d 201, and cases there cited.

In the light of these statutes, as interpreted and applied by the Court, the facts and circumstances in evidence in the case in hand, taken in the light most favorable to the State, are sufficient to support a finding by the jury, beyond a reasonable doubt, that on the occasion of the collision between the truck of defendant and the car of Gilbert Frye, on the night of 8 January, 1953, either (1) defendant was operating his truck upon

a highway within this State while he was under the influence of intoxicating liquor; or, (2) if June Lowe was operating the truck, he, Lowe, was under the influence of intoxicating liquor, and that defendant was riding in his truck, aiding and abetting in the operation of it. The case was submitted to the jury on this theory.

As to the second count: The statute, G.S. 20-166, as it existed on 8 January, 1953, in pertinent part, declares that the driver of any vehicle involved in an accident: (a) resulting in injury to any person, shall immediately stop such vehicle at the scene of such accident, and any person violating this provision shall upon conviction be punished as provided in G.S. 20-182; or (b) resulting in damage to property and in which there is not involved injury of any person, shall immediately stop such vehicle at the scene of the accident, and any person violating this provision shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court; or (c) resulting in injury to any person or damage to property shall also give his name, address, operator's or chauffeur's license number and registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in G.S. 20-182.

In the light of this statute, the evidence in the case in hand, taken in the light most favorable to the State, is sufficient to support a finding by the jury beyond a reasonable doubt that (1) there was an accident on night of 8 January, 1953, between the truck of defendant and the car of Gilbert Frye; (2) that Gilbert Frye was injured, and his car damaged; (3) that defendant did not stop, and comply with the provisions of subsection (c) above set forth.

The fourth question involves portions of the charge, particularly as to what is meant by the expression "under the influence of intoxicating liquor." The court charged that if the jury find beyond a reasonable doubt, the burden being upon the State, that on 8 January last, defendant "on the highway in this county, operated a motor vehicle after drinking any beverage containing alcohol to the extent . . . that he did not have the normal control of his mind and of his body, to the extent . . . to where his mental and physical faculties, or either one of them, has become appreciably impaired . . . it would be your duty to return a verdict of guilty on that count." Complaint is made of the use of the words "any beverage containing alcohol," rather than "a sufficient quantity of intoxicating beverage,"—it being contended that the use of such words was

calculated to mislead the jury to defendant's prejudice. While this Court has commended and commends the definition enunciated by *Denny, J.*, in *S. v. Carroll, supra,* quoted first hereinabove, it is not deemed that the phraseology to which exception is here taken is beyond the pale of the term. See *S. v. Bowen, supra; S. v. Lee, supra.*

Other exceptions to the charge are not of sufficient merit to require express consideration.

The second question relates to numerous exceptions to rulings in respect to admission and exclusion of evidence. However, consideration of each of them fails to show error.

And the third question is based upon exceptions which defendant contends indicate that the court erred in the manner in which trial below was conducted. Yet a most careful consideration and examination of the record and case on appeal fails to disclose any matters on which to found the question. Rather, it appears that the trial was orderly conducted, and the case fairly and squarely presented to the jury in accordance with established principles of law, and rules of practice. And the jury has not accepted defendant's version of the facts.

Hence in the judgment below, this Court finds

No error.

J. T. LOWERY, JR., v. JAMES C. HAITHCOCK AND WIFE, MARGARET L. HAITHCOCK (ORIGINAL DEFENDANTS), AND RALEIGH BUILDING & LOAN ASSOCIATION (ADDITIONAL DEFENDANT).

(Filed 16 December, 1953.)

1. Laborers' and Materialmen's Liens §§ 1, 9: Husband and Wife § 13a (3)—Evidence held sufficient to support finding that husband acted for wife in letting contract for construction on her premises.

In this action by a contractor to enforce a lien for labor and materials, the mortgagee in an instrument recorded after the contractor had started work resisted the lien on the ground that the contract for the construction was let by the husband of the owner of the land and that she was not a party thereto. Evidence tending to show that the *feme* owner participated in the preliminary negotiations and agreed to the contract for the erection of a store building and a house on her land, visited the premises after construction was begun and suggested and agreed on changes in the plans and in the materials to be used, *is held* to support the conclusion that her husband, with her consent, spoke for her as well as himself in making the contracts and therefore that she was a party to the contract so as to support lien for labor and materials.

2. Laborers' and Materialmen's Liens § 5—

Notice of lien for labor and materials must be filed in the office of the clerk of the Superior Court of the county in which the land is located

within six months from and after the date the work is completed, and the claim must specify in detail the work done and the materials furnished. G.S. 44-38.

3. Laborers' and Materialmen's Liens § 10—

Claimant must institute action to enforce a lien for labor and materials within six months from the date of the filing of the notice of claim of lien. G.S. 44-43, G.S. 44-48 (4).

4. Laborers' and Materialmen's Liens § 5—

G.S. 44-38 does not require the listing of material item by item, or the labor hour by hour, but does require sufficient detail to put parties who are or may become interested in the premises on notice as to the labor performed and materials furnished, the amount due therefor, and the property upon which employed.

5. Same—

In a notice of claim for labor and materials, an item which merely stipulates the amount due a named company, even though its name discloses the nature of its business, is insufficient itemization to show either the nature of the material or the date it was furnished as required by G.S. 44-38, and upon exception to such item it will be deleted from the amount of the lien on motion of a subsequent mortgagee.

6. Laborers' and Materialmen's Liens § 1: Husband and Wife § 13a (3)—

Where the evidence discloses that the wife participated in preliminary negotiations carried on by her husband and approved the contracts for construction of a store building and a house on her land let by him for her, but that after these contracts were let the husband alone entered into a contract for the drilling of a well on the property, and there is no evidence that the wife knew of or authorized the contract for the well, the contract for the well is an independent contract, and the evidence fails to show that she was a party to that contract so as to support a lien for labor and materials therefor.

7. Laborers' and Materialmen's Liens § 5—

Where the owner lets a contract for the construction of a store building and a house on her land, and thereafter a contract is let for the digging of a well thereon, the contract for the digging of the well is separate and distinct from the original contract, and when notice of lien therefor is not filed within six months after the completion of the well it is ineffective to create a lien therefor.

8. Laborers' and Materialmen's Liens § 5—

Where notice of claim of lien for labor and materials, considered as a whole, is in substantial compliance with the statute, an exception to the sufficiency of the notice as a whole cannot be sustained, even though some items therein may not be sufficiently specific.

9. Laborers' and Materialmen's Liens § 1—

In order to support a lien for labor and materials it is necessary that claimant show a contract between himself and the owner out of which the debt arose, and claimant, as against a subsequent lienor, may prove the existence of such contract by admissions made by the owner in her answer.

APPEAL by defendant Raleigh Building & Loan Association from *Burney, J.*, March Term, 1953, WAKE.

Civil action to recover balance due on a construction contract and to enforce a laborer's and materialman's lien for the payment thereof.

The *feme* defendant owned a tract of land on Highway 70 near Garner. She and her husband planned to erect a store building thereon and had plans drawn therefor. Beginning about 1 June 1950, they began to discuss with plaintiff the possibility of erecting the store. They met with him both at their house and at his. On or about 15 June they entered into a contract with plaintiff under the terms of which plaintiff agreed to erect the store on a cost-plus basis. That is, the Haithcocks were to pay for all materials and labor at cost and in addition pay plaintiff the sum of $500 for his services.

While the parties were discussing the contract for the construction of the store, the Haithcocks had plans prepared for a six-room dwelling to be erected on the same premises. The parties discussed the erection of this building, and on or about 3 July entered into the same type of contract for its erection as the one for the store, the plaintiff's fee being the same—$500.

Plaintiff began work on the store about 26 June and on the house shortly after the contract was made. The store was completed about 25 October and the house, on 10 November 1950. During the progress of the work a number of changes and additions to the plans were made, and different and more expensive material than originally contemplated was used.

The male defendant wanted a well drilled on the premises. Heater Well Company declined to accept a contract from him. Thereupon, plaintiff executed a contract with Heater, and the well was drilled at a total cost of $1,190.67. The drilling was begun in July, and the contract for the well was completed more than six months before the lien was filed. Plaintiff had no conversation whatever with Mrs. Haithcock about the well, and she did not authorize the same.

Defendants, during the progress of the work and shortly thereafter, paid plaintiff $14,500. The total cost was $23,030.99. When the work was completed, plaintiff presented to defendants a bill for the balance of $8,530.99 which they declined to pay. They assert that plaintiff contracted to erect the two buildings at a total cost of $14,500, which they have paid. In their answer they admit that, in addition, the plaintiff installed in the dwelling a heating plant, drilled a well, and installed a pump and sink in the store. While they admit liability for these items, they allege they were no part of the original contract to build the house and store.

On or about 20 March 1951, plaintiff filed in the office of the clerk of the Superior Court a declaration of his claim of a laborer's and materialman's lien for the balance due. There was attached thereto what purports to be an itemized, verified account of the labor and material furnished by plaintiff, including his fee, and the costs thereof.

Prior to the trial, the Raleigh Building & Loan Association was, on its own motion, made an additional party defendant and allowed to plead.

As to it, the material facts are these: On 28 September 1950, it loaned to defendants Haithcock the sum of $18,000, taking as security for the payment thereof a deed of trust on the land upon which the store and dwelling were constructed. Default was made in the payment of the debt, and the deed of trust was foreclosed. The loan company became the purchaser at the sale, and the trustee, on 19 January 1953, executed and delivered a foreclosure deed conveying said premises to it, so that it now owns said land subject to such prior lien thereon as plaintiff may possess.

At the trial in the court below, the issues arising on the pleadings were submitted to and answered by the jury. By their answers to the issues, the jury found that (1) the contract was on a cost-plus basis as contended by plaintiff, (2) the balance due is $8,530.99, plus interest, (3) the lien filed by plaintiff constitutes a valid subsisting lien against the property which (4) is prior to the lien of the loan company. The court signed judgment on the verdict. Defendant loan company excepted and appealed.

Teague & Johnson and Bunn & Bunn for plaintiff appellee.
A. L. Purrington, Jr., and Charles H. Young for defendant appellant.

BARNHILL, J. Defendant loan company, by its appeal, presents two primary questions for decision: (1) Is there sufficient evidence to support a finding that the *feme* defendant, owner of the land, was a party to the contract with plaintiff, and (2) does plaintiff's notice and claim of lien substantially comply with the requirements of the statute so as to make it a lien upon the *locus?* Both questions must be answered in the affirmative.

There is very substantial, uncontradicted testimony tending to show that the contract was the contract of Mrs. Haithcock. She was present at the preliminary conferences, except the first, both at her home and at the home of the plaintiff. At the last conference about the store building, her husband told plaintiff that they would accept his terms and he could proceed with the work. She was present and the circumstances are such as to compel the conclusion that he, with her consent, spoke for her as well as for himself. Then, after the construction was begun, she frequently visited the premises, suggested and agreed on changes in the plans

and in the material to be used. These and other circumstances appearing of record compel the conclusion that the *feme* defendant was a party to and is bound by the contract with plaintiff, under which he constructed the two buildings. Indeed, this is admitted in her answer and she further admits liability for certain extras furnished by plaintiff.

That plaintiff was entitled to file a lien on the premises as prescribed by statute to secure any balance that may be due him under the contract is not denied by appellant. But it does stressfully contend that plaintiff failed to perfect his lien. That is, it argues that the notice was not filed within the time prescribed by the statute and the statement attached to the notice is not itemized as required by statute, G.S. 44-38.

Under the law, to be effective as a lien relating back to the date the work was begun, the notice of lien must be filed in the office of the clerk of the Superior Court of the county in which the land is located within six months from and after the date the work was completed. And the claim must specify in detail the work done and the material furnished. G.S. 44-38; *Assurance Society v. Basnight,* 234 N.C. 347, 67 S.E. 2d 390. And the claimant must institute his action to enforce the lien within six months from the date of the filing of the notice of claim of lien. G.S. 44-43, 48 (4); *Assurance Society v. Basnight, supra; Norfleet v. Cotton Factory,* 172 N.C. 833, 89 S.E. 785. Whether the action was instituted within this time limit is not at issue.

All the testimony tends to show that the work was begun 26 June 1950; that the store was completed about 25 October, and the whole contract was completed 10 November 1950. The notice of claim of lien was filed in March 1951. Therefore—except as hereinafter noted—any contention that plaintiff did not comply with the time requirements of the statute is without substantial merit.

The decisive question relates to the sufficiency of the statement of labor, time, and materials furnished. Does this comply with the statute which provides that the notice of claim "shall be filed in detail, specifying the materials furnished or (and) labor performed, and the time thereof?" G.S. 44-38.

The statute does not require a listing of material item by item, or the labor hour by hour. Yet it demands more than a mere summary statement such as "To balance due on account for material and labor due for building one house in Fountain, the total amount of such account being $250, upon which she has paid $100, leaving a balance of $150, with interest from 1 January, 1911." *Jefferson v. Bryant,* 161 N.C. 404, 77 S.E. 341; *Cook v. Cobb,* 101 N.C. 68; *Wray v. Harris,* 77 N.C. 77.

It does require a statement in sufficient detail to put parties who are or may become interested in the premises on notice as to the labor performed and material furnished, the time when the labor was performed

and the material was furnished, the amount due therefor, and the property upon which it was employed. In other words, there must be a substantial compliance with the requirements of the statute. *King v. Elliott,* 197 N.C. 93, 147 S.E. 701; *Fulp v. Power Co.,* 157 N.C. 157, 72 S.E. 867; *Cameron v. Lumber Co.,* 118 N.C. 266.

In the *Cameron case* last cited, the claim filed was in these words: "J. S. Cameron, owner and possessor, to A. D. Cameron—1894, 22 October: To 122½ days of labor as sawyer at his sawmill on Jumping Run Creek, in Harnett County, and at his old mill, from 1 October, 1893 to 31 August, 1894, $137.24. (Signed) D. A. Cameron, claimant." In deciding whether there was a sufficient bill of particulars to meet the requirement that the claim shall be filed in detail, the Court said: "We think the bill filed is a reasonable and substantial compliance with the statute. No one need misunderstand who should become interested in the property."

We conclude, therefore, that the statement attached to and forming a part of plaintiff's notice and claim of lien, except as to a few items, is, under our decisions, a substantial statement in detail and a sufficient compliance with the statute.

Appellant, however, challenges the validity of the charge for a drilled well included in the bill of particulars or statement attached to the notice of claim. This item is listed "Heater Well Company, $787.50." Neither the nature of the material nor the date it was furnished is disclosed. Only from the word "Well" used in the name of the company may we surmise the nature of the "material furnished." Furthermore, the evidence clearly shows that the contract for the well was entirely separate and distinct from the original contract and was completed more than six months prior to the date the notice of claim was filed.

Moreover, there is no evidence the contract for the well was the contract of the *feme* defendant, or that it was authorized by her. Plaintiff testified he never mentioned it to Mrs. Haithcock, that Mr. Haithcock wanted a well drilled but Mr. Heater would not accept a contract from him, and that he, Lowery, signed the contract.

There are other items of costs incurred in furnishing the well not specified as such in the notice of claim which make the total costs of the well $1,190.67. This amount must be deducted from the lien on authority of *King v. Elliott, supra.*

There are other individual items which, standing alone, fail to comply with the statute. Some of them are discussed in defendant's brief on the contention, however, that the claim of lien as a whole is not sufficiently specific. The defendant, by tendering an issue as to the Heater Well Company item, challenged the validity of the lien as to the same. However, otherwise, the defendant only put in issue the validity of the lien

as a whole. In so far as we have been able to ascertain, no individual item, other than the charge for the well, is the subject of exception. The record affords us no opportunity to consider the elimination of any one or more of them. The notice of claim, generally speaking, is in substantial compliance with the statute and, except as noted, must be upheld.

A lien, such as the one here at issue, must be supported by a debt which arose out of a contract. It was necessary, therefore, for plaintiff to prove his contract with Mrs. Haithcock and his debt arising thereunder. What better evidence could he desire than the testimony or admissions of the debtor? Certainly then the court committed no error in overruling defendant's objection to the admissions made by the original defendants in their answer as to the debt due and owing plaintiff.

We have carefully examined the other exceptive assignments of error. They are without sufficient merit to require discussion. Likewise, we have examined the authorities cited and relied on by defendant and find that they are distinguishable. Our former decisions have liberalized the lien statute upon which plaintiff relies—perhaps beyond the original intent. Even so, we must apply the statute as heretofore construed by this Court.

The judgment for the defendant in the amount found by the jury is affirmed. However, so much thereof as declares it to be a lien upon the *locus* must be modified. The plaintiff is entitled to a lien in the amount of the debt less the cost of the well, to wit, $7,340.30, with interest.

Modified and affirmed.

HORACE M. NEAL AND RAY WALTERS v. JAMES MARRONE.

(Filed 16 December, 1953.)

1. Evidence § 39—

Where a contract is not required to be in writing it may be partly written and partly oral, but in the absence of fraud or mistake evidence of an asserted parol provision is incompetent when such parol provision is inconsistent with the writing or tends to substitute a new and different contract for the one evidenced by the writing, since it will be presumed that the writing was intended to represent all engagements dealt with therein, and merged therein all prior and contemporaneous negotiations.

2. Same: Brokers § 12—In broker's action on written contract, allegations relating to contemporaneous parol agreement in conflict with writing are properly stricken.

In a broker's action on a written contract giving him exclusive right to sell at a stipulated price and entitling him to receive as commissions all sums paid by the purchaser in excess of the price stipulated, allegations

to the effect that contemporaneously with the execution of the agreement it was verbally agreed that the writing be modified so as to provide only a 10% commission on the sale price in excess of the price stipulated, *is held* property stricken from the answer on motion of the broker, since the allegations relate to a parol agreement in contradiction of the writing. *Held further:* Other allegations amounting to erroneous conclusions of law that the contract as modified was revocable at will and that the vendor had revoked same after notice because his wife was too infirm to execute deed for her dower interest and because of the vendor's dissatisfaction with the manner in which the broker was handling the matter, were also properly stricken on motion aptly made as extraneous and irrelevant.

3. Pleadings § 30—

Upon plaintiff's motion to strike, allegations in the answer setting out a parol agreement in conflict with the writing declared on by plaintiff as well as allegations setting forth erroneous conclusions of law based thereon and allegations not pertinent to any valid defense, are properly stricken on motion. G.S. 1-153.

APPEAL by defendant from *Rudisill, J.*, at August Term, 1953, of UNION. Affirmed.

Suit for specific performance of contract to sell land, heard below on motion of plaintiffs to strike allegations of the defendant's Further Answer and Defense.

These in substance are the material allegations of the complaint:

"2. That both of the plaintiffs are licensed by the State of North Carolina to deal in real estate."

3. That on or about the first day of January, 1953, the defendant executed and delivered to the plaintiffs a contract, copy of which is attached to the complaint and by reference made a part thereof. The contract, in so far as material, is as follows:

"I, James Marrone, Sr., do hereby constitute and appoint Horace M. Neal and Ray Walters, trading as Walters & Neal Realtors, my exclusive agent for a period of one (1) year from date to sell the following described properties belonging to me . . . located in Union County, North Carolina, to wit;

"Seventy and one-half (70½) acres Vance Township; (two other parcels or groups of parcels—not pertinent to decision).

"The authority of said agents is limited as hereinafter set forth: (1) Purchase or selling price of the 70½ acre tract shall be $4,250.00 net to me, James Marrone; (2) (designated purchase price of other parcels included in contract).

"Walters & Neal, by the acceptance of this agreement do hereby promise and agree to use their best efforts to dispose of these properties hereinbefore referred to.

"James Marrone does agree to make good and sufficient fee simple deed(s) to any purchaser(s) secured by Walters & Neal upon the payment of the purchase price of respective parcels as hereinbefore set forth.

"Any compensation to Walters & Neal for their services in selling said properties shall be determined solely by said Walters & Neal by virtue of their authority to regulate the gross sales price of the respective parcels of land, and the excess of sales price above the hereinbefore recited net return(s) to the property owner, less the costs of such sales, shall constitute their entire compensation.

James Marrone (Owner) (SEAL)
Horace M. Neal (Vendor Agt.) (SEAL)
Ray Walters (Vendor Agt.) (SEAL)

"4. That on or about the 15th of March, 1953, the plaintiffs secured a purchaser for the 70.50-acre tract described in the contract . . . for the price of $4,250.00 and immediately advised the defendant that they had such a purchaser and requested that he prepare and execute a deed for said 70.50-acre tract.

"5. That on the 28th of April, 1953, the plaintiffs again advised the defendant that they had in hand the purchase money therefor; to wit, the sum of $4,250.00, and again called on the defendant to make a deed for said land as he had contracted and agreed to do and this the defendant has neglected and refused to do.

"6. That, acting under the authority . . . given the plaintiffs by the defendant as set out in the contract . . . and acting as agents for the defendant, the plaintiffs have obligated themselves to deliver to the purchaser a good fee simple title to the 70.50-acre tract of land which is described as follows: (Description by metes and bounds omitted as not pertinent to decision.)

"7. That the plaintiffs have duly performed all of the conditions of said agreement on their part and have always been ready and willing and still are ready and willing to fulfill the agreement on their part; and for a good and marketable title of said premises and a proper deed of the fee thereof free from all encumbrances the plaintiffs are willing and hereby offer to pay the purchase price of $4,250.00, but the defendant refused and still refuses to deliver a conveyance of said premises in accordance with the provisions of said agreement.

"8. That by reason of the failure of the defendant to convey said lands as he had contracted and agreed to do the plaintiffs have suffered loss and sustained damages in the amount of $2,750.00."

The prayer for relief is for specific performance, if such can be had; otherwise, for damages in the amount of $2,750.00.

The defendant by answer admits the execution of the written contract but denies plaintiffs' right to recover, on the theory that such contract "is not the whole and complete contract" between the parties. The defendant alleges the entire contract to be as set forth in his Further Answer and Defense, which is as follows:

"1. That the part of the agreement between the plaintiffs and the defendant referred to as Exhibit A in paragraph 3 of the complaint was prepared at the instigation and on instructions of the plaintiffs, and that the plaintiffs procured the same and brought it to the residence of the defendant for the defendant to sign, but that this defendant refused to sign same because said written agreement appointing the plaintiffs as defendant's agents and the amount of remuneration to be received by plaintiffs for acting as defendant's servants or agents was not satisfactory to the defendant and was not in conformity with the oral agreement between the plaintiffs and the defendant; the plaintiffs and the defendant having orally agreed previously, for subsequent reduction to writing, to the effect that the defendant would receive as his minimum net return no less amount than the minimum price set forth in the written agreement which was presented to him for execution and that the plaintiffs would receive as their compensation 10% of the gross sales price whatever the total sales price might be on any respective parcel of property, provided a sum sufficient to pay same was received in excess of the stated minimum to the defendant; that the plaintiffs told the defendant that if he would go ahead and sign the written agreement they would orally amend it to provide that the plaintiffs would account to the defendant for the total sales price of each parcel or lot of land and cause to be paid to the defendant by the purchaser(s) at least the specified minimum amounts and all sums in excess of such specified minimums except the 10% commissions to the plaintiffs, and that the plaintiffs would not receive any sum in excess of 10% of the gross sales prices, and that percentage only in cases where a sufficient gross was received to permit such remuneration to plaintiffs after defendant had received his minimum specified prices; and that the defendant signed said agreement as a part of the whole contract between the plaintiffs and the defendant in reliance upon the supplemental oral agreement as herein set forth; that the defendant is not an educated person and is unable to read, write, or speak English well and was forced to rely upon the statements of the plaintiffs as herein set forth.

"2. That subsequently the plaintiffs sold ten lots embraced by said contract and agreements to Dickerson, Inc., stating to the defendant that they had received from Dickerson, Inc., no sum in excess of the specified minimums of $500.00 per lot plus the commission agreed to be allowed the plaintiffs, but that the plaintiffs failed and refused to give any fur-

ther accounting of the transaction to the defendant and the defendant received checks from Dickerson, Inc., for only the minimum net amount per lot.

"3. That said agency agreement as embodied in the written part together with the oral agreement amending same was an integration into a single unilateral contract without consideration on the part of the plaintiffs and subject to revocation by the defendant at any time upon timely notice.

"4. That the defendant, immediately after the aforementioned sale of lots to Dickerson, Inc., and before the plaintiffs had secured any other offers on his other property, advised the plaintiffs that he was not satisfied with the manner in which the plaintiffs were handling the matter and that because of physical and mental infirmities the defendant's wife was unable to execute a deed for the release of dower and that defendant's brother-in-law and defendant's children had protested any further sale of property without protecting the dower interest of his wife, and that the defendant thereby gave plaintiffs notice of the termination of the agency and offered to pay the plaintiffs a reasonable sum for any services that they had rendered."

The plaintiffs lodged a motion to strike each and all of the paragraphs of the Further Answer and Defense. Judge Rudisill at the end of the hearing concluded the motion should be allowed in its entirety, and entered an order striking all four paragraphs.

To the order so entered, the defendant excepted as to each paragraph stricken and appealed therefrom to this Court, assigning errors.

Milliken & Richardson for plaintiffs, appellees.
E. Osborne Ayscue for defendant, appellant.

JOHNSON, J. A contract not required to be in writing may be partly written and partly oral. However, where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent. See *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 32 S.E. 2d 34; *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606; *Miller v. Farmers Federation,* 192 N.C. 144, 134 S.E. 407;

Mfg. Co. v. McPhail, 181 N.C. 205, 106 S.E. 672; *Evans v. Freeman,* 142 N.C. 61, 54 S.E. 847; *Moffitt v. Maness,* 102 N.C. 457, 9 S.E. 399; *Ray v. Blackwell,* 94 N.C. 10; Stansbury, North Carolina Evidence, Sec. 253; Wigmore on Evidence, Third Ed., Vol. IX, Section 2430; Restatement of the Law, Contracts, Sections 237, 240, and 241; 20 Am. Jur., Evidence, Sections 1099, 1100, 1137, and 1138; 12 Am. Jur., Contracts, Sec. 235; 32 C.J.S., Evidence, Sec. 851.

In the case at hand the defendant alleges that the entire contract between the parties was partly written and partly oral. He relies upon parol elements allegedly made and agreed upon prior to and contemporaneously with the execution of the written contract. But he does not allege fraud or mistake, nor does he seek reformation or rescission. The parol elements set up in paragraph 1 of the Further Answer and Defense are totally inconsistent with and contradictory of the provisions of the written contract which fix the plaintiffs' compensation and determine the purchase price of the lands. In these crucial particulars the alleged parol elements declared on by the defendant tend to establish an entirely different contract from the one evidenced by the writing. In the absence of allegations of fraud or mistake, any evidence proffered by the defendant in support of such matters would be incompetent. *Mfg. Co. v. McPhail, supra* (181 N.C. 205); *Evans v. Freeman, supra* (142 N.C. 61). It necessarily follows that the allegations of paragraph 1 are extraneous and irrelevant. They were properly stricken. G.S. 1-153; *Spain v. Brown,* 236 N.C. 355, 72 S.E. 2d 918; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412; *Parlier v. Drum,* 231 N.C. 155, 56 S.E. 2d 383.

As to the rest of the Further Answer and Defense, paragraphs 2, 3, and 4, it is noted that the allegations of paragraph 3 are nothing more than erroneous conclusions of law; whereas paragraphs 2 and 4 contain no allegations which are pertinent to or make for a valid defense (G.S. 1-135). All these paragraphs were properly treated by the presiding judge as irrelevant and redundant.

The judgment below is

Affirmed.

STATE OF NORTH CAROLINA v. HARRY HOWELL.

(Filed 16 December, 1953.)

1. Criminal Law § 78—

G.S. 1-206 (3) provides that no exception need be taken to any ruling upon an objection to the admission of evidence, but the statute does not do away with the necessity of making an objection to the ruling of the court, and therefore exceptive assignments of error to the ruling of the court in

excluding testimony presents no question for decision when no objection was taken to the ruling of the court.

2. **Homicide § 27b—Charge held for error in placing burden on defendant *to prove matters in mitigation beyond reasonable doubt.***

After charging the jury that if they were satisfied beyond a reasonable doubt from the State's evidence that defendant intentionally killed deceased with a deadly weapon, the law raised the presumptions that the killing was unlawful and that it was done with malice, constituting murder in the second degree, the court charged further that if the jury should find from the evidence beyond a reasonable doubt that defendant killed the deceased in the heat of passion by reason of sudden anger, defendant would be guilty of manslaughter, *is held* reversible error as placing the burden upon defendant to show beyond a reasonable doubt facts and circumstances sufficient to reduce the crime to manslaughter.

3. **Homicide § 16—**

An intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree, placing the burden upon defendant to prove to the satisfaction of the jury legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether on the ground of self-defense, accident, or misadventure.

4. **Criminal Law § 81c (2)—**

An erroneous instruction upon the burden of proof must be held for reversible error even though in another part of the charge the law be correctly stated, since the jury may have acted upon the incorrect instruction.

APPEAL by the defendant from *Hatch, Special J.,* May Special Term 1953. SCOTLAND.

Criminal action in which Harry Howell was tried upon a bill of indictment charging him with murder in the first degree of Larry Graham. New trial.

Since this case goes back for a new trial, we state only so much of the evidence as is requisite for the purposes of this appeal.

The State's evidence, after the defendant rested his case, tended to show these facts. On the night of 25 December 1952 Larry Graham, the deceased, and his wife with Sergeant Vernon E. Dodson of the U. S. Army, and his wife attended a dance in the Parachute Building at the Laurinburg-Maxton Air Base. About 2,000 or 2,500 people were present. The dance ended about 1:00 a.m., and Larry Graham and his party left the building to go to the Dodson's car in which they came. Floodlights were on in front of the building. Larry Graham had had no trouble with anyone there, and was unarmed. On the way to the car three or more men, all unidentified except the defendant Harry Howell, made an unprovoked assault on Graham knocking him down. Sergeant Dodson pulled one of these three men off of Graham while he was on his hands and knees

trying to get up. The deceased got to his feet, and backed up about 25 feet close to some parked cars. While Graham was standing there rubbing his head and saying "one at a time boys" the defendant Harry Howell standing 15 to 18 to 20 feet from Graham shot him with a pistol from which wound Graham was dead before he reached the hospital. There was also evidence for the State tending to show that Graham "was pushing himself up from the ground with his hands" when shot. The defendant admitted at the scene that he shot the deceased. Sergeant Dodson's testimony tended to show that he did not know the men assaulting Graham, nor the man he pulled off of him.

The defendant's evidence tended to show these facts. That he, the defendant, was about 25 feet in front of the building walking to his car. A woman had the deceased by his arm, and they were walking in front of the defendant. The deceased whirled around, and said "are you one of the s. o. b.'s wants to fight?", and knocked the defendant down. The deceased ran his hand in his right front pocket, and the defendant thought he was going to pull out a pistol and kill him. The defendant started to get up, and the deceased looked like this—the defendant indicated to the jury the position of Graham—whereupon the defendant shot him with a pistol. The defendant had not assaulted the deceased, nor had any prior trouble with him. The defendant offered several witnesses who gave evidence tending to show they were eye-witnesses who saw the deceased knock the defendant down, and the defendant shoot him. These witnesses were a brother of the defendant and his friends, except the witness Jerry Halton, who said he did not know the defendant nor the deceased. Halton testified that he was sitting in a car about 30 or 35 feet from where he saw a man jerk loose from a woman, go over, say something to a man, and knock him down. That the man who knocked the other man down, stepped back and reached with his right arm to his right pocket. The man knocked down got "to about one knee," and when the other reached for his right pocket shot him. When the defendant closed his case there had been no intimation in the evidence that Halton had assaulted Larry Graham, or had been near Graham.

The State in rebuttal recalled Sergeant Dodson to the stand who testified that he heard Jerry Halton testify, and Jerry Halton was the man he pulled off Larry Graham the night Graham was killed.

The defendant in rebuttal recalled Jerry Halton to the stand. One of the defendant's counsel said to the court "we have one more to put on in rebuttal." The court replied "No, sir. I asked you just now if that was the case." When that was said by the court, the record does not show. The defendant made no objection. However, the court sent the jury to their room, and in the absence of the jury Jerry Halton in response to questions asked him by the defendant's counsel gave evidence

tending to show that he did not assault Larry Graham nor anyone that night; that Sergeant Dodson did not pull him off Graham. The court said he would permit Halton to testify before the jury that Sergeant Dodson did not pull him off Larry Graham that night. The jury was recalled, and the court permitted counsel for the defendant to ask Halton this one question: "Q. Jerry, tell his Honor and the jury whether or not Sergeant Dodson or any other person pulled you off of Larry Graham or any other person at the dance, that were fighting, on the night of December 25th, or the morning of the 26th? A. No, sir. He nor anyone else pulled me off of anyone." The defendant made no objections to any of the rulings of the court in respect to the testimony of Jerry Halton, when he was recalled to the stand in rebuttal. After the trial the defendant entered exceptions Nos. 6 to 13, both inclusive, as to the rulings of the court in respect to the testimony of Jerry Halton when recalled in rebuttal. Each of these exceptions reads as follows in the record: "No formal exception was taken at the trial; but the defendant contends that an exception to the ruling of the court upon the above question was implied under the provisions of subsection 3 of G.S. 1-206."

The jury returned for its verdict: Guilty of murder in the second degree. Judgment: Confinement in the State's Prison at Raleigh for not less than 22 years and not more than 25 years.

Defendant appeals therefrom to Supreme Court assigning error.

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

Gilbert Medlin, Joe M. Cox, Pittman & Webb, and Jennings G. King for defendant, appellant.

PARKER, J. The defendant's assignments of error Nos. 2, 3, and 4, based on his exceptions Nos. 6 to 13, both inclusive, relate to the rulings of the court in excluding the testimony of Jerry Halton, and in permitting him to be asked only one question, when recalled in rebuttal. The defendant *did not object* to the rulings of the court *at the time,* but entered exceptions to these rulings after the trial when he prepared his statement of the case on appeal. The defendant vigorously contends in ten pages of his brief that these rulings of the court constitute reversible error; that "no exceptions were placed in the record at the time, but an exception was implied under the provisions of G.S. 1-206 (3)."

The general rule in criminal and civil cases is that exceptions to the evidence must be taken in apt time during the trial; if not, they are waived. *S. v. Ballard,* 79 N.C. 627; *Taylor v. Plummer,* 105 N.C. 56, 11 S.E. 266; *Lowe v. Elliott,* 107 N.C. 718, 12 S.E. 383; *Alley v. Howell,* 141 N.C. 113, 53 S.E. 821. It is too late after the trial to make excep-

tions to the evidence. *Alley v. Howell, supra; Hudson v. R. R.,* 176 N.C. 488, p. 496, 97 S.E. 388; *Ins. Co. v. Boddie,* 196 N.C. 666, 146 S.E. 598. These cases were decided prior to 1949. Ch. 150, S.L. 1949, now codified as G.S. 1-206 (3), is clear and plain. This statute provides that no exception need be taken to any ruling *upon an objection* to the admission of evidence, but it does not do away *with the necessity of making an objection* to the ruling of the court. *Cathey v. Shope,* 238 N.C. 345, 78 S.E. 2d 135; *S. v. Jenkins,* 234 N.C. 112, 66 S.E. 2d 819.

The defendant's assignments of error Nos. 2, 3 and 4 do not present any question for our decision, because the defendant has waived any rights he may have had by failing to object to the rulings of the court in apt time.

The defendant's assignment of error No. 12, based on his exception 21, is that the court erred in charging the jury as follows: "I charge you, Gentlemen, that if you find from the evidence or from the admissions of the defendant *beyond a reasonable doubt* that the defendant, Harry Howell, killed the deceased, Larry Graham, that he killed him intentionally, that he killed him in the heat of passion by reason of anger suddenly aroused on account of the assault which deceased was making upon the defendant, Harry Howell, and before a sufficient time had elapsed for the passion to subside and reason to resume its habitual control, then the defendant would be guilty of manslaughter, and if you so find it would be your duty to render a verdict of guilty of manslaughter against the defendant unless the defendant has satisfied you that he killed the deceased, Larry Graham, in self-defense."

Immediately after the shooting the defendant admitted several times that he intentionally shot Larry Graham with a pistol, but that he did it in self-defense. He made the same admission when a witness for himself during the trial. The court instructed the jury that it could return one of five verdicts: either guilty of murder in the first degree, or guilty of murder in the first degree with a recommendation that the punishment shall be imprisonment for life in the State's prison, or guilty of murder in the second degree, or guilty of manslaughter, or not guilty. The State in its brief does not contend that there was no evidence tending to reduce the alleged crime to manslaughter. From the evidence introduced during the trial it was proper for the court to charge the jury they could return one of five verdicts.

A few sentences before the part of the charge above quoted and excepted to, the court charged "I charge you further, gentlemen, if you find from the evidence beyond a reasonable doubt, the burden being upon the State, that the defendant, Harry Howell, intentionally killed the deceased, Larry Graham, with a deadly weapon, to wit, a pistol, which I charge you again is a deadly weapon, the law immediately raises two presumptions

against the defendant: First, that the killing was unlawful, and secondly, that it was done with malice, and an unlawful killing with malice constitutes murder in the second degree. This presumption, however, may be rebutted." The court then stated the correct rule that under those circumstances 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.

However, in applying the law to the facts the court charged the jury that the defendant *must show beyond a reasonable doubt* facts and circumstances sufficient to reduce the crime to manslaughter, and in so charging the court committed prejudicial error.

Since the correction of an erroneous statement of the law inadvertently made in *S. v. Johnson,* 48 N.C. 266, by *S. v. Ellick,* 60 N.C. 450, and by *S. v. Willis,* 63 N.C. 26, it has been unquestioned law 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. The law then casts upon the defendant the burden of proving to the satisfaction of the jury—not by the greater weight of the evidence nor beyond a reasonable doubt—but simply to the satisfaction of the jury the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, accident, or misadventure. *S. v. Carland,* 90 N.C. 668; *S. v. Little,* 178 N.C. 722, 100 S.E. 877; *S. v. Benson,* 183 N.C. 795, 111 S.E. 869; *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387; *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161; *S. v. Burrage,* 223 N.C. 129, 25 S.E. 2d 393; *S. v. Powell,* 238 N.C. 527.

Even if the court before and after in its charge stated the general principle of law correctly that the defendant must show to the satisfaction of the jury facts and circumstances sufficient to reduce the crime to manslaughter, yet that did not cure the error in the vital part of its charge when it applied the law to the facts, by requiring the defendant to show those facts beyond a reasonable doubt. 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; *S. v. Stroupe,* 238 N.C. 34, 76 S.E. 2d 313.

The State contends that the charge is supported by *S. v. Bright,* 237 N.C. 475, 75 S.E. 2d 407. That case is distinguishable for that defendant's defense was based on the theory of an accidental shooting.

Further exceptions to the charge raise serious questions, which it will not be necessary to discuss as this case goes back for a new trial.

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

STATE OF NORTH CAROLINA, ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, v. J. L. COE AND MRS. ILA COE, TRADING AS VICTORY BARBER SHOP, 508 BUILDERS BUILDING, CHARLOTTE, NORTH CAROLINA, EMPLOYER NO. 72-60-097.

(Filed 16 December, 1953.)

1. Master and Servant § 62—

Findings of fact of the Employment Security Commission are conclusive on appeal when supported by competent evidence. G.S. 96-4 (m).

2. Master and Servant § 58—

When employment within the meaning of the Employment Security Law is once established and the employer becomes covered thereunder, he remains so until coverage is terminated as provided by G.S. 96-11.

3. Same—Findings held to support conclusion that shoeshine boy was employee of barber shop within meaning of Employment Security Law.

Findings to the effect that the employer regularly employed seven barbers and in addition thereto "engaged" the services of a boy, who shined shoes for customers, and also swept and waxed the floors, cleaned mirrors, and removed soiled towels from barbers' stands, all at the employers' place of business, and that the shoeshine boy was under the direct control of the manager who could discharge him at any time, and that in return for these services the employer furnished the shoeshine boy a stand and materials, paid privilege tax, and permitted him to receive as compensation whatever he was paid for shining shoes, plus tips, *is held* sufficient to support the conclusions of the Employment Security Commission that such shoeshine boy was an employee and not an independent contractor, so as to bring the employer within the coverage of the Employment Security Law during the period in question prior to 1 January, 1949. G.S. 96-8 (g), G.S. 96-8 (n).

4. Same—

A finding by the Employment Security Commission that the employer "engaged" the services of a shoeshine boy is tantamount to a finding that it employed the shoeshine boy, and his compensation in being permitted to retain whatever he was paid for shines, plus tips, constitutes wages or remuneration for his services within the meaning of the Act.

5. Same—

When the Employment Security Commission finds upon competent evidence that a person was an employee of a defendant prior to 1949, the statute then in effect put the burden on such defendant to show to the satisfaction of the Commission that the services performed by such employee came within the exceptions provided by A, B and C of subsection

(g) 6 of G.S. 96-8, and since the statute states these exceptions conjunctively, all three must be met in order for the employee to be exempt.

APPEAL by defendants from *Sharp, Special Judge,* August Term, 1953, of MECKLENBURG.

This is a proceeding to determine whether J. L. Coe and wife, Mrs. Ila Coe, trading as the Victory Barber Shop, are liable for contributions upon wages paid their employees during the years 1947, 1948, 1949 and subsequent years, until coverage under the Employment Security Law is terminated as provided by law.

The findings of fact by the Employment Security Commission, which are essential to a determination of the question presented on this appeal, are as follows:

"2. . . . That in the operation of the barber shop the said partnership of J. L. Coe and wife, Ila Coe, hereinafter referred to as the barber shop, maintained seven barber's chairs, and in addition thereto maintained a shoeshine stand and a public bath service. That the barber shop paid all privilege tax to the City of Charlotte and the State of North Carolina upon the shoeshine stand.

"4. That during the calendar years 1947, 1948, and 1949, the barber shop employed regularly seven barbers during each week, and in addition thereto engaged the services of a shoeshine boy. That such shoeshine boy was supposed to shine shoes of customers, and in addition thereto was required to wax floors, clean mirrors, sweep floors, remove soiled towels from barber's stands, and prepare baths for customers. That such shoeshine boy was under the direct control of the manager of the barber shop, the manager having complete control of all operations therein. That the manager could discharge said shoeshine boy at any time, if it was necessary. That such shoeshine boy furnished the polish, shine rags, and brushes necessary to shine shoes. That the services performed by the shoeshine boy were performed in the place of business of the barber shop and were in the usual course of business thereof, and that the shoeshine boy was not customarily established in an independently established business of operating a shoeshine stand.

"5. That including the shoeshine boy as an employee of the barber shop, during the years 1947, 1948, and 1949, the barber shop had in employment as many as eight individuals in as many as twenty different weeks in each of such calendar years."

Pursuant to these findings of fact, the Commission entered an order to the effect that J. L. Coe and wife, Ila Coe, trading as the Victory Barber Shop, was a covered employer within the terms of the Employment Security Law during the years 1947, 1948, and 1949, and shall report and

pay contributions upon wages paid their employees during such years and continuing thereafter until coverage is terminated as provided by law.

The defendants excepted to the order of the Commission and appealed to the Superior Court. The hearing in the Superior Court resulted in an affirmance of the Commission's order, and the defendants appeal to this Court, assigning error.

H. Haywood Robbins and Harry C. Hewson for appellants.

W. D. Holloman, R. B. Overton, and D. G. Ball for appellee, Employment Security Commission.

DENNY, J. The sole question for determination on this appeal is whether or not the shoeshine boy performing services for the Victory Barber Shop, as outlined in the findings of fact, was employed by the barber shop within the meaning of the Employment Security Law.

The evidence clearly establishes the fact that the agreement between the manager of the barber shop and the shoeshine boy required the shoeshine boy to perform certain services for the barber shop, and he was at all times subject to discharge by the manager of the barber shop. In return for these services the barber shop furnished him a shoeshine stand and paid the privilege tax required therefor by the City of Charlotte and the State of North Carolina. The shoeshine boy furnished the polish, shine rags, and brushes necessary to shine shoes, and received as compensation for his services whatever he got for shoe shines and tips. He had no fixed hours, but the manager of the barber shop in testifying about when the shine boy rendered his services to the shop, said, "at various hours ranging from 8:00 A.M. to 6:00 P.M."

Are the findings of fact by the Commission supported by competent evidence? We think so. Consequently, such findings are conclusive on appeal. G.S. 96-4 (m); *Unemployment Compensation Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4; *Graham v. Wall,* 220 N.C. 84, 16 S.E. 2d 691; *Employment Security Com. v. Roberts,* 230 N.C. 262, 52 S.E. 2d 890; *Employment Security Com. v. Kermon,* 232 N.C. 342, 60 S.E. 2d 580; *Employment Security Com. v. Monsees,* 234 N.C. 69, 65 S.E. 2d 887.

It is our task to determine whether the findings of fact support the Commission's conclusions of law.

"'Employment' means service performed prior to January 1, 1949, which was employment as defined in this chapter prior to such date, and any service performed after December 31, 1949, . . . performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however,

the term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules." G.S. 96-8 (g).

However, since the services under consideration involve a period of two years prior to 1 January, 1949, it becomes necessary to ascertain what the law provided with respect to "employment" prior thereto. Moreover, where employment within the meaning of the Employment Security Law is once established and the employer becomes covered thereunder, he remains so until coverage is terminated as provided by G.S. 96-11.

Prior to 1 January, 1949, the law defined "employment" as ". . . service, . . . performed for remuneration or under any contract of hire, written or oral, express or implied." G.S. 96-8 (g) (1).

G.S. 96-8 (g) (6) of the Employment Security Law, prior to 1949, further defined "employment" as follows:

"(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commission that:

"(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract or service and in fact; and

"(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

"(C) Such individual is customarily engaged in an independently established trade, occupation, profession, or business."

The appellants contend that the Commission made no finding to the effect that the shine boy received any remuneration for the services rendered to the barber shop. However, in finding of fact No. 4, the Commission found "that during the calendar years 1947, 1948, and 1949, the barber shop employed regularly seven barbers during each week, and in addition thereto engaged the services of a shoeshine boy."

The word "engage" is defined in Black's Law Dictionary, Third Edition, page 661, as follows: "To employ or involve one's self; to take part in; to embark on." While Webster's New International Dictionary, Second Edition, defines the word "engaged" as: "Occupied; employed."

The Employment Security Law of North Carolina, in subsection (n) of G.S. 96-8, contains the following provisions:

"From and after March 10, 1941, 'wages' shall include commissions and bonuses and the cash value of all remuneration in any medium other

than cash. The reasonable cash value of remuneration in any medium other than cash, and the reasonable amount of gratuities shall be estimated and determined in accordance with rules prescribed by the Commission: . . ."

When we consider the words "employment," "wages," "services," and "remuneration," as they have been defined in our Employment Security Law, during the period involved herein, we are of the opinion that the judgment of the court below, which affirmed the order of the Commission, should be upheld. *Unemployment Compensation Com. v. Jefferson Standard Life Ins. Co.,* 215 N.C. 479, 2 S.E. 2d 584; *Employment Security Com. v. Distributing Co.,* 230 N.C. 464, 53 S.E. 2d 674; *Cooper v. Ice Co.,* 230 N.C. 43, 51 S.E. 2d 889; *Scott v. Lumber Co.,* 232 N.C. 162, 59 S.E. 2d 425; *Sisk v. Arizona Ice & Cold Storage Co.,* 60 Ariz. 496, 141 P. 2d 395; *Candido v. California Employment Stabilization Com.,* 95 Cal. 2d 338, 212 P. 2d 558; *McDermott v. State,* 196 Wash. 261, 82 P. 2d 568. The cases of *Butler v. United States* (D.C. Tex.), 61 F. Supp. 692, and *Magruder v. Yellow Cab Co. of D. C.* (C.C.A. Md.), 141 F. 2d 324, cited by the appellants, are distinguishable.

When the Employment Security Commission finds upon competent evidence that a person was an employee of a defendant prior to 1949, the statute then in effect put the burden on such defendant to show to the satisfaction of the Commission that the services performed by such employee comes within the exceptions provided in subsections A, B, and C of section 6 of subsection (g) of G.S. 96-8, hereinabove set out. Moreover, these exceptions are stated conjunctively and not disjunctively. Therefore, all three of these exceptions must be met in order that the defendant be exempted from the act. *Unemployment Compensation Com. v. Jefferson Standard Life Ins. Co., supra; Employment Security Com. v. Distributing Co., supra.*

The Commission held that the defendants did not bring themselves within the exceptions because, among other things, the shine boy was not free from direction or control of the manager of the barber shop; that the services rendered were not outside the usual course of the business carried on by the defendants, and not performed outside the place of business where the barber shop was operated, but on the contrary all the services were rendered in the place of business of the defendants. Neither was the shine boy, under the evidence disclosed by the record, an independent contractor. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137.

In *Cooper v. Ice Co., supra,* this Court held that an individual who entered into an oral arrangement with the ice company for sale and delivery of ice in a specified territory and who was furnished conveyance and equipment in connection with the retail delivery of such ice, and whose remuneration was determined by the difference between the whole-

sale price of the ice and its retail price, was an employee of the ice company. Likewise, under a similar arrangement, in the case of *Sisk v. Arizona Ice & Cold Storage Co., supra,* involving the Employment Security Act of that State, which is almost identical with ours, the Court said: "It appears that the services must be for wages. The contribution to be paid is based on the wages and consists of a percentage thereof. It is possible to contend the retail dealers were not paid wages, that therefore there is no basis upon which to compute contributions. It is apparent that their compensation for delivering the ice to the customer was to consist of the difference between what the appellee charged them for it and what they received from the customer, and the question is whether the legislative intent was that such remuneration should be classified as wages in construing the terms of the act." The Court held that the evidence sustained the finding that the compensation received by the retail ice dealers, consisting of the difference between what the ice company charged them and what they received from the customer, constituted "wages" within the meaning of the Employment Security Act, citing *Unemployment Compensation Com. v. Jefferson Standard Life Ins. Co., supra.*

In the case of *Candido v. California Employment Stabilization Com., supra,* the arrangement between the barber shop and the bootblack was similar to that in the instant case, except the bootblack paid $8.00 per month for the privilege of shining shoes. His compensation came from shoe shines and from tips. He performed generally the services of a porter, cleaning floors, taking care of towels and other equipment, helping customers of the barber shop put on their hats and coats, etc. The Court held the evidence sustained the finding that the bootblack was an employee of the proprietor of the barber shop, so as to render the proprietor liable for unemployment insurance assessments under the Unemployment Insurance Act, rather than as lessee or independent contractor.

In our opinion, the findings of fact made by the Commission herein are sufficient to support its conclusions of law. Therefore, the judgment of the court below is

Affirmed.

STATE v. EULISS RITTER, CHARLIE RITTER AND HARVEY KENNEDY.

(Filed 16 December, 1953.)

1. Criminal Law § 52a (1)—

On motion for judgment of nonsuit, the evidence is to be considered in the light most favorable to the State, and it is entitled to the benefit of every reasonable inference to be drawn therefrom.

2. Assault § 13—

Evidence tending to show that ill feeling had existed between appealing defendants and their adversary, and that in consequence all of them willingly entered into an affray in which the adversary of the appealing defendants was seriously injured by knife wounds and a beating with a tire tool, *is held* sufficient to sustain the denial of the appealing defendants' motion for nonsuit in a prosecution for an assault with a deadly weapon with felonious intent to kill, inflicting serious injuries not resulting in death.

3. Assault § 14b—

The charge of the court in this case *is held* to have given appealing defendants the benefit of their contentions that they were the innocent victims of an unlawful assault by their adversary and to have charged the law on the right of self-defense applicable to the evidence, and defendants' assignments of error to the charge cannot be sustained.

4. Assault § 9a—

The plea of self-defense must be based upon force exerted in good faith to prevent a threatened injury, and such force must not be excessive or disproportionate to the force it is intended to repel, the question of excessive force being ordinarily for the determination of the jury.

5. Assault § 9b—

If an affray is willingly entered into by both parties and there is no retreat by either of them, the brother of one of the parties may not be excused in entering the affray on the ground that he did so in the defense of his brother, since the right to fight in the defense of another cannot be more extensive than the right of such other to use force in self-defense.

6. Criminal Law § 78e (2)—

In this prosecution for assault, an inadvertence of the court in referring to certain witnesses as witnesses offered by the State, when as a matter of fact they were witnesses of a codefendant, the appealing defendants' adversary in the affray, comes within the rule requiring misstatements of the evidence or contentions of the parties to be brought to the trial court's attention in time to afford opportunity for correction in order for an exception thereto to be subject to review.

APPEAL by defendants, Euliss and Charlie Ritter, from *Rousseau, J.*, May Term, 1953, of MOORE.

At the August Term, 1952, of the Superior Court of Moore County, separate bills of indictment were returned against the defendants Euliss Ritter and Charlie Ritter, and Harvey Kennedy; charging the defendant, Euliss Ritter, with a felonious assault on Harvey Kennedy with a deadly weapon, to wit: a knife, with the felonious intent to kill and murder the said Harvey Kennedy, inflicting serious injuries not resulting in death; charging Charlie Ritter on a like felonious assault upon the said Harvey Kennedy, with a deadly weapon, to wit: a tire tool, with the intent to kill and murder the said Harvey Kennedy, inflicting serious injuries not

resulting in death, and charging Harvey Kennedy with a like felonious assault upon both Euliss and Charlie Ritter.

The cases were consolidated for the purpose of trial and tried as an affray, the State introducing Kennedy as a witness against the two Ritters, and introducing both Euliss and Charlie Ritter as witnesses against Kennedy.

The State's evidence was sufficient to show the following facts:

1. That prior to the affray involved in this appeal "bad blood" existed between the Ritters and Kennedy, caused by the fact that Kennedy had previously had a difficulty with Jesse Ritter, a brother of Euliss and Charlie Ritter.

2. That late in the afternoon on 20 June, 1952, the defendant Harvey Kennedy was sitting in front of a filling station in Moore County, operated by Mall Craven; that he saw Euliss and Charlie Ritter drive up in separate cars; that he got up and went inside the filling station and lay down on a counter.

3. The evidence tends to show that when Euliss and Charlie Ritter entered the filling station, Charlie said to Kennedy: "What do you boys mean fighting Jesse?" Kennedy stood up on the counter and took his knife out of his pocket. Charlie said: "Put up your knife." Mr. Craven ordered the Ritter boys out of the room. Kennedy put his knife in his pocket. Charlie Ritter then drew his knife and reached for Kennedy. Kennedy climbed up on the shelves in the corner of the filling station, with Charlie after him. There were some bottles on the shelves and Kennedy threw one at Charlie and missed him. He then threw one at Euliss and hit him. Charlie then threw a jug at Kennedy, which bursted beside his head, then Kennedy ran out of the room grabbing a tire tool in each hand as he ran. About that time Charlie threw a tire tool at Kennedy. Kennedy took out after him, and Charlie, who was in or near the highway in front of the filling station at that time, threw a rock at Kennedy and whirled around and was hit by a passing truck. He then crawled to where Kennedy was standing and grabbed him by the legs and held him. The evidence is conflicting as to whether Kennedy hit Charlie Ritter with the tire tool while he was holding him by the legs, but at this point in the fight, Euliss Ritter stabbed Kennedy with a knife six times in the chest, back, and shoulder. By this time Kennedy was down. Euliss Ritter then stabbed Kennedy in the head with the knife and Charlie Ritter got one of the tire tools which Kennedy previously had and hit him in the mouth and knocked out four teeth, and continued beating him with the tire tool while he was lying on the ground, until he was stopped by a passing motorist. The motorist got Kennedy in his car and took him to a hospital, where he remained for five days.

The jury returned a verdict of guilty as charged against all three defendants. The court imposed prison sentences of eighteen months against each of the defendants. Defendants Euliss and Charlie Ritter appeal, assigning error.

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

H. F. Seawell, Jr., Robert L. McMillan, Jr., Pittman & Staton, and Ed B. Hatch, Jr., for appellants.

DENNY, J. The defendants' second and tenth assignments of error are based on their exceptions to the refusal of the court to sustain their motion for judgment as of nonsuit at the close of the State's evidence and renewed at the close of all the evidence. On such motion, the evidence is to be considered in the light most favorable to the State, and it is entitled to the benefit of every reasonable inference to be drawn therefrom. *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Gordon,* 225 N.C. 757, 36 S.E. 2d 143; *S. v. Scoggins,* 225 N.C. 71, 33 S.E. 2d 473; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606. We think the evidence offered by the State when so considered was sufficient to sustain the ruling of the court below.

Furthermore, when all the evidence adduced in the trial below is considered, it is sufficient to support the conclusion that these appellants had some ill feeling towards the defendant Kennedy resulting from a difficulty which he had had with their brother, Jesse Ritter, and were seeking satisfaction. In fact, according to Kennedy's testimony, after he got out of the filling station, Charlie Ritter said: "You have been fighting Jesse and you are going to pay for it." It was then he threw the tire tool at Kennedy and ran and picked up a rock and also threw it at him. It would seem from the evidence that all three of the defendants fought willingly, with Kennedy losing the bout.

The defendants' assignments of error Nos. 11 through 24 are to the charge of the court. However, we will not undertake to discuss these assignments of error *seriatim.* The appellants urgently contend, however, that they were the innocent victims of the defendant Kennedy's unlawful assault on them and that they fought only in self-defense. Be that as it may, the court in its charge to the jury gave them the benefit of their contentions in that respect. Moreover, the charge of the court was in substantial compliance with the law on the right of self-defense applicable to the contentions of the appellants. *S. v. Robinson,* 212 N.C. 536, 193 S.E. 701; *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161; *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427; *S. v. Keeter,* 206 N.C. 482, 174 S.E. 298; *S. v. Cox,* 153 N.C. 638, 69 S.E. 419. In the last cited case, this Court

said: "In order to make good the plea of self-defense, the force used must be exerted in good faith to prevent the threatened injury, and must not be excessive or disproportionate to the force it is intended to repel, but the question of excessive force was to be determined by the jury."

The appellant Euliss Ritter insists that he took no part in the affray until he went to the defense of his brother. Consequently, he contends that he had the right to defend his brother and committed no offense in doing so. The general rule in this respect is pointed out in *S. v. Cox, supra,* in which case the Court was considering a similar contention. The Court said: "In the oral argument here the prisoner's counsel earnestly contended that the prisoner had the right to enter the fight to protect his father, but he only had that right to the same extent and under the same circumstances under which the father himself could have used force. If the father entered the fight willingly, and had not afterwards withdrawn from the fight and retreated to the wall, or if he used excessive force, he would have been guilty if he had slain his assailant. The same principle would apply to the conduct of the son, fighting in defense of a father who had not retreated to the wall or if the prisoner used excessive force."

The evidence disclosed on this record clearly tends to show that Charlie Ritter and the defendant Kennedy never ceased to fight after they ran out of the filling station until after Euliss Ritter entered the fight, and, according to the State's evidence, stabbed Kennedy in the manner heretofore described. Therefore, if Charlie Ritter entered the fight willingly, not having withdrawn therefrom, Euliss Ritter, in undertaking to aid his brother, was equally guilty of participating in the affray. Even so, Euliss Ritter's contention in this respect was submitted to the jury in a proper charge. The facts in the case of *S. v. Maney,* 194 N.C. 34, 138 S.E. 441, relied on by the appellants, are distinguishable from those presented in the instant case.

Exceptions Nos. 14 and 21 are directed to a statement in the charge of the court in which Mall Craven, a Mr. Ashburn, and Carl Rouse were referred to as witnesses offered by the State, when as a matter of fact they were offered by the defendant Kennedy. A mere inadvertence of this character falls within the rule applicable to misstatements of the evidence or contentions of the parties arising on the evidence by the trial judge in charging the jury. When that occurs, the aggrieved party must call the attention of the judge to the misstatement at the time it is made, and thus afford the judge an opportunity to correct it before the case goes to the jury. Otherwise, the misstatement of the evidence or the contentions based thereon will not be subject to review on appeal. *Brewer v. Brewer,* 238 N.C., 607, 78 S.E. 2d 719; *S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608, and cited cases.

We have carefully examined the remaining exceptions and assignments of error, and are of the opinion that the trial below was free from any prejudicial error that would warrant an interference with the result thereof.

No error.

IN THE MATTER OF CLIFFORD LAFAYETTE TATE.

(Filed 16 December, 1953.)

1. **Insane Persons § 1—**

G.S. Ch. 35 deals only with inebriates and mental incompetents in matters of a civil nature; G.S. Ch. 122, Art. 6, deals exclusively with mentally disordered criminals.

2. **Insane Persons § 17—**

A person committed to a State Hospital under the provisions of G.S. 122-84 because of mental incapacity to answer to an indictment in the Superior Court remains in the technical custody of that court and upon his recovery must be returned to it for trial, G.S. 122-87, and may be discharged only by a judge of the Superior Court, either at term or by writ of *habeas corpus*, G.S. 122-86.

3. **Same—**

A person accused of crime who is committed to a State Hospital under the provisions of G.S. 122-84 may not procure his release in a proceeding instituted under G.S. 35-4.

APPEAL by respondent guardian from *Rudisill, J.*, June Term, 1953, GUILFORD.

Petition under G.S. 35-4 for adjudication of sanity and release from the State Hospital for the Insane at Raleigh, N. C.

In June 1928, petitioner was put on trial in the Superior Court of Guilford County under a bill of indictment for a felonious assault. He pleaded that he was mentally incapable of pleading to the bill of indictment or preparing his defense. The jury so found. It was thereupon duly adjudged that the petitioner was insane and it was ordered that he be confined in the State Hospital "under and by virtue of the provisions of Section 6236 of the Consolidated Statutes of North Carolina" (now G.S. 122-83).

On 14 October 1953 counsel for petitioner filed a petition before the clerk of the Superior Court of Guilford County. The petition was filed under the provisions of G.S. 35-4, and it is alleged therein: "That on the ...... day of ...., 19......, your petitioner was adjudged incompetent to handle his affairs, and since that time has been confined to the State Hospital in Raleigh . . ." He prayed that his guardian, the re-

spondent Kate Tate Bain, be made a party and that the court summon a jury and make inquiry as to his present sanity as provided by G.S. 35-4.

The guardian filed answer and an amended answer in which she alleges that petitioner was committed to the insane asylum in a criminal cause in which he pleaded want of mental capacity to plead to the indictment, that he was committed under the provisions of G.S. 122-84, and that the court is without jurisdiction in this proceeding to order the release of the petitioner. She moved that the petition be dismissed.

Upon hearing the motion to dismiss, the clerk found as a fact that petitioner was confined under G.S. 122-84, as alleged; concluded that petitioner, notwithstanding the manner of his confinement, is entitled to seek his release under G.S. 35-4; and entered his order denying the motion to dismiss. The guardian excepted and appealed to the judge of the Superior Court.

At the hearing in the court below, the judge made full findings of fact as here summarized, affirmed the order of the clerk, and remanded the proceeding for hearing upon the merits under G.S. 35-4. The guardian excepted and appealed.

Moseley & Holt for respondent appellant.
W. Brantley Womble and Thomas Turner for petitioner appellee.

BARNHILL, J. Petitioner stood indicted, charged with the commission of a felony. Through counsel he pleaded that he was mentally incapable of pleading to the indictment or preparing his defense. Thereupon the court proceeded to ascertain the merits of the plea as provided in G.S. 122-84 and committed petitioner to the State Hospital at Raleigh. May he now procure his release in a proceeding instituted under G.S. 35-4? We are constrained to answer in the negative.

It is needless for us to enter into a lengthy discussion of the difference in the scope, purpose, and intent of G.S. Ch. 35 on the one hand, and G.S. Ch. 122 on the other, or to undertake to reconcile apparently conflicting and inconsistent provisions therein. Suffice it to say that G.S. Ch. 35 deals only with inebriates and mental incompetents in matters of a civil nature. Proceedings may be had thereunder to admit inebriates and mental incompetents to a State Hospital for treatment; for the appointment of guardians; for the discharge after commitment, and the like. There is no provision therein for the commitment or discharge of a person who stands indicted, charged with the commission of a felony, who pleads that he is incapable for the want of understanding to plead to the bill of indictment or prepare his defense.

Conversely, G.S. Ch. 122, Art. 6, deals exclusively with mentally disordered criminals. It provides the procedure for (1) the ascertainment

of mental incapacity; (2) the commitment, and (3) the discharge of mental incompetents convicted of or charged with the commission of a felony.

"All persons who may hereafter commit crime while mentally disordered, and all persons, who, being charged with crime, are adjudged to be mentally disordered at the time of their arraignment, and for that reason cannot be put on trial for the crimes alleged against them, shall be sent by the court before whom they are or may be arraigned for trial, when it shall be ascertained by due course of law that such person is mentally disordered and cannot plead, to the State Hospital at Raleigh . . . or to the State Hospital at Goldsboro . . ."

Under the terms of G.S. 122-84, "Any person accused of the crime of murder . . . or other crime" who "shall be found by the court to be without sufficient mental capacity to undertake his defense or to receive sentence after conviction, the court . . . shall detain such person in custody until an inquisition shall be had in regard to his mental condition . . ." If it is found that he is mentally incapable, the judge shall commit him as provided in sec. 122-84, "to be kept in custody therein (State Hospital) for treatment and care as herein provided. Such person shall be kept therein . . . until restored to his right mind . . ."

"When a person committed to a State Hospital under this section as unable to plead shall have been reported by the hospital to the court having jurisdiction as being mentally able to stand trial and plead, the said patient shall be returned to the court to stand trial as provided in sec. 122-87."

Then in sec. 122-87, it is provided that "Whenever a person confined in any hospital for the mentally disordered, and against whom an indictment for crime is pending, has recovered or has been restored to normal health and sanity, the superintendent of such hospital shall notify the clerk of the court of the county from which said person was sent, and the clerk will place the case against said person upon the docket of the superior court or criminal court of that county for trial." This section contains other provisions not material here.

That the Legislature intended that the criminal insane and those who may plead insanity or want of understanding to plead to a bill of indictment shall be committed to and discharged from a mental institution of the State only by a judge of the Superior Court is supported by other sections of this chapter.

"When it shall appear that any mentally disordered person under commitment to and confined in a hospital for the mentally disordered *but not charged with a crime or under sentence* shall have shown improvement in his mental condition . . ." he may be released on probation by the superintendent. G.S. 122-67. See also G.S. 122-84, 86, 90.

Thus it appears that the commitment to a State hospital of a person who pleads want of mental capacity to answer to an indictment does not end the jurisdiction of the Superior Court in which the indictment is pending. The petitioner remains in the technical custody of that court and upon his recovery must be returned to it for trial. He may, however, be heard under a writ of *habeas corpus.* G.S. 122-86. See also G.S. 122-87.

The provisions of G.S. Ch. 122, Art. 6, in no uncertain terms, prescribe the method for obtaining the discharge of a person accused of a felony and who has been committed to a State hospital under an inquisition bottomed on his plea that he was mentally incapable of pleading to the bill of indictment or preparing his defense. It does not include a proceeding under G.S. 35-4.

The amendments—amounting to a virtual rewriting—of our statutes relating to the criminal insane contained in ch. 952, S.L. 1945, render our former decisions bearing on the question here presented of doubtful value. But see *S. v. Pritchett,* 106 N.C. 667, and 44 C.J.S. 285, sec. 129.

This record discloses that the petitioner has been confined in the State hospital since 1928. Apparently no action has been taken by the superintendent, G.S. 122-87, or the court officials to ascertain his present mental condition so that he may be put on trial if now sane. We reverse the order entered and at the same time direct that the original cause be reinstated on the criminal trial docket for the attention of the solicitor and trial judge. In this connection we may note that the judge has the authority to direct the hospital officials to give temporary custody of the petitioner to the sheriff of the county to the end that he may produce the petitioner in court for further inquiry as to his present mental condition.

Reversed.

ELIZABETH HESTER v. PAUL J. HESTER.

(Filed 16 December, 1953.)

1. **Judgments § 19: Divorce and Alimony § 14—**

In the wife's action for alimony without divorce, G.S. 50-16, in which alimony *pendente lite* has been allowed, the merits of the cause are not before the court upon the hearing of an order to show cause, and the judge in chambers in another county is without jurisdiction to render judgment for permanent alimony in the action.

2. **Divorce and Alimony § 12—**

Where in the wife's suit for alimony without divorce under G.S. 50-16, order for alimony *pendente lite* has been rendered, but subsequent thereto

there is a reconciliation and a resumption of marital relations in the home, the necessity for alimony ceases, and a judge of the Superior Court has no power to reactivate the order for alimony *pendente lite.* However, the original cause is still pending and upon a subsequent separation and need for subsistence for the wife, the courts are open for whatever relief may be justified by the situation then existing.

APPEAL by plaintiff from *Rousseau, J.*, 13 April, in Chambers at Wadesboro; STANLEY Superior Court. Remanded.

Plaintiff instituted action for alimony without divorce under G.S. 50-16 in August, 1948. Plaintiff alleged abandonment, and defendant answered denying fault on his part and alleging excessive use of intoxicants by the plaintiff.

After notice, Judge Phillips heard plaintiff's motion for alimony *pendente lite* and entered order 31 August, 1948, allowing plaintiff $75 per month. The defendant paid this for four months and then ceased. Subsequently the plaintiff and defendant resumed their marital status, living together in the home in Albemarle. On 6 May, 1950, the parties again separated and since that time have continued to live separate and apart. In 1952 defendant Paul J. Hester instituted in Catawba County an action for divorce *a vinculo* on the ground of two years' separation. It was alleged Elizabeth Hester was then living in that county. In the Catawba action Elizabeth Hester filed answer and set up plea in abatement on account of pendency of the action in Stanly County, but this plea was overruled. In the trial of that action the jury found that Paul J. Hester had willfully abandoned the plaintiff and divorce was denied. In the final judgment in that case it was declared that the judgment should in no way affect the rights of Elizabeth Hester in any other proceeding now pending.

It was alleged by the plaintiff that the plaintiff instituted action in Florida and obtained judgment for alimony but nothing was paid thereon, and that action has no bearing on the question presented by this appeal.

In February, 1953, the plaintiff filed an amendment to her original complaint in Stanly Superior Court, setting out these additional facts and had notice served on the defendant to appear before Judge Rousseau in Wadesboro, Anson County, to show cause why he should not be required to pay alimony as decreed in Judge Phillips' order in 1948, and why said alimony should not be made permanent.

To this notice to show cause the defendant answered setting out his contentions in opposition and denying the right of the plaintiff to any allowance of alimony temporary or permanent under the original order of Judge Phillips.

Judge Rousseau, after finding the facts, adjudged that he had no jurisdiction to grant alimony in this cause, and dismissed plaintiff's motion. The plaintiff appealed.

R. L. Smith & Son for plaintiff, appellant.
J. C. Sedberry for defendant, appellee.

DEVIN, C. J. The original action instituted by plaintiff in Stanly County in 1948 was for alimony without divorce. In this action, on plaintiff's motion, an order was entered by Judge Phillips making her an allowance *pendente lite.* In compliance with this order the defendant made four monthly payments and has paid nothing since December, 1948. No other proceeding was had in that action. In 1953 plaintiff asked leave to file an amendment to her original complaint, and had notice served on the defendant to show cause before Judge Rousseau in Anson County why he should not be required to comply with the order of 1948 and why alimony should not be made permanent.

The final determination of the original Stanly County action was not before Judge Rousseau in chambers in Anson County. He had no jurisdiction to make an allowance of permanent alimony. The only matter he could have heard was the plaintiff's motion to require defendant to pay alimony *pendente lite* under the original order of 1948. Being of opinion that he was without jurisdiction to grant alimony in the cause, Judge Rousseau dismissed the plaintiff's motion. It seems plaintiff did not apply to Judge Rousseau for an order making her a new allowance *pendente lite* on the facts set up in her amended pleading, but asked for the reactivation of the order of 1948, and for an order granting her permanent alimony.

There is no allegation or proof that the reconciliation and resumption of marital relations in 1949 or 1950 was upon condition. No question of condonation or recrimination is raised. Plaintiff alleges she was induced to return to the home and live with the defendant as his wife. Certainly, during the period of such resumption, necessity for alimony of any kind ceased.

The plaintiff complains that the judge below declined to take action on her motion and contends she was entitled to an order requiring continuance of the payments of alimony *pendente lite* prescribed in the order of 1948. The judge correctly ruled that in chambers in another county he was without jurisdiction to render judgment for permanent alimony in the action at issue in the Superior Court of Stanly.

"Alimony, which signifies literally nourishment or sustenance, is the allowance which a husband may be compelled to pay his wife for her maintenance while she is living apart from him or has been divorced." 17 A.J. 405. Black's Law Dictionary defines alimony as "an allowance out of the husband's estate, made for the support of the wife when living separate from him."

The rule is that a reconciliation between husband and wife who have been living apart terminates a divorce action, and an allowance for temporary alimony falls with it. 17 A.J. 435; *Yoder v. Yoder,* 105 Wash. 491, 3 A.L.R. 1109.

In *Rogers v. Vines,* 28 N.C. 293, *Chief Justice Ruffin* used this language: "Now, 'alimony' in its legal sense may be defined to be that proportion of the husband's estate which is judicially allowed and allotted to a wife for her subsistence and livelihood during the period of separation. Poynter Marriage and Divorce 246; Shelford on Mar. and Div. 586. In its nature, then, it is a provision for a wife separated from her husband, and it cannot continue after reconciliation or the death of either party." This definition was quoted with approval in *Taylor v. Taylor,* 93 N.C. 418. And in *Crews v. Crews,* 175 N.C. 168, 95 S.E. 149, this Court said, "whether awarded as an incident to divorce *a mensa et thoro,* or as an independent right under the present statute, and whether in specified property or current payments, it terminates on the death of either of the parties or on their reconciliation."

The object of a judgment decreeing alimony is subsistence for the wife during the period of separation. *Anderson v. Anderson,* 183 N.C. 139, 110 S.E. 863. "It is not contemplated by the statute that the judgment should be final and conclusive; for should the husband return to the wife and resume his marital relations and obligations the necessity for such a provision would cease." *Skittletharpe v. Skittletharpe,* 130 N.C. 72, 40 S.E. 851.

If after an abandonment, followed by a suit for divorce *a mensa* and a court order for alimony *pendente lite,* there is a reconciliation and resumption of marital relations in the home, the necessity for alimony ceases. And if there is a subsequent separation and need for subsistence for the wife, the courts are open for whatever relief may be justified by the situation then existing.

Under the circumstances of this case and in view of the reconciliation between the parties and their resumption of marital relations, we are of opinion, and so hold, that the purpose and necessity of the allowance of alimony *pendente lite* had been served, and that the action of Judge Rousseau in declining now to enforce the order of 1948 may not be held for error.

The plaintiff calls our attention to the case of *Fountain v. Fountain,* 150 Ga. 742, 105 S.E. 294, as being in point. The facts in that case were these: After marriage the husband and wife separated. The wife instituted action for alimony. Pending the action there was a reconciliation and husband and wife resumed marital relations. Thereafter the husband and wife again separated, and the action was prosecuted to final judgment in favor of the wife. The husband failed to comply with the judgment

and was cited for contempt. He defended on the ground that the resumption of marital relations automatically ended the suit and it could not thereafter be prosecuted to judgment. It was held that while the husband on reconciliation could have had the suit dismissed as a matter of course, this was not done and the prosecution of the suit to judgment was upheld.

We observe that notwithstanding the vigorous charges and countercharges, and the proceedings in the several different counts as set forth in the record, the plaintiff has not seen fit for more than five years to press her action for alimony without divorce in the Superior Court of Stanly County where presumably she and her husband are resident. However, no final judgment has been rendered, and the cause must be regarded as still pending there.

The action of the court below in so far as it declined to grant plaintiff's prayer will not be disturbed, and the cause is remanded to the Superior Court of Stanly County for such orders as may be proper.

Remanded.

JOEL THOMAS O'BRIANT v. EMMA KATHERINE O'BRIANT.

(Filed 16 December, 1953.)

1. **Trial § 36—**

The court is not required to adopt any particular form of issues except to see that those which are submitted embrace all essential questions in controversy. G.S. 1-200.

2. **Divorce and Alimony § 9½—Validity of deed of separation held presented under issues submitted and failure to submit separate issue thereon was not prejudicial.**

Plaintiff husband instituted this action for divorce on the ground that the parties had lived separate and apart for more than two years after the execution of a deed of separation. Defendant maintained that the separation agreement was procured by undue influence and set up a counterclaim for divorce *a mensa* on the ground of abandonment. *Held:* In the absence of a tender of an issue, plaintiff may not complain that the court failed to submit the question of the validity of the deed of separation under a separate issue, it appearing that the court submitted the question under the issue as to whether the separation was caused by the wrongful conduct of plaintiff, and gave full and complete instructions on the law arising upon the evidence and the respective contentions of the parties on the question and properly placed the burden upon defendant to satisfy the jury by the greater weight of the evidence that she executed the separation agreement because of undue influence.

APPEAL by plaintiff from *Burney, J.*, May Term, 1953, of WAKE. No error.

This was an action by plaintiff, husband, for divorce under the two years' separation statute, G.S. 50-6.

Plaintiff and defendant intermarried in 1926. Both are residents of Wake County. The plaintiff alleged that he and the defendant signed a deed of separation 24 July, 1948, and that since that date they have continuously lived separate and apart from each other.

The defendant admitted the marriage and the separation, but alleged that the separation was caused solely by the wrongful conduct of the plaintiff, and that the separation agreement was procured by the fraud and undue influence of the plaintiff.

The defendant also set up a counterclaim for divorce *a mensa,* alleging that plaintiff had been guilty of improper association with other women, had used cruel and abusive language toward her, had failed to provide adequate support, and so mistreated her as to render her condition intolerable and life burdensome.

The plaintiff in reply denied the allegations of the answer.

For their verdict the jury answered the first three issues, relative to marriage, residence and two years' separation in the affirmative. The 4th and 5th issues were answered as follows:

"4th. If so, was said separation caused by the wrongful conduct of the plaintiff, as alleged in the answer? Answer: Yes.

"5th. During the marriage of plaintiff and defendant did the plaintiff offer such indignities to the person of the defendant as to render her condition intolerable and life burdensome, as alleged in the answer? Answer: Yes."

From judgment on the verdict that plaintiff was not entitled to divorce, and decreeing alimony for the defendant the plaintiff appealed.

Sam J. Morris, Victor S. Bryant, Jr., and Victor S. Bryant for plaintiff, appellant.

F. T. Dupree, Jr., for defendant, appellee.

DEVIN, C. J. As a defense to the plaintiff's action for divorce *a vinculo* on the statutory ground of two years' separation, the defendant alleged and introduced evidence tending to show that the separation was caused by the wrongful and willful abandonment of her by the plaintiff. But having admitted that the separation was initiated by an agreement which she signed, she endeavored to avoid its effect by allegation and evidence that she was induced to sign the agreement by the undue influence of the plaintiff. *Cobb v. Cobb,* 211 N.C. 146, 189 S.E. 479; *Brown v. Brown,* 205 N.C. 64, 169 S.E. 818. The evidence on this point, *pro* and *con,* and the rival contentions based thereon were submitted to the jury for their determination under the 4th issue, and also for consideration as they

related to the 5th issue which was addressed to the defendant's counterclaim for divorce *a mensa.* The jury answered the issues in favor of the defendant, and from judgment thereon the plaintiff has appealed, assigning errors in the rulings of the trial court, chiefly in respect to the judge's instructions to the jury on these last issues.

The gravamen of the appellant's argument was that the plaintiff was placed at a disadvantage by the failure of the court to submit a separate issue as to undue influence, which was alleged to have been exercised by the plaintiff to procure the defendant's execution of the separation agreement. It was urged that this material question should have been directly presented to the jury with appropriate instructions, since the question as to the validity of the separation agreement had an important bearing on the whole controversy, a successful attack upon it being essential to the defendant's case. Plaintiff calls attention to the requirement of statute G.S. 1-200 that it was the duty of the trial judge to submit issues on all material questions arising on the pleadings, and that whether requested or not this was a primary duty resting upon the judge. *Griffin v. Ins. Co.,* 225 N.C. 684 (686), 36 S.E. 2d 225. It was contended that the court's instructions on undue influence in the connection in which they were given were prejudicial to the plaintiff.

On the other hand, the defendant points out that no such separate issue was tendered by the plaintiff, and that there was no objection or exception on this ground to the issues which were submitted by the court.

The court is not required to adopt any particular form of issues except to see that those which are submitted embrace all essential questions in controversy. *Potato Co. v. Jeanette,* 174 N.C. 236, 93 S.E. 795. The rule was stated in *Clark v. Guano Co.,* 144 N.C. 64, 56 S.E. 858, as follows: "The court below need not submit issues in any particular form. If they are framed in such a way as to present the material matters in dispute and so as to enable each of the parties to have the full benefit of his contention before the jury and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the requirement of the statute is fully met." *Whiteman v. Transportation Co.,* 231 N.C. 701, 58 S.E. 2d 752; *Turnage v. McLawhon,* 232 N.C. 515, 61 S.E. 2d 336; *Caddell v. Caddell,* 236 N.C. 686, 76 S.E. 2d 923; McIntosh 545.

In the case at bar the court submitted the issue in this form:

"4. If so, was said separation caused by the wrongful conduct of the plaintiff as alleged in the answer?" Under this issue the court submitted to the jury all the evidence and the contentions of both parties in relation thereto, including the defendant's claim that the separation agreement which she signed was procured by the undue influence of the plaintiff. After instructing the jury there was no evidence of fraud the court used

this language: "The court will submit to you under this issue (4th) and under the instructions that it (I) will give you, the question as to whether or not the plaintiff exercised undue influence upon the defendant in the execution of said deed of separation."

Thereafter the court instructed the jury as to the meaning of undue influence as applied to the evidence in this case, and charged them that the burden of proof as to that, as well as to the other elements embraced in the 4th issue, was on the defendant. The jury was instructed that a valid separation agreement between husband and wife, in the absence of fraud or undue influence, "was binding on the parties, and would be a complete bar to a wife's action or cross-action for divorce from bed and board." As to the question of the validity of the separation agreement the court charged the jury as follows: "I instruct you that if the defendant Mrs. O'Briant has satisfied you from the evidence and by its greater weight that she signed or executed the separation agreement offered here in evidence, and that she did it because of undue influence, as I have defined that term to you, that such undue influence was exerted upon her by her husband, the plaintiff in this action, and that that was the sole reason for her executing and signing that agreement, then I instruct you that agreement would be null and void and she would not be bound thereby." The jury was instructed that if defendant had failed to satisfy them from the evidence, and by its greater weight of the presence in this case of all the elements of willful abandonment they should answer the 4th issue "No."

It would seem, therefore, that the questions of the separation agreement and of the defendant's attack thereon on the ground of undue influence were embraced in the instructions given the jury under the 4th issue in as ample a manner as the plaintiff could reasonably have required. It is not perceived that the jury could have failed to understand the instructions given them as shown by the record in this case. The plaintiff's complaint on this ground is insufficient to justify us in setting aside the verdict and judgment on the 4th issue or the 5th issue either which was addressed to defendant's cross action for divorce *a mensa.*

We have examined the other exceptions noted by the plaintiff and brought forward in his assignments of error and find none of sufficient merit to require another hearing. On the record we find

No error.

H. W. HINKLE, GUARDIAN OF RUTH E. SOWERS, WIDOW OF WALTER I. SOWERS, DEC'D.; W. G. MORRIS, EXECUTOR OF ESTATE OF WALTER I. SOWERS, DEC'D., v. CITY OF LEXINGTON (EMPLOYER) AND TRAVELERS INSURANCE CO. (CARRIER.)

(Filed 16 December, 1953.)

1. Master and Servant § 55d—

When supported by competent evidence, the findings of fact by the Industrial Commission on a claim properly constituted under the Workmen's Compensation Act are conclusive on appeal, both in the Superior Court and in the Supreme Court.

2. Master and Servant § 4a—

The usual test for determining whether the relationship between the parties is that of employer and employee or independent contractor is whether the employer has the right to control the workmen with respect to the manner and method of doing the work as distinguished from the mere right to require certain results, and it is not material as determinative of the relationship whether the employer actually exercises the right of control.

3. Master and Servant § 39b—

The evidence disclosed that a cemetery caretaker employed by a municipality was charged with the duties, under the direction and control of the cemetery committee, of cutting grass, selling cemetery lots, digging graves, removing surplus dirt and other duties incidental to the position, and was paid a monthly salary by the city and was paid for digging graves by persons requiring his services. *Held:* The evidence supports the conclusion of the Industrial Commission to the effect that in digging graves he was an employee of the city and not an independent contractor.

4. Master and Servant § 40d—

The words "in the course of the employment" as used in the Workmen's Compensation Act relate to the time, place and circumstances under which an injury occurs.

5. Master and Servant § 40c—

The term "arising out of the employment" as used in the Workmen's Compensation Act refers to the origin or cause of the injury, and requires that there be some causal relation between the employment and the injury, but does not require that such injury could have been foreseen or expected.

6. Same—

Evidence tending to show that a cemetery caretaker in the discharge of his duties customarily visited the funeral homes in the city early each evening to learn if graves were to be dug, funerals to be arranged, or cemetery lots to be sold, and that during the evening in question as he crossed the street en route to a funeral home he was struck by an automobile, *is held* sufficient to support the conclusion that the injury arose out of the employment as a hazard incident to the performance of his duties.

APPEAL by defendants from *Hubbard, Special Judge,* September Term, 1953, of DAVIDSON. Affirmed.

This was a proceeding under the Workmen's Compensation Act to obtain compensation for the fatal injury by accident sustained by Walter I. Sowers arising out of and in the course of his employment by the City of Lexington as Cemetery Keeper.

The Industrial Commission after hearing the evidence made detailed findings of fact from which it concluded that the death of the decedent resulted from an injury by accident which arose out of and in the course of his employment by the City, and that his surviving widow was entitled to the benefits prescribed by the statute.

The facts found by the Commission may be summarized as follows:

The deceased was employed by the City as Cemetery Keeper in 1938, and had continuously served as such until his death in September, 1951. His death resulted from being struck by an automobile while crossing the street on his way to a funeral home in connection with his employment. He was elected to this position by the Board of Commissioners of the City and paid a salary of $200 per month. His duties were to care for the cemeteries of the City under the direction and control of the Cemetery Committee, to cut the grass, sell cemetery lots, dig graves, remove the surplus dirt and perform such other duties as were incidental to the position of Cemetery Keeper. For digging graves he was paid by those who required his services. The tools were furnished by the City.

The deceased lived on West Third Street in the second block west of Main Street in the City. He had no telephone or means of communication except by going in person. It was his custom nearly every evening, and had been for many years, to visit the funeral homes in the City in order to learn if graves were to be dug, funerals arranged, cemetery lots sold. The Davidson Funeral Home located on East Third Street was in the first block east of Main Street, and the Piedmont Funeral Home was several blocks south. On the evening of 21 September, 1951, he set out on his usual round intending to go to the Davidson Funeral Home, but in crossing Main Street along the Third Street intersection he was struck by an automobile and killed.

To the findings, conclusions and order of the Industrial Commission the defendants filed exceptions and appealed to the Superior Court. In the Superior Court the presiding judge overruled all the defendants' exceptions and affirmed the award of the Industrial Commission.

The defendants excepted and appealed.

J. T. Jackson and Charles W. Mauze for plaintiff, appellee.

McNeill Smith, Bynum Hunter, and Smith, Sapp, Moore & Smith for defendants, appellants.

DEVIN, C. J. When supported by competent evidence, the findings of fact by the Industrial Commission on a claim properly constituted under the Workmen's Compensation Act are conclusive on appeal, both in the Superior Court and in this Court. *Fox v. Mills, Inc.,* 225 N.C. 580, 35 S.E. 2d 869. The appellants in the case at bar have preserved their exceptions to the order of the Industrial Commission and the judgment of the Superior Court on the ground that the determinative findings of the Commission were not supported by the evidence; but from an examination of the record we conclude that this initial challenge to the decision below cannot be sustained. We think there was competent evidence tending to support the findings and to permit the inferences drawn by the Commission. *Rewis v. Ins. Co.,* 226 N.C. 325, 38 S.E. 2d 97.

The appellants, however, contend that as a matter of law the record is insufficient to support the conclusion that the death of Walter I. Sowers arose out of and in the course of his employment by the City. They advance the argument that if at the time he was killed decedent was on his way to a funeral home, as found by the Commission, it was in connection with his independent business of digging graves.

It is true the decedent was paid by others for digging graves, but this was undoubtedly in connection with his general duties "to care for the cemeteries" under the direction and control of the Cemetery Committee. The usual test for determining whether the relationship between the parties is that of employer and employee or independent contractor is whether the employer has the right to control the workman with respect to the manner and method of doing the work as distinguished from the mere right to require certain results, and it is not material as determinative of the relationship whether the employer actually exercises the right of control. *Scott v. Lumber Co.,* 232 N.C. 162, 59 S.E. 2d 425; *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137; *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515; *Hodge v. McGuire,* 235 N.C. 132, 69 S.E. 2d 227.

Did the injury and death of the decedent, which resulted from his being struck by an automobile on the street, arise out of and in the course of his employment by the City of Lexington as Cemetery Keeper?

The appellants argue that on the facts in the record as found by the Commission it was not a part of decedent's employment to visit funeral homes at night, and that the fatal accident which happened to him as he walked across the street was not one of the hazards of his employment.

But we think the facts found by the Industrial Commission bring this case within the purview of the Compensation Act. The words "in the course of employment" relate to the time, place and circumstances under which an accidental injury occurs, and "arising out of the employment" refer to the origin or cause of the injury. *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668, and cases cited.

In order to constitute an injury as arising out of the workman's employment "there must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." *Conrad v. Foundry Co.,* 198 N.C. 723, 153 S.E. 266; *Withers v. Black, supra; Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907. The term "arising out of the employment" must be interpreted "in the light of the facts and circumstances of each case and there must be some causal connection between the injury and the employment." *Wilson v. Mooresville, supra.*

"Arising out of" means arising out of the work the employee is to do or out of the service he is to perform. The risk must be incidental to the employment." *Hunt v. State,* 201 N.C. 707, 161 S.E. 203.

The industrial Commission expressed the view that the custom and practice of the decedent in this case to visit the funeral homes for the purposes as set out, incidental to his employment as Cemetery Keeper and known to the employer, would tend to aid in the interpretation of the contract of employment of the decedent. *Smith v. Gastonia,* 216 N.C. 517, 5 S.E. 2d 540.

When as an incident of his employment as Cemetery Keeper and in the performance of a duty connected therewith, as shown by the established custom, the decedent crossed the street en route to a funeral home, the hazard of the journey may properly be regarded as within the scope of the Compensation Act. *Massey v. Board of Education,* 204 N.C. 193, 167 S.E. 695.

We note the exceptions to the ruling of the Hearing Commissioner in the reception of testimony in several instances, which the appellants have brought forward in their appeal. These exceptions were overruled by the judge below, and we perceive no prejudicial effect therefrom material to the decision.

We have examined the appellants' brief and the cases cited in support of their well presented arguments, in connection with the evidence and the findings of fact made by the Industrial Commission, but are unable to concur in the view that an erroneous conclusion was reached by the Industrial Commission and by the Judge of the Superior Court.

We think the judgment should be, and it is,

Affirmed.

JOHN C. McINTYRE, TRADING AS TEXTILE MOTOR FREIGHT, v. R. C. JOSEY, COLLECTOR OF THE ESTATE OF MAURICE ABRAMS, DECEASED.

(Filed 16 December, 1953.)

1. Abatement and Revival § 10—

Under the provisions of G.S. 28-172 all causes of action survive the death of the person in whose favor or against whom they have accrued, except the causes of action specified in G.S. 28-175.

2. Abatement and Revival § 12—

A cause of action for tortious injury to personal property survives the death of either party.

3. Executors and Administrators § 19—

The collector of the estate of a deceased tort-feasor may be sued in his representative capacity for an injury to personal property caused by the wrongful act of the tort-feasor. G.S. 28-172, G.S. 28-25, G.S. 28-27.

APPEAL by defendant from *Rousseau, J.*, in Chambers at Rockingham, North Carolina, on 16 March, 1953, in action pending in the Superior Court of SCOTLAND County.

Civil action by plaintiff to recover damages against the collector of the estate of a deceased person for an injury to plaintiff's personal property allegedly caused by the actionable negligence of the deceased.

The complaint alleges in detail that on 21 August, 1952, a southbound tractor-trailer combination owned by the plaintiff John C. McIntyre, trading as Textile Motor Freight, and a northbound automobile operated by Maurice Abrams collided upon a public highway in Halifax County, North Carolina, causing damage totaling $7,500.00 to the tractor-trailer combination and its cargo; that the collision and the resultant damage to the plaintiff's property were occasioned by the actionable negligence of Abrams in the operation of his automobile; that Abrams died in Halifax County, North Carolina, on 21 August, 1952; that letters of collection on the estate of Abrams were issued to the defendant R. C. Josey by the Clerk of the Superior Court of Halifax County on 23 September, 1952; and that the defendant thereupon qualified as collector of the estate of Abrams, and is still serving in that capacity. The complaint prays that the plaintiff be awarded a money judgment totaling $7,500.00 against the defendant in his representative capacity as collector of the estate of Abrams.

The defendant demurred to the complaint in writing upon the theory that it does not state facts sufficient to constitute a cause of action. This is the rationale of the demurrer: G.S. 28-25 authorizes a collector to collect and preserve the property of the decedent, and G.S. 28-27 provides that "he may commence and maintain or defend suits . . . for these

purposes." These statutes plainly imply that the law does not permit a collector to be sued in his representative capacity in any action, unless it is an action calculated to collect and preserve the property of the decedent. The plaintiff undertakes to sue the defendant in the instant case in his representative capacity as the collector of the estate of Abrams. "The complaint shows on its face that . . . the instant case . . . has not been instituted for the collection and preservation of the property of the decedent, but (has been brought) for the recovery (from the estate of the decedent) of an unliquidated demand growing out of an alleged tort committed by him before his death." As a consequence, the defendant is not legally capable of being sued in this action in his capacity as collector, and the complaint states no cause of action in favor of the plaintiff against him in that capacity.

Judge Rousseau entered a judgment overruling the demurrer, and the defendant appealed, assigning that ruling as error.

James W. Mason for plaintiff, appellee.

A. J. Fletcher, F. T. Dupree, Jr., and G. Earl Weaver for defendant, appellant.

ERVIN, J. The appeal presents this question for decision: Can the collector of the estate of a deceased tort-feasor be sued in his representative capacity for an injury to personal property caused by the wrongful act of the tort-feasor?

The answer to this question is to be found in G.S. 28-172 rather than in the statutes invoked by the defendant.

G.S. 28-172 was originally enacted as Section 63 of Chapter 113 of the Public Laws of 1868-69. It is couched in these words: "Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate."

This statute clearly manifests this twofold legislative purpose: (1) To declare what causes of action survive the death of the person in whose favor or against whom they have accrued; and (2) to designate the persons who may sue or be sued upon such surviving causes of action.

The Legislature employs language of broad signification to describe the causes of action which survive. It declares in express terms that "all demands whatsoever, and rights to prosecute or defend any action or special proceeding . . ., except as hereinafter provided, shall survive" the death of the person in whose favor or against whom they have accrued. The exceptive phrase "except as hereinafter provided" refers to G.S. 28-175, which was originally enacted as Section 64 of Chapter 113 of

the Public Laws of 1868-69, and which provides that "the following rights of action do not survive: (1) Causes of action for libel and for slander, except slander of title. (2) Causes of action for false imprisonment and assault and battery. (3) Causes where the relief sought could not be enjoyed, or granting it would be nugatory, after death."

It appears, therefore, that under G.S. 28-172 all causes of action survive the death of the person in whose favor or against whom they have accrued, except the causes of action specified in G.S. 28-175. *Suskin v. Trust Co.,* 214 N.C. 347, 199 S.E. 276; McIntosh on North Carolina Practice and Procedure in Civil Cases, section 266.

Since it is not one of the causes of action enumerated in G.S. 28-175, a cause of action for a tortious injury to personal property survives the death of either party. 1 C.J.S., Abatement and Revival, section 140. See, also, in this connection: *Butner v. Keelhn,* 51 N.C. 60; *Howcott v. Warren,* 29 N.C. 20; *Molton v. Miller,* 10 N.C. 490; *Browne v. Blick,* 7 N.C. 511; *Cutlar v. Brown,* 3 N.C. 182; *M'Alister v. Spiller,* 1 N.C. 314.

We return at this point to the specific question whether the collector of the estate of a deceased tort-feasor can be sued in his representative capacity upon a cause of action of this nature. We are compelled to answer this question in the affirmative. If we should do otherwise, we would fly in the face of the positive declaration of G.S. 28-172 that when a cause of action survives the death of the person in whose favor or against whom it has accrued, it survives "to and against the executor, administrator or *collector* of his estate."

The exact question under consideration arose in the case of *Shields v. Lawrence,* 72 N.C. 43, where remaindermen sued a life tenant to recover damages for an injury to land in the nature of waste, and the life tenant died pending the action. The Court made these adjudications: (1) That the cause of action survived against the collector of the estate of the deceased life tenant under the statutes now codified as G.S. 28-172 and G.S. 28-175, which were then incorporated in Sections 113 and 114 of Chapter 45 of Battle's Revisal; and (2) that the action could be continued against the collector of the estate of the deceased life tenant under the statute now embodied in G.S. 1-74, which was then incorporated in Section 64 of Chapter 17 of Battle's Revisal, because such statute provided that "no action abates by the death . . . of a party . . . if the cause of action survives or continues."

For the reasons given, the judgment overruling the demurrer is

Affirmed.

FILMORE BRANNON v. A. W. WOOD.

(Filed 16 December, 1953.)

1. **Contracts § 16—Where plaintiff's evidence tends to show breach by defendant of executory contract, nonsuit is improperly allowed in action to restore parties to status quo.**

Plaintiff's allegations and evidence were to the effect that defendant agreed to sell him a used car, allowing plaintiff a certain sum for plaintiff's car given in exchange, with plaintiff to pay a stipulated amount in cash and defendant to arrange the financing of the balance of the purchase price with a stipulated company, that plaintiff delivered to defendant his own car and made the cash payment, but that the finance company refused to finance the balance unless plaintiff made an additional cash payment, which plaintiff could not do, that defendant told plaintiff that he would finance the additional cash in another manner, but that plaintiff refused to go through with such transaction, took his own car back without objection and demanded the return of his cash payment, which defendant refused to do. *Held:* The contract was executory on the part of defendant, and plaintiff is entitled to have the cause submitted to the jury on the theory that defendant had failed altogether to perform his part of the contract, entitling plaintiff to rescind and recover his cash payment.

2. **Execution § 27—**

In an action to recover cash paid by plaintiff on the purchase price of an article upon defendant's failure to perform his executory contract to sell, plaintiff is not entitled, upon recovery, to the incarceration of defendant if execution upon the judgment is returned unsatisfied in whole or in part. G.S. 1-409 *et seq.*

APPEAL by the plaintiff from *Crisp, Special J.,* March Term 1953. GUILFORD (High Point Division). Reversed.

Civil action to recover $350.00 paid to the defendant by the plaintiff under an alleged contract for the sale and exchange of automobiles, which contract the defendant allegedly breached.

This action was instituted in the Municipal Court of the City of High Point. In that court the plaintiff was nonsuited at the close of all the evidence, and appealed *in forma pauperis* to the Superior Court. In the Superior Court the judgment of the Municipal Court was affirmed, and the plaintiff appealed to the Supreme Court *in forma pauperis.*

The plaintiff's evidence tended to show these facts. The plaintiff owned a 1941 Plymouth automobile. The defendant was a used car dealer in High Point, and owned a 1950 Oldsmobile automobile priced at $1,600.00. On 4 October 1952 the plaintiff went to defendant's place of business. The defendant offered to sell his Oldsmobile automobile to the plaintiff on these terms: The plaintiff to be allowed $345.00 for his Plymouth automobile, the plaintiff to pay the defendant $350.00 in cash, and the defendant to arrange the financing of the remainder due with the

Industrial Finance Company of High Point. The plaintiff agreed to buy, according to the terms of the offer, delivered his Plymouth automobile to the defendant, and paid him $350.00 in cash. The plaintiff and an agent of the defendant went to the office of the Industrial Finance Company which company refused to finance the remainder of the purchase price, unless the plaintiff made a further cash payment of $100.00. The plaintiff and defendant's agent returned to the defendant, and told him of the refusal of the Industrial Finance Company. The plaintiff told the defendant he could not pay an additional $100.00 in cash, and wanted his $350.00 back. The defendant told the plaintiff that he would finance the $100.00 necessary to complete the deal. The plaintiff said he would not go through with the transaction, and wanted his money back. The defendant would not return to plaintiff the $350.00, but gave plaintiff his receipt for that amount. The defendant has never returned any of the $350.00 to the plaintiff. The plaintiff drove his Plymouth automobile away from defendant's place of business without objection on defendant's part. The plaintiff never took possession of the Oldsmobile automobile.

The plaintiff's complaint substantially alleges the facts of the plaintiff's evidence set forth above, and prays that the plaintiff recover $350.00 with interest from the defendant, including a provision in the judgment for the arrest and incarceration of the defendant in jail in the event that execution against the defendant's property shall be returned unsatisfied in whole or in part.

The defendant's evidence tends to show the following: The defendant did not agree to arrange the financing of the remainder of the purchase price with the Industrial Finance Company, but sent plaintiff and his agent to that company. When it refused to finance the remainder due unless the plaintiff made an additional cash payment of $100.00, he told plaintiff that he could arrange to finance the remainder of the purchase price due with the Piedmont Finance Company, or he would personally finance the $100.00. The plaintiff was not interested in closing the deal on that basis, and insisted on a return of his $350.00. The defendant refused to return the down payment of $350.00 because he considered that an agreement had been made. The plaintiff drove the Plymouth automobile away without his consent.

From judgment of nonsuit, plaintiff appeals, assigning error.

No counsel for defendant, appellee.
Rufus K. Hayworth and E. F. Upchurch, Jr., for plaintiff, appellant.

PARKER, J. Interpreting the evidence in the light most favorable to the plaintiff, and giving to him the benefit of every inference which the

evidence fairly supports the evidence of plaintiff tends to show these facts. According to a contract entered into by them the plaintiff delivered his Plymouth automobile to the defendant and paid him $350.00 in cash, on the purchase price of defendant's Oldsmobile automobile, and the defendant was to arrange the financing of the remainder due on the purchase price of the Oldsmobile automobile with the Industrial Finance Company of High Point. The contract was executory on the part of the defendant, who altogether failed to perform his part of the contract. The plaintiff did not take possession of the Oldsmobile automobile, but notified the defendant that he desired to rescind the contract, and get back his $350.00. The defendant refused, and still refuses, to give the money back to plaintiff.

It seems to us that the case should be submitted to the jury on the theory that if the plaintiff can show by the greater weight of the evidence that there was a contract as contended by him, that the defendant has failed altogether to perform his part of the contract, and that the plaintiff has rescinded the contract, then the plaintiff is entitled to recover back the $350.00 paid to the defendant as money had and received by the defendant to his own use, or as said in *Hutchins v. Davis,* 230 N.C. 67, p. 73, 52 S.E. 2d 210, ". . . he may resort to remedies calculated to place him in *status quo.* Thus, he can recover the purchase price, or any portion of it he may have paid . . ." 12 Am. Jur., Contracts, p. 1028; 17 C.J.S., Contracts, p. 926.

Neither the allegations of the complaint, nor the evidence offered by the plaintiff will support a judgment for the arrest and incarceration in the common jail of Guilford County of the defendant, if the plaintiff recovers and an execution upon the judgment rendered is returned unsatisfied in whole or in part. G.S. 1-409 *et seq.*

For the reasons set forth above the judgment of nonsuit is

Reversed.

STATE v. O. MAX GARDNER CHAMBERS.

(Filed 16 December, 1953.)

1. Larceny § 5—

The fact that stolen goods are found in the possession of a person, by his own act or concurrence, soon after the goods were stolen, permits the logical inference therefrom that he is the thief.

2. Same—

The presumption arising from the recent possession of stolen property is one of fact only, and is to be considered by the jury merely as an evidential fact along with other evidence in determining defendant's guilt.

3. **Evidence § 6—**

A presumption of law is generally a mandatory deduction which the law directs to be made in the sense of a rule of law; a presumption of fact is a deduction from the evidence, having its origin in the well recognized relation between certain facts in evidence and the ultimate question to be proven.

4. **Larceny § 8—**

Instructions to the effect that where a defendant is found in recent possession of property feloniously stolen that there is a presumption that defendant did the stealing, which presumption is strong or weak depending upon the length of time intervening, *is held* not prejudicial in view of the evidence in this case that stolen tires were found in defendant's possession close to the place from which they were stolen soon after they had been stolen, and that defendant was selling them after dark for a fraction of their value.

5. **Larceny § 7—**

Evidence that defendant had possession of stolen tires close to the place from which they were stolen, soon after they had been stolen, and was selling them after dark for a fraction of their value, and that some time later when defendant was apprehended he referred to "tires," although tires had not been mentioned to him by the officer, *is held* sufficient to be submitted to the jury in this prosecution for larceny and receiving stolen goods.

APPEAL by defendant from *Rousseau, J.*, April Term, 1953, of RICHMOND. No error.

The defendant was convicted of receiving stolen goods knowing them to have been stolen.

The warehouse of the American Oil Company in Richmond County was broken and entered 3 October, 1952, and eleven automobile tires were stolen therefrom. On 14 October following the warehouse was again entered and six automobile tires stolen. The witness Arvie Snead testified that "on or about October 3" he purchased four new auto tires from the defendant about 7 p.m., paying $45 for tires (worth $22 each). Later he said, "I don't know just what date I got the tires, it was somewhere about the 18th." The defendant had him wait on the side of the road while he brought the tires. The place was some 200 yards from the Oil Company's warehouse. Another witness John W. Douglas testified about the 15th of October, about dark, the defendant delivered to him four new tires for which he paid him $20.00. He got them out of a parked car and put them in witness' car. These tires were of the same kind and type as those in the Oil Company's warehouse. The defendant lives nearby. He was not regularly employed at this time. Louis Allen, Chief of Police, testified he was investigating these break-ins and questioned the defendant but did not mention tires, and told him to come to his office next day.

The defendant did not come but left the county. Four months later the sheriff saw the defendant in Wayne County and arrested him. When he saw the sheriff, and before anything had been said about tires, the defendant said, "I was coming up there Saturday and straighten this thing up about them tires."

There was verdict of guilty, and from judgment imposing sentence the defendant appealed.

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

John T. Page, Jr., for defendant, appellant.

DEVIN, C. J. The defendant noted exception to and assigns as error the following instructions given to the jury by the court:

"Then on the count of larceny, gentlemen, there is this rule of law: Where a defendant is found in possession of property feloniously stolen and that possession is so recent from the time it was stolen that (he) could not have reasonably gotten the possession of that property without stealing it; if you find beyond a reasonable doubt that the defendant was in possession of the property and it had been feloniously stolen, then there is the presumption that the one in recent possession of the stolen property that that one did the stealing, and this presumption, gentlemen, is strong or weak depending upon the length of time that the property had been feloniously stolen, and the time it was found in the possession of the defendant. In other words, if the property was stolen last night feloniously, and found in the possession of the defendant today, that presumption would be stronger than it would if found in his possession two, three, or four weeks from the time it was stolen, and the further removed this possession is from the time it was stolen, the weaker this presumption becomes until it is only a mere circumstance to be considered by the jury."

The fact that stolen goods are found in the possession of a person, by his own act or concurrence, soon after the goods were stolen, permits the logical inference therefrom that he is the thief. This doctrine is imbedded in the law of evidence and has been frequently stated by this Court. While there is some difference in the decided cases as to the applicability of the doctrine and in the manner in which it is stated, the distinction lies rather in the nature of the evidence upon which it is grounded and the circumstance and character of the possession than in the expression of the principle involved. *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725; *S. v. McFalls,* 221 N.C. 22, 18 S.E. 2d 700; *S. v. Williams,* 219 N.C. 365, 13 S.E. 2d 617; *S. v. Baker,* 213 N.C. 524, 196 S.E. 829; *S. v. Lippard,* 183 N.C. 786, 111 S.E. 722; Stansbury, secs. 215, 242.

"If the circumstances are such as to exclude the intervening agency of others between the theft and the recent possession of stolen goods, then such recent possession may afford presumptive evidence that the person in possession is the thief. *S. v. Patterson,* 78 N.C. 470; *S. v. Lippard,* 183 N.C. 786, 111 S.E. 722; *S. v. McFalls,* 221 N.C. 22, 18 S.E. 2d 700. The presumption, however, is one of fact only and is to be considered by the jury merely as an evidential fact along with other evidence in determining the defendant's guilt." *S. v. Weinstein, supra.*

Referring to the distinction to be drawn between a presumption and an inference, we said *In re Will of Wall,* 223 N.C. 591 (594), 27 S.E. 2d 728, "However, the term presumption as connotating a presumption of law is generally used as indicative of a mandatory deduction which the law directs to be made, in the sense of a rule of law laid down by the Court, while a presumption of fact used in the sense of an inference is a deduction from the evidence, having its origin in the well recognized relation between certain facts in evidence and the ultimate question to be proven."

While the language in which the court stated the principle of recent possession may be subject to criticism when considered as the statement of a general rule applicable to all cases, in view of the evidence for the State that stolen tires were found in the possession of the defendant so soon after they were stolen, close to the place from which they were stolen, and that they were being sold after dark for a fraction of their value, we perceive no prejudicial effect from the language used of which the defendant can justly complain.

The evidence was sufficient to carry the case to the jury and the motion for judgment of nonsuit was properly denied.

We have examined the other exceptions to the judge's charge brought forward in defendant's case on appeal, but find nothing therein which would justify vacating the verdict and judgment of the Superior Court.

No error.

STATE v. SAMMY WOOTEN.

(Filed 16 December, 1953.)

1. Intoxicating Liquor § 9d—

Evidence tending to show that defendant's house and a church faced each other across an unpaved street and that officers found nontax-paid liquor in a broom sedge field and concealed in vines between the rear of the church and a paved highway, is insufficient to show that defendant had either actual or constructive possession of the liquor, and nonsuit should have been entered in a prosecution for unlawful possession of intoxicating

liquor and unlawful possession of intoxicating liquor for the purpose of sale.

2. Criminal Law § 83—

Where defendant's motions for compulsory nonsuit are sustained on his appeal to the Supreme Court, the rulings have the force and effect of verdicts of not guilty. G.S. 15-173.

APPEAL by defendant from *Burney, J.*, and a jury, at September Term, 1953, of COLUMBUS.

Criminal prosecution upon a warrant charging the accused with the violation of the statutes relating to the possession of intoxicating liquor.

This action originated in the Recorder's Court of Columbus County, and was carried thence to the Superior Court by the appeal of the defendant. Trial was had *de novo* before a petit jury in the Superior Court upon the original warrant, which contained a first count charging an unlawful possession of intoxicating liquor, and a second count charging an unlawful possession of intoxicating liquor for the purpose of sale. Both sides offered testimony at the trial in the Superior Court.

When the evidence for the State is stripped of insinuations of no probative value, it reveals these facts:

1. The home of the defendant and a church stand on opposite sides of an unpaved street in the Town of Chadbourn. Since both buildings front the street, they necessarily face each other. There is a paved highway some distance to the rear of the church. Several other dwellings are situated in the neighborhood, but none of them are as close to the church as that of the defendant.

2. Police officers searched the home of the defendant under a search warrant. They "didn't find anything there." The officers then crossed the unpaved street, and explored the area around the church. They discovered ten half gallon jars "full of white lightning" in that area. One of the jars was cached in a broom sedge field, and the other nine were concealed in vines between the rear of the church and the paved highway. The officers did not know who owned the liquor or the land where it was found.

The evidence for the defendant indicates that he had no connection whatever with the liquor or the land where it was hidden.

The jury found "the defendant guilty of both counts as charged in the warrant," and the trial judge sentenced him to imprisonment as a misdemeanant on each count. The defendant appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

Powell & Powell for defendant, appellant.

ERVIN, J. The only assignments of error requiring consideration are those based upon the disallowances of the motions of the defendant for compulsory nonsuits on both counts.

The testimony for the State is ample to show that some person violated the statutes relating to the possession of intoxicating liquor. It leaves to mere conjecture, however, the all-important question whether the culprit was the defendant or somebody else. Since the evidence does not indicate that the defendant had either the actual or the constructive possession of the intoxicating liquor found by the officers, the prosecution should have been involuntarily nonsuited in the Superior Court. *S. v. McLamb,* 236 N.C. 287, 72 S.E. 2d 656; *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268.

The convictions and sentences in the Superior Court are vacated and reversed, and the motions of the defendant for compulsory nonsuits on both counts are sustained on this appeal. Under G.S. 15-173, these rulings have the force and effect of verdicts of not guilty on both counts. *S. v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908.

Reversed.

STATE v. ADELYN C. GRAHAM.

(Filed 16 December, 1953.)

Criminal Law §§ 79, 80b (4)—

The failure of defendant to file a brief works an abandonment of the exceptions and assignments of error, and when no error appears on the face of the record the appeal will be dismissed under Rule 28.

APPEAL by defendant from *Armstrong, J.,* at 27 July Term, 1953, of GUILFORD (Greensboro Division).

Motion by State to dismiss appeal for failure to file brief.

Attorney-General McMullan and Samuel Behrends, Jr., Member of Staff, for the State.

No counsel contra.

PER CURIAM. The record discloses that at the 11 May Term, 1953, of the Superior Court of Guilford County, Greensboro Division, the defendant entered a plea of guilty of the offense of careless and reckless driving. Judgment was entered directing that she be confined in the common jail of Guilford County for a term of 60 days, the prison sentence to be suspended for two years on certain conditions, among which

is this one: "(3) That she not operate a motor vehicle on the highways of this State for a period of six months."

At the 27 July Term, 1953, Judge Armstrong, after hearing the evidence of the State and of the defendant, found as a fact that the defendant had operated a motor vehicle on the streets of Greensboro on 24 July, 1953, in violation of the foregoing condition, and thereupon judgment was entered directing that commitment issue requiring the defendant to serve the 60-day prison sentence.

The defendant gave notice of appeal to this Court. The record and case on appeal were duly docketed here. However, no brief has been filed. This works an abandonment of the exceptions and assignments of error (*S. v. Hadley,* 213 N.C. 427, 196 S.E. 361; *S. v. Tuttle,* 207 N.C. 649, 178 S.E. 76), and no error appears on the face of the record. *S. v. Robinson,* 214 N.C. 365, 199 S.E. 270; *S. v. Hamlet,* 206 N.C. 568, 174 S.E. 451. See *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66. The motion of the Attorney-General to dismiss under Rule 28 is allowed.

Judgment affirmed.

Appeal dismissed.

MRS. FRANCES PREVATTE v. W. D. PREVATTE.

(Filed 16 December, 1953.)

1. Appeal and Error § 12—

Where the judge writes on the judgment that plaintiff be allowed to appeal *in forma pauperis* upon compliance with the statute, but plaintiff obtains no order allowing appeal *in forma pauperis* after the filing of affidavit of poverty subsequent to the term, the appeal must be dismissed for failure to comply with the mandatory provision of the statute. G.S. 1-288.

2. Same—

The statutory requirements of appeals *in forma pauperis* are mandatory, and failure to comply deprives the Supreme Court of any appellate jurisdiction.

APPEAL by plaintiff from *Grady, Emergency Judge,* August Term, 1953, of ROBESON. Appeal dismissed.

I. Murchison Biggs for plaintiff appellant.

Robert Weinstein and F. D. Hackett for defendant appellee.

PER CURIAM. This was a suit for divorce *a mensa.* From order denying motion for alimony *pendente lite* the plaintiff gave notice of appeal and attempted to appeal *in forma pauperis.* However, it appears

that there was no order allowing appeal *in forma pauperis* after the filing of affidavit of poverty subsequent to the term. G.S. 1-288. True, the judge wrote in the judgment "plaintiff allowed to appeal *in forma pauperis* upon compliance with the statute," but this would not authorize disregard of the provisions of the statute. *Anderson v. Worthington,* 238 N.C. 577. The requirements of the statute allowing appeals *in forma pauperis* are mandatory and failure to comply deprives this Court of any appellate jurisdiction. *Williams v. Tillman,* 229 N.C. 434, 50 S.E. 2d 33; *Brown v. Kress & Co.,* 207 N.C. 722, 178 S.E. 248.

Appeal dismissed.

W. D. CASEY, JR., AND EUNICE WINBORN CASEY v. HAROLD J. GRANTHAM AND VIOLA B. GRANTHAM, CLARENCE GRANTHAM, AND W. POWELL BLAND, TRUSTEE.

(Filed 15 January, 1954.)

1. Pleadings § 15—

Upon demurrer, the factual allegations of the complaint are to be taken as true and the pleader given the benefit of every reasonable intendment therefrom, and the pleading liberally construed with a view to substantial justice between the parties.

2. Partnership § 2—

Partners have a fiduciary relationship to each other which imposes upon them the obligation to use the utmost good faith in dealing with one another in respect to partnership affairs, each being the confidential agent of the other with the right to know all that the other knows in regard to the partnership affairs.

3. Partnership § 12—

Allegations of a partner that the other partner had usurped complete control and exclusive possession of the books, records and entire assets of the partnership and was squandering its earnings and assets, and had refused, after demand, to account to plaintiff for any share of the profits or earnings of the business, *is held* to state a cause of action for an accounting between the partners.

4. Partnership § 15—

Under the equitable principle of marshaling of assets, a partner is entitled to have the partnership property first applied to the payment or security of partnership debts before resort is had to his individual assets. G.S. 59-68 (1).

5. Same—

Where partners and their wives execute a deed of trust on the entire partnership property and also the individual realty of a partner to secure a partnership debt, allegations of one of the partners that the part-

nership property is sufficient to discharge the debt in full without resort to his individual property states a cause of action in his favor to enjoin the foreclosure of the deed of trust *en masse* pending an accounting of the partnership assets.

6. Injunctions § 8—

Ordinarily a temporary restraining order should not be dissolved when the injury, if any, which defendant would suffer from its operation would be slight compared to the irreparable damage which would result to plaintiffs from its dissolution.

7. Partnership § 15: Pleadings § 2—In partner's action against co-partner for accounting he may enjoin lien-holder from foreclosing deed of trust on partnership and individual property.

The complaint alleged a cause of action in favor of one partner against his co-partner for an accounting and settlement of the partnership property. The complaint also alleged that the partners and their wives had executed a deed of trust covering not only the partnership property but also realty belonging to plaintiff individually, to secure a partnership debt, that the partnership property was sufficient to pay the partnership debt, and sought to restrain the foreclosure of the deed of trust *en masse* pending an accounting of the partnership property, the trustee and the *cestui que trust* being parties. *Held:* Demurrer on the ground of misjoinder of parties and causes of action should have been overruled, the trustee and the *cestui* being necessary parties for a complete determination and settlement of the questions involved.

8. Parties § 4—

Plaintiff is entitled to join as defendants all who claim an interest in the subject matter of the controversy adverse to plaintiff or who are necessary parties to a complete determination of the cause of action. G.S. 1-69.

JOHNSON, J., dissenting.

WINBORNE, J., concurs in dissent.

APPEAL by plaintiffs from *Frizzelle, J.*, at March Term, 1953, of WAYNE. Reversed.

Civil action by plaintiff W. D. Casey, Jr., against defendant Harold J. Grantham for an accounting of a partnership owned solely by them, and in which W. D. Casey, Jr., and wife Eunice Winborn Casey seek to enjoin the foreclosure of a deed of trust on the partnership property and on the home and farm of W. D. Casey, Jr., held by the defendant Clarence Grantham, father of the defendant Harold J. Grantham, until the partnership accounting is had.

The defendant Clarence Grantham demurred to the complaint on these grounds: (1) Misjoinder of parties defendant; (2) misjoinder of causes of action; (3) misjoinder of both parties and causes of action; and (4) for failure of the complaint to state facts sufficient to constitute a cause of action.

The complaint alleges these substantive and constituent facts upon which the plaintiffs' claim to relief is founded.

1. On 17 September 1948, W. D. Casey, Jr., and Harold J. Grantham organized a partnership to engage in a sawmill and cotton gin business. They are equal partners. Casey was general manager. Grantham was to arrange the financing and credit, and said his father, Clarence Grantham, was a man of means, and he could arrange the financing of the business with him. Each partner was to receive one-half of the net profits.

2. During the first and second years of the partnership, Harold J. Grantham borrowed from his father, Clarence Grantham, $15,000.00 in cash at 6% interest for the partnership business, for which loan neither the partnership, nor the individual partners, gave any evidence of this indebtedness or security therefor.

3. In 1951 Casey went to New Mexico on partnership business, leaving the management and control of the partnership business in Wayne County to his partner. When Casey returned to Wayne County, he found the partnership cotton gin was not open, though the cotton ginning season was in progress.

4. To secure Clarence Grantham for his $15,000.00 loan to the partnership prior to going to New Mexico, Casey and his wife, and Harold J. Grantham and his wife executed and delivered to Clarence Grantham 15 promissory notes in the sum of $1,000.00 each bearing interest at 6%; the first note to become due and payable one year from date, and the other 14 notes to become due and payable one each year for the next 14 years. The date of each of said notes was 23 December 1950. To secure this indebtedness the makers of the notes executed and delivered a deed of trust to W. Powell Bland, Trustee, for Clarence Grantham, conveying in said deed of trust to the trustee the assets of the partnership and the home and farm of the plaintiff W. D. Casey, Jr., which deed of trust is properly recorded in Wayne County and by reference made a part of the complaint.

5. Upon his return from New Mexico, Casey found the partnership affairs in bad shape, and a study and accounting of its debts, engagements and affairs were necessary to enable plans to be made for the more orderly operation of the partnership or the settlement of its affairs. Casey undertook to arrange such study and accounting with Harold and Clarence Grantham, but after diligent efforts and numerous conferences nothing could be done to that end.

6. The books and records of the partnership are now, and have been, in the hands of the defendants Harold J. Grantham and wife Viola Grantham. Harold J. Grantham, aided and abetted by his father, has usurped complete control and exclusive possession of the entire assets and business of the partnership, is squandering its assets, and refuses to account to Casey for any share of the profits. That Harold J. Grantham and his

father have entered into a course of dealing with each other for the purpose of ousting Casey from the partnership to the end that they may take over not only the assets of the partnership conveyed in the deed of trust above mentioned, but also the home and farm of Casey conveyed in the deed of trust. That in furtherance of this purpose Harold J. Grantham and his father have caused Bland, Trustee, to advertise for public sale on 6 December 1952, the property conveyed in the deed of trust so that W. D. Casey, Jr.'s farm and home may be sold at a forced sale to plaintiffs' irreparable damage.

7. That the partnership property conveyed in the deed of trust is well worth the amount of the debt and interest owed by the partnership to Clarence Grantham.

The plaintiffs prayed first for an accounting of the partnership business and second that the sale of the property under the deed of trust be enjoined.

On 6 December 1952, Honorable Henry L. Stevens, Jr., holding the courts of the 4th Judicial District, issued a temporary restraining order.

At the March Term 1953, the Honorable J. Paul Frizzelle signed a judgment sustaining the demurrer to the complaint filed by Clarence Grantham on the ground of a misjoinder of parties and causes of action, dismissing the action and dissolving the temporary restraining order before issued by the Honorable Henry L. Stevens, Jr.

From the judgment so entered the plaintiffs appealed.

J. Faison Thomson & Son and S. B. Berkeley for plaintiffs, appellants.
Paul B. Edmundson for defendant, appellee.

PARKER, J. Upon the essential or ultimate facts stated in the complaint, which on a demurrer we are required to construe liberally with a view to substantial justice between the parties with every reasonable intendment to be made in favor of the pleader, these three questions are presented for decision: First, does the complaint state a cause of action for an accounting and settlement of partnership affairs between the partners W. D. Casey, Jr., and Harold J. Grantham; Second, can the plaintiffs enjoin the foreclosure sale under the deed of trust of the partnership property and the home and farm of the plaintiff W. D. Casey, Jr., until after an accounting and settlement of the partnership; and Third, if so, are Clarence Grantham and W. Powell Bland, Trustee, proper parties defendants so that it can be done in this suit?

It is elementary that the relationship of partners is fiduciary and imposes on them the obligation of the utmost good faith in their dealings with one another in respect to partnership affairs. Each is the confidential agent of the other, and each has a right to know all that the others

know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs. 40 Am. Jur., Partnership, p. 217.

G.S. 59-52 provides "any partner shall have the right to a formal account as to partnership affairs: (a) if he is wrongfully excluded from the partnership business or possession of its property by his co-partners . . . (d) whenever other circumstances render it just and reasonable."

Equitable jurisdiction is practically exclusive in proceedings for an account and settlement of partnership affairs, including suits for an accounting and settlement of the firm's affairs between the co-partners themselves. Pomeroy's Equitable Jurisprudence (5th Ed.), Vol. 4, p. 1078.

The complaint alleges that the partner Harold J. Grantham has usurped complete control and exclusive possession of the entire business and assets of the partnership; that the books and records of the partnership are in the hands of Harold J. Grantham and his wife; that Harold J. Grantham is squandering the assets and earnings of the partnership and refuses to account to his partner W. D. Casey, Jr., one of the plaintiffs, for any share of the profits or earnings of the business, though demand has been made therefor. The complaint clearly states a cause of action for an accounting of the partnership between the partners. *Pugh v. Newbern,* 193 N.C. 258, 136 S.E. 707.

G.S. 59-68 (1) reads: "When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners."

"Each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners to the firm." Lindley on Partnership, 10th Ed., p. 426. See also Rowley Modern Law of Partnership, Vol. I, p. 413. For practical purposes this right does not exist until the affairs of the partnership have to be wound up, or the share of a partner ascertained. Lindley, *ibid.,* p. 427.

It is said in 68 C.J.S., Partnership, p. 639, "the right, in equity, to have the partnership and individual assets marshaled is for the benefit and protection of the partners themselves, and, therefore, the equity of a creditor, to the application of this doctrine, is of a dependent and subordinate character, and must be worked out through the medium of the partners or their representatives"—citing in support of the text *Dilworth v.*

Curts, 139 Ill. 508, 29 N.E. 861, where it is said "the right in equity to have the partnership and individual assets marshaled is one resting in the hands of the partners, and must be worked out through them."

Each partner has the right to have the partnership property applied to the payment or security of partnership debts in order to relieve him from personal liability. *Bankers Trust Co. v. Knee,* 222 Iowa 988, 270 N.W. 438; see also *Simmons v. Simmons,* 215 Iowa 654, 246 N.W. 597, 601.

It appears that under the general rule as to marshaling partnership and individual assets, or under the application of a principle of equity similar to that rule, the rule that partnership debts may be paid out of individual assets is subject to the modification that the individual assets may be so applied where, and only where, there are no firm assets, or where the firm assets have become exhausted. It would seem that the rationale for this modification to the rule rests upon the fact that the partners occupy the position of sureties in respect to their individual property being liable for the payment of partnership debts. 68 C.J.S., Partnership, p. 664; 35 Am. Jur., Marshaling Assets and Securities, Sec. 21; 37 Am. Jur., Mortgages, Sec. 695; Annotations; 47 L.R.A. (N.S.) 303; 12 L.R.A. (N.S.) 695; L.R.A. 1917 B., p. 528.

The complaint alleges that the partnership property conveyed in the deed of trust to Bland, Trustee, for the benefit of the defendant Clarence Grantham is well worth the amount of the debt and interest owed by the partnership to Clarence Grantham. The demurrer admits that allegation to be true. The reasonable inference to be drawn from the complaint is that all of the partnership property is situate in Wayne County, and is in the jurisdiction of the Superior Court of that county. There is nothing in the complaint to show that the partnership has any debt, except the debt to Clarence Grantham, father of Harold J. Grantham. Harold J. Grantham owes to his partner W. D. Casey, Jr., the obligation of the utmost good faith in respect to the partnership affairs, but instead of performing that duty he has in his possession the books, records and assets of the partnership, and refuses to account to Casey as to the partnership affairs. The complaint further alleges that Harold J. Grantham and his father Clarence Grantham are seeking to oust W. D. Casey, Jr., from the partnership so that they may take over not only the assets of the partnership, but also Casey's home and farm, and have had Bland, Trustee, to advertise for sale the property conveyed in the deed of trust to plaintiffs' irreparable damage.

It may be that the property of the partnership conveyed in the deed of trust may not sell for enough at a forced sale to pay Clarence Grantham's debt in full—though the demurrer admits that it will—but that Harold J. Grantham may be indebted to the partnership in an amount to make up such deficiency, if such a deficiency should exist. How can

that be determined, until there is an accounting between the partners of the partnership affairs?

Under the rules laid down above it would seem to be plain that the plaintiffs have alleged sufficient facts to enjoin a foreclosure sale under the deed of trust until there has been an accounting and settlement of the partnership affairs between the partners, Casey and Harold J. Grantham. Under such circumstances it is the rule with us that an injunction should be granted where the injury, if any, which the defendant Clarence Grantham, would suffer from its issuance would be slight as compared with the irreparable damage which the plaintiffs would suffer from the forced sale of their home and farm from its refusal, if the plaintiffs should finally prevail. *Huskins v. Yancey Hospital, Inc.,* 238 N.C. 357, 78 S.E. 2d 116, where the authorities are cited.

We now come to the third question: Are W. Powell Bland, Trustee, and Clarence Grantham proper parties defendants so that such an injunction can be issued in this suit? The answer is Yes.

"As a rule, creditors of a partnership are neither necessary nor proper parties to a suit between partners for a firm settlement and accounting . . . the circumstances may be such that they are properly made parties in the first instance." 68 C.J.S., Partnership, p. 939. In support of the statement "the circumstances may be such that they are properly made parties in the first instance" the text cites *Hoskins v. McGirl,* 12 Mont. 563, 31 P. 544. In that case the headnote correctly states the court's decision as follows: "A. and B., as partners, became indebted to C. and D., for which B. became liable, as A. afterwards withdrew. A., claiming that such debt had been fully paid, which B. denied, brought action against B., making C. and D. parties, for an accounting and on a note which specified that B. should be allowed 'set-offs for all debts of the firm of A. & B., which he may now be or hereafter become liable to pay.' Held, under Code, Sec. 16, which provides that 'any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein,' that C. and D. were proper parties." In the opinion the Court said: "In an action of this nature, we are of opinion that the whole matter should be settled by the court, with all the parties before it at once, and that in such settlement Mund is a proper party."

G.S. 1-69 provides that "all persons may be made defendants, jointly, severally, or in the alternative, who have, or claim an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved."

One cause of action is alleged in the complaint—a suit by W. D. Casey, Jr., as a partner against his partner Harold J. Grantham for an account-

ing and settlement of the partnership affairs between themselves and in which suit the plaintiffs are seeking to enjoin the foreclosure of a deed of trust by Bland, Trustee, and Clarence Grantham, father of Harold J. Grantham, on the partnership property and on their home and farm until the partnership accounting is had. The demurrer of Clarence Grantham admits as true the allegation in the complaint that the partnership property conveyed in the deed of trust is well worth the amount of the debt with interest owed by the partnership to Clarence Grantham. In our opinion, W. Powell Bland, Trustee, and Clarence Grantham are necessary parties so that the court can completely determine and settle the questions involved *with all the parties before it at once.* How can the joinder of these parties embarrass or injuriously affect the rights of Harold J. Grantham and wife? *Ezzell v. Merritt,* 224 N.C. 602, 31 S.E. 2d 751.

There is no misjoinder of parties and causes of action, and the judgment of the lower court sustaining the demurrer and dismissing the action at the costs of the plaintiffs was entered improvidently, and it is ordered

Reversed.

JOHNSON, J., dissenting: In this case the plaintiffs have declared upon two causes of action. The first is against the defendant Harold J. Grantham for an accounting and settlement of the business and affairs of a partnership owned solely by the plaintiff W. D. Casey, Jr., and Harold J. Grantham. The second cause of action is to enjoin the foreclosure of a deed of trust on the partnership property held by the defendant Clarence Grantham.

The gravamen of the first cause of action is that the plaintiff W. D. Casey, Jr., and the defendant Harold J. Grantham are equal partners in a sawmill and cotton gin business of which Casey is general manager; and that Harold J. Grantham has usurped complete control and exclusive possession of the entire business and assets of the partnership, is squandering its assets and earnings, and refuses to account to Casey for any share of the profits or earnings of the business.

For the purpose of decision it may be conceded that the plaintiffs have alleged facts sufficient to constitute a cause of action for partnership accounting against Harold J. Grantham. *Pugh v. Newbern,* 193 N.C. 258, 136 S.E. 707. The joinder of the *feme* plaintiff may be treated as surplusage. This upon the theory that the mere joinder of an unnecessary party plaintiff is immaterial. *Pendergraph v. American Ry. Express Co.,* 178 N.C. 344, 100 S.E. 525; *McMillan v. Baxley,* 112 N.C. 578, 16 S.E. 845.

The gist of the second cause of action, when stripped of legal inferences and conclusions of the pleader, is (1) that the defendant Clarence Grantham is the holder of a series of partnership notes totaling $15,000, made

by the two partners and their spouses, secured by deed of trust embracing all property and assets of the partnership, and also including the home and farm of the plaintiffs, their individual property; (2) that the property belonging to the partnership "is well worth the amount of the debt" owed by the partnership to the defendant Clarence Grantham; and (3) that all the property embraced in the deed of trust, including the individual property of the plaintiffs, is being advertised for *en masse* public sale under the power contained in the deed of trust.

G.S. 1-123 classifies and limits the causes of action which may be joined in the same complaint. It provides in part: "The plaintiff may unite . . . several causes of action, of legal or equitable nature, or both, where they all arise out of—1. The same transaction, or transaction connected with the same subject of action."

From the decisions construing and applying the foregoing provisions of the statute these general principles seem pertinent to the case at hand:

1. Causes of action which arise from a series of transactions connected together forming one course of dealing and tending to one end, ordinarily may be joined. *Barkley v. Realty Co.*, 211 N.C. 540, 191 S.E. 3; *Balfour Quarry Co. v. Construction Co.*, 151 N.C. 345, 66 S.E. 217; *King v. Farmer*, 88 N.C. 22.

2. However, each cause of action so joined "must relate to one general right," and each "must be so germane to it as to be regarded really as a part thereof." *Pressley v. Tea Co.*, 226 N.C. 518, 39 S.E. 2d 382. And "the connection with the subject of the action must be immediate and direct." *Hancammon v. Carr*, 229 N.C. 52, 47 S.E. 2d 614. Ordinarily, "a remote, uncertain, partial connection is not enough to satisfy the requirements of the statute." *Hancammon v. Carr, supra.*

3. The word "transaction" as used in G.S. 1-123 "means something which has taken place whereby a cause of action has arisen, and embraces not only contractual relations but also occurrences in the nature of tort." *Smith v. Gibbons*, 230 N.C. 600, 54 S.E. 2d 924.

The word "transaction" as employed in the statute may also connote the meaning "of the conduct or finishing up of an affair, which constitutes as a whole the 'subject of action.' " *Cheatham v. Bobbitt*, 118 N.C. 343, 24 S.E. 13; *Smith v. Gibbons, supra.*

4. The "subject of action" means "the thing in respect to which the plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had." *Hancammon v. Carr, supra; Smith v. Gibbons, supra.*

In the next to the last paragraph of G.S. 1-123 it is provided that (subject to an exception not pertinent here) "the causes of action so united . . . *must affect all the parties to the action.*" (Italics added.)

The foregoing provision of the statute stands as a further limitation on the joinder of causes of action. Its plain meaning, as construed and applied in a long line of uniform decisions of this Court, is to prohibit the joinder of distinct causes of action against different persons having no substantial connection with each other in respect to such causes of action, and to prevent two or more persons from being sued in the same action in respect to distinct causes of action when there is no joint or common liability among them. *Brown v. Coble,* 76 N.C. 391; *Logan v. Wallis,* 76 N.C. 416; *Street v. Tuck,* 84 N.C. 605; *Burns v. Williams,* 88 N.C. 159; *Mitchell v. Mitchell,* 96 N.C. 14, 1 S.E. 648; *Bank v. Angelo,* 193 N.C. 576, 137 S.E. 705; *Mills v. Bank,* 208 N.C. 674, 182 S.E. 336; *Burleson v. Burleson,* 217 N.C. 336, 7 S.E. 2d 706.

Thus, when a complete determination of one cause of action united with another requires the joinder of parties not necessary to the other, it is demurrable. *Logan v. Wallis, supra; Roberts v. Mfg. Co.,* 181 N.C. 204, 106 S.E. 664; *Mills v. Bank, supra.*

Our statute which regulates the joinder of defendants is G.S. 1-69. It provides that all persons "may be made defendants, . . . who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved."

Where there is a misjoinder of causes of action alone, the case should not be dismissed. Rather, the court should sever the causes and divide the action for separate trials. G.S. 1-132; *Pressley v. Tea Co., supra; Snotherly v. Jenrette,* 232 N.C. 605, 61 S.E. 2d 708; *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345.

However, where there is not only a misjoinder of distinct causes of action, but also misjoinder of parties having no community of interest, the action may not be divided on demurrer, and where this occurs the demurrer must be sustained, and the usual practice is for the court to dismiss the case. *Teague v. Oil Co., supra; Southern Mills v. Yarn Co.,* 223 N.C. 479, 27 S.E. 2d 289; *Bank v. Angelo, supra; Roberts v. Mfg. Co., supra; Jones v. McKinnon,* 87 N.C. 294; *Cromartie v. Parker,* 121 N.C. 198, 28 S.E. 297. But compare *Shore v. Holt,* 185 N.C. 312, 117 S.E. 165, where the main cause of action was salvaged and retained by allowing the plaintiffs to strike out the companion cause of action which produced the misjoinder of parties and causes. See also *Campbell v. Power Co.,* 166 N.C. 488, 82 S.E. 842; *Patterson v. Franklin,* 168 N.C. 75, 84 S.E. 18.

This complaint, when measured by facts properly pleaded, with legal inferences and conclusions of the pleader disregarded, as is the rule on demurrer (*Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32), discloses no sufficient community of interest among the parties defendant

or connection between the causes of action to justify joinder. *Burleson v. Burleson, supra* (217 N.C. 336).

It is true the complaint contains certain allegations which, if treated as factual allegations, would sustain joinder, but it is submitted that these determinative allegations are not allegations of fact. Rather, they are conclusions of the pleader to be disregarded.

Before examining these allegations in detail, attention is directed to certain fundamental principles by which the allegations are required to be tested.

Our Code of Civil Procedure provides, G.S. 1-122, that "The complaint must contain—2. A plain and concise *statement of the facts* constituting a cause of action, . . ." (Italics added.)

"A plain and concise statement of facts," within the meaning of this statute, means a statement of all the facts necessary to enable the plaintiff to recover. By a "plain" statement is meant a direct and positive averment of fact, and not by way of inference, conclusion, or argument. *Commissioners v. McPherson,* 79 N.C. 524; *Citizens Bank v. Gahagan,* 210 N.C. 464, 187 S.E. 580; *Barron v. Cain,* 216 N.C. 282, 4 S.E. 2d 618; McIntosh, North Carolina Practice and Procedure, p. 353; 71 C.J.S., Pleading, Sec. 69.

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. *Chason v. Marley,* 223 N.C. 738, 28 S.E. 2d 223; *Griggs v. Griggs,* 213 N.C. 624, 197 S.E. 165; *Wilcox v. McLeod,* 182 N.C. 637, 109 S.E. 875; *Lassiter v. Roper,* 114 N.C. 17, 18 S.E. 946; *Moore v. Hobbs,* 79 N.C. 535. See also *Galloway v. Goolsby,* 176 N.C. 635, 97 S.E. 617; *Rountree v. Brinson,* 98 N.C. 107, 3 S.E. 747.

And 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., supra* (236 N.C. 698); *Bank v. Gahagan, supra* (210 N.C. 464); *Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800; *Bank v. Bank,* 183 N.C. 463, 112 S.E. 11.

Against this background of general principles, the allegations which are specially urged as being sufficient to overthrow the demurrer are here set out in summary:

That in 1951, the plaintiff *"left the local affairs of said partnership under the management and control of the defendant Harold J. Grantham* and went to the State of New Mexico for the purpose of" operating an adjunct of the partnership business; that on his return from New Mexico he discovered "that the partnership affairs were in such shape that a thorough study, analysis, and accounting of its situation, debts, engage-

ments and affairs was necessary to enable plans to be made for a more orderly operation of said partnership or for the settlement of its affairs, and a division of the remaining assets of the partnership . . .; that he . . . undertook to arrange such action with Harold and Clarence Grantham, but . . ., though diligent . . . efforts were made . . . nothing could be effectuated in this regard; . . . That . . . the plaintiff . . . has had *conference after conference with the defendant Harold J. Grantham and the defendant Clarence Grantham in an effort to have an accounting and settlement of the partnership affairs, to see the books and records of the partnership, which are now and have been in the hands of the defendant Harold J. Grantham and his wife, Viola B. Grantham;* . . . all of these conferences and efforts made by the plaintiff . . . have failed utterly; . . ." (Italics added.)

Up to here the gist of the allegations is that the plaintiff since returning from New Mexico has been unable to get a satisfactory accounting in respect to the condition and affairs of the partnership business which he turned over to his partner when he left the State. But it is nowhere alleged that lien-creditor Clarence Grantham had any dealings with the partnership while the plaintiff was out of the State, or that he knows anything about the partnership affairs, or that he owes the plaintiff partner any duty to assist him in getting an accounting from his copartner. The plaintiff alleges that partner Harold Grantham and wife have the books of the partnership and that he is unable to get an accounting or settlement. These allegations may make for a cause of action for an accounting in favor of the plaintiff against partner Harold Grantham, but not so as against Clarence Grantham. No duty rests on Clarence Grantham as a mere lien-creditor to come forward and assist the plaintiff in getting his settlement from his co-partner. And here, again, it is noted that the status of Clarence Grantham's past due debt is nowhere disputed or challenged by the plaintiff. Therefore the mere allegation that Clarence sat in on one or more of the plaintiff's futile conferences with partner Harold Grantham in no wise implicates lien-creditor Clarence Grantham in the partnership accounting.

The thread of allegation then moves on to this: ". . . that your plaintiff W. D. Casey, Jr. *now verily believes and so alleges,* that the defendant, Harold J. Grantham, *aided and abetted* by his father, the defendant Clarence Grantham, has usurped complete control and exclusive possession of the entire business and assets of the said partnership; that the *said co-partner* is squandering the assets and earnings of the partnership and refuses to account to the plaintiff . . . for any share of the profits or earnings of the business. . . . that the said defendant Harold J. Grantham, as the plaintiff W. D. Casey, Jr. *verily believes and so alleges,* and his said father, the defendant Clarence Grantham, have entered into

a course of dealing with each other for the purpose of ousting the plaintiff . . . from the business affairs and premises of said partnership and the assets thereof, to the end that they, themselves, may take over not only the assets of the partnership conveyed in the deed of trust . . ., but also the home and farm of the plaintiff . . ., also conveyed in said deed in trust; and that as a part of and in furtherance (of) this said *oppressive, unfair, unjust and inequitable and unlawful plan and course of dealing,* they, the said defendants, Harold Grantham and his father, Clarence Grantham, have caused the defendant W. Powell Bland, Trustee . . ., to advertise for public sale, at the courthouse door in Goldsboro, at 12 o'clock noon, . . . the 6th day of December, 1953, the properties conveyed in the deed of trust . . ., to the end that all of the valuable assets of said partnership . . . together with the home of the plaintiffs . . . and their farm will be sold . . ." (Italics added.)

From the foregoing, it is noted that while the plaintiff W. D. Casey, Jr., first states in the complaint that he turned the partnership business and property over to partner Harold Grantham when he left for New Mexico, he alleges in the paragraphs now under analysis that partner Harold, aided and abetted by his father, Clarence, usurped "control and possession" of the business, and that "said co-partner is squandering the assets . . ." As to this, it is significant that the "exclusive possession" and the "squandering" of assets complained of are not alleged against Clarence Grantham, nor against Clarence and Harold jointly, but solely against partner Harold. The only allegation against Clarence is that he "aided and abetted" Harold. Yet no single fact is alleged in respect to how or in what manner Clarence "aided and abetted" Harold. The allegation stands as nothing more than a conclusion of the pleader, wholly unsupported by factual allegations of any sort tending to make for a cause of action against Clarence Grantham. As stated by *Chief Justice Stacy* in *Bowen v. Mewborn,* 218 N.C. 423, p. 428, 11 S.E. 2d 372, "It is axiomatic that unless the conclusion deduced is supported by facts stated, it is a mere *brutum fulmen*"—which in common parlance means "harmless thunder."

Here the unsupported charge that son Harold was "aided and abetted" by father Clarence is no more than the attempt in *Bowen v. Mewborn, supra,* to hold the father responsible for an assault of the son under allegations that the father "procured, instigated and influenced his said son to maliciously assault and abuse the plaintiff . . ." These allegations, mere conclusions of the pleader, were held insufficient to connect the father, and his demurrer was sustained.

In *Sharp v. Cox,* 158 Kan. 253, 146 P. 2d 410, the allegations that the defendants "instigated, caused and procured the arrest and confinement

of said plaintiff . . .," unaccompanied by any statement of facts supporting the pleader's conclusion, were held insufficient.

The instant charge that Clarence "aided and abetted" son Harold is like charging "a fraud upon creditors," without supporting factual allegations (*Development Co. v. Bearden,* 227 N.C. 124, 41 S.E. 2d 85; *Mills Co. v. Mfg. Co.,* 218 N.C. 560, 11 S.E. 2d 550), or like alleging an "assault" without factual particulars about how it occurred (*Chancey v. R. R.,* 174 N.C. 351, 93 S.E. 834), or like charging a defendant with "negligence" without stating the factual details making for negligence and proximate cause (*Whitehead v. Telephone Co.,* 190 N.C. 197, 129 S.E. 602), or like charging that "the negligence of the defendant in constructing and maintaining said underpass in an unlawful manner was 'wanton'" (*Baker v. R. R.,* 205 N.C. 329, p. 333, 171 S.E. 342). It is like alleging, without supporting facts, that "the defendant Bank is indebted to the plaintiff in the sum of $21.38, the face amount of said check." (*Ins. Co. v. Stadiem,* 223 N.C. 49, p. 51, 25 S.E. 2d 202). See also *Mills Co. v. Mfg. Co., supra,* (218 N.C. 560); *Andrews v. R. R.,* 200 N.C. 483, 157 S.E. 431; *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Leonard v. Maxwell,* 216 N.C. 89, 3 S.E. 2d 316; *Whitehead v. Telephone Co., supra.*

Likewise, the adjectives "oppressive, unfair, unjust and inequitable and unlawful" appearing in the instant complaint are only conclusions of the pleader, to be disregarded. See *Baker v. R. R., supra; Development Co. v. Bearden, supra; Chancey v. R. R., supra;* 41 Am. Jur., Pleading, Sec. 20.

Similarly, the charge that "plaintiffs . . . verily believe and so allege," that Harold and Clarence have entered into a "course of dealing" for the purpose of ousting the plaintiff from the partnership to the end that they may take over the property of the partnership and that of the plaintiffs, standing as it does without supporting allegation of facts, are only conclusions of the pleader. *Bowen v. Mewborn, supra* (218 N.C. 423); *Mills Co. v. Mfg. Co., supra* (218 N.C. 560); *Development Co. v. Bearden, supra* (227 N.C. 124); *Chancey v. R. R., supra* (174 N.C. 351).

The allegations of this complaint fall far short of connecting Clarence Grantham with the partnership accounting action against Harold Grantham on the theory of the decision in *Trust Co. v. Peirce,* 195 N.C. 717, 143 S.E. 524 (cited and relied on by appellants), in which the complaint was held not demurrable where it alleged specific facts which were characterized by *Chief Justice Stacy* as amounting to "a general course of dealing and systematic policy of wrong doing, concealment and mismanagement, virtually amounting to a conspiracy, in which the defendants are all charged with having participated at different times and in varying degrees. . . . A connected story is told and a complete picture

is painted of a series of transactions, forming one general scheme, and tending to a single end."

An examination of the record in *Trust Co. v. Peirce, supra,* discloses a complaint covering 95 pages of the printed record and containing over 290 paragraphs of factual allegations charging a group of former officers and directors of a closed bank with specific acts of mismanagement which lead, over a period of some six years, to ultimate insolvency of the bank.

Nothing of the sort is alleged here. It is one thing to allege, as in *Trust Co. v. Peirce, supra,* specific facts and transactions which when taken as true on demurrer show an unlawful plan and course of dealing, virtually amounting to a conspiracy. But it is quite another thing to allege, as here, merely on "belief" of the pleader that the defendants have formed an "unlawful plan and course of dealing," without specific factual allegations to support the general denunciation. *Development Co. v. Bearden, supra.* See these cases wherein the complaints are held insufficient to invoke the doctrine applied in *Trust Co. v. Peirce: Grady v. Warren,* 201 N.C. 693, 161 S.E. 319; *Wilkesboro v. Jordan,* 212 N.C. 197, 193 S.E. 155; *Holland v. Whittington,* 215 N.C. 330, 1 S.E. 2d 813. And these cases in which the allegations are held sufficient to come within the doctrine of *Trust Co. v. Peirce: Garrett v. Garrett,* 228 N.C. 530, 46 S.E. 2d 302; *Bellman v. Bissette,* 222 N.C. 72, 21 S.E. 2d 896.

The allegations in the instant case fail to allege a joint tort or conspiracy within the purview of the principle applied in *Trust Co. v. Peirce, supra,* though undoubtedly that is what the plaintiffs were "driving at."

In a strict legal sense there is no such thing as a civil action for conspiracy. In civil conspiracy the action is for damages caused by acts committed in furtherance of a formed conspiracy, rather than by the conspiracy itself. 11 Am. Jur., Conspiracy, Sec. 45. It is otherwise as to criminal conspiracy. *S. v. Hedrick,* 236 N.C. 727, 73 S.E. 2d 904. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage done—not the conspiracy or the combination. *Eason v. Petway,* 18 N.C. 44 (opinion by *Ruffin, C. J.*); *Gallop v. Sharp,* 179 Va. 335, 19 S.E. 2d 84; *Sikes v. Foster,* 74 Ga. App. 350, 39 S.E. 585; *Dano v. Sharp,* 236 Mo. App. 113, 152 S.W. 2d 693. Whereas the unlawful combination is the essence of criminal conspiracy; the conspiracy is the crime and not its execution. *S. v. Hedrick, supra; S. v. Whiteside,* 204 N.C. 710, 169 S.E. 711; *S. v. Wrenn,* 198 N.C. 260, 151 S.E. 261.

It necessarily follows that to constitute civil conspiracy, the complaint must contain allegations of the facts—not conclusions—necessary to constitute a cause of action. 11 Am. Jur., Conspiracy, Sec. 55.

A conspiracy cannot be grounded on the doing of a lawful act unless the means are unlawful. *U. S. Food & Grocery Bureau of Southern*

California, 43 F. Supp. 966; nor may a conspiracy be rested upon mere "silent observation and acquiescence." First headnote, *Brannock v. Bouldin*, 26 N.C. 61, opinion by *Ruffin, C. J.* It is also elemental that conspiracy may not be grounded on the mere establishment of separate causes of action against two or more defendants. *Thomas Russell & Sons v. Stampers' & Gold Leaf Local Union No. 22*, 107 N.Y.S. 303.

The complaint in the case at hand alleges no actionable tort or conspiracy against Clarence Grantham, nor do the allegations, when tested by established principles of law, connect him in a legal sense with the partnership accounting action against Harold Grantham. See *Brannock v. Bouldin, supra; Setzar v. Wilson*, 26 N.C. 501; *Kirby v. Reynolds*, 212 N.C. 271, 193 S.E. 412.

Testing the complaint further by the statutory provisions which control the joinder of parties and causes of action, these factors come into focus:

1. Plaintiff Casey's cause of action for accounting arises out of the alleged misconduct of the defendant Harold J. Grantham in taking exclusive possession of the assets of the partnership and usurping, to the exclusion of co-partner Casey, complete control of the business, and in squandering the assets and earnings of the partnership and refusing to account to Casey for any share of the profits.

2. Plaintiffs' cause of action for injunctive relief arises out of the impending foreclosure *en masse* of all the property described in the deed of trust, with the plaintiffs being entitled to have the court, in the exercise of its chancery powers, require that the trustee first offer for sale the partnership property in exoneration of the individual property of the plaintiffs, with direction that the individual property be sold only in the event the partnership property proves inadequate to satisfy the lien debt.

3. The two causes of action, as alleged, are separate and distinct both in the sense that they neither arise out of the same transaction nor out of transactions connected with the same subject of action. The first cause of action relates only to the accounting between the two partners; whereas the second cause of action is for equitable relief by way of injunction against Bland, Trustee, and Clarence Grantham, strangers both to the partnership agreement and to the partnership accounting. It is noted that in the action against partner Harold J. Grantham for an accounting, there is no allegation involving Clarence Grantham. The validity of his lien debt is not challenged. The amount due thereon stands undisputed. In respect to the accounting, nothing is alleged entitling the plaintiffs to relief of any sort against Bland, Trustee, or lien-creditor Clarence Grantham, and in no sense are they necessary parties to a complete determination of the questions involved in the accounting action.

It thus appears upon the face of the complaint that there is no substantial relation or connection between the two causes of action; and, further, that the defendants in the injunction action are in no sense necessary parties to or affected by the partnership accounting action. It necessarily follows that there is a misjoinder of both parties and causes of action. Therefore, under authoritative decisions of this Court, the judgment of Judge Frizzelle sustaining the demurrer and dismissing the action should be upheld. *Mills v. Bank, supra; Roberts v. Mfg. Co., supra.*

Nor is it perceived that lien-creditor Clarence Grantham may be held as a party to this cause on the theory that the complaint alleges only one cause of action, and that he is a necessary party defendant. The majority opinion concedes that according to the general rule "creditors of a partnership are neither necessary nor proper parties to a suit between partners for a firm settlement and accounting and have no right to intervene therein." 68 C.J.S., Partnership, Sec. 415, p. 939. Decision as announced in the majority opinion seems to be rested on an exception to the general rule as established by the decision in *Hoskins v. McGirl,* 12 Mont. 563, 31 P. 544, cited in 68 C.J.S., p. 939. This case was decided in 1892, and according to Shepard's Pacific Reporter System it has never before been cited as authority for a decided case. But be that as it may, an examination of the cited case discloses that the facts there are quite different from the facts here, and it is not believed that the instant case comes within the purview of the exception to the general rule as so established by the Montana Court. In that case the validity of the lien-creditor's claim was under direct attack; whereas, in the instant case nothing of the sort appears.

With the lien debt standing past due and undisputed, it is manifest that Clarence Grantham was acting within his legal rights in calling on the trustee to exercise the power of sale. The debt being past due and unchallenged, Clarence Grantham has a clear legal right to have his deed of trust foreclosed, and this is so regardless of what his motives may be. *Fleming v. Dano,* 304 Mass. 46, 22 N.E. 2d 609; *Dickerman v. Northern Trust Co.,* 176 U.S. 181, 20 S. Ct. 311, 44 L. Ed. 423. See also *Robitaille v. Morse,* 283 Mass. 27, 186 N.E. 78.

The majority opinion states, on authority of the Montana case, *supra,* that "W. Powell Bland, Trustee, and Clarence Grantham are necessary parties so that the court can completely determine and settle the questions involved with all the parties before it at once." It is not perceived that any questions involving the rights of lien-creditor Clarence Grantham are presented for settlement. His unchallenged claim affects none of the questions involved in the accounting action between the partners. Nor does it appear that his rights are in anywise affected by what may happen in the accounting action between the partners.

The majority opinion in closing states: "How can the joinder of these parties (Bland, Trustee, and Clarence Grantham) embarrass or injuriously affect the rights of Harold J. Grantham and wife?" This, it seems to me, misses the point. Certainly, it may be conceded that the rights of Harold J. Grantham and wife will not be injuriously affected by the joinder of lien-creditor Clarence Grantham. Harold and wife have made no objection to the joinder; they do not appeal. It is lien-creditor Clarence Grantham who asserts he is not a necessary or proper party to the action. It is he, and not Harold, who demurred below. Manifestly, his rights as the holder of an unchallenged, past-due note may be seriously affected if he is held in the action and required by injunction to withhold foreclosure of his deed of trust until the partnership accounting, in which he has no connection, runs the gamut through possible receivership and reference hearings to final determination.

It may be conceded that the plaintiffs are entitled to have their individual property marshaled, to the end that it may be sold only in the event the partnership property fails to bring enough to settle the lien debt. However, they are not entitled to such relief in this action as presently constituted. Indeed, they neither specifically allege themselves entitled to such relief nor ask it in this action. See *Bank v. Caudle, post,* p. 270. They seek, rather, to stay foreclosure of all the property until after the accounting action is terminated. The majority opinion seems to place such relief within their grasp. I am constrained to the view that a questionable precedent is being set which may disturb fundamental principles fixing the rights of responsible lending agencies to collect their loans without undue delay. It seems to me that the able judge who presided below applied the correct principles of law in dismissing the action, and my vote is to sustain the judgment.

WINBORNE, J., concurs in dissent.

CITY OF GREENSBORO AND ROBERT H. FRAZIER, M. A. ARNOLD, WILLIAM B. BURKE, J. A. CANNON, JR., E. C. FAULCONER, WILLIAM B. HAMPTON AND BOYD R. MORRIS v. HERMAN AMASA SMITH, FOR AND ON BEHALF OF HIMSELF AND ALL OTHER CITIZENS AND TAXPAYERS OF THE CITY OF GREENSBORO, AND SUBSCRIBERS TO GREENSBORO WAR MEMORIAL FUND.

(Filed 15 January, 1954.)

1. Constitutional Law § 8b: Municipal Corporations § 8e—

Where the General Assembly by legislative act approves and ratifies a municipal ordinance setting forth therein the ordinance in full, the ordi-

nance is merged into the legislative act, and a war memorial commission which is created therein as a legal entity becomes a creature of the Legislature and derives all of its legal functions and powers from the statute.

2. Same: Municipal Corporations § 43—

Where a municipal war memorial commission as constituted by statute of the General Assembly consists of fifteen commissioners with final authority to determine and designate the location of the proposed memorial, the city council is thereafter without authority to amend such commission's charter or modify its corporate powers, and an ordinance thereafter enacted increasing the number of commissioners to seventeen is void so that subsequent acts by the seventeen man commission, including the approval of a site for the memorial, are a nullity. No site having been selected in contemplation of law, the city is without authority to disperse war memorial funds or appropriate city funds of any kind toward the construction of the memorial at the site approved by the seventeen man commission.

3. Taxation § 5—

While a municipal swimming pool is not a necessary expense of government within the purview of Art. VII, sec. 7, of the Constitution of North Carolina, and a tax therefor may not be levied without the approval of its voters, such a facility is a public purpose for which the municipality may expend unallocated municipal liquor store profits without a vote, Ch. 394, Session Laws 1951.

4. Municipal Corporations § 43: Taxation § 10½—

The fact that a municipality levies a special tax for recreational purposes with the approval of its voters does not deprive the municipality of the right to supplement such special tax funds with moneys derived from the operation of municipal liquor control stores, there being no stipulation, express or implied, in the issue submitted to the voters for the special tax that the amount spent for recreational purposes should be limited to funds raised by such special tax.

APPEAL by defendant from *Sharp, Special Judge,* at 2 November Civil Term, 1953, of GUILFORD, Greensboro Division.

Civil action under the Declaratory Judgment Act (G.S. 1-253 *et seq.*) to determine questions respecting (1) whether the City of Greensboro may appropriate funds from sources other than *ad valorem* taxes to supplement private contributions to the Greensboro War Memorial Fund and expend this fund in erecting certain memorial facilities, including a municipal auditorium, and (2) whether profits from the City's liquor control stores may be expended in constructing a public swimming pool.

Jury trial was waived by agreement of the parties and the trial court found facts, made conclusions of law, and entered judgment. These in gist are the findings of fact pertinent to decision:

1. On 4 April, 1944, the City Council of the City of Greensboro enacted an ordinance, designated as Chapter 73 of its Code, establishing the

Greensboro War Memorial Fund Commission to be composed of fifteen members; and on 2 May, 1944, the City Council appointed the members of the Commission and they met and organized.

2. The General Assembly of North Carolina, by enactment of Chapter 436, Session Laws of 1945, "approved, ratified, and validated" the aforesaid Chapter 73 of the Code of the City of Greensboro. This Act of the General Assembly, containing the same provisions and couched in the same language as the previously adopted ordinance of the City of Greensboro, in so far as material to decision, is as follows:

"*The General Assembly of North Carolina do enact:*

Section 1. That Chapter seventy-three of the City Code of the City of Greensboro enacted by the City Council of the City of Greensboro on the sixteenth day of May, one thousand nine hundred and forty-four, be and the same is hereby, in all respects, approved, ratified and validated, said Chapter seventy-three being in words and figures as follows:

CHAPTER 73

GREENSBORO WAR MEMORIAL FUND COMMISSION

ARTICLE I.

ORDINANCE RELATING TO GREENSBORO WAR MEMORIAL FUND COMMISSION.

"Section 1. Creation of Commission. There is hereby created a commission to be known as Greensboro War Memorial Fund Commission.

"Sec. 2. Members, vacancies. *That said commission shall consist of fifteen members* to be appointed by the city council for a term of five years each. In the event of vacancy in the membership of the commission, the city council shall make an appointment for the unexpired term. (Italics added.)

"Sec. 3. No authority to incur expenses, members to serve without pay. The said commission shall not be authorized to incur on behalf of the City of Greensboro any expense without specific approval of the city council, and the members of the commission shall serve without compensation.

"Sec. 5. Eight members of said commission shall constitute a quorum for the transaction of business. No motion shall be carried except by vote of at least eight members.

ARTICLE 2

MEMORIAL TO BE ESTABLISHED.

"Section 1. It is hereby determined that an auditorium is a desirable and suitable memorial to be established in the City of Greensboro to per-

petuate the memory of the men and women of Greensboro whose lives shall have been given for their country during the present war.

"The commission may, in its discretion, also include playground and recreation centers and other activities as a part of such memorial.

ARTICLE 3.

POWERS AND DUTIES OF THE COMMISSION.

"Section 1. The powers and duties of the commission shall be as follows:

"(a) The commission shall study the requirements of the City of Greensboro with respect to the type and kind of auditorium, playgrounds, recreation centers and other activities to be established.

"(b) The commission shall advise with and encourage the citizens of Greensboro and the friends of Greensboro who are interested in the city, and in the establishment of such memorial to said men and women of Greensboro whose lives shall have been given for their country during this war, and who desire to make donations to the City of Greensboro in order to make such memorials possible, . . .

"(c) The commission may, in its discretion, accept on behalf of City of Greensboro special gifts to be used for a specific designated purpose in connection with said memorial.

"(d) *The commission shall have full and final power and authority to determine and designate the location of such memorial, the plans for construction of such memorial, the furnishing and equipping thereof,* all within the limits of the funds paid to City of Greensboro for such purpose, together with any additional sum which may be obtained by City of Greensboro by governmental grant, supplement or otherwise, except as the city council may be restricted by law. (Italics added.)

ARTICLE 4

FUNDS TO BE HELD BY CITY OF GREENSBORO.

"Section 1. Any funds, other than special gifts hereinabove provided for, donated to City of Greensboro for the purpose hereinabove set out, shall be held by City of Greensboro in a separate fund until such time as a location is selected and the remainder held until the construction of said memorial is possible and deemed advisable. . . ."

3. ". . . that on October 15, 1946 the *City Council of the City of Greensboro adopted an ordinance amending Chapter 73, Article I, Section 2, of the Code of the City of Greensboro increasing the number of members of said Commission from fifteen to seventeen;* that the said Commission has continuously existed and functioned, exercising the powers and functions conferred upon it by Chapter 73 and approved by

Chapter 436 of the Session Laws of 1945, and amendments to said ordinances made by the City Council of the City of Greensboro." (Italics added.)

4. "In the year 1944, and again in the year 1946, the Greensboro Memorial Fund Commission conducted campaigns for the solicitation of gifts of funds and property by businesses conducted in the City of Greensboro and by individual citizens to be used for the purposes and in the manner set forth in said Chapter 73 of the City Code of the City of Greensboro; that the said Commission has received subscriptions in the total amount of $893,108.85, and as of the date of the institution of this action has collected all of such subscriptions except the amount of $37,162.92."

5. "That since the organization of the Greensboro War Memorial Fund Commission a number of sites located within the corporate limits of the City of Greensboro have been considered by the City Council and by the said Commission; that the first site considered was the Van Noppen property located in the business district near the United States Post Office, on Gaston and Eugene Streets which had been theretofore acquired by the City without using any funds of the Greensboro War Memorial Fund Commission; . . . that on August 6, 1946, and on November 5, 1946 the City purchased two adjacent tracts of land in the northern residential section of the City between North Elm, Wendover, Carolina, and Northwood Streets (referred to as Wendover Street property) for the total price of $43,000, . . . and the City appropriated the purchase price from funds derived from the sale of real property by the City of Greensboro then on hand; . . . since objection was made by numerous citizens to the use of the Wendover Street property for the construction of an auditorium, on June 24, 1952 the City Council amended Chapter 73 of the City Code of the City of Greensboro" so as to take from the Commission and confer upon the City Council the power to determine and designate the type and location of the memorial to be established. The amendatory ordinance adopted by the City Council directs that Chapter 73, Article 3, Section 1 of the previous enactment be amended by striking out Subsection (d) of Section 1 and substituting in lieu thereof a new Subsection (d) to read as follows:

"(d) The Commission shall have full power and authority, after the City Council has determined and designated the type and location of the memorial to be established, to select and approve the plans for the construction of such memorial and the furnishing and equipping thereof, all within the limits of the funds paid to City of Greensboro for such purpose, together with any additional sum which may be obtained by City of Greensboro by governmental grant, supplement, or otherwise, except as the City Council may be restricted by law."

Following this, "the City Council also adopted a resolution authorizing the purchase of property located on the west side of Forbis Street, between Mebane Street and Lindsey Street, and on or near Summitt Avenue in the City of Greensboro, as a site for a part of the war memorial on which an auditorium shall be built pursuant to the provisions of Chapter 73 of the City Code; . . ."

6. "That the City of Greensboro, in the acquisition of the Forbis Street land, expended $191,056.65 from the War Memorial Commission Fund held by the City; that a controversy arose as to whether the City of Greensboro had a right to expend said amount of the War Memorial Commission Funds for the purchase of land to be used as a site for the war memorial, or any part of such memorial, and the Commission adopted a resolution requesting among other things that the City supplement the fund of the Greensboro War Memorial Fund Commission by an amount not less than $191,056.65 used by the City for the purchase of the said property; . . ."

7. "Thereafter, the City Council, by a resolution, determined that a part of the Forbis Street property would be used for general parking purposes instead of exclusive auditorium or war memorial purposes, and appropriated the cost thereof in the sum of $140,134.25 from general fund surplus from sources other than tax revenue, and transferred said amount to the War Memorial Fund; . . ."

8. On 15 June, 1953, the City Council adopted an ordinance again "amending Chapter 73 of the City Code." This amendment purports to retain in the City Council the right to designate the location of the memorial to be established, but revests in the Commission the power to determine the type of the memorial and to select and approve the plans and specifications thereof and the furnishing and equipment therefor.

9. On 15 June, 1953, "the City Council appropriated an additional sum of $10,000 available in its current surplus revenue from sources other than *ad valorem* taxes to be used to supplement the Greensboro War Memorial Fund, and indicated its intention to appropriate further sums from time to time for the same purpose; . . ."

10. On 10 August, 1953, "the Greensboro War Memorial Fund Commission adopted a resolution definitely and officially approving as a site for part of the war memorial, the property on North Forbis Street theretofore selected by the City Council, but upon the condition that the City would supplement the War Memorial Fund by the additional sum of $50,922.40 including the $10,000 appropriated by the City Council on June 15, 1953, thus restoring to the War Memorial Fund the total amount of $191,056.65 used by the City for the purchase of the Forbis Street property; . . ."

11. "Thereafter the City Council approved the resolution of the Greensboro War Memorial Fund Commission and appropriated the additional sum of $40,922.40 from current surplus revenue from sources other than *ad valorem* taxes to supplement the War Memorial Fund; . . ."

12. "That pursuant to the necessary statutory authority, an election was held on July 25th 1950, at which time there was submitted to the voters of the City of Greensboro the following question:

"Shall the City of Greensboro provide, establish, maintain and conduct a supervised recreation system for said City, and shall an annual tax be levied on each $100 of assessed valuation of taxable property within the corporate limits of the City of Greensboro for park and recreation purposes not exceeding 7c for the year 1950, not exceeding 8c for the year 1951, not exceeding 9c for the year 1952, and not exceeding 10c for the year 1953 and thereafter?";

that at said election 1896 votes were cost in favor of said proposal and 679 votes were cast against said proposal, and since that time the City of Greensboro has regularly levied and collected an *ad valorem* tax of 7c on each $100 of assessed property valuation for recreational purposes, and has maintained and still maintains a system of playgrounds and recreational areas and facilities for the use of its citizens."

13. "That as part of its recreation systems and playgrounds, the City of Greensboro, on July 7, 1952, appropriated the sum of $80,000.00 from profits derived from the operation of A B C Stores, and included the same in its budget for the fiscal year ending June 30, 1953, to be used for the construction of a swimming pool; that said amount was not expended within the said fiscal year and, on August 3, 1953, the same was carried forward in the City's budget for the fiscal year to end June 30, 1954, and at the same time an additional appropriation of $80,000.00 was made from profits derived from the operation of A B C Stores to be used for the same purpose; that the total sum of $160,000 appropriated for recreational purposes is in addition to the *ad valorem* tax of 7c on each $100 of assessed property valuation, . . .; that the sum of $160,000.00 is now available for the purpose of adding to and improving the recreation and playground system by the construction of a swimming pool."

14. That a liquor control election was held in the City of Greensboro on 5 June, 1951, at which a majority of the voters cast their ballots "For City Liquor Control Stores." Thereafter a liquor control system of stores was set up by the City, in accordance with Chapter 394, Session Laws of 1951, and has since been operated so as to yield a substantial annual profit.

15. "That pursuant to the provisions of Chapter 73 of the City Code of the City of Greensboro, the Greensboro War Memorial Fund Commission has determined that with funds now available to it, it will proceed to construct a single unit auditorium-arena type of building on the Forbis Street property to be used as a public auditorium and said action by said Commission has been approved by the City Council of the City of Greensboro; that it is the intention of the City of Greensboro and the Greensboro War Memorial Fund Commission to devote the Wendover Street property to use as a part of the City recreation and playground system and as a part of the memorial authorized by said Chapter 73 of the City Code."

16. "That the City of Greensboro now has in its custody and control and has always had the custody and control of all funds designated and known as the Greensboro War Memorial Fund; . . ."

17. That defendant is a "citizen and taxpayer of the City of Greensboro and a subscriber to the Greensboro War Memorial Fund and is sued in this action as a representative of a class."

Upon the facts found the court concluded and adjudged as follows:

"1. That the City of Greensboro had the lawful right to appropriate the sum of $10,000 on June 15, 1953, and the further sum of $40,922.40 on the 8th day of September 1953 from current available surplus revenue from sources other than *ad valorem* taxes for the purpose of supplementing the Greensboro War Memorial Fund, . . .

"2. That the City of Greensboro has the lawful right to disburse the funds of the Greensboro War Memorial Commission, including appropriations made by the City, for the purpose of paying the cost of construction of a portion of a War Memorial consisting of a single unit auditorium-arena building to be planned, designed, and approved by said Commission and the City Council, said plans to be finally approved by the City Council, and located on the site on Forbis Street selected by the City and approved by said Commission, and for the purpose of paying the cost of other parts of said Memorial and to be located on the Wendover Avenue property purchased by the City and approved by the Commission. In making contracts and expending the said Greensboro War Memorial Fund, the City of Greensboro shall comply with all of the applicable laws of North Carolina with respect to the awarding of contracts and expenditure of public funds for public purposes by municipalities.

"3. That the City of Greensboro had the lawful right to appropriate $80,000.00 in its budget for the year ending June 30, 1953, and a like amount in its budget for the year ending June 30, 1954, from profits derived from the operation of A B C Stores to be used for adding to and improving its recreation and playground system by the construction of a

swimming pool, notwithstanding the election held on June 25, 1950, in which the majority of the voters authorized the levy of a tax not exceeding ten cents on each $100.00 property valuation for recreational purposes and has a lawful right to disburse said funds for said purpose."

From the judgment entered the defendant appealed.

Herman C. Wilson and L. P. McLendon for plaintiffs, appellees.
Horace R. Kornegay for defendant, appellant.

JOHNSON, J. This appeal does not present for decision the question whether the City Council of Greensboro by the adoption of Chapter 73 of its Code gave legal existence to the Greensboro War Memorial Fund Commission. Whatever legal efficacy, if any, this Commission may have had in the first instance merged into the legislative act, Chapter 436, Session Laws of 1945, and upon its ratification on 8 March, 1945, the Commission as a legal entity became solely the creature of the General Assembly of North Carolina, deriving all its legal functions and powers from that body. Thenceforth, the City Council of Greensboro was without power or authority to amend the Commission's charter or modify its corporate powers.

It necessarily follows that the ordinances of the City Council purporting to withdraw from the Commission the power to determine and designate the location of the Memorial and changing the membership of the Commission from fifteen to seventeen were and are void and ineffectual.

The plaintiffs urge that if it be conceded the City Council was without authority to take from the Commission the power to select the site or sites for the Memorial and make the selection or selections itself, even so, the question is moot since the Commission, as shown by the findings of fact, has approved the sites selected by the City Council for the location of the auditorium and the playground to be developed as a part of the proposed Memorial. The contention is untenable for the reason that the seventeen-member Commission which approved the City Council's site selections was and is an illegally constituted body. The legislative act set up a fifteen-member Commission and clothed it with "full and final power and authority to determine and designate the location of" the Memorial. See *Webb v. Port Commission,* 205 N.C. 663, 172 S.E. 377; *Brumley v. Baxter,* 225 N.C. 691, 36 S.E. 2d 281. Therefore, the Commission has functioned as an illegally constituted body since 15 October, 1946, when the City Council, without authority of law, increased the membership of the Commission from fifteen to seventeen members. It was this seventeen-member Commission that approved the Forbis Street and Wendover Street sites selected by the City Council as the locations, respectively, for the auditorium and the playground. This action of the illegally consti-

tuted Commission is a nullity. In legal contemplation no site has been selected as required by law. Yet, the City Council and the seventeen-member Commission are about to proceed to expend the moneys contributed to the Memorial Fund, as supplemented by City appropriations, in constructing on the Forbis Street site an auditorium-arena building.

The City of Greensboro has no lawful right to disburse War Memorial Funds or appropriate City funds of any kind toward the construction of improvements on the Forbis Street site or any other site unless and until the same be selected by a legally constituted Commission as directed by Chapter 436, Session Laws of 1945. It necessarily follows that the court below erred in adjudging that the City of Greensboro has the lawful right to disburse the Greensboro War Memorial funds for the purpose of erecting the proposed auditorium-arena building on the Forbis Street site, and in improving the Wendover Street site as a playground or recreation center. It is also manifest that the court erred in adjudging that the City of Greensboro has the lawful right to appropriate the sums of $10,000 and $40,922.40, respectively, from surplus revenue for the purpose of supplementing the War Memorial funds to be used in paying the costs of the projects proposed to be located on these illegally selected sites.

We come now to consider the challenged appropriations made by the City for the construction of a swimming pool. These appropriations were made from profits derived from the City's Liquor Control Stores.

While the construction of a swimming pool as a part of a city's recreation system may not be financed as a necessary expense of government under our constitutional limitation (N. C. Const., Art. VII, Sec. 7) without a vote of the people (*Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702), nevertheless, such a facility is a public purpose (G.S. 160-155 *et seq.*) for which unallocated Liquor Store profits of the City of Greensboro ordinarily may be appropriated and expended without a vote of the people. As to this, it is noted that Chapter 394, Session Laws of 1951, under which the Liquor Control system of the City of Greensboro operates, expressly provides that the net profits derived by the City from the operation of its liquor stores may be used "in the operation of the water and sewer system of the City, for debt service, for the general fund, *or for any public purpose.*" (Italics added.) See *Purser v. Ledbetter, supra; Atkins v. City of Durham,* 210 N.C. 295, 186 S.E. 330. See also *Henderson v. Wilmington,* 191 N.C. 269, 132 S.E. 25; *Hall v. Redd,* 196 N.C. 622, 146 S.E. 583; *Nash v. City of Monroe,* 198 N.C. 306, 151 S.E. 634; *Mewborn v. City of Kinston,* 199 N.C. 72, 154 S.E. 76; *Goswick v. Durham,* 211 N.C. 687, 191 S.E. 728; *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211; *Brumley v. Baxter, supra* (225 N.C. 691).

The defendant in challenging the appropriations for the swimming pool alleges and contends that since the voters of the City had authorized the

levy and collection of an *ad valorem* tax for the purpose of maintaining and operating the City's recreation system, it had no right to supplement these special tax funds with moneys derived from the operation of liquor control stores for the purpose of improving its recreation and playground system by the construction of a swimming pool. The defendant cites and relies on the recent decision in *Rider v. Lenoir County,* 236 N.C. 620, 73 S.E. 2d 913. However, the case at hand is factually distinguishable from and is in nowise controlled by the cited case. In the *Rider case* the bond order on which the proposition submitted to the voters was based contained a stipulation to the effect that the amount of county funds required to finance the proposed hospital project would "not exceed $465,000." We treated that stipulation as a compact with the voters, limiting to $465,000 the amount of county funds which might be expended on the project, and held that the original appropriation, as expressly so limited by the bond order approved by the voters, could not be supplemented by the addition of $138,713.80 from nontax sources. In the *Rider case* the voters, in adopting the plan that expressly limited the amount of county funds to be spent on the hospital project, by clear implication voted down the right of the county to supplement the project with county funds of any kind. But nothing of the sort appears in the present case. In the issues submitted to the voters in the Greensboro City election of 25 July, 1950, respecting the special tax levy for the recreation system, there was no stipulation, express or implied, that the amount to be spent for recreation purposes should be limited to funds raised by the special tax.

We conclude, and so hold, that the court below properly upheld the appropriations of $160,000 from liquor store profits for the construction of a public swimming pool.

However, for the errors in respect to the appropriations for the erection of the Memorial facilities on sites not selected as provided by law the cause will be remanded.

Error and remanded.

HERBERT SPAUGH, CHAIRMAN, EMILY H. BELLOWS, J. G. CHRISTIAN, JR., JOHN P. HOBSON, BEN F. HUNTLEY, R. M. MAULDIN AND F. O. ROBERTS, MEMBERS OF THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF CHARLOTTE, AND THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF CHARLOTTE v. THE CITY OF CHARLOTTE.

(Filed 15 January, 1954.)

1. Appeal and Error § 1—

The jurisdiction of the Supreme Court is derivative, and where the court below has no jurisdiction the Supreme Court can acquire none by appeal.

2. Judges § 2b—

The jurisdiction of a special judge is limited to that granted him by the Constitution as implemented by statute.

3. Courts § 2: Appeal and Error § 6c (1)—

Objection to the jurisdiction may be made at any time during the progress of the action or controversy without action, and even in the absence of objection, the court will take cognizance thereof *ex mero motu.*

4. Judges § 2b—

In the district of his residence, a special judge has concurrent jurisdiction with the resident judge of the district and the judge regularly presiding over the courts of the district, to hear chambers matters, in or out of term. Constitution of N. C., Art. IV, sec. 11; G.S. 7-58; G.S. 7-65.

5. Same—

Neither Ch. 1119, Session Laws of 1951, nor Ch. 1322, Session Laws of 1953, repeals G.S. 7-65 as amended by Ch. 78, Session Laws of 1951, giving special judges jurisdiction of chambers matters in the districts of their residences, the later acts being supplemental and not repugnant to the former in regard to the jurisdiction of special judges.

6. Statutes § 13—

Repeal of statutes by implication is not favored, and in order for a later statute to repeal a former statute by implication the statutes must be irreconcilable, or the intent to effect a repeal must be clearly apparent.

7. Dedication § 1—

Dedication of land to the use of the public may be made either in express terms or implied from the conduct of the owner manifesting an intent to set the land apart for the benefit of the public, and such dedication is effective immediately upon acceptance on the part of the public without regard to the length of time of its use by the public.

8. Dedication § 6—

Dedication of land to the public, once fully made, is irrevocable.

9. Dedication § 1—

A political subdivision of the State may dedicate lands owned by it to a particular public use.

10. Same: Municipal Corporations § 24½: Schools § 6e—Held: Municipality dedicated land for school purposes and its use could not be diverted from this purpose without compensation to school authorities.

The governing body of a municipality purchased a tract of land within the city with funds derived from other than school taxes, set aside a building thereon and a certain part of the land for use as a public graded school, and delivered possession of same to the school commissioners of the city. The school authorities went into possession and used the land for school purposes for a number of years. *Held:* There was a dedication of the property by the municipality for school purposes and an acceptance of the dedication by the school authorities, constituting an irrevocable dedication, and the property may not be diverted by the city to any use other than school purposes unless the school authorities are paid the reasonable market value of the land. This principle applies equally to land reacquired by the city and added to the school site for the purpose of enlarging its playground.

APPEAL by defendant from *Clarkson, Special Judge,* 17 September, 1953, in Chambers,—he being a duly appointed special judge of Superior Court, resident of the city of Charlotte, and Mecklenburg County, in the Fourteenth Judicial District of North Carolina.

Controversy without action submitted to the court, pursuant to provisions of G.S. 1-250, *et seq.,* for decision and determination of the question of the right of the City of Charlotte to use a lot or parcel of land known as the D. H. Hill School property within said city as a right of way for Independence Boulevard, a State highway, without paying to the Board of School Commissioners, to be used for public school purposes, a sum of money equal to the reasonable value of the property,—the record title to the property being in the city of Charlotte, but the property having been used exclusively for school purposes at all times since the year 1883.

The controversy here presented is built around substantially the following factual framework:

1. The individuals named as plaintiff are members of, and constitute the Board of School Commissioners of the city of Charlotte,—an agency of the State created by law and charged by Chapter 115 of the General Statutes of North Carolina and the various sections thereof with the duty of acquiring sites, erecting schoolhouses, administering the public school system within the Charlotte School Administrative Unit, and holding title to school property.

2. The city of Charlotte is a municipal corporation created according to law and holding title to all property belonging to said city.

3. The Board of School Commissioners of the city of Charlotte was originally created pursuant to the provisions of Chapter 138 of the Private Laws of the 1874-75 session of the General Assembly of North Carolina, material parts of which are: (1) Grant of authority to the Board

of Aldermen of the city of Charlotte to hold an election by ballot to ascertain the sense of the qualified voters of the city on the question of establishing and maintaining by taxation in the city, public graded schools, and the maximum rate of taxation for such purpose, and to elect two school commissioners from each ward, who should, in the event a majority of those voting on the "Aforesaid scheme," be in favor thereof, be charged with the carrying the same into effect,—the eight so elected to constitute a board, a majority of whom should be a quorum at all meetings duly called; and

(2) That the "said board of commissioners shall have power and authority to purchase sites and build schoolhouses in the city, open and regulate schools therein, appoint examiners, employ teachers and fix their salaries, prescribe courses of study, and, in general do whatever may be necessary to establish and continue within said city a good system of graded public schools, to be kept open at least nine months in the year, without charge, for the education of the children of the city, within the ages of six and twenty-one," and that "the said board shall be a body politic and corporate" under the name of "The School Commissioners of the City of Charlotte," with all the rights and powers of the school committees of the respective townships in addition to the powers in this act granted.

And in accordance with the provisions of said act, an election was held, within the corporate limits of the city of Charlotte, as then constituted, on the first Monday in June 1880, at which election the majority of the voters voted in favor of levying a tax for public or graded school purposes of one-tenth of 1% on property and a poll of $0.30.

4. Thereafter, on 16 January, 1882, the Board of School Commissioners, the members thereof having been elected as provided in said act, met and organized for the purpose of establishing and administering a public graded school system in the City of Charlotte, generally known and identified as "the graded school." And at all times since said date there has been operated and maintained within the Charlotte School Administrative District a public or graded school system under a Board of School Commissioners possessing all the rights and powers granted by the said act of 1874-75, and including all rights and powers vested in township school committees by Chapter 164 of the Public Laws of the 1876-77 Session of the General Assembly (should be Chapter 162) and Chapter 200 of the Public Laws of 1881 as provided in said act, except as such rights and powers may have been modified or changed by the Public Laws of the 1933 General Assembly, and subsequent enactments of said body.

5. On 16 April, 1883, the Board of Aldermen of the city of Charlotte, the official governing body of said city, in order to provide a permanent building for white school children in the Charlotte Graded Schools,

adopted an ordinance authorizing the purchase of the Carolina Military Institute property for $15,000. The ordinance read as follows: "Whereas public graded schools have been established in the city of Charlotte by a vote of the people, and

"Whereas buildings have been bought for the permanent use of the colored school, and it is indispensable for the success of the school for white children that a permanent building should be built or purchased for their use:

"Be it ordained by the Board of Aldermen that $15,000 of the money now in the City Treasury be and the same is hereby appropriated to purchase the property known as the 'Carolina Military Institute' property for the use of the city of Charlotte . . ."

And pursuant to this ordinance the sum of $15,000 was drawn from funds accumulated over a period of years prior to the then fiscal year, from sources other than school taxes, and in the City Treasurer, and the property was acquired by deed from J. H. Carson and others to the City of Charlotte, dated 16 April, 1883, and duly recorded. The property was a certain specifically described tract of land containing twenty-seven acres.

6. There was located on said tract of land at the time of the purchase, and is now, a three-story brick structure, known as the D. H. Hill School, which, "with the land adjacent thereto, is hereinafter more particularly identified and described." And the "Board of School Commissioners of the city of Charlotte took possession of the same as the location of a white graded school within the Charlotte School District, and at all times since then the building, with the adjacent land, hereinafter described, has been in the sole and exclusive custody and possession of the Board of School Commissioners and has been used solely and exclusively for public school purposes."

7. In the year 1886 the Board of Aldermen had the twenty-seven acres of land, described above, subdivided into a large number of lots, and a map made, and adopted as, and declared to be an official map and record of the City of Charlotte. And the Board caused the lot or parcel of land on which was located the three-story brick structure above referred to, "to be laid off, marked and set aside on said map as the Charlotte Graded School lot," lying "along the southerly side of East Morehead Street as now constituted and extending from South Boulevard to South Caldwell Street fronting approximately 300 feet or more on South Boulevard."

8. "At a meeting held on 24 May, 1886, the Board of Aldermen voted to sell part of said property not needed for school purposes, and it thereafter proceeded to sell" in reference to the map above referred to all the lots laid off on the map, and a later map, except the lot designated "Charlotte Graded School lot."

9. Among the lots sold by the Board of Aldermen in the year 1886, the city of Charlotte re-acquired from R. N. Littlejohn title to a specific part of certain lots "for the purpose of enlarging the playground of the D. H. Hill School" and same was added to the school site and used as a part of it. The fund for the purchase of this property came from the City Treasury.

10. That the record title to lot in controversy, specifically described, remains in the city of Charlotte.

11. The use of building on the lot in question was confined to classroom instruction and it was used continuously for such purposes from date of its acquisition until end of school term in June, 1937, when such use was discontinued on account of the fact that part of it had been condemned. Thereupon the School Board converted the building into store quarters for school furniture, school instruction supplies and janitorial supplies, and, in the main, has since so used it.

12. The city of Charlotte now proposes to use the D. H. Hill School lot as now constituted as a part of the city's contribution toward a right of way for the extension of Independence Boulevard, a State highway within the city,—that is, to raze the school building, and locate the Boulevard on the land. No compensation would be paid to the city except that the city would be given credit to the extent of the reasonable market value of the property toward the city's share of the cost of acquiring a right of way for the Boulevard, which the city has agreed to pay. The city does not propose to pay over to the Board of School Commissioners for its use for school purposes any amount as compensation for its conveyance of the property.

The contentions of the parties are:

(1) The Board of School Commissioners contend that the D. H. Hill School property as described in the agreed statement of facts is public school property and cannot legally be diverted to any other use unless said Board shall be first adequately compensated for it to the end that any funds received in compensation may be used for school purposes.

(2) The city of Charlotte contends that it is the owner of said property in fee simple, holding the record legal title thereto, and that the Board of School Commissioners has now, and, at all times referred to in the statement of agreed facts, has had only permissive use of property belonging to the city of Charlotte.

And the parties stipulated that if the court agree with the contention of the Board of School Commissioners, it shall be entitled to have and recover of the city of Charlotte the reasonable market value of said land before it can be conveyed by the city of Charlotte or put to the use as contemplated by the city. On the other hand, if the court should conclude that the contention of the city be correct, the Board shall recover nothing.

The cause came on for hearing before his Honor, Francis O. Clarkson, Special Judge of the Superior Court, resident in the Fourteenth Judicial District, and was heard in Chambers. And the Judge, after considering the matter, and hearing argument of counsel for the parties, concluded that "the property cannot be diverted to any use other than school purposes," and adjudged that "the said Board of School Commissioners have and recover of the city of Charlotte the reasonable market value of the D. H. Hill School site before the same be put to the use contemplated by the city as set forth in the agreed statement of facts."

Defendant City of Charlotte excepted thereto, and appeals to Supreme Court and assigns error.

Brock Barkley for plaintiffs, appellees.
John D. Shaw for defendant, appellant.

WINBORNE, J. While the parties to this controversy without action have not formally presented it, this Court is confronted with a question of jurisdiction suggested on the oral argument on this appeal, which must be determined before proceeding to consideration of the assignments of error.

The question is whether or not a special judge of the Superior Court has jurisdiction to hear and determine in Chambers a controversy without action in the county of his residence, when he has not been assigned by the *Chief Justice* to hold a term of court in such county? If a special judge of Superior Court does have such jurisdiction, this case is properly before the Supreme Court. But if he does not have such jurisdiction, the case is not before the Court. For the jurisdiction of the Supreme Court is derivative. *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445.

The jurisdiction of a special judge of the Superior Court over the subject matter of an action, or of a controversy without action, 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, or controversy without action. This principle is enunciated and applied in a long line of decisions in this State. See *Henderson Co. 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 *Lewis v. Harris,* 238 N.C. 642, and cases cited.

In *Burroughs v. McNeill, supra,* it is stated by *Gaston, J.,* that: "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."

Moreover, in *Greene v. Stadiem,* 197 N.C. 472, 149 S.E. 685, opinion by *Stacy, C. J.,* filed 2 October, 1929, interpreting Art. IV, Sec. 11, of the N. C. Constitution, as it was then written, and pertinent statute as it then existed, P.L. 1929, Chap. 127, this Court held that a special judge to whom the controversy without action was submitted, by agreement of the parties, had not been commissioned by the Governor to hold a court in Lenoir County at the time of the signing the judgment, was without authority to determine the matter, and, hence, the proceeding was a nullity, being *coram non judice,* and the judgment void.

And in *Shepard v. Leonard, supra,* in opinion by *Barnhill, J.,* filed 28 April, 1943, likewise interpreting Art. IV, Sec. 11, of the N. C. Constitution, and pertinent statute, Chap. 41 of P.L. 1941, then in effect, it was held that Art. IV of Sec. 11 of the Constitution did not confer, or authorize the Legislature to confer any "in Chambers" or vacation jurisdiction upon a special judge assigned to hold a designated term of court, and the jurisdiction of a special judge was then limited to matters arising in the courts which he was duly appointed to hold.

But since these decisions were rendered both Art. IV, Sec. 11, and the statute in respect to special judges have been altered. Therefore, it seems appropriate that the Court here and now determine what jurisdiction is granted to a special judge in matters wholly in Chambers and in vacation, that is, when he is not assigned to hold a particular term of court.

Art. IV, Sec. 11, of the Constitution of North Carolina, as amended, pursuant to proposal submitted under Chap. 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 in the Act. Chap. 775 of 1949 Session Laws, Sec. 5, it is provided that "all laws and clauses of laws in conflict with the provisions of this Act are hereby repealed."

Thereafter the General Assembly, at the 1951 session, implementing the authority conferred upon it by Art. IV, Sec. 11, of the Constitution, as so amended, passed two acts, Chap. 78 of 1951 Session Laws of North Carolina, relating to the jurisdiction of special judges of the Superior Court, ratified 20 February, 1951, and Chap. 88 of 1951 Session Laws of North Carolina, relating to the jurisdiction of emergency judges of the Superior Court, ratified 22 February, 1951. In the first Act. Chap. 78, the statute, G.S. 7-58, was rewritten and the statute, G.S. 7-65, was amended.

Sec. 1 of the Act reads as follows: "Special 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. A special 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."

Sec. 2 reads: (a) G.S. 7-65 is hereby amended by inserting in line seven immediately following the word "and" the words "any special Superior Court Judge, residing in the district and."

And Sec. 2 reads: (b) G.S. 7-65 is hereby further amended by inserting in line 14 after the word "district" and in line 16 after the word "judge" the words "and any Special Superior Court Judge residing in the district."

Thus G.S. 7-65 as so amended was made to read in pertinent part (Italics ours) as follows: "In all cases where the Superior Court in vacation has jurisdiction, and all of the parties unite in the proceedings they may apply for relief to the Superior Court in vacation, or in term time, at their election. The resident judge of the judicial district and *any special Superior Court judge residing in the district* and the judge regularly presiding over the courts of the district, shall have concurrent jurisdiction in all matters and proceedings where the Superior Court has jurisdiction out of term: Provided, that in all matters and proceedings not requiring the intervention of a jury or in which trial by jury has been waived, the resident judge of the judicial district and *any special Superior Court judge residing in the district* shall have concurrent jurisdiction with the judge holding the courts of the district, and the resident judge and *any Special Superior Court judge residing in the district* in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of term or in term time . . ."

And Sec. 3 of Chap. 78 of 1951 Session Laws, *supra,* declares that "All laws and clauses of laws in conflict with this Act are hereby repealed,"

and Sec. 4 makes the Act effective on ratification, and the Act was ratified 20 February, 1951.

Manifestly, the amendments to G.S. 7-65 vested a special judge of the Superior Court, resident of a particular district, with concurrent jurisdiction with the resident judge and the judge regularly presiding over the courts of the district in all matters and proceedings where the Superior Court has jurisdiction out of term, and with authority in the exercise of such concurrent jurisdiction, to hear and pass upon all such matters and proceedings in vacation, out of term or in term time.

But the General Assembly when it came later to make provision for the appointment of special judges, enacted Chap. 1119 of 1951 Session Laws, effective from ratification, and ratified 14 April, 1951, in substance the same as previous acts providing biennially for appointment of special judges of the Superior Court, beginning in the year 1941.

Sec. 5 of this Act as in previous biennial acts reads as follows: "To the end that such special judges shall have the fullest power and authority sanctioned by Art. IV, Sec. 11, of the Constitution of North Carolina, such judges are hereby vested in the courts which they are duly appointed to hold, with the same powers and authority in all matters whatsoever that regular judges holding the same courts would have. A special judge duly assigned to hold the courts of a particular county shall have during said term of court, in open court and in Chambers, the same powers and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same term of court."

And Sec. 8 declares that "All laws and clauses of laws which may be in conflict with this Act, to the extent of such conflict, are hereby repealed: Provided, that nothing herein shall in any manner affect Secs. 7-50 and 7-51 of the General Statutes of North Carolina."

Therefore this question arises: Are the provisions of Chap. 78 of the 1951 Session Laws of North Carolina repealed by Sec. 8 of Chap. 1119 of the 1951 Session Laws? This Court is of opinion, and holds that the question merits a negative answer.

When the provisions of Sec. 1 of Chap. 78 of the 1951 Session Laws are compared with the provisions of Sec. 5 of Chap. 1119 of the 1951 Session Laws it is seen that the jurisdiction vested in special judges of the Superior Court in these two acts is substantially the same, and the two are not in conflict. Does then the authority of concurrent jurisdiction granted by the amendments to the statute G.S. 7-65 amount to a conflict with the provisions of Sec. 5 of Chap. 1119 of 1951 Session Laws? It is not considered that it is. Rather, it appears to be supplemental to the jurisdiction conferred by the provisions of Sec. 5. The latter relates to matters arising in the courts which the special judges of the Superior

Court are assigned to hold, and the former to in Chambers matters arising in the district of which the special judge of the Superior Court is a resident.

Indeed, repeal of statutes by implication is not favored in this State. As stated by *Adams, J.*, in *Story v. Comrs.*, 184 N.C. 336, 114 S.E. 493, "The presumption is against the intention to repeal where express terms are not used, and it will not be indulged if by any reasonable construction the statutes may be reconciled and declared to be operative without repugnance. 'To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed.'" See, among numerous others, the cases of *Kelly v. Hunsucker,* 211 N.C. 153, 189 S.E. 664; *S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9; *McLean v. Board of Elections,* 222 N.C. 6, 21 S.E. 2d 842.

And it may be noted the purpose and intent expressed in Sec. 5 were appropriate when the section was first incorporated in Chap. 51 of P.L. 1941, and when subsequent acts were biennially enacted, prior to the 1950 amendment to Art. IV, Sec. 11, of North Carolina Constitution. But by this amendment the previous limitation was removed and the General Assembly was given unlimited authority to define the jurisdiction of special judges of the Superior Court. Hence, it is apparent that the General Assembly in enacting Chap. 1119 of 1951 Session Laws was concerned with perpetuation of authority for the appointment of special judges of the Superior Court, rather than in defining their jurisdiction,— a thing already accomplished at the same session.

Moreover, it is observed that the statute, Chap. 1322 of 1953 Session Laws, providing for the appointment of special judges of the Superior Court for the biennium ending 30 June, 1955, is couched in almost identical language to that used in Chap. 1119 of 1951 Session Laws, above considered, except as to number of special judges authorized to be appointed. And, since the provisions of Chap. 78 of 1951 Session Laws are not found and held to be in conflict with the provisions of Chap. 1119 of 1951 Session Laws, they are not in conflict with the provisions of Chap. 1322 of 1953 Session Laws.

Therefore, this Court concludes that the Honorable Francis O. Clarkson, a special judge of Superior Court residing in the Fourteenth Judicial District of North Carolina, had jurisdiction in Chambers to hear and determine this controversy without action, which arose in the district of his residence.

Now, we come to the challenge to the ruling and judgment from which the appeal is taken. These are the questions presented:

(1) Where the board of aldermen of the city of Charlotte, acting in its capacity as the governing body of the city, did in the year 1883, with

funds in the treasury of the city and accumulated from sources other than school taxes, purchase a boundary of land on which was located a three-story brick structure, suitable for permanent use, and indispensable to the success of the system of public graded schools inaugurated pursuant to authority of the electorate of the city, and took title thereto in the name of the city, and, thereafter, set aside the building and a certain part of the land so purchased, as a graded school lot, and delivered possession of same to the school commissioners of the city of Charlotte,—a body politic and corporate, empowered and authorized to purchase sites and build schoolhouses in the city, and to regulate and operate within the city a system of graded public schools, who went into possession of the building and lot, and operated therein and thereon a public graded school for approximately fifty-four years, and continued to occupy same for public school purposes for approximately sixteen more years, do these facts constitute a dedication by the city of Charlotte, and an acceptance by the school commissioners of the city of Charlotte, of the property, building and lot, for a special public purpose?

(2) If so, is such dedication revocable by the city of Charlotte?

Principles generally recognized and applied dictate an affirmative answer to the first question, and a negative answer to the second.

"Dedication is the intentional appropriation of land by the owner to some proper public use. More specifically, it has been defined as an appropriation of realty by the owner to the use of the public and the adoption thereof by the public,—having respect to the possession of the land and not the permanent estate." Dedication may be either in express terms or it may be implied from conduct on the part of the owner. And dedication applies not only to highways, but, among other purposes and uses, to school lots. See 16 Am. Jur. 348, Dedication 2, and *Tise v. Whitaker,* 146 N.C. 374, 59 S.E. 1012.

In the *Tise case,* in opinion by *Hoke, J.,* this Court declared: "It is established that if there is a dedication by the owner, completed by acceptance on the part of the public, or by persons in a position to act for them, the right at once arises, and the time of user is no longer material." And again (quoting from Elliott on Roads and Streets, 2nd Ed.), " 'An implied dedication is one arising by operation of law from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written.' And further, on the question of intent (again quoting): 'It is essential that the donor should intend to set the land apart for the benefit of the public, for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to public use. If the intent to dedicate is absent, then there is no valid

dedication. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public . . . have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose.' "

And in *Sexton v. Elizabeth City*, 169 N.C. 385, 86 S.E. 344, it is said: "The dedication, when once fully made, is held to be irrevocable."

Moreover, a political subdivision of the State may dedicate lands owned by it to a particular public use. 16 Am. Jur. 356.

In the light of these principles applied to the agreed statement of facts, it seems clear that the D. H. Hill School building and lot were acquired by the city, and delivered to the school committee with intent that it be dedicated to purpose of operating the city system of public graded schools, and that it was so accepted by the school committee in behalf of the public. Therefore, the city may not now revoke the dedication.

Indeed, the principle applies alike to the land re-acquired by the city, and added to the school site, for the purpose of enlarging the playground of the D. H. Hill School.

But there are no facts that indicate that there was a dedication of the remainder of the twenty-seven acre tract. Nor is there question of abandonment presented.

For reasons stated, the judgment below is

Affirmed.

MARGARET HAWKINS v. DR. WALKUP McCAIN.

(Filed 15 January, 1954.)

1. Evidence § 46c—

While nonexperts may testify as to a person's physical appearance before and after taking certain medical treatment, they may not testify as to the effect such treatment had upon the patient, since such an opinion must be based upon scientific knowledge pertaining to a particular branch of learning.

2. Trial § 22a—

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to her.

3. Trial § 22b—

Upon motion to nonsuit, defendant's evidence may be considered to the extent that it is not in conflict with plaintiff's evidence, but tends to explain or make clear that which has been offered by plaintiff.

4. Physicians and Surgeons § 14—

By undertaking to treat a patient, a physician implies that he has the degree of learning, skill and ability necessary to the practice of his profession which is ordinarily possessed by others similarly situated, that he will exercise reasonable and ordinary care and diligence in the use of his skill and the application of his knowledge to the patient's case, and that he will exert his best judgment in the treatment and care of the case.

5. Physicians and Surgeons § 18½—

In an action for malpractice, the burden is upon plaintiff to prove by the greater weight of the evidence not only that defendant was negligent, but that such negligence was the proximate cause or one of the proximate causes of her injury.

6. Physicians and Surgeons § 20—Evidence held insufficient to be submitted to jury in this action for malpractice.

Evidence tending to show that plaintiff was suffering from a malignant and debilitating disease, that thereafter she went to defendant physician for a skin disorder, that he prescribed an arsenic solution, and that after using it for a short time plaintiff's legs became swollen and the side of her face broke out with yellow blisters, for which she went to a hospital for treatment by other physicians, without evidence that the treatment prescribed by defendant was not approved and in use by the medical profession generally in such cases or that defendant did not have the requisite degree of learning or skill or failed to use his best judgment in the treating of the case, together with defendant's evidence that her hospital treatment was for another disease, *is held* insufficient to be submitted to the jury in plaintiff's action for malpractice, there being no evidence that defendant's treatment caused the latter disease or aggravated her condition in respect to her former disease.

7. Same—

Where certain treatment is approved and in general use by the medical profession for the treatment of a particular disease the mere fact that the patient has an unfavorable reaction therefrom does not support the application of the doctrine of *res ipsa loquitur.*

8. Physicians and Surgeons § 14—

A physician is not a warrantor of cures nor an insurer.

9. Physicians and Surgeons § 20—

Upon motion for nonsuit in an action for malpractice, defendant's expert testimony is properly considered to ascertain the nature of the diseases the plaintiff had according to her evidence, both before and after the treatment by defendant.

APPEAL by plaintiff from *Clarkson, Special Judge,* August Term, 1953, of GUILFORD (High Point Division).

Civil action to recover for personal injuries allegedly resulting from the negligence of the defendant in failing to exercise proper medical care and skill in the treatment prescribed by him for a skin disease from which the plaintiff was suffering.

The pertinent allegations in the complaint and the essential averments in the answer thereto, are set out below.

1. In sum and substance the plaintiff alleges in her complaint that the defendant, a practicing physician, was employed to treat her for a skin disease; that after making a perfunctory examination of plaintiff's condition, he prescribed an arsenic solution for her; that she took it according to his instructions for four days, at the end of which time her eyes were swollen and the corners of her mouth were sore; that becoming alarmed over her condition, she again went to the defendant who advised her to continue taking the solution as prescribed; that she followed his advice for five days more, at which time she collapsed; that it was necessary to rush her to a hospital where she was treated by four other physicians, and narrowly escaped death. That by reason of the improper treatment and unskillful and negligent conduct of the defendant in giving her an excessive amount of arsenic, she "has suffered great bodily injury, nervous disorder and mental anguish; has not been able to work and does not expect to be able to work at any time in the future as she has in the past."

2. The defendant in his answer admits that he is a duly licensed physician and authorized to practice medicine in North Carolina. He alleges that he possesses that degree of knowledge of the science of medicine and that degree of skill in the practice of the art of medicine which is required by law. He also avers in his answer that at the time the plaintiff came to his office in September, 1950, she had a history of having received X-ray treatment for chronic Hodgkin's disease, and of having received hospitalization therefor. That upon examination he found that the plaintiff had a skin disease and undertook the care and treatment of said disease. The defendant denies the allegations of negligence, and further alleges that in the use of his skill and the application of his knowledge in the treatment of the plaintiff's condition as he diagnosed it and in the exercise of his best judgment for her treatment and care, he prescribed for her and gave her full instructions with respect to the medicine which he prescribed.

The substance of the plaintiff's testimony is to the effect that prior to August, 1950, she was in good health and had never had to go to bed for any extended period of time; that in August, 1950, she was working at the Dutch Laundry in High Point as a checker, making around $20.00 a week. In August or around the first of September, 1950, she had some sort of skin disorder which was something like ringworm; that it did not bother her in any way but looked bad and she wanted to get rid of it.

That on or about the first of September, 1950, she went to see Dr. McCain, and told him she had heard that he had a light treatment which was good for skin diseases. She stated to him that she wanted these light or heat treatments; they had a discussion about it; that she had known him before. He had given her some tonic shots to build up her blood, maybe three or four years before that time; that the defendant knew her condition relative to Hodgkin's disease. That she had been to Dr. Gray for X-ray treatments prior to September, 1950, for Hodgkin's disease. That Dr. McCain did give her a heat treatment but expressed the opinion that it would do no good. He stated that arsenic was used for the treatment of the skin disease she had and he would give her that to take. He told her how to take the arsenic solution and described the symptoms she might look for if she should get too much. He said to watch for a metallic taste in her mouth and yellow blisters behind her ears, which she never had at any time. That she had the prescription for the arsenic solution, given to her by the defendant, filled at a local drug store. That the defendant told her what dosage to take; that she took the medicine as prescribed for seven days and one dose on the eighth day and quit; that on that day her feet and legs were swollen so bad that she could hardly get her shoes on to go home from work; that after she had taken the prescription for four days she went back to see Dr. McCain because her eyes were swollen and each corner of her mouth was broken out. She asked him if he thought it was the arsenic causing that and he said no, and told her to continue to take the prescription as directed. On the eighth day she was sick on her stomach. The next morning she was hardly able to go but went to the grocery store and returned home and went to bed and continued to get worse. That on the ninth day she was swollen very bad and the whole side of her face was broken out with yellow blisters. Dr. Grayson, her regular family physician (who has since died), was called. He treated her over a period of about four weeks. She went to the hospital about the fourth or fifth week after she started taking the arsenic solution and stayed three or four days. That she had not been able to work at the Dutch Laundry and cannot do her housework like she formerly did but that she tries to do it. That in September, 1950, she weighed 137 pounds and during the next sixteen weeks she lost 40 pounds and weighed only 98 pounds at the time of the trial. That about three weeks after she started taking the arsenic, Dr. McCain visited her in her home; that he said: "You don't care very much about yourself. You have been laying out here without medical attention." She said: "I have had medical attention." She informed him that Dr. Grayson had been attending her. He then said: "Well, I think you ought to give me a chance to right my wrong." That she did not send for Dr. McCain because she did not want any more of his treatment.

On cross-examination, the plaintiff testified that she had previously gone to Dr. Parks, a skin specialist, and he had given her one heat treatment for the skin condition on her legs and had given her a prescription; that she did not continue his prescription because it caused her so much pain when she put the ointment on her legs she could not stand it; that when she went to the hospital in October, Dr. McCain treated her. That Dr. Leath examined her before she went to the hospital; that Dr. Gray treated her in the hospital, but it was another hospital from that in which Dr. McCain treated her.

The plaintiff also testified that she had had Hodgkin's disease for quite a while, since about 1945; that she thought it was a right serious disease. That when she testified to the jury that she had never had a serious illness, she meant other than Hodgkin's disease. That Dr. Gray had treated her for the results of Hodgkin's disease off and on from 1945, and that he had treated her fairly recently since 1950. From time to time she had been under the care of other doctors, including Dr. Childs at Jamestown, for indigestion, and Dr. Parks, for her skin disease; that she didn't recall any other doctors except Dr. Grayson, Dr. Leath, Dr. Phillip Davis, Dr. Gray, and Dr. McCain. That Dr. Grayson gave her injections of "tonic shots" several years before she had this trouble. She testified, "I don't recall exactly when I entered the hospital, but it was on the 9th or 10th of October, I believe. The next time Dr. McCain was called was about three or four or five days before I entered the hospital. In the meantime I had been treated by Dr. Grayson and I took his medicine. I was admitted to the hospital for herpes zoster and they said it was herpes which was circling my eye. When Dr. McCain saw it he did not say that in his opinion it was not caused by arsenic. He stated, 'I won't say it is caused by the arsenic and I won't say it is not.' "

The plaintiff offered as witnesses in her behalf several of her neighbors, her son-in-law, and her husband, all of whom testified to the change in her appearance after she took the arsenic. Her husband testified that he took his wife to see Dr. McCain on the fourth day after she began to take the arsenic; that he noticed a little puffiness around her eyes; that later he took her to see Dr. Leath about her eye and then to the hospital where Dr. Gray saw her; that Dr. McCain arranged for a room at the old hospital and she was carried there where she remained for about four days.

The defendant testified that the plaintiff came to see him around the first of September, 1950; that "she had psoriasis, big . . . rough scales on her legs and arms, the exposed surfaces. In nonmedical language, psoriasis is a chronic skin disease. The cause is unknown and the cure is unknown. It will improve with certain drugs, arsenic, and some ultraviolet lights and going to the seashore sometimes will help it, but you cannot promise one it will ever be well." That he prescribed for Mrs.

Hawkins two drams of Fowler's solution which contains arsenic, and according to practically all authorities is the best treatment in small doses for the skin disease she had. That the prescription called for one dose of two drops before each meal to be increased one drop a day, that would be six drops for the first day, seven the second day, eight the third day, and so on. That he told her what symptoms to look for, and any time symptoms arose to stop it and see him. That he did not see Mrs. Hawkins again until October 4th or 5th. Her husband came by his office and said his wife's eye was bad. He immediately went to see her. He examined her and found she had a very definite herpes of her right frontal forehead, and her eye was badly swollen. She was very sick. That he did not think there is any relationship between psoriasis and herpes. They are different diseases or conditions of the skin. That he sent her to Dr. Leath's office and then to Dr. Gray. Thereafter he sent her to the Guilford General Hospital where she remained for four days and was treated for herpes zoster. He denied making any statement to her about righting any wrong and also testified that he had no recollection or record of a visit to his office by the plaintiff on the fourth day after he prescribed for her.

Dr. C. L. Gray, an admitted expert physician, surgeon, and radiologist, a witness for the defendant, testified that he knew the plaintiff, Mrs. Hawkins; that he saw her in April, 1945. He examined her at that time and diagnosed her condition. On her initial introduction to him, she made the statement that she had Hodgkin's disease and had been treated previously, about a year or two before by another physician in Greensboro, who was at that time in the Armed Services. "At the time I saw her, she was rather pale and anemic. She had enlarged swollen glands in her neck. On X-ray examination of the chest, there were large lymph nodes or large glands on either side of the heart and a good portion of the chest, all of which is perfectly characteristic of Hodgkin's disease. That was my diagnosis. Hodgkin's disease is a disease of unknown cause; it is a malignant disease, one of the most malignant diseases of what we call the lymph system, the glands in the body, characterized by enlargement of these glands, frequent loss of weight, loss of appetite, anemia, easy fatigue, and characterized also by periods with proper treatment of remissions where these people feel perfectly well and are able to resume their work. At other periods, there is a recurrence of this difficulty and they begin to go downhill again. It is characterized in that manner throughout the rest of that patient's life. The ultimate outcome is not good. That is the condition that Mrs. Hawkins has now. It is a disease that is known to be incurable. When I first examined Mrs. Hawkins, I don't recall that she did have any skin eruptions. About 1949 or 1950, I did notice a skin rash; it was mostly about the hands, the legs, the elbows,

the exposed portions of the body, the knees . . . I was not treating her for that particular condition, but I did notice it. It is not uncommon to have skin disorders with Hodgkin's disease. It might not be this particular one, but skin changes are characteristic of Hodgkin's disease. I saw Mrs. Hawkins in 1950 on three occasions: October 9, 10, and 11, . . . I was asked to see Mrs. Hawkins . . . because of this herpes or shingles that involved the right side of the face, forehead and under the eye. The skin manifestation was characterized by a rather large, fiery, red blister formation, characteristic of that disease, and I was asked to see her in regard to giving her X-ray treatments for that particular disorder. I did administer three treatments for her. She was not in our hospital at that time; she came back and forth. . . . We are never certain of the cause of herpes because herpes zoster may appear as a primary infection in some individuals who otherwise seem well, and it may also appear in people who have chronic diseases or current diseases with what we speak of as poor resistance, . . . Hodgkin's disease is a debilitating disease; it is one such as patients have who frequently have shingles. Shingles does appear in debilitating diseases quite frequently . . . Patients do have herpes zoster who have not taken arsenic. All patients who take arsenic in small or even large doses do not have herpes zoster, or shingles. . . . The loss of weight is one of the characteristics of Hodgkin's disease. The plaintiff's progress with suffering from Hodgkin's disease has been rather characteristic with one exception. . . . Mrs. Hawkins has lived longer than any patient I have even seen with Hodgkin's disease. . . . When I attended Mrs. Hawkins on October 9, 10 and 11, she was in bad physical condition. That condition was caused in part by the shingles. I think it affected her nervous system to a great extent. I am unable to say whether it is still affecting her; it could. Mrs. Hawkins is obviously pale now and has lost considerable amount of weight since I last saw her . . ."

Dr. Phillip B. Davis, a witness for the defendant and admitted to be a medical expert, testified that he did not see the plaintiff, Mrs. Hawkins, until a year after the time Dr. McCain treated her. He treated her in 1951 for anemia as a result of Hodgkin's disease. This witness further testified, "The causes of herpes zoster are unknown. . . . You see herpes most often in those individuals with long, debilitating diseases, that is, herpes zoster. . . . As a rule Hodgkin's disease is a long and debilitating disease. Hodgkin's disease is classified among the blood diseases, that is the lymphatic system, where you have a change in the lymph glands. It is a debilitating condition manifested by anemia to such a marked degree that the patient usually expires from weakness. We feel very fortunate . . . when we find a patient who has lived two to five years after the inception of the disease."

The defendant moved for judgment as of nonsuit at the close of the plaintiff's evidence, the motion was denied. It was renewed at the close of all the evidence and allowed. The plaintiff appeals, assigning error.

J. V. Morgan for appellant.
Smith, Sapp, Moore & Smith for appellee.

DENNY, J. Assignments of error Nos. 1, 2, 3, 4, and 6 are based on like numbered exceptions to the exclusion of evidence by nonexpert witnesses as to what advice they gave the plaintiff upon observing her condition, and the reason for offering such advice. These witnesses were permitted to testify as to the plaintiff's physical appearance before she took the Fowler's solution, as well as during the time she was taking it and immediately thereafter. However, the court sustained the defendant's objections to their proposals to testify that they advised her to stop taking the medicine "because it seemed to be killing her."

In cases where the physician's or surgeon's want of skill or lack of care is so gross or patent as to be within the comprehension of laymen and to require only common knowledge and experience to understand and judge it, expert evidence is not required. *Jackson v. Sanitarium,* 234 N.C. 222, 67 S.E. 2d 57; *Wilson v. Hospital,* 232 N.C. 362, 61 S.E. 2d 102; *Gray v. Weinstein,* 227 N.C. 463, 42 S.E. 2d 616; *Groce v. Myers,* 224 N.C. 165, 29 S.E. 2d 553; *Covington v. James,* 214 N.C. 71, 197 S.E. 701. But in other factual situations the rule is different as pointed out by *Justice Seawell* in *Groce v. Myers, supra,* in which he said: "In cases involving the application of scientific knowledge peculiar to that branch of learning (the science of medicine), there is no question that the rules of evidence requiring expert opinion in matters of scientific knowledge ought to be carefully enforced, both in the interest of justice and in the protection of a profession peculiarly liable to suit when, after exhausting every known resource and applying the highest degree of skill, the result is not what the patient or friends desire or hoped for."

The court below properly excluded the above testimony. It constituted nothing more than mere conjecture or surmise on the part of these lay witnesses as to cause and effect in a field of knowledge in which only an expert could give a competent opinion, *Jackson v. Sanitarium, supra,* that is, one as to whether the health of the plaintiff had been injuriously affected by taking the prescribed medicine.

The plaintiff also assigns as error the exclusion of other proffered testimony. But a careful examination of the exceptions upon which these assignments of error are based discloses that they are without merit. Hence, they are overruled.

Assignment of error No. 10 is based on an exception to the ruling of the trial court in sustaining the defendant's motion for judgment as of nonsuit. Therefore, we must determine whether or not the plaintiff's evidence, when considered in the light most favorable to her, as it must be on such motion, *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Winfield v. Smith,* 230 N.C 392, 53 S.E. 2d 251, is sufficient to warrant its submission to the jury. In our opinion it is not.

In arriving at this conclusion we are advertent to the rule that we are not permitted to consider the defendant's evidence, unless it is favorable to the plaintiff, except when it is not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff. *Nance v. Hitch,* 238 N.C. 1, 76 S.E. 2d 461; *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543, and cited cases.

The duty of a physician to his patient was set forth in the case of *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356, by the late *Chief Justice Stacy* in the following language: "Ordinarily, when a physician or surgeon undertakes to treat a patient without any special arrangement or agreement, his engagement implies three things: (1) 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; (2) that he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to the patient's case; and (3) that he will exert his best judgment in the treatment and care of the case entrusted to him," citing numerous authorities. See *Nance v. Hitch, supra; Jackson v. Joyner,* 236 N.C. 259, 72 S.E. 2d 589; *Waynick v. Reardon,* 236 N.C. 116, 72 S.E. 2d 4; *Jackson v. Sanitarium, supra; Wilson v. Hospital, supra; Grier v. Phillips,* 230 N.C 672, 55 S.E. 2d 485; *Buckner v. Wheeldon,* 225 N.C. 62, 33 S.E. 2d 480.

The plaintiff alleges in her complaint that she has suffered great bodily injury, nervous disorder and mental anguish resulting from the defendant's want of skill, his improper treatment and his failure to use and apply such skill and care as should have been applied in the ordinary course of treatment for her condition.

In an action for malpractice, the burden is upon the plaintiff to prove by the greater weight of the evidence not only that the defendant was negligent, but that such negligence was the proximate cause or one of the proximate causes of her injury. *Grier v. Phillips, supra; Smith v. Wharton,* 199 N.C. 246, 154 S.E. 12.

An examination of the plaintiff's evidence discloses that she employed the defendant on or about 1 September, 1950, to treat her for a skin disease; that she has been a victim of Hodgkin's disease since 1945; that after she took the Fowler's solution for seven days and one dose on the eighth day, she discontinued taking it. That after she began to take

Fowler's solution that contained arsenic, her legs began to swell and her face was puffed around her eyes; that on the ninth day after she started taking Fowler's solution the whole side of her face was broken out with yellow blisters. She called her regular family physician, Dr. Grayson, who treated her over a period of four weeks. Thereafter, her husband called the defendant who went to see her at her home and found she was suffering from herpes zoster; that she went to the hospital on the 9th or 10th of October, where the defendant treated her; that in the meantime Dr. Leath treated her eye and Dr. Gray also treated her for herpes zoster; that when she was admitted to the hospital she was informed that "it was herpes which was circling my eye."

It is significant that the plaintiff offered no evidence in support of her allegations with respect to the defendant's want of skill and that he prescribed the wrong treatment for her condition. There is no allegation or evidence to the effect that the defendant did not use his best judgment in treating the plaintiff. There is no evidence as to what Dr. Grayson, her family physician, treated her for or what medicine he gave her. Neither is there any evidence that she ever informed Dr. Grayson, Dr. Leath or Dr. Gray that she had taken Fowler's solution. In so far as the plaintiff's evidence is concerned, the treatment prescribed by the defendant may have been the one overwhelmingly approved and used by the medical profession generally in such cases. Furthermore, if it was an approved and acceptable treatment and the dosages as prescribed proper, the mere fact that she had an unfavorable reaction from its use would not make the doctrine of *res ipsa loquitur* applicable, nor would it be sufficient to establish actionable negligence against the defendant. *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251; *Smith v. McClung,* 201 N.C. 648, 161 S.E. 91; *Byrd v. Hospital,* 202 N.C. 337, 162 S.E. 738. As stated by *Barnhill, J.,* in *Lippard v. Johnson,* 215 N.C. 384, 1 S.E. 2d 889: "Practical application of the medical science is necessarily to a large degree experimental. Due to the varying conditions of human systems the result of the use of any medicine cannot be predicted with certainty. What is beneficial to many sometimes proves to be highly injurious to others." Moreover, a physician is not "a warrantor of cures nor an insurer." *Pendergraft v. Royster,* 203 N.C. 384, 166 S.E. 285.

It is permissible for us to examine the defendant's evidence in order to ascertain the nature of the diseases the plaintiff had, according to her evidence, at the time the defendant prescribed for her and at the time she entered the hospital more than a month thereafter. It will be noted that there is a considerable variance between the allegations of the complaint and the plaintiff's evidence as to the time she was hospitalized.

The defendant testified that when he prescribed for her she had psoriasis, which is a chronic skin disease; that its cause is not known and there

is no known cure for it; that it will improve in response to certain treatments.

Dr. Gray testified that Hodgkin's disease is a disease of unknown cause; that it is malignant, one of the most malignant diseases of the lymph system, the glands of the body, characterized by the enlargement of these glands, frequent loss of weight, loss of appetite, anemia, and easy fatigue; it is incurable. This witness further testified that "we are never certain of the cause of herpes because herpes zoster may appear as a primary infection in some individuals who otherwise seem well, and it may also appear in people who have chronic diseases or current diseases . . . Hodgkin's disease is a debilitating disease; it is one such as patients have who frequently have shingles." Therefore, it is not established by the plaintiff's evidence or by the evidence of the defendant favorable to her, that the treatment prescribed for her by the defendant caused the herpes zoster or aggravated her condition with respect to Hodgkin's disease.

In our opinion, the evidence disclosed on this record does not establish actionable negligence against the defendant. *Boger v. Ader,* 222 N.C. 758, 23 S.E. 2d 852; *Lippard v. Johnson, supra; Ferguson v. Glenn,* 201 N.C. 128, 159 S.E. 5.

For the reasons stated, the judgment of the court below is

Affirmed.

NITA HARTLEY, ADMINISTRATRIX OF THE ESTATE OF LLOYD HARTLEY, DECEASED, v. MRS. B. G. SMITH AND THOMAS GILBERT POPE.

(Filed 15 January, 1954.)

1. **Appeal and Error § 40i—**

In passing upon an exception to the refusal of the trial court to grant a motion for involuntary nonsuit, the evidence supporting plaintiff's cause must be considered in the light most favorable to him, and any evidence which tends to contradict or impeach such evidence must be disregarded.

2. **Automobiles §§ 8i, 18h (2)—Notwithstanding that vehicles approach intersection at same time, driver on right may be negligent in driving at excessive speed.**

Nonsuit should not be entered even though plaintiff's evidence discloses that the two vehicles approached an intersection within a municipality at approximately the same time, that defendant's vehicle approached the intersection from the right of plaintiff's intestate, and that defendant's vehicle ran into the side of intestate's vehicle at the intersection of their proper lanes of travel, when plaintiff's evidence further tends to show that intestate's vehicle was being operated at a lawful speed and that defendant's vehicle, as disclosed both by testimony and the physical facts at the scene, was being operated at excessive speed, since the testimony, if ac-

cepted by the jury, supports an inference that except for defendant's speed, intestate reached the intersection in ample time to have crossed in safety without creating an unnecessary traffic hazard.

3. Automobiles § 18g (5)—

The fact that after the collision, a vehicle ran into a house more than twenty-five feet from the sidewalk is not conclusive on the question of the driver's lack of control when the evidence discloses that the driver was fatally injured in the collision.

4. Automobiles § 24½a—

An admission in the answer that the *feme* defendant owned the car and that at the time of the collision it was being driven by her son who frequently drove the car with her consent, knowledge and approval is an admission on the issue of *respondeat superior* binding upon the parties without the necessity of introducing the admission in evidence.

5. Pleadings § 25½—

The admission in the answer of a material fact specifically alleged in the complaint which constitutes the basis of one of the issues, establishes such fact for the purposes of the trial, and therefore the introduction in evidence of the admission is not required.

6. Automobiles § 24½e—

An admission of the ownership of one of the vehicles involved in a collision is sufficient to make out a *prima facie* case of agency sufficient to support, but not to compel, a verdict against the owner under the doctrine of *respondeat superior* for damages proximately caused by the negligence of the driver. G.S. 20-71.1.

7. Same—

G.S. 20-71.1 provides that proof of registration is *prima facie* proof of ownership, and that proof of ownership is *prima facie* proof of agency.

8. Automobiles § 24½f: Appeal and Error § 39f—

Where plaintiff relies upon an admission of ownership of the other vehicle involved in the collision to support the application of the doctrine of *respondeat superior*, the court is required to analyze and explain the provisions of G.S. 20-71.1 as a part of the law of the case, but inadvertence of the court in charging the effect of registration rather than the effect of the admitted ownership, even though error, is harmless. G.S. 1-180.

9. Same—

Where under the issue of whether intestate was injured and killed by the negligence of the owner of the other vehicle involved in the collision, the court instructs the jury to the effect that such defendant's admission of ownership is sufficient to send the case to the jury and support a finding against the defendant upon the issue, the instruction must be held for prejudicial error.

10. Appeal and Error § 39f—

An erroneous instruction upon a material aspect of the case must be held for reversible error notwithstanding that in other portions of the

charge the court may have correctly instructed the jury as to the law on such aspect.

11. Trial § 31b—

An erroneous statement of the law, even though made in stating a contention of a party, constitutes prejudicial error.

12. Appeal and Error § 6c (5)—

An exception to a portion of the charge stating several propositions of law will not be held ineffectual when the exception presents the sole question of whether the court correctly construed and applied a pertinent statute to the facts of the case.

13. Automobiles § 24½f—

An instruction to the effect that if the jury found that the operator of the vehicle was guilty of negligence proximately causing the collision, the jury should answer in the affirmative the issue as to the liability of the owner of the vehicle, must be held for reversible error.

APPEAL by defendants from *Frizzelle, J.,* May Term, 1953, HARNETT. New trial.

Civil action to recover compensation for the wrongful death of plaintiff's intestate resulting from an intersection motor vehicle collision.

As plaintiff's intestate was one of the actors in the unfortunate occurrence which resulted in his death, we may more conveniently refer to him as the plaintiff in summarizing the facts and discussing the assignments of error.

About 7:00 p.m. on 4 July 1952, Hartley was operating a Chevrolet pickup truck southwardly on South Washington Avenue, approaching East Pearsall Street, in the town of Dunn. At or about the same time, defendant Pope was operating the Mercury automobile of his mother, defendant Smith, in an easterly direction on East Pearsall Street, approaching the same intersection. Thus Pope was to the right of Hartley. Whether they approached the intersection at approximately the same time is one of the controverted facts.

No stop signs or other traffic signs were erected at or near the intersection of either street. Therefore, the rights of motorists approaching said intersection at approximately the same time were and are controlled by the rule that "the motorist on the right has the right of way." G.S. 20-155.

Both streets are paved and each is approximately thirty feet wide. They intersect at right angles.

Each motorist was traveling on his own right-hand side of the highway. Just as Hartley's truck got almost astraddle Pope's lane of travel, the left front part of Pope's vehicle collided with the truck, striking it about the hinges of the door to the cab, causing the truck to veer to the left, cross

the curb and sidewalk, cross the yard of a house set back about twenty-five feet from each street, and strike the underpinning of the house, or the house itself. One witness testified it struck the underpinning; another, that it struck the house. At least, the house or underpinning was dislocated a fraction of an inch. The Mercury, after striking the truck, also crossed the curb and sidewalk, knocked down the cement street marker, and skidded into the same yard, stopping about five or six feet from the sidewalk. The brake or skid marks "began in the southwest corner of the intersection about three to five feet south of the center of the intersection," and extended a distance of forty-two feet to the rear of the Mercury sitting in the yard. These marks indicated the Mercury was traveling sidewise rather than straight forward. The left front of the Mercury was damaged but its right headlight was not broken.

Hartley received serious injuries which caused his death on 7 July—three days later.

There was testimony tending to show that the two vehicles were traveling at about the same speed—thirty to thirty-five, thirty-five to forty m.p.h.—and approached the intersection "about the same time." "It looked like they both came to the intersection about the same time, and that neither decreased their speed."

On the other hand, one witness testified Pope was traveling "60 m.p.h.," "at least 60 m.p.h." Another stated the Mercury was traveling thirty-five m.p.h. when it crossed Magnolia Street two blocks from the collision, and that it "picked up speed" as it approached Washington Avenue. The maximum speed limit in that area was thirty-five m.p.h.

Each motorist was traveling on his own right-hand side of the highway so that the collision occurred just east of the center line of South Washington Avenue and south of the center line of East Pearsall Street.

Issues were submitted to and answered by the jury as follows:

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendant Mrs. B. G. Smith, as alleged in the Complaint?

"Answer: Yes.

"2. Was the plaintiff's intestate injured and killed by the negligence of the defendant Thomas Gilbert Pope?

"Answer: Yes.

"3. Did the plaintiff's intestate by his own negligence contribute to his injury and death?

"Answer: No.

"4. What amount of damage is the plaintiff entitled to recover on account of the wrongful death of her intestate?

"Answer: $13,000.00.

"5. What amount of damage, if any, is the plaintiff entitled to recover on account of the mental and physical suffering of her intestate between the time of his injury and his ensuing death?

"Answer: $2,500.00."

The court below signed judgment on the verdict and defendants appealed.

Ruark, Ruark & Moore and Wilson & Johnson for plaintiff appellee.
Salmon & Hooper for defendant appellants.

BARNHILL, J. Both the oral and physical testimony tend to show that the collision occurred within the intersection of South Washington Avenue and East Pearsall Street. Therefore it appears beyond peradventure that the two vehicles in fact reached the intersection at approximately the same time. No witness tendered by plaintiff testified that Hartley reached and entered the intersection at a time when Pope was a sufficient distance away to furnish reasonable grounds for him to assume, and that he did assume, that he could cross the intersection in safety, ahead of Pope's vehicle, without creating an unnecessary traffic hazard. Indeed, there is no evidence, either oral or physical, such as skid marks, tending to show that Hartley ever saw Pope before the vehicles collided. A witness testified the two vehicles were traveling "at about the same speed" and approached the intersection "about the same time." Even so, on this record, the exception to the refusal of the court to enter judgment of nonsuit is untenable. The testimony affords some evidence tending to show that Hartley was not under the duty to slow down and, if necessary, stop and yield the right of way to Pope. The weight and credibility to be accorded this testimony is for the jury to decide.

It is axiomatic with us that in deciding the merits of an exception to the refusal of the trial court to grant a judgment of involuntary nonsuit we must consider the testimony in the light most favorable to the plaintiff and disregard any evidence which tends to contradict or impeach such testimony. When the testimony appearing in this record is so considered, it is made to appear that Hartley was traveling at a speed of only thirty or thirty-five m.p.h.—within the maximum limit allowed in a residence district—while Pope was traveling at least sixty m.p.h.; that Pope did not apply his brakes until the front part of his automobile had entered the intersection, and that although Pope's vehicle ran into the side of Hartley's truck, which must have checked or retarded his speed to a considerable extent, he skidded forty-two feet over the curb, across the sidewalk, knocked down a cement street marker and stopped several feet inside the yard of a house on the lot located at the southeast corner of the intersection. This testimony, if accepted by the jury as representing the

truth of the unfortunate occurrence, will support an inference that Pope was operating his vehicle at an excessive rate of speed and that, except for such speed, Hartley reached the intersection in ample time to cross in safety without creating an unnecessary traffic hazard.

It is true the truck traveled—one witness said was knocked—across the sidewalk and yard and ran into the house more than twenty-five feet from the sidewalk. But Hartley received fatal injuries. They may have been inflicted at the time the two vehicles collided. Therefore, on the question of Hartley's apparent lack of control of his truck, *Bailey v. Michael,* 231 N.C. 404, 57 S.E. 2d 372, and *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554, are controlling.

Defendants admit in their answer that defendant Smith owns the 1951 Mercury sedan automobile being operated by her son, defendant Pope, at the time of the collision, "and that the defendant Thomas Gilbert Pope frequently drove the same by and with the consent, knowledge and approval of the defendant Mrs. B. G. Smith . . ." Since this was the admission of a fact which establishes, *prima facie,* the agency of Pope—a fact at issue—we are of the opinion it was not necessary for plaintiff to offer it in evidence. *McCaskill v. Walker,* 147 N.C. 195; *Leathers v. Tobacco Co.,* 144 N.C. 330; *Barbee v. Davis,* 187 N.C. 78, 121 S.E. 176; *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16; *Royster v. Hancock,* 235 N.C. 110, 69 S.E. 2d 29; *Light Co. v. Sloan,* 227 N.C. 151, 41 S.E. 2d 361; *S. v. Martin,* 191 N.C. 401, 132 S.E. 14.

Connor, J., speaking for the Court in *Leathers v. Tobacco Co., supra,* says:

"It is true that for the purpose of availing himself of admissions not responsible (*sic*) to nor called for by the specific allegations in the former pleadings, but made by way of recital, the party relying upon them must put them in evidence, the reason given in *Smith v. Nimocks,* 94 N.C. 243, and cases in which it is cited, being that it is but fair to give the party making such admissions an opportunity to explain them . . . When, however, the plaintiff, in making a 'plain and concise statement of facts constituting a cause of action,' sets out a date or other material fact, and the defendant, being thus fully informed of the allegation by the plaintiff, expressly admits such material fact so alleged, we can see no good reason why the Court may not take such admission as settling such fact for all purposes connected with the trial. It must be conceded that the decisions heretofore made in respect to admissions which come within the rule announced in *Smith v. Nimocks* do not so clearly mark the line of distinction as might be desired. The difficulty experienced in doing so is manifest, but we think it safe to say that when a material fact is alleged in the complaint and admitted in the answer—a fact the denial of which would have presented an issuable controversy in the cause—it may for the

purpose of the trial be taken as true. *Cui bono* submit to the jury an issue or offer proof of something solemnly admitted to be true?"

Plaintiff offered no testimony tending to show that at the time of the collision Pope was the agent or employee of Mrs. Smith and was about his master's business at the time of the collision. He sues on the theory the Mercury was a "family purpose" automobile and that Pope was a member of Mrs. Smith's family, and, on this aspect of the case, he relies solely on the rule of evidence created by G.S. 20-71.1 which makes proof of ownership *prima facie* proof of agency.

As to defendant Smith, these admissions make out a *prima facie* case of agency which will support, but does not require, a verdict against her, under the doctrine of *respondeat superior,* for any damages assessed against Pope. G.S. 20-71.1.

That statute, ch. 494, S.L. 1951, G.S. 20-71.1, provides that:

"(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be *prima facie* evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose. (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be *prima facie* evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment; Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within one year after his cause of action shall have accrued."

As this statute constitutes the law of the case on the question of the liability of defendant Smith, the court below undertook to analyze and explain it to the jury and apply it to the facts, as they relate to her liability under the doctrine of *respondeat superior,* as it was its duty to do. G.S. 1-180. In so doing, it instructed the jury as follows:

"The plaintiff contends, in answer to the defendants' contention that you cannot hold Mrs. Smith liable for that the plaintiff has not shown the relationship of a principal and agent, or master and servant, or employer and employee, and that the servant was about his master's business at the time, plaintiff contends *that this very statute was enacted and designed to render proof unnecessary.* That is to say, that by reason of this statute, particularly the portion of it reading, 'Proof of registration of a motor vehicle in the name of any person, firm or corporation, shall for the purpose of any such action, be *prima facie* evidence of owner-

ship and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible,' *not only sends this case to the jury upon the question of ownership and the responsibility of the owner for the conduct of the person operating the owner's automobile, but that it is prima facie evidence of ownership and responsibility of the owner, and that it is sufficient to support a finding favorable to the plaintiff under that first issue.* I have already instructed the jury as to the meaning of *prima facie* evidence. *The Court says it is sufficient to support a finding against a defendant* but that, after all, it is a matter for the jury. *It is sufficient to send the case to the jury. It is sufficient for the jury to predicate a finding favorable to the plaintiff upon,* but the jury is not compelled to do so, the burden still remaining upon the plaintiff to satisfy the jury upon the evidence, by its greater weight, that the plaintiff's allegations and contentions are correct." (Italics supplied.)

The statute was designed to create a rule of evidence. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. It does not have, and was not intended to have, any other or further force or effect.

The two sections of the Act are identical in their objective. While the language used in section (a) is not as apt as that used in section (b), the intent and meaning of the two are the same. The caption of the Act, as well as the language thereof, so indicates. The caption reads: "AN ACT TO PROVIDE NEW RULES OF EVIDENCE IN REGARD TO THE AGENCY OF THE OPERATOR OF A MOTOR VEHICLE INVOLVED IN ANY ACCIDENT."

Manifestly, the Legislature used the language "was being operated and used with the authority, consent, and knowledge of the owner" to connote "under the direction and control of the owner," and when one acts under the direction and control of another, he is an agent or employee. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137. Certainly it did not intend to give greater force and effect to mere proof of registration than to the admission or actual proof of ownership.

In short, proof of registration is *prima facie* proof of ownership, section (b), which in turn is *prima facie* proof of agency, section (a).

The court below inadvertently charged the jury under the "registration" rather than the "ownership" section of the Act. Since there was no admission or proof that the Mercury was registered in the name of Mrs. Smith, the court applied a provision of the law which is not applicable to the facts in this case. This, perhaps, under our decisions constitutes error. *Collingwood v. R. R.,* 232 N.C. 724, 62 S.E. 2d 87; *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558; *Cook v. Hobbs,* 237

N.C. 490, 75 S.E. 2d 322. However, since proof of registration is *prima facie* proof of ownership, and ownership was admitted by Mrs. Smith the error, if any, was harmless.

The vice in the excerpt quoted from the charge rests in the language we have italicized. In so instructing the jury, the court inadvertently accorded the statute a meaning that goes far beyond its real purpose and intent.

As heretofore stated, this Act was designed and intended to, and does, establish a rule of evidence which facilitates proof of ownership and agency in automobile collision cases where one of the vehicles is operated by a person other than the owner. It was not "enacted and designed to render proof unnecessary," nor does proof of registration or ownership make out a *prima facie* case for the jury on the issue of negligence. Neither is it sufficient "to send the case to the jury," or "support a finding favorable to plaintiff under that first (negligence) issue," or "to support a finding against a defendant" on the issue of negligence. It does not constitute evidence of negligence. It is instead directed solely to the question of agency of a nonowner operator of a motor vehicle involved in an accident.

Non constat the statute, it is still necessary for the party aggrieved to allege both negligence and agency in his pleading and to prove both at the trial. *Parker v. Underwood, post,* 308.

It is urged, however, that the court later correctly charged the law in respect to G.S. 20-71.1. Even if this be conceded, we have consistently held that inconsistent instructions constitute prejudicial error requiring a new trial. *Templeton v. Kelley,* 217 N.C. 164, 7 S.E. 2d 380; *S. v. Overcash,* 226 N.C. 632, 39 S.E. 2d 810; *Sumner v. Sumner,* 227 N.C. 610, 44 S.E. 2d 40; *Dixon v. Brockwell,* 227 N.C. 567, 42 S.E. 2d 680; *S. v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685; *Green v. Bowers,* 230 N.C. 651, 55 S.E. 2d 192.

The record discloses clear indication that the instruction was prejudicial. Mrs. Smith was neither the operator of nor a passenger on the Mercury. She was not even present at the scene of the collision. Yet the jury, in its answer to the first issue, found that Hartley's injury and death were proximately caused by the negligence of Mrs. Smith. And it cannot be said that the jury so answered the issue under the doctrine of imputed negligence, for the judge, in his charge, made no reference to that doctrine.

Neither is the fact the exceptive portion of the charge begins as the statement of a contention material. It is evident this was done as the basis for the direct and unequivocal statement that "the Court says it is sufficient to support a finding against a defendant," etc. In any event, this is immaterial, for the erroneous statement of the law, even in the

form of a contention, constitutes prejudicial error. *McKinney v. High Point,* this day decided, and cases therein cited. Nor is there more than one question or proposition of law included within the exception, and that is: Did the court below correctly construe and apply the statute, G.S. 20-71.1, to the facts in this case? It is evident that that question must be answered in the negative.

In its charge the court also instructed the jury in part as follows:

"If the plaintiff has satisfied the jury by the greater weight of the evidence that the defendant violated either of the statutes pleaded, and has further satisfied the jury by the greater weight of the evidence that such violation was the proximate cause of the injury and death, then the jury should answer the first issue YES; otherwise they should answer the issue No."

The error in this charge is self-evident. Pope was the nonowner operator. He is the one who, plaintiff alleges, was guilty of negligence which proximately caused the injury and death of her intestate. Yet the court made Pope's negligence, if established by the greater weight of the evidence, alone sufficient to warrant an adverse answer to the first issue which is directed to the alleged liability of Mrs. Smith, the owner.

Errors of the nature of those here discussed do not usually appear in the records of cases tried by the able and conscientious judge who presided over the trial in the court below. That these inadvertences did occur is understandable. In reading the instructions to the jury, it is made to appear that when the court began its charge the first two issues were combined, and, as one issue, was directed to the question of the negligence of the two defendants. He was interrupted by counsel and requested to divide the issues into two. He granted this request, but in so doing inadvertently failed to withdraw from the consideration of the jury what he had theretofore said or in any wise correct or modify his former statements.

There are other exceptive assignments of error we need not now discuss.

May we suggest that in cases of this type where plaintiff seeks to establish liability on the part of the nonowner operator and the owner on the theory that the owner is liable under the doctrine of *respondeat superior,* it will materially simplify the charge and tend to eliminate error if issues in substance as follows are submitted to the jury, to wit:

Were the plaintiff's injury and death proximately caused by the negligence of (the nonowner operator)?

If so, was he, at the time, the agent or employee of (the owner) and engaged in the discharge of his duties as such?

For the reasons stated there must be a

New trial.

WILLIAM SAMUEL BAKER, JR., v. L. R. VARSER, CHAIRMAN, AND GEORGE B. GREENE, KINGSLAND VAN WINKLE, L. T. HARTSELL, JR., BUXTON MIDYETTE, JOHN H. HALL AND THOMAS H. LEATH, ALL MEMBERS OF THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, AND THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA.

(Filed 15 January, 1954.)

1. **Courts § 2—**

Where the court is without jurisdiction to enter an order, the order is a nullity.

2. **Appeal and Error § 1—**

The jurisdiction of the Supreme Court is derivative.

3. **Judges § 2a—**

The jurisdiction of a regular judge of the Superior Court over the subject matter of an action depends upon the authority granted to him by the Constitution and the laws of this State, and is fundamental.

4. **Courts § 2: Appeal and Error § 6c (1)—**

Objection to the jurisdiction may be made at any time during the progress of an action, and, even in the absence of objection, the court will take cognizance thereof *ex mero motu.*

5. **Evidence § 2—**

The courts will take judicial notice as to the residence of a regular Superior Court judge and the district to which he is assigned by rotation and whether he was assigned at any particular time to hold court in a particular district.

6. **Same—**

The courts will take judicial notice that a particular county is located in a particular judicial district.

7. **Same—**

The courts will take judicial notice as to the county in which a municipality of this State is situate.

8. **Judges § 2a—**

A regular judge of the Superior Court while assigned by rotation to hold the courts of the judicial district of his residence has no jurisdiction to hear a petition for *mandamus* in Chambers in another judicial district to which he is not assigned to hold court. Constitution of N. C., Art. IV, sec. 2; Art. IV, sec. 10; Art. IV, sec. 11; G.S. 7-65; G.S. 7-74.

9. **Mandamus § 1: Administrative Law § 6: Attorney and Client § 2:—**

Mandamus will not lie to review final action of the Board of Law Examiners, an administrative agency of the State, in refusing an application for permission to take the law examination, since *mandamus* is an exercise of original jurisdiction and may not be used as a substitute for an appeal.

10. Administrative Law § 6—

If there is no provision for appeal from an order of an administrative agency of the State the proper method for review is by *certiorari.*

11. Administrative Law § 6—

The courts will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable or arbitrary action, or disregard of law.

12. Same: Attorney and Client § 2: Mandamus § 5—

Where in an action for *mandamus,* the complaint liberally construed is sufficient to allege that the Board of Law Examiners, in denying plaintiff's application to take the law examination, acted in misapprehension as to what is in law "residence" within the purview of its rule, the applicant is entitled to have the Board act in the light of the true meaning of the term, and rather than dismiss the action, the complaint may be considered as an application for a writ of *certiorari.*

APPEAL by defendants from *Harris, J.,* in Chambers at Wilmington, N. C., on 3 August, 1953, and 5 August, 1953.

Petition for *mandamus,*—requiring defendants, Board of Law Examiners of the State of North Carolina, to permit plaintiff to receive the examination to be given applicants for admission to practice law in North Carolina in the city of Raleigh, on 4, 5 and 6 August, 1953.

The record on this appeal shows:

1. That summons in this action issued out of Superior Court of New Hanover County, North Carolina, on 3 August, 1953, and was served 3 and 4 August, 1953.

2. That on 3 August, 1953, plaintiff filed a complaint in this action in which these allegations appear:

(1) "That the plaintiff is a citizen and resident of the county of New Hanover and State of North Carolina."

(2) That the defendants L. R. Varsér, Chairman, and six other persons, naming them, are members of and constitute the Board of Law Examiners of the State of North Carolina,—"duly elected and qualified" . . . pursuant to the provisions of Article 4 of Chapter 84 of the General Statutes of North Carolina, 1943, as amended, and pursuant to the Rules, Regulations, Organization and Ethics of the North Carolina State Bar, which were duly promulgated and adopted in accordance with the provisions of "said article as amended." And "that the Board of Law Examiners of the State of North Carolina is the agency of the State of North Carolina duly authorized and empowered to conduct, and charged with the duty of conducting the examination of applicants for admission to practice law in the State of North Carolina."

"(3) That sometime prior to June 15, 1953, plaintiff filed with the Board of Law Examiners of the State of North Carolina his application

for admission to practice law in the State of North Carolina to be held in the City of Raleigh, North Carolina, on August 4, 5, 6, 1953, which said application was in due form and complied fully with the rules and regulations of said Board of Law Examiners.

"(4) The Secretary of said Board of Law Examiners having questioned plaintiff's residence and citizenship in North Carolina for a period of one year next preceding the date of filing application for admission to practice law in North Carolina, which is a condition precedent to the right to stand the examination for admission to practice law in the State of North Carolina, plaintiff requested the said Board of Law Examiners in writing to grant him a hearing, and on July 25, 1953, plaintiff was granted a hearing with respect to his residence and citizenship, at which time plaintiff testified to all of the essential facts concerning his residence and citizenship in North Carolina, and submitted himself to said Board for examination with respect thereto, which facts are hereinafter set forth.

"(5) That after said hearing the Board of Law Examiners, on July 27, 1953, through its Secretary, rejected plaintiff's application for permission to take said examination in a letter which reads as follows: 'The Board of Law Examiners instructed me to advise you that your application for admission to the examinations in August, 1953, has been rejected as you failed to satisfy the Board as to your citizenship and residence as contemplated under Rule 5. We return to you herewith refund in the amount of $22.00 as contemplated under the rules of the Board.'

"(6) Rule 5 of the Rules Governing Admission to Practice of Law (North Carolina General Statutes, 1943, Vol. 4, page 65) in part provides: 'Each applicant at the time of filing his application, must be a citizen of the United States, a person of good moral character, and must have been, for the twelve months next preceding the filing of his application, a citizen and resident of North Carolina. . . . He must be at least 21 years of age at the time of filing his application, or of such an age that he will become 21 within twelve months next after filing his application, provided that no license shall actually issue to any person until he has reached the age of 21.'

"(6) That, notwithstanding the fact that plaintiff has met all of the requirements of law and furnished to the defendants plenary evidence of the fact that he is a citizen of the United States and is and has been a citizen and resident of the State of North Carolina for more than twelve months next preceding the time of the filing of his application, the defendants have unreasonably, arbitrarily and erroneously refused and still refuse to permit plaintiff to stand said examination, and unless the Court shall, in the exercise of its extraordinary equitable jurisdiction, grant immediate relief to plaintiff and the defendants are ordered and directed by this Court to permit plaintiff to take said examination, plaintiff will

be denied his right to do so, in violation of the Constitution of the State of North Carolina and the Fourteenth Amendment to the Constitution of the United States."

(7) "That the facts with respect to plaintiff's resident and citizenship are as follows: That plaintiff was born in Charleston, S. C., on the 5th day of January, 1925, and lived with his parents in the States of South Carolina, Alabama, Georgia and Florida, and on the first day of February, 1945, when Plaintiff was twenty years of age, his parents removed from Augusta, Georgia, to Wilmington, North Carolina, where his parents have since continuously resided." Then there is set forth in chronological order details of his movements, associations and presence in connection with various places, and engagements, culminating with this: "Plaintiff, since removing to Wilmington, N. C., with his parents during his minority, has never acquired citizenship in any other State than North Carolina. Plaintiff has never had a domicile other than that of his parents and has never had any intention of changing his domicile from that of his parents in Wilmington, N. C., to any other place, and his presence in the City of Washington, D. C., for a predetermined fixed period was due to the exigencies of his employment by the Government."

"(8) There will not be another examination of applicants for admission to practice law until the first Tuesday in August, 1954, and if plaintiff is deprived of the right to take the examination to be given on August 4, 5 and 6, 1953, a year will elapse before he can apply for examination again, and he will thereby suffer irreparable injury and is without adequate remedy at law, and if plaintiff practices his chosen profession and enters into the practice of law, he would be forced to return to South Carolina for the better part of a year, or to enter government service for the better part of a year, in either of which events he would again be faced with the unfavorable attitude of the Board of Law Examiners with respect to his residence and citizenship in North Carolina.

"(9) That the General Assembly of 1953 passed an Act (Chapter 1012, Session Laws, 1953) amendatory of Section 84-24 of the General Statutes of North Carolina, which provides that appeals may be had from the rulings of the defendants in accordance with rules or procedures promulgated by the defendants and approved by the Supreme Court, which said Act was ratified April 24, 1953, and since the ratification of said Act such rules or procedures have not been promulgated, and therefore no means have been provided pursuant to said Act whereby preliminary questions as to the eligibility of an applicant for admission to the Bar in North Carolina can be judicially determined in such manner that the rights of a citizen and resident of North Carolina may not be prejudiced.

"Wherefore, plaintiff prays that the court enter an order herein directing the defendants to permit the plaintiff to receive the examination to be

given applicants for admission to practice law in North Carolina in the City of Raleigh, N. C., on August 4, 5, and 6, 1953, with the understanding and agreement that, in the event the plaintiff shall successfully pass such examination, and the defendants are still of the opinion that plaintiff is not a citizen and resident of North Carolina, his license to practice law in the State of North Carolina may be withheld until the question as to such residence and citizenship shall have been determined by the courts in a manner favorable to the plaintiff."

Thereupon, on 3 August, 1953, at Wilmington, North Carolina, the Honorable W. C. Harris, "Judge of the Superior Courts of North Carolina, entered and signed" an order worded as follows:

"This cause coming on to be heard before the undersigned Judge of the Superior Courts of North Carolina upon the duly verified complaint of the plaintiff, and being heard, and it appearing to the court that if the relief prayed is not granted plaintiff will suffer irreparable injury and that plaintiff is without adequate remedy at law, and it further appearing to the court that no harm can be suffered by the defendants by the granting of the relief prayed by the plaintiff:

"Now, Therefore, It is ordered and adjudged, in the exercise of the extraordinary equitable jurisdiction of the court, that the defendants be, and they are hereby directed to permit the plaintiff to stand the examination to be given applicants for admission to practice law in North Carolina in the City of Raleigh, North Carolina, on August 4, 5, and 6, 1953, and that, in the event the plaintiff shall successfully pass such examination, and the defendants are still of the opinion that plaintiff is not a citizen and resident of North Carolina, his license to practice law in the State of North Carolina may be withheld until the question as to such residence and citizenship shall have been determined by the courts in a manner favorable to the plaintiff."

Thereafter on 5 August, 1953, defendants excepted to the above order of Harris, J., entered as above set forth for that, among numerous other grounds, Judge Harris was "without jurisdiction and power to enter same," and "for that, upon the complaint itself, the plaintiff was not entitled to the relief sought and the order obtained."

And on 7 August, 1953, a copy of these exceptions was served upon the attorney for plaintiff by sheriff of Wake County, N. C.

And on 5 August, 1953, defendants made motion before Harris, J., that the order entered by him on 3 August, 1953, be revoked and vacated for that:

"(a) The plaintiff has failed to comply with the rules and regulations of the defendant Board relating to residence requirements; and

"(b) The plaintiff has been given a full, fair and impartial hearing before the defendant Board which Board has found that the plaintiff has

not complied with other rules and regulations duly adopted relating to applicants for admission to practice law in North Carolina; and

"(c) The plaintiff can suffer no irreparable injury by completing his residence requirements in the State of North Carolina and by complying with all other rules and regulations as is required of all other applicants; and

"(d) The order grants the entire relief as requested by the plaintiff in his complaint with the defendants not being served with notice prior to the signing thereof and the said order was entered before service of summons and complaint and without notice and opportunity to be heard; and

"(e) Said order was erroneously entered without jurisdiction and power to enter same, there being no jurisdiction conferred on the court over this action since Chapter 1012 of the 1953 Session Laws takes the Board of Law Examiners of North Carolina out from under the provision of Chapter 1094 of the 1953 Session Laws; and

"(f) The plaintiff has not exhausted his administrative remedies as provided by Chapter 1012 of the 1953 Session Laws."

This motion was denied by Judge Harris on the same day. And to the refusal of the Judge to allow the motion to vacate, and to sign an order vacating and dissolving the order entered on 3 August, 1953, defendants object, and excepted.

Defendants appeal to Supreme Court of North Carolina, and assign error.

R. P. Upchurch for plaintiff, appellee.
Bennett H. Perry for defendants, appellants.

WINBORNE, J. While appellants present on this appeal numerous other assignments of error, decision here turns upon the one based on exceptions to the orders involved, on the ground that, at the time and under the existing situation, Judge Harris did not have jurisdiction to enter them. If he did not have such jurisdiction, and it is held that he did not, his action in signing the orders is in law a nullity, and must be so declared. For the jurisdiction of the Supreme Court is derivative. *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445.

The jurisdiction of a regular judge of the Superior Court over the subject matter of an action depends upon the authority granted to him by the Constitution and laws of the State, 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 *Lewis v. Harris,* 238 N.C. 642, 78 S.E. 2d 715, and cases cited; also *Spaugh v. City of Charlotte, ante,* 149.

In *Burroughs v. McNeill, supra,* it is stated, in opinion by *Gaston, J.,* that: "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 is apparent, stop the proceedings."

In this connection the Court will take judicial notice of the fact that at the time of the signing of the orders in question, the Honorable W. C. Harris was the regularly elected judge of, and by rotation was assigned to hold the terms of the Superior Court of the Seventh Judicial District in the eastern division of North Carolina; that he was not then assigned to hold any term of Superior Court, regular or special, in New Hanover, or any other county, in the Eighth Judicial District in the eastern division of North Carolina; and that New Hanover County, in which this action was instituted, is located in the Eighth Judicial District aforesaid. General Statutes, Chap. 7, sub-chapter II, Article 7. *Greene v. Stadiem,* 197 N.C. 472, 149 S.E. 685.

And the record on this appeal discloses the fact that the orders in question were signed "at chambers . . . at Wilmington, N. C." In this respect the Court will take notice of the fact, also, that Wilmington, North Carolina, is situated in the county of New Hanover.

In this situation, did Judge Harris have jurisdiction to entertain a petition for, and to grant a writ of *mandamus* in the instant action? The Constitution and laws of North Carolina say "No."

The Constitution of North Carolina declares: That the judicial power of the State, other than a court for the trial of impeachments, a Supreme Court, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law, shall be vested in Superior Courts. Art. IV, Sec. 2.

In respect to "Judicial Districts for Superior Courts," the Constitution, Art. IV, Sec. 10, declares that "The General Assembly shall divide the State into a number of judicial districts . . . and shall provide for the election of one or more Superior Court judges for each district"; and that "There shall be a Superior Court in each county at least twice in each year . . ."

And in respect to "Judicial Districts: Rotation . . . Assignment of Superior Court Judges by Chief Justice," the Constitution, Art. IV, Sec. 11, declares that "Each judge of the Superior Court shall reside in the district for which he is elected"; that "the General Assembly may divide the State into a number of judicial divisions"; that "the judges shall preside in the courts of the different districts within a division successively; but no judge shall hold all the courts in the same district oftener than once in four years"; and that "The Chief Justice, when in his opinion the public interest so requires, may assign any Superior Court judge to hold one or more terms of Superior Court in any district."

These provisions of the Constitution have been implemented by enactments of the General Assembly: (1) dividing the State into twenty-one judicial districts for each of which a judge shall be chosen in the manner provided by law, G.S. 7-40; (2) numbering the districts first to twenty-first, composed of designated counties respectively, G.S. 7-68; (3) dividing the State into two judicial divisions, the Eastern and Western Judicial Divisions,—the counties included in judicial districts from one to ten, both inclusive, to constitute the Eastern Division, and those in judicial districts from eleven to twenty-one, both inclusive, to constitute the Western Division, G.S. 7-69; (4) directing that the judges of the Superior Court shall hold the courts of the several judicial districts successively, according to a specified order and system—the judges resident in the Eastern Judicial Division to hold the courts in that division, and the judges in the Western Judicial Division to hold the courts in that division, for spring and fall terms successively,—the judge riding any spring circuit to hold all the courts which fall between January and June, both inclusive, and the judge riding any fall circuit to hold all the courts which fall between July and December, both inclusive, G.S. 7-74; also *West v. Woolworth Co.*, 214 N.C. 214, 198 S.E. 659; and (5) requiring that every judge of the Superior Court shall reside in the district for which he is elected; that the judges shall preside in the courts of the different district successively, but no judge shall hold the courts in the same district oftener than once in four years; and that the *Chief Justice,* when in his opinion the public interest so requires, may assign any Superior Court judge to hold one or more terms of Superior Court in any district. G.S. 7-46, as amended by 1951 Session Laws, Chap. 471, Sec. 2.

Moreover, the General Assembly in respect to "Jurisdiction in vacation or at term" amended G.S. 7-65 to read as follows: "In all cases where the Superior Court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the Superior Court in vacation, or in term time, at their election. The resident judge of the judicial district and any special Superior Court judge residing in the

district and the judge regularly presiding over the courts of the district, shall have concurrent jurisdiction in all matters and proceedings where the Superior Court has jurisdiction out of term; Provided, that in all matters and proceedings, not requiring the intervention of a jury or in which trial by jury has been waived, the resident judge of the judicial district and any special Superior Court judge residing in the district shall have concurrent jurisdiction with the judge holding the courts of the district, and the resident judge and any special Superior Court judge residing in the district, in the exercise of such concurrent jurisdiction, may hear and pass upon such matters and proceedings, in vacation, out of term, or in term time . . ."

Thus it is manifest that under the statute relating to rotation of judges, G.S. 7-74, a regular Superior Court judge assigned to a district is the judge of that district for six months beginning 1 January, or 1 July as the case may be, *Hamilton v. Icard,* 112 N.C. 589, 17 S.E. 519, and *Reidsville v. Slade,* 224 N.C. 48, 29 S.E. 2d 215, and within such period, has jurisdiction of all "in chambers" matters arising in the district, but that such jurisdiction is limited to such matters. See *Shepard v. Leonard, supra.*

In this *Shepard case,* speaking to the subject, *Barnhill, J.,* has stated: "It may be said that a regular judge holding the courts of the district has general jurisdiction of all 'in chambers' matters arising in the district . . . The general 'vacation' or 'in chambers' jurisdiction of a regular judge arises out of his general authority. Usually it may be exercised anywhere in the district and it is never dependent upon and does not arise out of the fact that he is at the time presiding over a designated term of court or in a particular county. As to him, it is limited, ordinarily, to the district to which he is assigned by statute. It may not be exercised even within the district of his residence except when specially authorized by statute," citing *Ward v. Agrillo,* 194 N.C. 321, 139 S.E. 451, and *Howard v. Coach Co.,* 211 N.C. 329, 190 S.E. 478.

Too, it may be noted that G.S. 7-65, thereafter amended, gives concurrent jurisdiction as hereinabove shown. But the jurisdiction is not extended beyond the limits of the district. Hence the fact that Judge Harris, at the time here involved, was both the regular judge holding the courts of, and the resident judge of the Seventh Judicial District did not enlarge his jurisdiction. Rather, under such circumstances, his jurisdiction "in vacation" and "in chambers" was limited to matters arising only in the Seventh Judicial District.

It is contended, however, that under the provisions of G.S. 1-493 judges of the Superior Court have jurisdiction to grant injunctions and restraining orders in all civil actions and proceedings. True enough! But we are here dealing with *mandamus,* and not with injunctions or restraining orders.

Here the Board of Law Examiners, an administrative agency of the State of North Carolina, had taken final action on a matter within its jurisdiction. Plaintiff, being dissatisfied with the ruling of the Board, made after hearing, seeks a judicial review, and a reversal of the action so taken by the Board. For this purpose, "*mandamus* is not a proper instrument," as stated by this Court in opinion by *Seawell, J.*, in *Warren v. Maxwell,* 223 N.C. 604, 27 S.E. 2d 721, citing *Pue v. Hood, Commr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896. In the *Pue case,* opinion by *Barnhill, J.*, it is said that: "The issuance of a writ of *mandamus* is an exercise of original and not appellate jurisdiction . . . and is never used as a substitute for an appeal."

Moreover, in the *Warren case, supra,* it is said: "If there has been an error in law, prejudicial to the parties, or the board has exceeded its authority, or has mistaken its power, or has abused its discretion—where the statute provides no appeal—the proper method of review is by *certiorari,*" citing numerous cases.

So, if it be conceded that there was in effect no provision for an appeal from the Board of Law Examiners, the statute, G.S. 1-269, provides that writ of *certiorari* is authorized as heretofore in use.

In this connection the Court will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable or arbitrary action, or disregard of law. See *Utilities Com. v. Ray,* 236 N.C. 692, 73 S.E. 2d 870, opinion by *Denny, J.*

When tested by this rule the complaint of plaintiff, liberally interpreted, seems to allege that the Board of Law Examiners in considering the question of his residence within the State for twelve months, acted in misapprehension of what is in law "residence" within the purview of rule five governing admission to the practice of law in the State of North Carolina. If that be true, he would be entitled to have the Board act in the light of the true meaning of the term. *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324, and numerous cases cited in Shepard's N. C. Citations of headnote 3 of the *McGill case.*

Hence, rather than to dismiss the action, it is deemed proper that the complaint may be considered an application to the Superior Court for a writ of *certiorari* to the end that the record of pertinent proceeding in respect to question of rule applied in determining residence of plaintiff within the State in connection with his application for bar examination, may be judicially reviewed.

Hence the orders from which appeal is taken are hereby reversed, and the proceeding is remanded to Superior Court for further consideration in the light of this opinion.

Reversed and remanded.

ROBERT ALEXANDER WINESETT v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA.

(Filed 15 January, 1954.)

1. Automobiles § 34b—

The Department of Motor Vehicles has exclusive power to suspend or revoke a license to operate a motor vehicle.

2. Same—

Where the Department of Motor Vehicles suspends or revokes a driver's license under the provisions of G.S. 20-16, the Department must notify the licensee, and upon request afford him a hearing which is *de novo,* with right of appeal as prescribed by statute, and where the Department elects to proceed under this statute it may not contend that the licensee has no right of appeal because of a conviction of, or a plea of *nolo contendere* to, an offense requiring mandatory revocation of license. G.S. 20-25.

3. Same—Plea of nolo contendere is insufficient evidence to support suspension of driver's license in proceeding under G.S. 20-16.

Plaintiff entered a plea of *nolo contendere* in a local court to a charge of driving while under the influence of intoxicating liquor and the clerk of that court sent the record to the Commissioner of Motor Vehicles. The Department of Motor Vehicles elected to proceed in accordance with G.S. 20-16, suspended the license, granted the licensee a hearing, and denied his request that his license be returned, basing its action solely upon the record showing that licensee had entered a plea of *nolo contendere* to the charge of drunken driving. *Held:* The hearing was in another forum, and the plea of *nolo contendere* could not be used against licensee as an admission of guilt and was insufficient, standing alone, to constitute "satisfactory evidence" of defendant's guilt of the charge, and the Department's refusal to return the license was error.

4. Criminal Law § 17c—

While a plea of *nolo contendere* establishes defendant's guilt for the purpose of judgment in that particular prosecution, such plea cannot be considered as an admission of guilt in any other proceeding, criminal or civil.

5. Same—

A plea of *nolo contendere* cannot be entered as a matter of right, but is pleadable only by leave of the court, and both the court and the prosecuting attorney may decline to accept such plea in cases where the due administration of justice might be improperly affected.

6. Automobiles § 34b: Criminal Law § 62f—

While the Department of Motor Vehicles is given the exclusive authority to suspend or revoke a driver's license, a court, either upon a plea of guilty or *nolo contendere,* may make the surrender of defendant's driver's license a condition upon which prison sentence or other penalty is suspended.

PARKER, J., concurring.

APPEAL by respondent from *Bone, J.*, October 12, 1953, from WASHINGTON. Affirmed.

This was a civil proceeding under G.S. 20-16 to review an order of the Commissioner of Motor Vehicles suspending for one year the operator's license of the petitioner.

The petitioner filed his petition in accord with the provisions of the statute before Judge Bone, resident judge of the Second Judicial District, setting forth the following material facts:

The petitioner is a resident of Washington County. A motor vehicle operator's license was duly issued him by the Commissioner of Motor Vehicles and this license has not expired. On 26 June, 1953, the petitioner was arraigned in the Trial Justice Court of Pasquotank County charged with operating a motor vehicle while under the influence of intoxicating liquor and petitioner entered a plea of *nolo contendere,* which plea was accepted by the prosecuting officer of the court and by the court. Following the rendition of judgment therein the clerk of that court sent a record thereof to the Commissioner of Motor Vehicles which record showed that petitioner had pleaded *nolo contendere.* Thereafter the respondent served notice on petitioner that his motor vehicle operator's license had been suspended for one year, the notice showing that the cause of suspension was under G.S. 20-16 for that the petitioner had "committed an offense for which mandatory revocation of license is required upon conviction."

The respondent Commissioner of Motor Vehicles exercised his authority in the premises solely upon the record that petitioner had entered a plea of *nolo contendere.* Thereafter petitioner filed with respondent request for hearing, which was subsequently granted, and at said hearing the only evidence before the hearing officer was the record that petitioner had entered plea of *nolo contendere* in the Trial Justice Court of Pasquotank County. Petitioner objected to said record being used against him, but the hearing officer overruled his objection and concluded that the record afforded satisfactory evidence that petitioner had committed an offense for which mandatory revocation of license was required upon conviction, and thereupon denied petitioner's request that his license be returned. Petitioner alleged the action of respondent was erroneous and without authority of law.

The respondent filed answer in which he admitted the facts alleged but maintained that his action in the premises was lawful and proper, and that the record of petitioner's plea of *nolo contendere* to the charge of operating a motor vehicle while under the influence of intoxicating liquor was satisfactory evidence that petitioner had committed the offense charged.

Judge Bone found the facts to be substantially as alleged and that "all of the actions of respondent were taken and based solely upon the showing that petitioner entered the plea of *nolo contendere* as herein set out." Thereupon it was adjudged that the action of the respondent in suspending petitioner's operator's license and denying his request for return thereof was without authority of law, and that petitioner was entitled to return of his license.

Respondent excepted and appealed.

Bailey & Bailey for petitioner, appellee.

Attorney-General McMullan and Samuel Behrends, Jr., Member of Staff, for respondent, appellant.

DEVIN, C. J. The appeal of the Commissioner of Motor Vehicles presents for decision the question whether the record that the petitioner in a local court in Pasquotank County had entered a plea of *nolo contendere* to the charge of driving a motor vehicle while under the influence of intoxicating liquor was alone satisfactory evidence in a hearing before the Commissioner under G.S. 20-16, and authorized the Commissioner to suspend his driver's license and to deny his plea for its return.

The statutes regulating the operation of motor vehicles on the highways created the Department of Motor Vehicles and gave to this department the exclusive power to suspend or revoke driver's license for the causes set out in the statutes. *S. v. Warren,* 230 N.C. 299, 52 S.E. 2d 879.

Section 20-16 of the General Statutes provides that the Department of Motor Vehicles "shall have authority to suspend the license of any operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee . . . has committed an offense for which mandatory revocation of license is required upon conviction."

By subsection (c) of this section (G.S. 20-16) it is provided that upon suspending the license of any person as authorized by this section, the department shall notify the licensee, and upon his request shall afford him a hearing. Upon such hearing the duly authorized agent of the department may administer oaths, issue subpoenas and hear evidence, and may rescind or extend the order of suspension. The effect of this subsection is that all suspensions and revocations of driving licenses under this section (G.S. 20-16), made in the discretion of the department, are reviewable by the method prescribed. *In re Wright,* 228 N.C. 584, 46 S.E. 2d 696. The hearing under this section is *de novo. In re Wright,* 228 N.C. 301, 45 S.E. 2d 370.

Section 20-24 of the General Statutes provides in subsection (b) that every court having jurisdiction of offenses committed in violation of laws

relating to the operation of motor vehicles on the highways shall forward to the Department a record of the conviction of any person thereunder.

Section 20-17 of the General Statutes, which is codified under the heading "Mandatory revocation of license by Department," provides that the Department of Motor Vehicles "shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for . . . driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug."

G.S. 20-25 provides for right of appeal to the courts in all cases where license has been denied, suspended or revoked, "except where such cancellation is mandatory under the provisions of this article," and prescribes the machinery for the exercise of the right of appeal by filing petition for hearing in the Superior Court or before the resident judge of the District, and thereupon the court or judge is vested with jurisdiction to hear and determine the question.

Thus it would seem that the mandatory revocation prescribed by G.S. 20-17 in consequence of conviction for driving a motor vehicle while under the influence of intoxicating liquor is not reviewable under G.S. 20-25. *In re Wright, supra.*

But, in this case, it expressly appears from the record that the respondent proceeded under G.S. 20-16, and that the record before him showed that the petitioner had entered a plea of *nolo contendere* to the charge in the Pasquotank County Court. It was also admitted that the petitioner's request for a hearing was granted and that on the hearing respondent acted solely on the record furnished him by the Pasquotank Court and upon that denied petitioner's plea.

Judge Bone was of opinion that the ruling of respondent in the proceeding before him, based on the showing of a plea of *nolo contendere* in the Trial Court of Pasquotank County, was erroneous, and entered judgment accordingly.

The respondent's appeal brings the case here for review.

Unquestionably under the statute quoted the department had authority to suspend the petitioner's license to operate a motor vehicle without preliminary hearing upon a showing by its record or other satisfactory evidence that he had been convicted of the offense with which he was charged in the Pasquotank Court. G.S. 20-16 (a) 1. The department, however, proceeded upon notice, in accordance with the statute, G.S. 20-16, in view of the record of petitioner's plea in the Trial Court, and granted him a hearing. Petition to the resident judge of his District was in the nature of an appeal from an adverse ruling on that hearing. This raised the question whether in this proceeding the fact that he had pleaded *nolo contendere* in the criminal action in Pasquotank County could be used against him. We observe that the record which was agreed

to by the State denominates this proceeding as a "civil action." Certainly it was a different proceeding in another forum. The established rule in this jurisdiction is that a plea of *nolo contendere* does not estop the defendant to deny his guilt in a civil action based on the same facts. *S. v. Burnett,* 174 N.C. 796, 93 S.E. 473. Nor can this plea be used against him as an admission in an action in the nature of a civil action, or as an admission in any other criminal action. *S. v. Thomas,* 236 N.C. 196, 72 S.E. 2d 525; *In re Stiers,* 204 N.C. 48, 167 S.E. 382. Hence it would seem that petitioner's objection to the use in this proceeding of his plea in the criminal case in Pasquotank County should have been sustained, and the respondent's conclusion based solely thereon was without legal foundation.

However, it is urged by the respondent that under the statutes G.S. 20-16 and G.S. 20-17 the offense of driving an automobile on the highway while under the influence of intoxicating liquor is one "for which mandatory revocation of license is required upon conviction," and that the provisions for review of the order of the Commissioner under G.S. 20-25 expressly excludes cases where revocation is mandatory upon conviction. In such case the action of the Commissioner is not reviewable under G.S. 20-25. *In re Wright, supra.* But the record states the proceedings were under G.S. 20-16, which provides for a review. In such rehearing the plea of *nolo contendere* is not equivalent to a conviction or a confession of guilt. *In re Stiers,* 204 N.C. 48, 167 S.E. 382.

The statute G.S. 20-16 declares that the authority of the department to suspend or revoke an operator's license must be based upon showing by the record or other satisfactory evidence that the licensee has committed an offense which upon conviction requires mandatory revocation of license. The statute uses the phrase "satisfactory evidence." Satisfactory evidence is such as a reasonable mind might accept as adequate to support a conclusion. It is equivalent to sufficient evidence, which is defined "to be such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it was adduced." 32 C.J.S. 1043.

The plea of *nolo contendere* to a criminal charge or indictment is one which has long been recognized by the courts of this State. It means "I will not contest it." Black's Law Dictionary; 66 C.J.S. 598. By it the defendant says merely, "I do not wish to contend with the State." *S. v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695. When accepted by the prosecution and approved by the Court it ends the case and subjects the defendant to the judgment of the court as if guilt had been confessed. But this plea has a double implication. So far as the court is concerned, in that court and in that particular case, it authorizes judgment as upon conviction by verdict or plea of guilt. *S. v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695.

But so far as the defendant is concerned, he is at liberty in all other proceedings, civil and criminal, to assert his innocence, and his plea may not be considered as an admission of guilt. *In re Stiers, supra; S. v. Thomas, supra.* So it would seem to be the established rule that it requires more than the record of a plea of *nolo contendere* to constitute conviction in all respects in so far as the pleader is concerned.

In this connection we think it proper to call attention to the fact that it is not required of the solicitor or other prosecuting officer, or the Trial Court, to accept the proffered plea of *nolo contendere.* The plea cannot be entered as a matter of right but is pleadable only by leave of the court. *S. v. McIntyre,* 238 N.C. 305, 77 S.E. 2d 698. Both the court and the prosecuting attorney may well decline to accept such plea in cases where the due administration of justice might be improperly affected, for when the plea is accepted it is accepted with all the implications and reservations which under the law and accurate pleading appertain to that plea. It may be noted in this connection that there is authority for holding that a defendant may be impeached by cross-examination in another proceeding by being asked if he had not pleaded *nolo contendere* to a criminal charge (58 A.J. 397); and that the plea may be regarded as such a conviction as would warrant severer punishment as a second offense. 25 A.J. 265.

The reasoning upon which the decisions in *In re Stiers* and *S. v. Thomas* were made to rest would seem to be decisive of the question of the effect of an accepted plea of *nolo contendere.*

In the *Stiers case* the defendant, an attorney at law, pleaded *nolo contendere* to an indictment charging embezzlement. Under the statutes then in force disbarment proceedings predicated upon conviction for a felony were instituted. But this Court held that the fact that he had pleaded *nolo contendere* could not be used against him in a disbarment proceeding predicated on conviction for a felony. The Court held that a plea of *nolo contendere* does not amount to a conviction or confession in open court. "The mere introduction of a certified copy of the indictment, and judgment thereon, based upon a plea of *nolo contendere,* is not sufficient to deprive an attorney of his license." And in the *Thomas case* the rule was extended to embrace other criminal actions as well as civil proceedings based on the same facts, and it was held the plea could not in another proceeding be construed as an admission of guilt.

The question here presented has been considered by this Court in numerous cases and the decisions thereupon tend to support the ruling below. *S. v. Oxendine,* 19 N.C. 435; *S. v. Burnett,* 174 N.C. 796, 93 S.E. 473; *In re Stiers,* 204 N.C. 48, 167 S.E. 382; *S. v. Parker,* 220 N.C. 416, 17 S.E. 2d 475; *S. v. Ayers,* 226 N.C. 579, 39 S.E. 2d 607; *S. v. Beasley,* 226 N.C. 580, 39 S.E. 2d 607; *S. v. Stansbury,* 230 N.C. 589, 55 S.E. 2d

185; *S. v. Jamieson,* 232 N.C. 731, 62 S.E. 2d 52; *S. v. Horne,* 234 N.C. 115, 66 S.E. 2d 665; *S. v. Thomas,* 236 N.C. 196, 72 S.E. 2d 525; *S. v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695; *S. v. McIntyre,* 238 N.C. 305, 77 S.E. 2d 698; 152 A.L.R. 280.

The rules laid down by this Court in the cases cited have been discussed with reference to the effect of the plea of *nolo contendere* in a subsequent proceeding in a different forum. These cases do not restrict the power of the court in which the plea is accepted to render any proper judgment in the same case. If the suspension or revocation of the pleader's right to operate a motor vehicle on the highway were a part of the judgment in the case in which the plea was tendered the defendant would have no cause for complaint. But the statutes have now placed this authority exclusively in the Department of Motor Vehicles, though surrender of driver's license might be by the court made a condition, agreed to by defendant, upon which prison sentence or other penalty is suspended, whether the plea be guilty or *nolo contendere.*

The record of a plea of *nolo contendere* in the criminal action in the Pasquotank Court was not competent in this proceeding under G.S. 20-16 as an admission of guilt, nor should it be held to constitute sufficient evidence to sustain the ruling of the respondent. Hence we think the respondent was in error in denying petitioner's plea. The efforts of the Commissioner of Motor Vehicles to discourage violations of the statutes regulating the operation of motor vehicles on the highways by the revocation of drivers' licenses in all cases authorized by the statutes are to be commended. The operation of a motor vehicle on the highway by one under the influence of intoxicating liquor constitutes a menace to the most circumspect user of the public highways. However, the right to operate a motor vehicle on the highway by a licensed operator is granted by the State, and one should not be deprived of this right except as authorized by statute, in accordance with prescribed procedure, and in accord with the established rules of law.

For the reasons stated we conclude that the court below has properly interpreted the rule as to the effect of an accepted plea of *nolo contendere* when considered in connection with G.S. 20-16, and that the judgment rendered must be

Affirmed.

PARKER, J., concurring: I concur in the scholarly opinion written by our beloved and illustrious *Chief Justice,* who has served the State so long and so ably to the admiration and satisfaction of all our people. I have known him all my life.

I agree with the statement that a plea of *nolo contendere* cannot be used in a subsequent proceeding in a different forum, and that such a

plea was not competent in this proceeding under G.S. 20-16 as an admission of guilt, nor should it be held to sustain the ruling of the respondent. However, a plea of *nolo contendere* "is equivalent to a plea of guilty in so far as it gives the court the power to punish. It seems to be universally held that when the plea is accepted by the court, sentence is imposed upon a plea of guilty." *In re Stiers,* 204 N.C. 48, 167 S.E. 382.

G.S. 20-24, subsection (a), provides that whenever any person is convicted of any offense for which this article makes mandatory the revocation of the license of such person by the Department of Motor Vehicles, the court in which such conviction is had shall require the surrender to it of the license then held by the person so convicted, and the court shall forward the same together with a record of such conviction to the Department.

G.S. 20-17, which is captioned "Mandatory Revocation of License by Department," states that the Department shall forthwith revoke the license of a person upon receipt of a record of such person's conviction, when such conviction has become final, for driving a motor vehicle while under the influence of intoxicating liquor.

All the authorities agree that when a plea of *nolo contendere* is accepted by the court, sentence is imposed as upon a plea of guilty by the court accepting the plea. Mandatory revocation of license is part of the punishment for driving an automobile while under the influence of intoxicating liquor. When the court in Pasquotank County accepted the defendant's plea of *nolo contendere,* G.S. 20-24, subsection (a), required it to take up the license of the petitioner and to forward the same together with a record of the plea to the Department. Upon receipt of such license and record by the Department, G.S. 20-17 requires a mandatory revocation of the defendant's license. Such mandatory revocation by the Department seems to me to be as much the performance of a ministerial duty in the petitioner's case in Pasquotank County, as the Clerk of the Court in Pasquotank County entering the judgment of the court in the case in the Minutes of that Court. I think it is the same case, the same proceeding, the same forum.

Therefore, in my opinion, it is the duty of the Department now to revoke the petitioner's license under G.S. 20-17; and under said statute to revoke the licenses of all persons who have entered pleas of *nolo contendere* to a charge of driving an automobile while under the influence of intoxicating liquor, upon receipt of a record from a court in the State showing such a plea was entered.

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, PETITIONER, v. E. M. BLACK AND WIFE, ZELLA R. BLACK, AND LOUISA J. BLACK, DECEASED, AND E. M. BLACK, ADMINISTRATOR, RESPONDENTS.

(*Filed 15 January, 1954.*)

1. Appeal and Error § 39c—

In a proceeding to assess compensation for the taking of part of a dairy farm upon which a spring was located, the admission of testimony of another dairy farm owner that he had five springs on his property and "valued" his springs is not held for prejudicial error, since the testimony could not have influenced the jury in the decision of the case.

2. Same—

An exception to the exclusion of testimony cannot be held harmful when the record fails to show what the testimony would have been if the witness had been permitted to answer the questions.

3. Trial § 15—

Where an answer is not responsive to the question the adverse party must request that it be stricken or the jury instructed not to consider it, and an objection to the question alone is insufficient.

4. Eminent Domain §§ 8, 18e—Compensation must be based on right acquired as of the time of the taking.

In a proceeding to assess compensation for an easement for highway purposes, an instruction by the court that the landowner is entitled to recover compensation for the part taken and compensation for injury to the remaining portion of the land, offset by general and special benefits, G.S. 136-19, will not be held erroneous on the ground that it permits recovery for the fee when only an easement is taken and precludes any reduction of compensation on account of any use which the landowner might be permitted to make of the portion of the right of way not covered by the highway, since the petitioner acquires the unrestricted right to use in perpetuity the entire surface of the right of way for highway purposes, and any possibility of abandonment of the easement is too remote and uncertain for consideration on the question of compensation.

5. Eminent Domain § 8—

Compensation for the taking of private property for a public use must be determined as of the time of the taking and must be based upon the rights acquired by the condemnor at that time and not on the basis of the condemnor's subsequent exercise of such rights, and therefore the fact that the condemnor may thereafter allow a permissive use of a part of the right of way is not to be considered.

6. Eminent Domain § 18e—

In a proceeding to assess compensation for the taking of an easement for highway purposes, an instruction that it is the duty of the jury in assessing compensation to leave the owners of the land "in as near the same position in respect to their entire tract as you can," the burden being upon them to show by the greater weight of the evidence the damages, if any,

and that the possibility of abandonment of the easement was too remote for consideration in passing upon the question of compensation, ***is held*** **without error.**

APPEAL by petitioner from *Hubbard, Special Judge,* and a jury, at September Term, 1953, of DAVIDSON.

Special proceeding to determine compensation payable to landowners on account of the condemnation of a right of way for a public highway heard *de novo* at term on the appeals of both sides from the judgment of the clerk confirming the report of the assessing commissioners.

These are the facts:

1. During the fifteen years next preceding 1 April, 1952, E. M. Black, Zella R. Black, and Louisa J. Black operated a dairy upon their thirty-six acre farm in a rural section of Davidson County. A narrow and little traveled dirt road belonging to the county highway system bisected the farm, separating the dwelling, the dairy buildings, and the small pasture on the southwest side from the large pasture on the northeast side. The grade of the road was on a virtual level with abutting parts of the farm. In consequence, cattle could be driven without difficulty from the portion of the farm lying southwest of the road to the large pasture, which was plentifully supplied with water by a spring.

2. On 1 April, 1952, the State Highway and Public Works Commission actually appropriated substantially all of the roadbed of the dirt road, and additional portions of the farm totaling four acres and lying on both sides of the dirt road to public use as "the 150-foot" right of way for a relocated main traveled highway, to wit, United States Highway 64. Subsequent to such appropriation, the State Highway and Public Works Commission altered the grade of the right of way in a drastic manner, and constructed thereon a "50-foot" hard surfaced highway, which cuts the remainder of the farm into two parts virtually equal in area.

3. Since the parties were unable to agree as to compensation, the State Highway and Public Works Commission, as petitioner, brought this special proceeding against E. M. Black, Zella R. Black, and Louisa J. Black, as respondents, to determine the compensation payable to them on account of the condemnation of the right of way covering the additional four acres, and to obtain a decree vesting "said easement . . . in the petitioner . . . for the present and future use thereof by the State Highway and Public Works Commission, its successors and assigns, for all purposes for which the said State Highway and Public Works Commission is authorized by law to subject the same." Louisa J. Black, whose interest in the farm was an unassigned dower right, died during the pendency of the proceeding, and her administrator was made a party in her stead.

4. Both sides offered testimony bearing on the question of compensation at the trial *de novo* before Judge Hubbard and the jury. The evidence for the respondents tended to show that the additional acreage taken for the right of way had been highly developed in pasturage; that the drastic alteration in the grade of the right of way prevented the transfer of cattle from the portion of the farm containing the dairy buildings to the remainder of the large pasture lying northeast of the highway; that the new highway itself covered and destroyed the spring which had formerly supplied water to the large pasture; and that as the immediate result of these matters the market value of the farm was substantially impaired for dairying and all other adaptable purposes.

5. The jury returned this verdict: "What amount of damages, if any, are . . . respondents entitled to recover from the petitioner . . . for the taking of the easement of right of way across their lands as set out in the proceedings herein? Answer: $5,000.00."

6. Judge Hubbard entered a judgment adjudging that the respondents are entitled to recover $5,000.00 from the petitioner as compensation for the condemnation of the additional four acres for the right of way for the highway, and declaring that the petitioner acquired "the additional easement of right of way in . . . the lands of the respondents for all purposes for which the said Commission is authorized by law to subject the same."

7. The petitioner excepted to the judgment and appealed, assigning errors.

R. Brookes Peters, E. W. Hooper, and Stoner & Wilson for the petitioner State Highway and Public Works Commission, appellant.

DeLapp & Ward and Hubert E. Olive for the respondents E. M. Black, Zella R. Black, and E. M. Black, Administrator of Louisa J. Black, deceased, appellees.

ERVIN, J. We deem it necessary to take specific note of only four of the twenty-eight exceptions of the petitioner to rulings of the trial judge admitting, excluding, striking out, or refusing to strike out, evidence.

Exception 18 covers the admission of the simple statement of George Hedrick, a witness for the respondents, that he had "a bunch of cattle . . . and five springs" on his farm, and that he "valued" his springs. It is apparent that the receipt of this simple statement could not have influenced the jury in the decision of the case. In consequence, its admission must be adjudged harmless to the petitioner. *S. v. Bennett,* 237 N.C. 749, 76 S.E. 2d 42; *S. v. Glover,* 208 N.C. 68, 179 S.E. 6. Exceptions 25 and 26 are addressed to the action of the trial judge in sustaining objections of the respondents to questions put to the petitioner's witness T. C. Johnson by counsel for the petitioner. These exceptions cannot be

considered because the case on appeal does not show what the evidence of the witness would have been if he had been permitted to answer the questions. *Francis v. Francis,* 223 N.C. 401, 26 S.E. 2d 907. Exception 27 likewise presents nothing for review. This exception is directed solely to the action of the trial judge in overruling an objection of the petitioner to a question asked its witness T. C. Johnson by counsel for the respondents on cross-examination. The answer of the witness was not responsive to the question. If counsel for the petitioner considered the answer objectionable, they ought to have requested the trial judge to strike it out or to instruct the jury to disregard it. *Hodges v. Wilson,* 165 N.C. 323, 81 S.E. 340. The rulings on evidential matters covered by the other twenty-four exceptions are free of legal inaccuracies.

This brings us to Exceptions 29, 30, and 31, which are directed to the charge.

When the recent case of *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479, was before us, we made these observations in respect to the measure and elements of compensation where part of a tract of land is condemned by the State Highway and Public Works Commission for the right of way of a public highway: "It is a fundamental principle in this jurisdiction that the taking of private property for public use imposes upon the condemnor a correlative duty to make just compensation to the owner of the property appropriated . . . If the State Highway and Public Works Commission and a landowner are unable to agree upon the compensation justly accruing to the latter from the taking of property by the former, the matter is to be determined once for all in a condemnation proceeding instituted by either party under the provisions of Chapter 40 of the General Statutes. G.S. 136-19. Where only a part of a tract of land is appropriated by the State Highway and Public Works Commission for highway purposes the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. *The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion,* which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway. G.S. 136-19; *Highway Com. v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314."

In instructing the jury in respect to the measure and elements of compensation recoverable by the respondents on account of the condemnation by the petitioner of the additional right of way easement across their farm, the trial judge employed the formula set out in the above quotation from the *Proctor case.*

The petitioner noted Exception 29 to the part of the formula embodied in the italicized words. The petitioner challenges the validity of this part of the formula on the twofold ground that it permits the landowner to recover excessive compensation and that it is without support in sound precedent.

The petitioner lays hold on these general arguments to support its thesis that the part of the formula under attack permits the landowner to recover excessive compensation: That there is a vast difference between an easement and a fee simple estate in land; and that the part of the formula in question allows the landowner, who retains the fee, to recover from the State Highway and Public Works Commission, which acquires an easement, the full market value of the strip of land covered by the right of way, the same as if the fee in the strip were also condemned. The petitioner augments these general arguments with the specific assertion that the part of the formula under attack results in the award of excessive compensation to the landowner because it precludes any reduction of compensation on account of any use which the landowner might make of any portion of the strip, or on account of the possibility that the public road-governing authorities might some day abandon the use of the strip for highway purposes and thus permit all rights in the strip to revert to the then owner of the fee.

The petitioner advances these arguments to sustain its theory that the part of the formula challenged by Exception 29 is without support in sound precedent: That this part of the formula is relevant only where a portion of a tract of land is appropriated to public use in fee simple; that the suggestion that this part of the formula applies where a portion of a tract of land is subjected to an easement for public use is not to be found anywhere except in *Proctor v. Highway Commission, supra,* which involved the appropriation of an easement in a portion of a tract of land; that the court made such suggestion in the *Proctor case* solely upon the authority of *Highway Com. v. Hartley, supra;* and that the court fell into error in so doing because the *Hartley case* involved the condemnation of a portion of a tract of land for Blue Ridge Parkway purposes in fee simple and for that reason had no application to the *Proctor case.*

The contention of the petitioner that the part of the formula under attack permits the landowner to recover excessive compensation from the State Highway and Public Works Commission will not survive an analysis when form is laid aside in favor of substance. Whether there is any substantial difference between an easement and a fee simple estate in land depends upon the nature and extent of the easement. Where it exercises the power of eminent domain vested in it by the statute codified as G.S. 136-19 and in that way appropriates the land of another to public use as the right of way for a public highway, the State Highway and

Public Works Commission acquires once for all the complete legal right to use the entire right of way for highway purposes as long as time shall last. From the viewpoint of practicality, the difference between an easement of this nature and extent and a fee simple estate in the land covered by the right of way is negligible.

A review of relevant decisions demonstrates the invalidity of the contention of the petitioner that the part of the formula under attack is without support in sound precedent. The formula used by the trial judge in charging the jury on the measure and elements of compensation applicable to the easement involved in this proceeding did not have its genesis in the *Proctor case.* Moreover, it is not based upon a misconstruction of the *Hartley case.* When all is said, the formula constitutes a rule of law which has been recognized and enforced in North Carolina in cases involving the acquirement of perpetual easements by condemnation since the "time whereof the memory of man runneth not to the contrary."

The rule of law is simply this: Where the State, or one of its agencies or subdivisions, or a public utility takes by condemnation a perpetual easement entitling it to occupy and use the entire surface of a part of a tract of land, the landowner is entitled to recover just compensation from the condemnor for the easement taken, and just compensation in such case includes the market value of the part of the tract covered by the easement and the damage done to the remainder of the tract by the taking of the easement, subject to such deduction or set-off for benefits, special or general, resulting to the remainder of the tract from the taking of the easement as the statute authorizing the taking may specify. *Bailey v. Highway Commission,* 214 N.C. 278, 199 S.E. 25; *Light Co. v. Rogers,* 207 N.C. 751, 178 S.E. 575; *Light Co. v. Reeves,* 198 N.C. 404, 151 S.E. 871; *Moses v. Morganton,* 195 N.C. 92, 141 S.E. 484; *Power Co. v. Hayes,* 193 N.C. 104, 136 S.E. 353; *Stamey v. Burnsville,* 189 N.C. 39, 126 S.E. 103; *Power Co. v. Russell,* 188 N.C. 725, 125 S.E. 481; *Campbell v. Commissioners,* 173 N.C. 500, 92 S.E. 323; *McMahan v. R. R.,* 170 N.C. 456, 87 S.E. 238; *R. R. v. Manufacturing Co.,* 169 N.C. 156, 85 S.E. 390, and 166 N.C. 168, 82 S.E. 5; *Lloyd v. Venable,* 168 N.C. 531, 84 S.E. 855; *R. R. v. Armfield,* 167 N.C. 464, 83 S.E. 809; *R. R. v. McLean,* 158 N.C. 498, 74 S.E. 461; *Railroad v. Land Co.,* 137 N.C. 330, 49 S.E. 350, 68 L.R.A. 333, 107 Am. S. R. 490; *Railroad Co. v. Platt Land,* 133 N.C. 266, 45 S.E. 589; *Liverman v. R. R.,* 114 N.C. 692, 19 S.E. 64; *Railroad v. Church,* 104 N.C. 525, 10 S.E. 761; *Haislip v. Railroad Co.,* 102 N.C. 376, 8 S.E. 926; *Raleigh v. Augusta Air Line R. R. Co. v. Wicker and others,* 74 N.C. 220; *Freedle v. The North Carolina Railroad Company,* 49 N.C. 89. A similar rule prevails in other jurisdictions. *Cumbaa v. Town of Geneva,* 235 Ala. 423, 179 So. 227; *Ensign Yellow Pine Co. v. Hohenberg,* 200 Ala. 149, 75 So. 897; *Baucum v. Arkansas Power & Light*

Co., 179 Ark. 154, 15 S.W. 2d 399; *Sexton v. Union Stock Yard & Transit Co.*, 200 Ill. 244, 65 N.E. 638; *Dethample v. Lake Koen Navigation, Reservoir & Irrigation Co.*, 73 Kan. 54, 84 P. 544; *Boston Chamber of Commerce v. Boston*, 195 Mass. 338, 81 N.E. 244; *General Ice Cream Corp. v. State*, 199 Misc. 620, 99 N.Y.S. 2d 312; *Grand River Dam Authority v. Martin*, 192 Okl. 614, 138 P. 2d 82; *Kentucky-Tennessee Light & Power Co. v. Beard*, 152 Tenn. 348, 277 S.W. 889; *Kentucky-Tennessee Light & Power Co. v. Burkhalter*, 8 Tenn. App. 380; *State of Georgia v. City of Chattanooga*, 4 Tenn. App. 674; *Joint School District No. 1, Town of Greenfield, v. Bosch*, 219 Wis. 181, 262 N.W. 618.

To be sure, the rule declares the full market value of the part of the land covered by the perpetual easement to be a proper element of compensation, and forbids any diminution in the allowable compensation on account of any use which the landowner might make of any part of the land covered by the perpetual easement, or on account of the possibility that the condemnor might some day abandon the use of the land covered by the perpetual easement and permit all rights in it to revert to the then owner of the fee. The reasons which underlie and support these features of the rule are fundamentally sound. They may be stated in this wise:

1. In the very nature of things, compensation for private property taken for public use must be determined as of the time of the taking. *Ayden v. Lancaster*, 197 N.C. 556, 150 S.E. 40; *Power Co. v. Hayes, supra;* 29 C.J.S., Eminent Domain, section 185. As a consequence, compensation is to be assessed on the basis of the rights acquired by the condemnor at the time of the taking, and not on the basis of the condemnor's subsequent exercise of such rights. *McMahan v. R. R., supra; R. R. v. McLean, supra.* "It is well settled that the defendant is entitled to recover not only the value of the land taken, but also the damages thereby caused to the remainder of the land. Even if the plaintiff should not use the entire right of way, the rule would be the same, as it is not what the plaintiff actually does, but what it acquires the right to do, that determines the *quantum* of damages." *Railroad v. Land Co., supra.*

2. Since the condemnor acquires the complete right to occupy and use the entire surface of the part of the land covered by the perpetual easement for all time to the exclusion of the landowner, the bare fee remaining in the landowner is, for all practical purposes, of no value, and the value of the perpetual easement acquired by the condemnor is virtually the same as the value of the land embraced by it. *McMahan v. R. R., supra; R. R. v. McLean, supra; Railroad v. Land Co., supra; Sexton v. Union Stock Yard & Transit Co., supra; Boston Chamber of Commerce v. Boston, supra; General Ice Cream Corp. v. State, supra; Grand River Dam Authority v. Martin, supra; Joint School Dist. No. 1, Town of*

Greenfield, v. Bosch, supra; 18 Am. Jur., Eminent Domain, section 251; 29 C.J.S., Eminent Domain, section 143.

3. Since the condemnor acquires the complete right to occupy and use the entire surface of the part of the land covered by the perpetual easement for all time to the exclusion of the landowner, any use which the landowner may make of any part of the land embraced by the perpetual easement is necessarily permissive in character, and cannot be considered in diminution of compensation because it may be terminated by the condemnor at any time. *McMahan v. R. R., supra; Haislip v. Railroad Co., supra; Baucum v. Arkansas Power & Light Co., supra; Kentucky-Tennessee Light & Power Co. v. Beard, supra;* 29 C.J.S., Eminent Domain, section 143. Moreover, "the probability that the appropriator will not exercise, or the fact that he has no present intention of exercising, to the full extent the rights acquired should not be considered in reduction of the damages, where there is nothing to prevent a full exercise of such rights, since the presumption is that the appropriator will exercise his rights, and use and enjoy the property taken, to the full extent." 29 C.J.S., Eminent Domain, section 155. See, also, in this connection: *Barnes v. Peck,* 283 Mass. 618, 187 N.E. 176; and *Old Colony R. Co. v. Miller,* 125 Mass. 1, 28 Am. R. 196.

4. A condemnor cannot demand a perpetual easement with one breath and insist with the next that he be excused from paying full compensation for the perpetual easement on the ground that there is a bare possibility that he may abandon the perpetual easement on some uncertain day before the last lingering echo of Gabriel's horn trembles into ultimate silence. This is true because the law of eminent domain deems the possibility of the abandonment of a perpetual easement by nonuser so remote and improbable it will not allow the contingency to be taken into consideration in determining the value of the easement. *State of Georgia v. City of Chattanooga, supra;* 18 Am. Jur., Eminent Domain, section 251. See, also, in this connection: *McMahan v. R. R., supra; Railroad v. Davis,* 19 N.C. 451; 29 C.J.S., Eminent Domain, sec. 149.

What has been said shows that the trial judge did not err in charging the jury in respect to the measure and elements of compensation germane to this proceeding. It likewise shows the untenability of Exception 30, which covers a part of the charge in which the trial judge instructed the jurors, in essence, that the mere possibility that the public road-governing authorities might some day abandon the use of the condemned right of way for highway purposes, and thus permit all rights in it to revert to the then owner of the fee was "too remote and too uncertain" for their consideration in passing on the question of compensation.

Exception 31 is addressed to this instruction: "Applying these rules I have given you, it is your duty by your verdict to leave the respondents

. . . in as near the same position with respect to their entire tract of land as you can, the burden being on them, as the court has explained to you, to show by evidence and by the greater weight, the damages, if any, they have sustained." This instruction is not subject to any just criticism. It merely advises the jury that the respondents are entitled to be put in as good position pecuniarily as if their property had not been taken. *S. v. Lumber Co.*, 199 N.C. 199, 154 S.E. 72; *Abernathy v. Railroad,* 150 N.C. 97, 63 S.E. 180; *Railroad Co. v. Platt Land, supra.* "Certainly where by compulsory process and for the public good the State invades and takes the property of its citizen, in the exercise of its highest prerogative in respect to property, it should pay him full compensation." *Brown v. Power Co.*, 140 N.C. 333, 52 S.E. 954.

The remaining exceptions are formal and require no discussion.

The judgment will be upheld because there is in law

No error.

DOROTHY MAE STONE LOVETT, VICTORIA STONE PHIPPS, I. L. STONE AND BILLY STONE v. DEWEY STONE.

(Filed 15 January, 1954.)

1. Trial § 55—

Where the parties consent to trial by the court without a jury, the findings of the court are as conclusive as the verdict of a jury if they are supported by evidence.

2. Infants § 10—

Since the court has the discretionary power to appoint any person whom it considers suitable next friend of an infant plaintiff, whether such person is related or not to the infant, the fact that application for appointment is made by a non-relative of the infant does not affect the efficacy of the appointment of such person upon proper findings. Rule of Practice in the Superior Courts No. 16.

3. Appeal and Error § 38—

Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed. So, where the court grants the application of a non-relative of the infant for appointment as next friend, it will be presumed that the court made the appointment because no person closely connected with the infant would apply.

4. Infants § 10—

Where an infant plaintiff attains his majority during the prosecution of the cause, he ratifies the appointment of the next friend by continuing the prosecution of the action in his own right.

5. Wills § 44—

Where it is apparent from the will that testator intended that a beneficiary thereunder should not enjoy the devise or bequest unless such beneficiary relinquished a right or claim of his own which would defeat the full effect and operation of the will, such person is put to his election.

6. Same—Heir electing to take under will takes quality of estate as limited by the will.

Defendant owned two-thirds interest in fee in a part of a certain tract of land which he had inherited from his father. Thereafter his grandfather died leaving a will devising to him a life estate in the entire tract with remainder to his children, with further provision that defendant's brother, in order for the brother to take other lands under the will, should convey to defendant the other one-third interest in the part of the tract. Defendant's brother conveyed to him the one-third interest in the part of the tract "in full compliance with the terms . . . of the last will." Defendant manifested his election to take under the will by accepting and using the tract actually devised to him for life. *Held:* By his election to take under the will defendant's estate was limited to a life estate in the tract of land, which limitation was binding upon him and those claiming under him with notice.

7. Deeds § 13a—

A grantor cannot convey an estate of greater dignity than the one he has, and when he has only a life estate, his deed to the land, even though in the form of a conveyance in fee simple, conveys only his life estate.

8. Adverse Possession § 4i—

The grantee in a deed conveying only the life estate of the grantor cannot hold adversely to the remaindermen until the death of the grantor, and where one of the remaindermen is then under the disability of infancy the grantee cannot acquire title by adverse possession against him under color of the deed until after the lapse of seven years from the removal of the disability. G.S. 1-38.

9. Ejectment § 20—

The owner of a life estate executed deed purporting to convey the fee in the lands. The grantee in the deed admitted he had been in continuous possession since the execution of the deed, and acquired title by adverse possession as against all of the remaindermen but one, who was under disability as an infant until the institution of the action. *Held:* Upon recovery by this remainderman of his share of the land, he is entitled to recover also his proportion of the rents and profits against defendant, first in the character of a disseizor and then in the character of a tenant in common.

10. Betterments § 4—

Where the grantee knows that his grantor has only a life estate in the lands and nevertheless accepts deed in form sufficient to convey fee simple title, and makes improvements upon the land, he may not recover for such betterments placed on the land as against a remainderman, since such improvements were not made under the belief that his color of title to the interest of the remainderman was good. G.S. 1-340.

APPEAL by defendant Dewey Stone from *Grady, Emergency Judge* at August Term, 1953, of ROBESON.

Civil action involving the title to realty.

The pleadings put in issue the title, the right of possession, and the rental value of a tract of land known as the H. J. Stone tract, which contains "50 acres, more or less," and is located in Britt's Township, Robeson County, North Carolina. The cause was tried by Judge Grady without a jury at the August Term, 1953, of the Superior Court of Robeson County pursuant to the consent of the parties entered in the minutes. Both sides offered testimony at the trial. Judge Grady found that the defendant Dewey Stone had acquired title to the three of the four undivided shares claimed by the plaintiffs Dorothy Mae Stone Lovett, Victoria Stone Phipps, and I. L. Stone by adverse possession under color of title during the seven years ending on 20 January, 1952, and entered judgment accordingly. These plaintiffs did not appeal. As a consequence, this appeal is concerned solely with the one-fourth undivided interest claimed by the plaintiff Billy Stone.

When the facts placed in evidence by the plaintiffs and consistent clarifying facts presented in evidence by the defendant are interpreted in the light most favorable to the plaintiff Billy Stone, they make out this factual case:

1. On 21 October, 1889, Harvey J. Stone conveyed the H. J. Stone tract to Alexander Stone in fee simple.

2. On 9 November, 1899, Alexander Stone conveyed a part of the H. J. Stone tract, to wit, 20 acres thereof, to his son, Ira Lennon Stone, in fee simple. This part of the H. J. Stone tract is hereafter called the 20 acres.

3. Ira Lennon Stone died intestate during 1905, survived by three infant children, namely, Hector Alexander Stone, the father of the four plaintiffs; Dewey Stone, the defendant in this action; and Artemissia Stone, who inherited the 20 acres in equal shares as tenants in common. Artemissia Stone subsequently married John Burney.

4. After her arrival at legal age, to wit, on 18 June, 1921, Artemissia Stone Burney and her husband conveyed her one-third undivided interest in the 20 acres to her brother, Hector Alexander Stone, in fee simple.

5. Alexander Stone died testate, seized in fee simple of all of the H. J. Stone tract except the 20 acres, a farm known as the English Rice farm, and other properties. Subsequent to his death, to wit, on 4 February, 1928, the will of Alexander Stone was duly admitted to probate in the Superior Court of Robeson County.

6. Alexander Stone, who knew the state of the title to the 20 acres, extended certain benefits to his grandsons, Hector Alexander Stone and the defendant Dewey Stone, by Items 5 and 6 of his will.

7. Item 5 is couched in these words: "I hereby give and devise unto my grandson, Hector Alexander Stone, during the term of his natural life and after his death to be equally divided among his children the tract of land known as the H. J. Stone tract, except about 10 acres which will be disposed of in another section of this will, and also I devise unto my said grandson . . . the sum of $500.00." Alexander Stone did not undertake to dispose of any part of the H. J. Stone tract in any other section of his will. Consequently, Item 5, in final result, embraced all of the H. J. Stone tract. (See, in this connection, *Bartlett v. Lumber Co.*, 168 N.C. 283, 84 S.E. 267.)

8. Item 6 is thus phrased: "I give and devise unto my grandson, Dewey . . . Stone, during the term of his natural life and then to his children in fee simple the tract of land known as the English Rice land, except what lies on South west side of big ditch . . . I direct that the said Dewey . . . Stone . . . shall sign his brother, Hector Alexander Stone, a deed to the lands owned by his father, I. L. Stone, deceased, and his failure to sign said deed and comply with this request . . . will forfeit his right to his entire interest in my estate." When he referred to "the lands owned by . . . I. L. Stone, deceased," the testator meant the 20 acres.

9. After the will of their grandfather, Alexander Stone, had been admitted to probate, Hector Alexander Stone and the defendant Dewey Stone became cognizant of its provisions. Hector Alexander Stone, acting with such knowledge, accepted, used, and enjoyed the entire H. J. Stone tract, and the defendant Dewey Stone, acting with such knowledge, accepted, used, and enjoyed the portion of the English Rice farm devised to him. Moreover, the defendant Dewey Stone deeded his one-third undivided interest in the 20 acres included in the H. J. Stone tract to Hector Alexander Stone "in full compliance with the terms and stipulations of the last will and testament of Alexander Stone."

10. Some years later, to wit, on 5 October, 1940, Hector Alexander Stone made a deed whereby he professed to convey the H. J. Stone tract to the defendant Dewey Stone in fee simple. Since that time, Dewey Stone has adversely possessed the tract under known and visible lines and boundaries and under the deed from Hector Alexander Stone; has taken and devoted to his own use all of the profits arising from the tract; and has made improvements on the tract. Dewey Stone did these things with full knowledge of the provisions of Items 5 and 6 of the will of Alexander Stone and the acceptance by Hector Alexander Stone and himself of the benefits extended to them by these items. The rental value of the interest claimed by the plaintiff Billy Stone in the H. J. Stone tract has been $200.00 yearly during the times, subsequent to 20 January, 1945, Dewey Stone has occupied the tract.

11. Meanwhile, to wit, on 20 January, 1945, Hector Alexander Stone died, leaving him surviving four children, namely, the plaintiffs Dorothy Mae Stone Lovett, Victoria Stone Phipps, I. L. Stone, and Billy Stone.

12. This action was brought on 19 January, 1953. Since he was an infant without general or testamentary guardian at that time and did not attain his legal majority until after the trial of the action in the Superior Court, to wit, on 23 September, 1953, the plaintiff Billy Stone sued in this action until he reached his legal age through his next friend, John Wishart Campbell, a disinterested, reputable, and suitable person not closely connected with Billy Stone, who was appointed to act in that capacity by an order entered by the court upon his own written application after due inquiry as to his fitness.

Judge Grady made specific findings of fact in respect to the claim of the plaintiff Billy Stone conforming to the matters recited in numbered paragraphs 1 through 12. He then concluded and adjudged in detail that the plaintiff Billy Stone was the owner in fee simple of a one-fourth undivided interest in the H. J. Stone tract; that the plaintiff Billy Stone was entitled to recover $200.00 of the defendant Dewey Stone for each year of his occupancy of the H. J. Stone tract subsequent to 20 January, 1945; and that the defendant Dewey Stone was not entitled to recover anything of the plaintiff Billy Stone on account of any improvements made by Dewey Stone on the H. J. Stone tract. The defendant Dewey Stone excepted to the portions of Judge Grady's judgment containing these findings, conclusions, and adjudications, and appealed, assigning errors.

Robert Weinstein, Frank D. Hackett, and McLean & Stacy for plaintiff, Billy Stone, appellee.

Varser, McIntyre & Henry for defendant, Dewey Stone, appellant.

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

1. The trial judge committed error in holding that John Wishart Campbell was properly appointed next friend of the plaintiff Billy Stone.

2. The trial judge committed error in refusing to dismiss the claim of the plaintiff Billy Stone upon a compulsory nonsuit.

3. The trial judge committed error in finding, concluding, and adjudging that the plaintiff Billy Stone is the owner in fee simple of a one-fourth undivided interest in the land in controversy.

4. The trial judge committed error in admitting evidence of the rental value of the land in controversy during its occupancy by the defendant subsequent to the death of Hector Alexander Stone.

5. The trial judge committed error in finding, concluding, and adjudging that the plaintiff Billy Stone is entitled to recover of the defendant one-fourth of the value of the rents and profits of the land in controversy during its occupancy by the defendant subsequent to the death of Hector Alexander Stone.

6. The trial judge committed error in finding, concluding, and adjudging that the defendant is not entitled to recover anything of the plaintiff Billy Stone on account of improvements made by him upon the land in controversy.

We will consider these assignments of error in the order of their statement. Before taking up this task, we pause to note that the findings of fact of the trial judge harmonize with the evidence at the trial, and are binding on the parties on this appeal under this rule: Where the parties consent to trial by the court without a jury, the findings of the court are as conclusive as the verdict of a jury if they are supported by evidence. *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464.

Proceedings for the appointment of a next friend for an infant plaintiff are regulated by this rule of court: "In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed." Rule 16, Rules of Practice in the Superior Court.

The answer of the defendant challenged the validity of the order appointing John Wishart Campbell next friend of the plaintiff Billy Stone solely upon the ground that it was made by the court upon the written application of Campbell, a non-relative, rather than upon the written application of some "person closely connected with such infant."

Since the next friend of an infant plaintiff is an officer of the court subject to judicial supervision (*Tate v. Mott,* 96 N.C. 19, 2 S.E. 176), and since an infant plaintiff who sues by a next friend is as much bound by the judgment of the court as an adult (*Settle v. Settle,* 141 N.C. 553, 54 S.E. 445), it may be argued with much reason that a defendant has no legal standing entitling him to question the court's selection of a next friend for an infant plaintiff. *Carroll v. Montgomery,* 128 N.C. 278, 38 S.E. 874.

Be this as it may, the trial judge did not err in rejecting the challenge to the appointment in the case at bar. His ruling finds complete support in the established procedural rule that the court possesses the overriding discretionary power to appoint any person whom it considers suitable, whether related or not, to act as next friend of an infant plaintiff. Mc-

Intosh: North Carolina Practice and Procedure in Civil Cases, Section 253. Besides, the present record warrants the conclusion that the court paid strict heed to the rule of court in appointing a next friend in the instant case. Under the law of evidence, it is presumed unless the contrary appears that judicial acts and duties have been duly and regularly performed. *Henderson County v. Johnson,* 230 N.C. 723, 55 S.E. 2d 502; *Smith v. Smith,* 226 N.C. 506, 39 S.E. 2d 391; *Freeman v. Morrison,* 214 N.C. 240, 199 S.E. 12; *McKellar v. McKay,* 156 N.C. 283, 72 S.E. 375; *Harris v. Brown,* 123 N.C. 419, 31 S.E. 877; *Pearle v. Folsom,* 2 N.C. 413. As the contrary does not appear in this case, it must be assumed that the court made the appointment of the next friend upon the written application of Campbell because no person closely connected with the plaintiff Billy Stone would apply. In passing from this phase of the appeal, we indulge the observation that this question may now be considered to be moot. The plaintiff Billy Stone has attained his legal majority since the trial in the Superior Court, and has ratified the proceedings had in his behalf there by continuing the prosecution of the cause in his own right. *Hicks v. Beam,* 112 N.C. 642, 17 S.E. 490.

The assignments of error in the second and third categories present the same problems and will be considered together.

These problems admit of ready solution if proper heed is paid to the significant circumstances that the testator Alexander Stone owned all of the H. J. Stone tract except the 20 acres, that the devisee Hector Alexander Stone owned a two-thirds undivided interest in the 20 acres, and that the devisee Dewey Stone owned the remaining one-third undivided interest in the 20 acres.

When the will of the testator Alexander Stone is read in the light of these significant circumstances, it is manifest that this case calls into play the doctrine of election. This doctrine has been thus phrased by a text writer: "Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both, the principle being that one shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if legal and well founded, which would defeat or in any way prevent the full effect and operation of every part of the will." 69 C.J., Wills, section 2330. This statement of the doctrine of election finds full sanction in our decisions. *Rouse v. Rouse,* 237 N.C. 492, 75 S.E. 2d 300; *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183; *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29; *Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584, 156 A.L.R. 814; *Bank v. Misenheimer,* 211 N.C. 519, 191 S.E. 14, 110 A.L.R. 1310; *Peel v. Corey,* 196 N.C. 79, 144 S.E. 559; *Craven v. Caviness,* 193 N.C. 311, 136 S.E. 705; *McGehee v. McGehee,*

189 N.C. 558, 127 S.E. 684; *Royal v. Moore,* 187 N.C. 379, 121 S.E. 666; *Brown v. Brown,* 180 N.C. 433, 104 S.E. 889; *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162; *Tripp v. Nobles,* 136 N.C. 99, 48 S.E. 675, 67 L.R.A. 449; *Syme v. Badger,* 92 N.C. 706; *Isler v. Isler,* 88 N.C. 581; *Sigmon v. Hawn,* 87 N.C. 450; *Weeks v. Weeks,* 77 N.C. 421; *Flippin v. Banner,* 55 N.C. 450; *McQueen v. McQueen,* 55 N.C. 16, 62 Am. D. 205; *Robertson v. Stephens,* 36 N.C. 247; *Melchor v. Burger,* 21 N.C. 634; *Wilson v. Arny,* 21 N.C. 376; *Field v. Eaton,* 16 N.C. 283.

The testator Alexander Stone clearly intended his will to operate so as to vest all of the H. J. Stone tract in Hector Alexander Stone for life with remainder in equal shares in the children of Hector Alexander Stone in fee simple. Items 5 and 6 were designed to effect this intention. The testator did these two things by Item 5: (1) He actually gave all of the H. J. Stone tract except the 20 acres to Hector Alexander Stone for life with remainder in equal shares to the children of Hector Alexander Stone in fee simple; and (2) he professed to make the same disposition of the 20 acres, which were owned by Hector Alexander Stone and the defendant Dewey Stone in these proportions: Hector Alexander Stone, a two-thirds undivided interest; and Dewey Stone, a one-third undivided interest. By Item 6, the testator devised a life estate in a part of his English Rice farm to Dewey Stone upon the express condition that Dewey Stone should convey his one-third undivided interest in the 20 acres to Hector Alexander Stone to the end that it might be enjoyed by Hector Alexander Stone for life and his children in remainder in accordance with the provisions of Item 5.

Hector Alexander Stone and Dewey Stone knew the contents of the will. Dewey Stone elected in express terms to take under the will. He manifested his election by accepting and using the part of the English Rice farm devised to him for life, and by deeding his undivided interest in the 20 acres to Hector Alexander Stone "in full compliance with the terms and stipulations of the last will and testament of Alexander Stone." Hector Alexander Stone could not set up his right to the fee simple ownership of the 20 acres without defeating the provision of Item 5 specifying that his children should take the remainder in the 20 acres in equal shares and in fee simple. Hector Alexander Stone was, therefore, compelled by the will to choose whether he would claim fee simple ownership of the 20 acres, or renounce the remainder in the 20 acres and take in lieu thereof that which the testator gave him, namely, a life estate in all of the H. J. Stone tract except the 20 acres. He elected to take under the will, and manifested his election by accepting, occupying, and using for a number of years the part of the H. J. Stone tract actually devised to him for life. *Craven v. Caviness, supra; Hoggard v. Jordan,* 140 N.C. 610, 53 S.E. 220, 4 L.R.A. (N.S.) 1065; *Brown v. Ward,* 103 N.C. 173, 9 S.E.

300; 57 Am. Jur., Wills, Section 1538; 69 C.J., Wills, Sections 2396, 2398. Inasmuch as he elected to take under the will, Hector Alexander Stone and those claiming under him with notice were bound by the testamentary provision, which limited his interest in all of the H. J. Stone tract to a life estate, and gave the remainder in fee in all of that tract to his children in equal shares. *Brown v. Ward, supra;* 69 C.J., Wills, Section 2429. This being true, Hector Alexander Stone had a life estate in the H. J. Stone tract subsequent to his election to take under the will.

A grantor cannot convey to his grantee an estate of greater dignity than the one he has. Although Hector Alexander Stone professed to convey the H. J. Stone tract to Dewey Stone in fee simple, his deed of 5 October, 1940, transferred nothing to Dewey Stone except his life estate. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717. Since a person occupying land under a deed effective only as to the life interest does not hold adversely to the remaindermen prior to the death of the life tenant, the possession of the H. J. Stone tract by the defendant Dewey Stone did not become adverse to the four plaintiffs until the death of Hector Alexander Stone, which occurred on 20 January, 1945. *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179; *Eason v. Spence, supra.* The plaintiff Billy Stone was under the disability of infancy at that time, and his disability was not removed until after the commencement of this action. As a consequence, the adverse possession of the H. J. Stone tract by the defendant Dewey Stone does not operate as a bar against the plaintiff Billy Stone, who still owns the one-fourth undivided interest given him by Item 5. G.S. 1-38; McIntosh: North Carolina Practice and Procedure in Civil Cases, Sections 107, 108.

It necessarily follows that the assignments of error in the second and third categories are untenable.

The plaintiff Billy Stone has been entitled to one-fourth of the rents and profits of the H. J. Stone tract ever since 20 January, 1945, when Hector Alexander Stone, the life tenant, died. The defendant Dewey Stone converted this share of the rents and profits to his own use, and thereby rendered himself liable to the plaintiff Billy Stone in the character of a disseizor for the part of the share accruing before the ripening of his title to the interests in the tract claimed by the other three plaintiffs, and in the character of a tenant in common for the part of the share accruing after that event. *Northcot v. Casper,* 41 N.C. 303; *Camp v. Homesley,* 33 N.C. 211; *Holdfast v. Shepard,* 31 N.C. 222; 28 C.J.S., Ejectment, Section 131; 62 C.J., Tenancy in Common, Section 65. As the plaintiff Billy Stone was under the disability of infancy at the time of the accrual of his claim against the defendant Dewey Stone for his share of the rents and profits, and did not reach the age of twenty-one years until after the commencement of this action, the trial judge did not

err in finding, concluding, and adjudging that the plaintiff Billy Stone was entitled to recover of the defendant Dewey Stone the value of his share of the rents and profits accruing upon the H. J. Stone tract subsequent to 20 January, 1945. McIntosh: North Carolina Practice and Procedure in Civil Cases, Sections 107, 108. Moreover, the testimony of the witnesses for the plaintiffs as to the rental value of the land in controversy during this period was rightly received. *Perry v. Jackson,* 88 N.C. 103. The testimony was limited to the H. J. Stone tract which is described in somewhat specific terms in the second paragraph of the complaint. The defendant admitted in express terms in the third paragraph of his answer that he was "in the . . . possession of the lands described in the second paragraph" of the complaint.

The trial judge found, concluded, and adjudged with correctness that the defendant Dewey Stone was not entitled to any offset or recovery against the plaintiff Billy Stone on account of the improvements made by him on the H. J. Stone tract. This is true for the very simple reason that the defendant Dewey Stone did not make the improvements under the belief that his color of title to the interest of the plaintiff Billy Stone was good. G.S. 1-340; *Rogers v. Timberlake,* 223 N.C. 59, 25 S.E. 2d 167; *Pritchard v. Williams,* 181 N.C. 46, 106 S.E. 144. The reverse is true. The defendant Dewey Stone was familiar with the provisions of Items 5 and 6 of the will of his grandfather, Alexander Stone, and the actions taken by him and his brother, Hector Alexander Stone, to carry these testamentary provisions into effect. He knew that the deed of 5 October, 1940, passed nothing to him except the life estate which Hector Alexander Stone elected to take under the will of Alexander Stone, and that in consequence the color of title afforded by it to him in respect to the interest of his infant nephew, the plaintiff Billy Stone, was not good.

For the reasons given, the provisions of the judgment challenged by this appeal are

Affirmed.

JOHN GATLING, EXECUTOR OF THE ESTATE OF BARTHOLOMEW M. GATLING, v. BART M. GATLING, JR., LAWRENCE GATLING, WILLIAM C. GATLING, LOUIE GATLING WHITE, JAMES M. GATLING; CLAUDE BARBEE III, FIRST CITIZENS BANK & TRUST COMPANY, GUARDIAN FOR MRS. LENORA C. GATLING; JOHN GATLING, LETTIE ALSTON, CHRISTINE MIAL, SARAH GATLING BARBEE.

(Filed 15 January, 1954.)

1. Appeal and Error § 29—

Exceptions not discussed in the brief are deemed abandoned, and therefore where there is a general exception to the entire judgment, but the

brief is addressed solely to a particular part of the judgment specifically assigned as error, only the particular assignment of error will be reviewed, and other portions of the judgment will not be disturbed.

2. Wills § 31—

Each will must be construed in the light of its own particular language.

3. Same—

The cardinal principle in the interpretation of wills is to discover the intent of the testator, looking at the instrument from its four corners, and such intent will be given effect unless contrary to some rule of law or at variance with public policy.

4. Same—

The intent of testator is to be gathered from the will as a whole, and effect will be given to every clause and phrase and word, when possible, in accordance with the general purpose of the will.

5. Wills § 35: Executors and Administrators § 13a—Under direction of will, lands of testator other than lots specified should first be sold if necessary to make assets.

Testator devised all of his property in trust for his wife for life with full power to her to sell or mortgage same, with remainder to his children and the representatives of deceased children, *per stirpes.* By later item he directed that certain lots facing the homeplace should not be subject to the provisions of the prior item during the life of his wife, and that in the final distribution of the lands, the lots be allotted to designated children and grandchildren, and accounted for in the division. It was apparent from the will as a whole that testator loved his home, which was then owned by one of his children, and wished it kept in the family, and was seeking to protect it from adverse surroundings by the provisions relating to the specified lots. *Held:* The lots specified were not subject to sale or mortgage by the wife, and in the event it is necessary to sell real estate to make assets, such lots do not stand on a parity with the other real estate for this purpose, but such other real estate should be first sold and the lots specified allotted to the devisees named, who should account to other devisees in order that there be an equal division among the beneficiaries.

APPEAL by defendants Louie Gatling White, Bart M. Gatling, Jr., James Moore Gatling, William C. Gatling and Sarah Gatling Barbee from *Paul, Special J.,* August Special Term 1953. WAKE. The other defendants did not appeal.

This is a civil action instituted by John Gatling, Executor of the last will and testament of Bartholomew Moore Gatling, deceased, seeking a construction of the will and for advice and guidance in the administration of the estate thereunder pursuant to the Declaratory Judgment Act, G.S. 1-253 *et seq.*

All the parties waived a jury trial, and the court after hearing the evidence found the facts, made conclusions of law, and entered judgment. There are no exceptions to the court's findings of facts.

These are the essential facts. 1. Bartholomew Moore Gatling, a citizen and resident of Raleigh, died testate 2 August 1950; his last will and testament was duly probated and is recorded in the Office of the Clerk of the Superior Court of Wake County in Will Book S, p. 225. His son, John Gatling, the plaintiff, is executor of his will. This is a summation of the essential parts of the will necessary to be stated for the purposes of this appeal.

Item 1. I give, devise and bequeath all of my property both real and personal to my faithful and devoted wife, Lenora Crudup Gatling, in trust for herself for life and after her death equally to my children and if any child or children be dead leaving any lawful issue then alive such issue shall take the share of his, her, or their parent would have received, if alive *per stirpes.*

It is my express direction that my wife shall have full power, authority and control over the estate during her life and especially the right to encumber or sell such part thereof as in her opinion may be necessary to provide ample support and maintenance for herself without application to, or order from any court and without the requirement of giving any bond or rendering any account of her transaction.

Item 3. I have heretofore conveyed to my daughter, Louie, subject to the life estate of my wife and myself, the home place with nearly six acres of land around it. This conveyance was made for full value, and is not to be construed as an advancement.

Item 5. I direct that the 13 lots facing South on E. Martin Street and numbered 143, 144, 145, 146, 147, 148, 149, 177, 178, 179, 180, 181 and 182 shall not be subject to the provision of Item I of this will during the life of my wife, but that in the final distribution or division of my lands, they be allotted to Bart M. Gatling, Jr., James Moore Gatling, Louie Gatling White, Claude B. Barbee, 3rd, and Sarah Gatling Barbee and accounted for in the division—and with the request that they hold the same as a protection against any undesirable encroachments in close proximity to the home, and that if any of them need to sell their part of these lots, they first offer the same to Louie Gatling White or other members of the family then owning the home place. If, however, the home place should pass out of the family this request is not to have any force or effect.

Item 6. In this item I wish to give to each of my children, but subject to the rights of my wife under Item I of this will, some item or items of personal property as a memorial of the home in which they were born and reared—all of them to remain in the home as long as my wife lives there. (a) To Bart M. Gatling, Jr., the portrait of his great Grandfather, Bartholomew Figures Moore, and a described oriental rug; (b) To John Gatling the desk and chair said to have been used by Henry Clay in the

House of Representatives at Washington, D. C., and also the medical hand bag or gritchel that was used by his great grandfather, Mr. John Gatling of Sunbury in Gates County. It is in brown leather and has in it some of the medical instruments used by doctors of that period; (c) To Lawrence Gatling, certain dining room furniture and a soup tureen given us as a wedding present; (d) To William Gatling, certain flat silver including six silver teaspoons marked SLB received by me from my mother; (e) To James Moore Gatling, the silver water pitcher given by my father to my mother in 1878 and so marked and also the old gold hunting case watch with fob-chain and gold seal stone attached. The fob-chain and gold seal stone are said to have belonged to his great-great-grandfather, James Gatling, and the watch was given me by my father; (f) To my daughter, Louie, the oriental rug in her mother's private sitting room. (This item stricken out by Bart M. Gatling at her request and given to Bart M. Gatling, Jr.), the old pine chest made in dove tail and the Currier & Ives print Washington's Dream.

I have not included my grandchildren Claude and Sarah Barbee in this item as they are well provided with silver, furniture, and many other articles of household wares from their mother's estate.

Item 7. If our present servants Lottie Alston and Christine Mial continue in our service until my death or so long as each of them are not incapacitated by sickness I give to each and to the one made incapable of service from disease if she continued until disabled to serve us the sum of two hundred and fifty dollars.

Item 8. I appoint my son John Gatling as executor of this will, written in my own handwriting, hoping he can by good management, preserve and keep the homeplace for some member of the family for quite a while yet, and I suggest that he look into the possibility of setting up a development of a small area around the home for white people before finally concluding any disposition of the lots owned North and East of the home. The property has been in the family almost a hundred years. It would be a very happy thought if one of us would continue to own it. If all of you work in harmony it might be possible. May God bless all of you and Good-bye.

2. All the beneficiaries under the will of Bartholomew Moore Gatling were living at the time of his death. All the beneficiaries, except John Gatling, are defendants; the widow, Mrs. Lenora Crudup Gatling, a person *non compos mentis,* appeared by her duly appointed and acting trustee, the First Citizens Bank and Trust Company, though by inadvertence in the caption of this proceeding and in the complaint the First Citizens Bank and Trust Company is denominated her guardian. Pending the appeal Mrs. Gatling died 2 October 1953, and her duly appointed admin-

istrator, the First Citizens Bank and Trust Company, came in, and, on its motion was admitted to become a party to this proceeding.

3. The home place referred to in Item 5 of the will is now owned by Louie Gatling White, in fee, though at the time the judgment was entered in the Superior Court, Lenora Crudup Gatling was living and had a life estate therein, and did not constitute any part of the estate of which Bartholomew Moore Gatling died seized and possessed.

4. The executor has in his possession certain personalty, including certain items of personalty specifically bequeathed under the will. The executor estimates the total value of all this personalty as between $2,000 and $3,000, which is the only evidence of value in the record.

5. The testator owned at his death over 100 vacant building lots in the eastern part of Raleigh, including the 13 lots mentioned in Item 5 of the will. The executor estimates that all these lots have a minimum value of $55,500, which is the only evidence of value in the record. The 13 lots have a value of about $19,500.

The debts, taxes and cost of administration of the estate will apparently exceed $10,000, and it appears that the personal property of the estate will be insufficient to pay the debts, taxes and costs of administration, and that resort to the realty will be necessary in order to pay these debts.

The court ordered and decreed: "1. That the executor must first sell all of the personal property belonging to the estate, including that specifically bequeathed, and must apply the proceeds of such sale to the payment of debts, taxes and costs of administration before he resorts to the sale of any of the real estate to make assets, unless all of the devisees join in a request that such personal property not be sold; 2. That the Executor would be permitted to sell real estate to make assets to pay the debts, taxes and costs of administration of the estate before selling the articles of personal property bequeathed under Item 6 of the will if all of the devisees, legatees and beneficiaries under the will request and consent to the sale of real estate without the sale of the particular articles of personal property bequeathed under said item of the will; 3. That in the event it is necessary to sell real estate to make assets in the settlement of said estate, the 13 lots facing south on East Martin Street, as described in Item 5 of the will, and the remainder of the lands belonging to said estate and devised under Item I of said will are specifically devised subject to the debts, taxes and costs of administration of the estate, and stand on a parity for the purpose of the payment of such charges. In the event any part of said lands shall be sold to make assets, the devisee or devisees whose devise is thereby diminished will be entitled to such contribution from the other devisees as will effect an equality of contribution as among all of said devisees; 4. That the executor is not required to sell lands to

make assets to pay the bequests of money to Lettie Alston and Christine Mial under Item 7 of the will."

To the judgment rendered the defendant, Louie Gatling White, excepted and appeals assigning error. When the case was called for argument in the Supreme Court Bart M. Gatling, Jr., James Moore Gatling, William C. Gatling and Sarah Gatling Barbee made a motion that they be allowed to join in as appellants, which motion was allowed.

John W. Hinsdale, Howard E. Manning, and Frank S. Katzenbach for Louie Gatling White, Bart M. Gatling, Jr., James Moore Gatling, William C. Gatling, and Sarah Gatling Barbee, Defendants, Appellants.

Samuel R. Leager for First-Citizens Bank and Trust Company, Defendant, Appellee.

Brassfield & Maupin, Allen Langston, and I. Weisner Farmer for Plaintiff, Appellee.

PARKER, J. The appellants have two assignments of error. First: A general assignment of error as to the rendering and signing of the judgment. Second: They specifically assign as error the first sentence of the third conclusion of law in the judgment "that in the event it is necessary to sell real estate to make assets in the settlement of said estate, the 13 lots facing South on East Martin Street, as described in Item 5 of the will and the remainder of the lands belonging to said estate and devised under Item 1 of said will, are specifically devised, subject to the debts, taxes and costs of administration of the estate, and stand on a parity for the purpose of the payment of such charges."

The appellants did not specifically except to the second sentence of the third conclusion of law reading: "In the event any part of said lands shall be sold to make assets, the devisee or devisees whose devise is thereby diminished will be entitled to such contribution from the other devisees as will effect an equality of contribution as among all of said devisees."

Although the appellants excepted generally to the signing of the entire judgment, the argument in their brief is addressed only to that part of the judgment that they specifically assign as error. Therefore, under Rule 28 of the Rules of Practice in this Court exceptions not discussed are deemed abandoned. This leaves intact the second sentence of the third conclusion of law set forth above. The appellants state in their brief: "No harm can come to anyone by the preservation of these 13 lots; they stand as a guarantee to the heirs not participating in them that they will receive equitable and just treatment. Much good may come from their preservation; Mr. Gatling thought so. No harm can come."

The brief of the appellee, First Citizens Bank and Trust Company, administrator of the estate of Lenora Crudup Gatling, deceased, hereafter

called the Trust Co., makes these arguments. First: That Lenora Crudup Gatling under Item 1 of the will was given a life estate in all of testator's estate, including the 13 lots mentioned in Item 5 of the will, with power to encumber or sell such part of the estate, excepting the 13 lots described in Item 5, as may be necessary for her support. That Item 1 is the basic dispositive provision of the will, and means that what remains of the testator's estate at his wife's death is to be divided into seven equal shares for division between his six living children and one share for the issue of a child deceased. That Item 5 only modifies this basic disposition to this extent; if there is enough property to go around, then these 13 lots are to be included in the respective shares of the three children and two grandchildren named; if not, then the interest in these lots of the five individuals named in Item 5 would be reduced to the extent requisite to make an equal *per stirpes* distribution, or these five individuals would be required to contribute ratably to the other devisees to make an equal distribution. That it is erroneous to consider Item 5 as a specific devise and Item 1 as a residuary clause, and that all of the devisees under the will are on a parity and should bear ratably a diminution of real property caused by payment of debts, taxes and costs of administration. Second: Regardless of which land may be sold, the devisees of that land are entitled to equitable contribution from the other devisees.

The appellants contend in their brief: First: That Item 5 of the will is a specific devise of the 13 lots; that Item 1 is a general devise, and that if it is necessary to sell realty to pay debts of the estate and costs of the administration resort should first be had to realty of the testator other than that of the 13 lots set forth in Item 5. Second: If the devises in Items 1 and 5 of the will be considered of the same class, that Items 5 and 8 of the will should be given such controlling effect as to require resort to the sale of other lands to pay debts of the estate and costs of the administration before the specifically described 13 lots may be sold.

The epigram of Sir William Jones over 250 years ago "no will has a brother" has been often quoted by the courts. *Ball v. Phelan,* 94 Miss. 293, 49 So. 956, 23 L.R.A. (N.S.) 895; *Meeker v. Draffen,* 201 N.Y. 205, 94 N.E. 626, 33 L.R.A. (N.S.) 816. Two wills rarely use exactly the same language. Every will is so much a thing of itself, and generally so unlike other wills, that it must be construed by itself as containing its own law, and upon considerations pertaining to its own peculiar terms. Probing the minds of persons long dead as to what they meant by words used when they walked this earth in the flesh is, at best, perilous labor. As said by *Smith, C. J.,* in *Brawley v. Collins,* 88 N.C. 605, "it is seldom that we can derive aid from an examination of adjudicated cases."

However, the two following canons of construction have been universally established by the courts.

The cardinal principle to be sought in the interpretation of wills is to discover the intent of the testator, looking at the instrument from its four corners, and when that intent is ascertained, the mandate of the law is "thy will be done" unless contrary to some rule of law or at variance with public policy. *Trust Co. v. Whitfield,* 238 N.C. 69, 76 S.E. 2d 334; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247.

To find out the meaning of particular parts the intention of the testator is to be gathered from the will as a whole. Where possible, effect should be given to every clause and phrase and to every word in accordance with the general purpose of the will. "Every part of a will is to be considered in its construction, and no words ought to be rejected, if any meaning can possibly be put upon them. Every string should give its sound." *Edens v. Williams,* 7 N.C. 27; *Williams v. Rand, supra; Holland v. Smith, supra.*

Reading the will in its entirety it clearly appears that the testator was proud of his distinguished ancestry, and loved his home with a deep and abiding affection. In Item 8 of his will he expresses the hope that some member of the family could keep and preserve the homeplace for quite a while, and says "the property has been in the family almost a hundred years; it would be a very happy thought if one of us would continue to own it; if all of you work in harmony it might be possible. May God bless all of you and Good-bye." It also plainly appears that it was the testator's intent and purpose to preserve the homeplace from adverse surroundings by endeavoring to keep the ownership of the 13 lots facing on E. Martin Street and specifically numbered in Item 5 of the will in members of his family, so long as the homeplace remained in the family.

To effectuate this purpose in Item 1 of his will he gives, devises and bequeaths all of his property, both real and personal, to his wife in trust for herself for life and after her death equally to his children and if any child or children be dead leaving any lawful issue then alive such issue shall take the share his, her, or their parent would have received if alive *per stirpes.* His wife was given power to encumber or sell such part thereof as necessary for her support. It would seem from reading the will as a whole that the devise to the children after the death of the life tenant should be regarded as general rather than specific, since we have a statute G.S. 31-41 which states that every will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. No such contrary intention appears in the instant will. 57 Am. Jur., Wills, p. 938; 88 A.L.R. Anno. p. 560.

However, in Item 5 of the will the testator *directs* that the 13 lots facing South on E. Martin Street and specifically numbered shall not be subject to the provision of Item 1 of the will during the life of his wife, but that in the final distribution or division of his lands these lots be allotted to Bart M. Gatling, Jr., James Moore Gatling, Louie Gatling White, Claude B. Barbee, 3rd, and Sarah Gatling Barbee and accounted for in the division. In this Item 5 the testator requests that they hold the same as a protection against any undesirable encroachments in close proximity to the home and if any of them need to sell their part of these lots they first offer the same to the member of the family owning the homeplace; but if the homeplace should pass out of the family this request is not to have any force.

The verb *direct* has as one of its meanings "to point out to with authority; to instruct as a superior or authoritatively; to order; as, he directed them to go; the judge directs the jury in matter of law." Webster's New International Dictionary (2d Ed.).

Looking at the will from its four corners we construe the following words in Item 5 of the will "I direct that the 13 lots facing South on E. Martin Street and numbered 143, 144, 145, 146, 147, 148, 149, 177, 178, 179, 180, 181 and 182 shall not be subject to the provision of Item one of this will during the life of my wife, but that in the final distribution or division of my lands, they be allotted to Bart M. Gatling, Jr., James Moore Gatling, Louie Gatling White, Claude B. Barbee, 3rd, and Sarah Gatling Barbee and accounted for in the division" to be a positive, unqualified and mandatory direction that the widow of the testator was given no power to encumber or sell the 13 lots facing South on E. Martin Street for her support, and that in the final distribution or division of the testator's lands they be allotted to the devisees named in Item 5 of the will; that in such division these named devisees shall account to the other devisees so that there may be an equal division between the children of the testator and the lawful issue alive of a deceased child who shall take his, her or their parent's share, if alive, *per stirpes,* and that in the event it is necessary to sell real estate of the testator to make assets to pay debts, taxes and costs of administration resort must first be had to lands of the testator other than the 13 lots facing South on E. Martin Street, and specifically numbered in Item 5 of the will. In the following cases directions in a will were held to be imperative. *Trust Co. v. Allen,* 232 N.C. 274, 60 S.E. 2d 117; *Seagle v. Harris,* 214 N.C. 339, 199 S.E. 271.

We are further supported in our opinion as to the construction of the will by the words the testator used in Item 8 of his will. To adopt the construction contended for by the Trust Company we should have to ignore the imperative direction of Item 5 of the will, and be deaf to the

sound this string gives. The language used by the testator is clear. His intent as expressed is controlling.

This cause is remanded for judgment in accordance with this opinion, and the judgment as thus modified is affirmed.

Modified and affirmed.

J. W. MOORE v. HOWARD DEAL.

(Filed 15 January, 1954.)

1. Judgments § 27a—

The standard of care required of a litigant is that which a man of ordinary prudence usually bestows on his important business, but where a litigant employs a reputable attorney licensed in this State, the neglect of the attorney will not ordinarily be imputed to the client, provided the client is without fault.

2. Same—

A judgment will not be set aside on the ground of surprise or excusable neglect on motion of defendant unless defendant shows a real and substantial defense on the merits.

3. Same: Appeal and Error § 40d—

The findings of fact by the trial court on motion to set aside the judgment under G.S. 1-220 are conclusive on appeal when supported by any competent evidence, but conclusions of law made by the judge upon such facts are reviewable.

4. Judgments § 27a—

The trial court found that defendant employed a reputable attorney licensed in this State to defend the suit against him, that defendant was constantly in communication with the attorney who assured him that he was taking care of the matter, that defendant had been guilty of no neglect, but that judgment was taken against him through the inexcusable neglect of his attorney. *Held:* Such findings, supported by competent evidence, are sufficient to show excusable neglect on the part of the defendant.

5. Same—

While ordinarily the court upon a motion to set aside a judgment under G.S. 1-220 must find the facts upon which he bases his conclusion of a meritorious defense, and the Supreme Court will not consider affidavits for the purpose of making findings of fact on such motion, when the verified motion itself sets forth facts which, if believed, constitute a meritorious defense, the order setting aside the judgment may be upheld under the presumptions obtaining upon appeal.

6. Appeal and Error § 38—

The burden is on appellant not only to make error plainly appear but also to show that such error prejudicially affected a substantial right and that there is a reasonable probability that the result would be more favorable to him if the error had not occurred.

7. Judgments § 27a—

Where defendant pays a judgment obtained against him upon inquiry after default, but pays the judgment under protest upon the advice of his attorney upon execution issued upon the judgment, such payment is involuntary and does not constitute such laches as will preclude or estop him from moving to set aside the judgment under G.S. 1-220.

8. Same—

A judgment affirming the order of the clerk entering a judgment by default and inquiry does not preclude the defendant from moving thereafter to set aside the default judgment under G.S. 1-220.

BARNHILL, J., dissents.

APPEAL by plaintiff from *Pless, J.,* August Term 1953 of IREDELL.

A motion was made by the defendant under G.S. 1-220 to vacate a judgment by default and inquiry rendered by the Clerk of the Superior Court of Iredell County on 28 February 1953, and a verdict and judgment upon the inquiry rendered at the March Term 1953 of the Superior Court of the same county, on the ground of inexcusable neglect of his attorney.

The plaintiff filed a reply to the motion. The judge heard the evidence of the defendant and the plaintiff, and entered the following order:

"This cause was heard before the undersigned Judge upon the motion of the defendant to set aside the judgment by default and inquiry and the final judgment in this cause. Upon the affidavits and evidence, the court finds the following facts:

"Prior to the institution of this action the defendant engaged Bedford W. Black of Kannapolis, N. C., who was a reputable attorney, to represent him in all matters growing out of the collision between the vehicles of the plaintiff and the defendant on January 26th, 1952, said arrangement having been made approximately six months prior to the institution of this action. Following the institution of the action the said Black completely neglected his client's interests, in failing to file an answer within the time allowed by law or put the same into proper form, and further neglected his duties as an attorney in failing to take steps to protect his client from judgment by default and inquiry or from trial upon the inquiry. At all times the defendant was constantly in communication with the said Black who assured him that he was taking care of the matter, and the court finds as a fact that the defendant has been guilty of no neglect whatever, and that the neglect of Black under the circumstances is not imputable to the defendant Deal. The court further finds that the defendant has a good and meritorious defense to the plaintiff's cause of action, and that the matter is one for trial and determination by a jury where the parties have an opportunity to appear and have their day in court.

"The court is of the opinion and so finds, that following the rendition of the judgment that the defendant should have sought other counsel and taken further action before paying the judgment, but that he continued to rely upon the advice of Black, and upon his advice paid off the execution under protest without first seeking to have the judgment set aside or take other steps to protect himself. In so doing, the defendant demonstrated a gullibility that is hard to reconcile with proper diligence, but that the same does not constitute such laches as would defeat his motion nor estop him in presenting his position to the court.

"In view of the fact that other factors may later enter into the disposition of the amount paid by the defendant under execution to the plaintiff, the court does not at this time require the repayment of said amount by the plaintiff, reserving the authority to make such further orders in that connection as the determination of the case upon proper trial may require. The defendant consented to the court's action in this regard.

"Upon the foregoing findings and conclusions, it is now ORDERED that the judgment by default and inquiry before the Clerk and that the verdict and judgment upon the inquiry dated March ...... 1953 be, and the same are hereby set aside.

"The defendant is allowed 30 days from this date in which to file answer or otherwise plead."

To the order rendered the plaintiff excepts and appeals.

Baxter H. Finch, and William I. Ward, Jr., of the firm of Land, Sowers, Avery & Ward, for defendant, appellee.

J. G. Lewis, C. B. Winberry, of the firm of Adams, Dearman & Winberry, for plaintiff, appellant.

PARKER, J. The plaintiff appellant in his brief admitted that the defendant Deal's attorney, Bedford W. Black, "was guilty of neglect, and even gross neglect. It is doubted that there has ever been a case before this Court where the neglect of the attorney was as great and as gross as the neglect of the defendant's attorney in this case." That defendant's attorney Black was guilty of inexcusable neglect of his client Deal's case is not debatable.

We have had many cases for decision as to when relief will be afforded to a client against whom a judgment by default has been rendered by the negligence of his attorney. The following general principles of law seem to be established by our decisions.

We held as far back as 1871 in *Griel v. Vernon,* 65 N.C. 76, that an attorney's neglect to file a plea is a surprise on the client whose failure to examine the record to ascertain that it had been filed is an excusable neglect.

We have held in a number of cases since that ordinarily a client is not charged with the inexcusable neglect of his attorney, provided the client himself has exercised proper care. *Rierson v. York,* 227 N.C. 575, 42 S.E. 2d 902; *Meece v. Commercial Credit Co.,* 201 N.C. 139, 159 S.E. 17; *Helderman v. Hartsell Mills Co.,* 192 N.C. 626, 135 S.E. 627; *Grandy v. Products Co.,* 175 N.C. 511, 95 S.E. 914; *Schiele v. Northstate Fire Ins. Co.,* 171 N.C. 426, 88 S.E. 764. "We have consistently held that where the negligence is that of the attorney, and not of the client against whom a judgment by default is rendered, relief will be afforded the latter." *Holland v. Benevolent Ass'n.,* 176 N.C. 86, 97 S.E. 150. See also *Gunter v. Dowdy,* 224 N.C. 522, 31 S.E. 2d 524.

"In considering the propriety of the order entered on the hearing of defendant's motion, we must remember that the excusability of the neglect on which relief is granted is that of the litigant, not that of the attorney. The neglect of the attorney, although inexcusable, may still be cause for relief." *Rierson v. York, supra,* and cases cited.

The standard of care required of the litigant is that which a man of ordinary prudence usually bestows on his important business. *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67; *Jones-Onslow Land Co. v. Wooten,* 177 N.C. 248, 98 S.E. 706.

The attorney employed "must be one licensed to practice in this State, and his negligence on which the prayer for relief is predicated must have been some failure in the performance of professional duties which occurred prior to and was the cause of the judgment sought to be vacated." 26 N. C. Law Review, p. 85. *Manning v. Railroad,* 122 N.C. 824, 28 S.E. 963; *Lumber Company v. Cottingham,* 173 N.C. 323, 92 S.E. 9.

A further requirement seems to be that the lawyer employed must be reputable, skilled and competent, and that the client must impart to him facts constituting his defense. *Sutherland v. McLean,* 199 N.C. 345, 154 S.E. 662; *Helderman v. Mills Co., supra.* However, the mere employment of counsel is not enough. *Lumber Co. v. Chair Co.,* 190 N.C. 437, 130 S.E. 12. The client may not abandon his case on employment of counsel, and when he has a case in court he must attend to it. *Roberts v. Allman,* 106 N.C. 391, 11 S.E. 424; *Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906.

The party seeking to set aside a default judgment must be without fault. *Kerr v. N. C. Joint Stock Land Bank of Durham,* 205 N.C. 410, 171 S.E. 367; *Abbitt v. Gregory,* 195 N.C. 203, 141 S.E. 587.

The defendant must have a real or substantial defense on the merits, otherwise the court would engage in the vain work of setting a judgment aside when it would be its duty to enter again the same judgment on motion of the adverse party. *Perkins v. Sykes,* 233 N.C. 147, 63 S.E. 2d

133; *Hanford v. McSwain*, 230 N.C. 229, 53 S.E. 2d 84; *Stephens v. Childers*, 236 N.C. 348, 72 S.E. 2d 849.

The findings of fact by the trial court upon the hearing of a motion to set aside a judgment under G.S. 1-220 are conclusive on appeal when supported by any competent evidence. *Carter v. Anderson*, 208 N.C. 529, 181 S.E. 750; *Craver v. Spaugh*, 226 N.C. 450, 38 S.E. 2d 525; *Hanford v. McSwain, supra.*

The conclusions of law made by the judge upon the facts found by him are reviewable on appeal. *Abbitt v. Gregory, supra; Hanford v. McSwain, supra;* McIntosh N. C. Prac. & Proc., p. 743.

The trial court found as facts that six months prior to the institution of this action the defendant engaged Bedford W. Black of Kannapolis, North Carolina, who was a reputable attorney, to represent him in all matters growing out of the collision between the vehicles of the plaintiff and the defendant on 26 January 1952; that Black completely neglected his client's interests, in failing to file an answer within the time allowed by law, and further neglected his duties as an attorney in failing to take steps to protect his client from judgment by default and inquiry or from trial upon the inquiry. At all times the defendant was constantly in communication with his lawyer who assured him that he was taking care of the matter and the court finds as a fact that the defendant has been guilty of no neglect whatever, and that under the circumstances the neglect of Black is not imputable to the defendant. There was plenary competent evidence to support such findings, and the lower court's conclusions are in accord with our decisions. The plaintiff in his brief admits Black was guilty of gross neglect. "The negligence of the attorney, upon the facts found, even if conceded, will not be imputed to defendant, who was free from blame." *Helderman v. Mills Co., supra.*

The trial lower court also found that the defendant has a good and meritorious defense, though he did not find the facts showing a meritorious defense. In *Parnell v. Ivey*, 213 N.C. 644, 197 S.E. 128, it is said: "As to meritorious defense the finding was 'and that defendants have a meritorious defense to the pending action.' This is not sufficient; there should be a finding of the facts showing a meritorious defense."

We do not consider affidavits for the purpose of finding facts ourselves on motions of this sort. *Cayton v. Clark*, 212 N.C. 374, 193 S.E. 404; *Gardiner v. May*, 172 N.C. 192, 89 S.E. 955; *Holcomb v. Holcomb*, 192 N.C. 504, 135 S.E. 287.

Sutherland v. McLean, supra, is a case where a motion was made under C.S. 600, now G.S. 1-220, to set aside a default judgment on the ground of negligence of the attorney. We quote from that case. "The point is made that the trial judge did not find that the defendant had a meritorious defense. There are decisions to the effect that a failure to make such

finding is fatal. There are decisions to the contrary. For instance, in *English v. English,* 87 N.C. 497, this Court said: 'Nor can we give our assent to the proposition that before setting aside the judgment, it was the judge's duty to have ascertained as a fact, whether there existed a meritorious defense to the action, since, that would necessitate a trial by the court, of all the issues involved, and be to anticipate the very purposes of the motion. The affidavit of the defendant sets forth facts which establish a *prima facie* defense, and that is all the law requires.'

"Indeed it is the duty of the court to state the facts constituting the defense in order that the Supreme Court may determine the merit of the question. *Winborne v. Johnson,* 95 N.C. 46; *Vick v. Baker,* 122 N.C. 98, 29 S.E. 64; *Gaylord v. Berry,* 169 N.C. 733, 86 S.E. 623.

"In the *Gaylord case, supra,* the court examined the affidavits filed and found therefrom a meritorious defense, although the trial judge found to the contrary and remanded the case for 'fuller findings of fact, with leave to file additional affidavits, if the parties are so advised.'

"In those cases in which no answer has been filed the nature of the defense must necessarily be presented by affidavits. In such event it would be necessary for the trial judge to find whether or not there was a meritorious defense. But in cases where the pleadings have been filed an inspection of the pleading itself will disclose to the reviewing court whether a meritorious defense was alleged. This perhaps explains the irreconcilable ruling of the court upon the subject. In support of this view it is perhaps more than significant that the following cases: *Bowie v. Tucker,* 197 N.C. 671, 150 S.E. 200; *School v. Peirce,* 163 N.C. 424, 79 S.E. 687; *Hardware Co. v. Buhmann,* 159 N.C. 511, 75 S.E. 731; *Norton v. McLaurin,* 125 N.C. 185, 34 S.E. 269; *Taylor v. Gentry,* 192 N.C. 503, 135 S.E. 327; *Albertson v. Terry,* 108 N.C. 75, 12 S.E. 892; *Holcomb v. Holcomb,* 192 N.C. 504, 135 S.E. 287, were all cases in which no answer had been filed; and in these cases the absence of a finding of meritorious defense has been featured.

"In the case at bar an answer was filed in apt time and is here before us. An examination of the answer discloses that facts are alleged, which, if believed, would constitute a meritorious defense."

In this case a verified motion to set aside the judgment by default and inquiry and the verdict and judgment on the inquiry under G.S. 1-220 was made by the defendant. An examination of this motion discloses that facts are stated, which if believed, would constitute a meritorious defense. It would seem under the authority of *Sutherland v. McLean* that the order of the lower court should not be upset for failing to find the facts showing a meritorious defense. The practical rule of appellate procedure is that the burden is on the appellant to make it plainly appear that error affected prejudicially a substantial right belonging to him, and that there

is a reasonable probability that the result may be more favorable to him, if the error had not occurred. *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398; *Beaman v. R. R., ibid.,* p. 418, 78 S.E. 2d 182; *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342. However, the failure to find such facts is not approved.

The appellant contends in his brief that the court committed error in holding that the defendant's conduct did not constitute such laches as would defeat his motion and bar his right to the relief sought therein, and further committed error in not holding that payment of the judgment by the defendant put an end to the entire action.

Judgment by default and inquiry was rendered by the Clerk on 28 February 1953. The verdict and judgment on the inquiry was entered at the March Term 1953 of the Superior Court. "It (laches) is generally defined to mean negligent omission for an unreasonable time to assert a right enforceable in equity." *Stell v. Trust Co.,* 223 N.C. 550, 27 S.E. 2d 524. "Laches is such delay in enforcing one's rights as works disadvantage to another." 30 C.J.S. 520. The court was correct in holding that the defendant was not guilty of laches so as to defeat his motion or to estop him.

According to the findings of fact after the verdict and judgment on the inquiry was entered an execution on the judgment was entered, and that the defendant still relying upon his attorney Black and upon his advice paid off the execution under protest,

In *Pardue v. Absher,* 174 N.C. 676, 94 S.E. 414, we held that where a corporation has voluntarily paid off a judgment rendered against it without protest and with full knowledge of the facts, and the judgment has been canceled, the corporation may not recover back the money paid. In that case we quoted from 30 Cyc. 1302 as follows: "Payment of a judgment is voluntary unless made to procure the release of the goods of the party making the payment after seizure, or to prevent their seizure by an officer armed with the authority or apparent authority to seize them." Our decision in *Pardue v. Absher* seems to be the general rule. 31 Am. Jur., Judgments, p. 307; 70 C.J.S., Payment, p. 349.

"It has been held, however, that the payment of a judgment on execution is not a voluntary payment and does not operate as a waiver of the right to restitution . . . So the payor may recover money paid on an execution on a judgment when the judgment subsequently is reversed." 70 C.J.S., Payment, p. 349.

"On the other hand, there is authority for the rule that a judgment may be set aside even though it has been paid, where the payment is involuntary. Under this rule, the fact that the amount of a judgment has been collected by a levy and sale under execution does not preclude the vaca-

tion of the judgment." 31 Am. Jur., Judgments, p. 307; *Hays v. Sound Timber Co.,* 261 Fed. 571; 29 A.L.R. 1067.

When an attorney is licensed to practice in a state it is a solemn declaration that he is possessed of character and sufficient legal learning to justify a person to employ him as a lawyer. He is an officer of the court which should hold him to strict accountability for his negligence or misdeeds, if he commits such. The client is not supposed to know the technical steps of a lawsuit. "Where he employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably rely upon the counsel's doing what may be necessary on his behalf." *Whitson v. R. R.,* 95 N.C. 385—quoted in *Gwathney v. Savage,* 101 N.C. 103, 7 S.E. 661; *Schiele v. Ins. Co., supra.* The defendant has been gullible in his reliance on the advice of his attorney but considering that his attorney is an officer of the court, licensed to practice his profession in this State, we cannot say that such gullibility has barred his rights. The payment in this case was under protest, after an execution was issued on the judgment. The defendant paid it off under Black's advice. In no sense of the word was the payment voluntary. The lower court did not commit error in not holding that the payment of the judgment by the defendant under such circumstances put an end to the entire action.

In the Record appears the following order: "The judgment of the Clerk in this cause is affirmed by default and inquiry and it appearing to the court that defendant, after the rendition of the judgment by default and inquiry in this matter, appealed to this court contending that he had filed an answer herein;

"The court finding as a fact that the answer made by the attorney for defendant was not in order and was not verified or signed by the attorney or verified by the defendant, and that the same is not an answer and therefore the appeal is dismissed." This order bears no date, and has no signature. The appellant contends that this order has not been vacated or set aside by any subsequent order, that no appeal was taken from it, that this order became final, and is not subject to be set aside by the motion made by the defendant in this case. There is no merit to this contention because of the plain terms of G.S. 1-220.

When this case is heard by a judge and jury upon the merits, the defendant may or may not prevail. However, it would be a grave reflection upon the law, if it did not give to the defendant an opportunity to have his day in court after he has been the victim of such gross neglect on the part of his lawyer, an officer of the court.

The judgment of the lower court is
Affirmed.

BARNHILL, J., dissents.

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

(Filed 15 January, 1954.)

1. Appeal and Error § 51a—

Allegations to the effect that the aluminum paint used on defendant municipality's water storage tank reflected the rays of the sun and concentrated an excessive glare on plaintiffs' premises to such an extent as to materially lessen the value of the property, were held on a former appeal to state a cause of action as for a taking of the property *pro tanto* for a public use. The decision constitutes the law of the case and precludes nonsuit upon evidence supporting such allegations.

2. Municipal Corporations § 46—

A cause of action by a property owner to recover for depreciation of the value of his property resulting from the reflection of the rays of the sun by the aluminum paint on defendant's water storage tank does not arise until the tank is painted with aluminum paint, and this date must be used in determining whether plaintiff's claim was filed in apt time, if, indeed, the municipal charter provisions in regard thereto apply to such action.

3. Municipal Corporations § 37: Eminent Domain § 8—

A municipality is not bound by its own zoning ordinances, and therefore in an action by a landowner to recover compensation for the depreciation of his property resulting from the erection of a water storage tank in a residential zone, the existence of the ordinance has no bearing upon the question of damages and its admission in evidence is error, since the municipality has the right to erect the tank and compensation may be recovered only for a manner of use amounting to a taking.

4. Same—Landowners in a residential area may not recover compensation based solely on construction of water storage tank within the area by the municipality.

Zoning ordinances are enacted in the exercise of the police power granted a municipality and are subject to amendment or repeal at the will of its governing body, and therefore landowners within a residential zone can acquire no vested right therein and may not recover compensation for the depreciation of their property resulting from the erection by the municipality of a water storage tank in such zone in the exercise of a governmental function, and an instruction to the effect that such landowners are entitled to compensation for the impairment or destruction of their property right that the zone remain a residential area, and permitting the jury to consider as elements of damage the proximity of the tank to their premises, its height, etc., must be held for prejudicial error.

5. Trial § 31b—

An erroneous statement of the law, even though made in stating a contention of a party, must be held for reversible error when the court does not charge the jury as to the erroneous nature of the contention or give the jury the correct rule to be followed by them in arriving at their verdict.

APPEAL by defendant from *Godwin, Special J.*, May Term, 1953, GUILFORD—High Point Division. New trial.

Civil action to recover compensation for a partial taking of plaintiffs' property for a public purpose.

The cause was here on former appeal from an order overruling a demurrer to plaintiffs' complaint. *McKinney v. High Point*, 237 N.C. 66, 74 S.E. 2d 440. The facts alleged as the basis of plaintiffs' cause of action, in support of which they offered evidence in the trial below, are there stated. The testimony essential to a decision of the questions presented on this appeal may be summarized as follows:

Plaintiffs own two lots in High Point located at the southeast intersection of Salem Street and Bridges Street. They have a frontage of 123.5 feet on Salem Street and 148 feet on Bridges Street. There is a one-story residence consisting of seven rooms, hall, bathroom, and front and back porches located on these lots. The residence faces Salem Street. They also own two other lots to the rear of the residence property and located at the southwest corner of Bridges and Howard Streets with a frontage of 148 feet on Bridges and 111.75 feet on the southwest side of Howard Street. These lots are vacant. Thus plaintiffs' property extends from Salem to Howard Streets, a distance of 275 feet.

Defendant acquired certain lots in the middle of the block on the northeasterly side of Howard Street upon which to build a water tank to supplement its water works system. Shortly thereafter, after hearings participated in by plaintiffs and other owners of property located in that vicinity, the defendant, on 15 August 1950, let the contract for the construction of said water tank which is 184 feet high and has a capacity of one million gallons. The work was completed 19 September 1951.

The tank was constructed near the center of the property purchased by defendant, the nearest cement foundation block being 44 feet from the easterly line of Howard Street. The tank is not directly behind plaintiffs' residence property but is at an angle almost directly east thereof. The southeast—rear—corner of plaintiffs' residence is nearer the front cement foundation of the tank than any other part of the residence. The distance between these two points is 298 feet. The distance between the tank and the southeast corner of plaintiffs' vacant lots facing on the opposite side of Howard Street is 125 feet.

Both plaintiffs' property and property purchased by defendant are located in a Residence A Zone under defendant's zoning ordinance.

The allegations of the elements of the damages, including damages caused by the erection of a building of a commercial nature in a Residence A Zone, appear in the former opinion. The plaintiffs contend that the construction of the water tank in the Residence A Zone near their property has "cheapened" the value of property in that location, and that

the zoning of said section including their property "created in plaintiffs . . . a vested property right which the defendant has violated by its action of erecting a business enterprise in the district."

They further allege that the tank was painted with aluminum paint which reflects glaring rays of the sun, which at times, according to their testimony, shines upon their property and the rear side of their residence with such intensity as to materially depreciate the value of their property for residence purposes, to which it is limited by the local zoning ordinance.

The issues submitted to the jury and the answers thereto are as follows:

"1. Are the plaintiffs the owners of the land mentioned and described in the complaint, as therein alleged?

"Answer: YES.

"2. Has the defendant taken a part of the plaintiffs' property for a public use, as alleged in the complaint?

"Answer: YES.

"3. If so, what compensation are the plaintiffs entitled to recover of the defendant?

"Answer: $2,000.00.

"4. Did the plaintiffs in apt time file their notice of claim with the defendant, as alleged in the complaint?

"Answer: YES."

The court below signed judgment on the verdict and defendant excepted and appealed.

James B. Lovelace and Frazier & Frazier for plaintiff appellees.

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

BARNHILL, J. This cause is again before us in large measure because counsel and the trial court misconstrued and misinterpreted our former opinion, *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440. When that opinion is considered contextually and correctly analyzed and construed, it appears that we, in effect, held that the complaint alleged only one act on the part of defendant which, if established by evidence, will support a finding that defendant has made a partial appropriation of plaintiffs' property for a public use without just compensation.

Plaintiffs offered some evidence tending to show that the aluminum-colored tank, by reflecting the rays of the sun, concentrates an excessive glare on their premises to such an extent as to materially "cheapen" its value. This evidence is supported by allegation. For this reason the motion to dismiss, in view of our former opinion, *McKinney v. High Point, supra,* is untenable.

There is respectable authority to the effect that anything less than an actual physical invasion and "taking" of property for a public use cannot constitute a taking within the meaning of the fundamental law which requires the payment of just compensation. However, we need not enter into a discussion of that question—raised in the briefs—for our former opinion is the law of this case in respect thereto. Instead, we come directly to the exceptive assignments of error. These will not be discussed *seriatim.* We will only discuss briefly some of the questions raised thereby.

Plaintiffs' claim was filed in apt time. Their cause of action arose, if at all, when the defendant painted the tank with aluminum paint, thereby allegedly concentrating reflected rays of the sun on their property. Theretofore they had suffered no injury for which compensation may be recovered. *Lyda v. Town of Marion, post,* p. 265, and cases cited. Indeed, there is serious doubt whether the charter provision relied on by the defendant is controlling here. It would seem to apply to tort claims only. But this we do not decide.

In paragraph 9 of the complaint plaintiffs allege the various acts and conduct of defendant which, in combination, they contend constitute a wrongful taking of their property. It is true this Court summarized these allegations (including those which do not state conditions as they now exist but express the fears of the plaintiffs as to what may occur in the future) and said: "These allegations allege a taking of plaintiffs' property for which compensation must be paid for any loss the plaintiffs may have suffered under the fundamental law of the State and Nation." However, we also said: "If a complaint is good in any respect or to any extent, it cannot be overthrown by a demurrer."

If the opinion had stopped there, little could be said about the theory of the trial in the court below. But that is not all. Speaking through *Parker, J.,* the Court then proceeded to "knock down the ten pins" one by one.

We there held that (1) under the law as it then existed the defendant was not bound by its own zoning ordinance, and therefore it had the right to construct its water tank in a Residence A Zone without incurring any liability for the consequential damages sustained by residents of the zone as a result of such nonconforming use; and (2) in building the tank the defendant was acting in its governmental capacity and exercising one of its discretionary governmental powers or functions.

We further held that the complaint fails to allege a nuisance or negligent operation, and that the allegation that the tank constitutes a constant hazard to plaintiffs' property from airplanes, windstorms, and the like are contingent and speculative, for which no damages may be assessed.

Thus we left the allegation "that it is painted a bright silver color so that the reflection of the rays of the sun upon it causes a continuous and

blinding glare" which materially depreciates the value of their property as the one allegation upon which plaintiffs must rest their claim.

The court admitted the zoning ordinances to be considered on the question of damages only. This must be held for error. In so far as the defendant's action in erecting the water tank in a Residence A Zone is concerned, the cause must be heard as if there was no ordinance. Since defendant was not bound by the ordinance, it can have no possible bearing on the question of damages. It did what it had a right to do, and any damages caused to surrounding property by reason of the erection and maintenance by the municipality of the tank in a Residence A Zone are consequential in nature for which no recovery may be had. *McKinney v. High Point, supra; Clinton v. Ross*, 226 N.C. 682, 40 S.E. 2d 593 (Operation of tobacco sales warehouse); *King v. Ward*, 207 N.C. 782, 178 S.E. 577 (Operation of cotton gin across street from plaintiffs' residence).

In the *King case* this Court approved the charge to the jury as follows:

"I charge you, gentlemen, that even if the building of the gin in that locality diminished the value of the plaintiff's . . . property, you could not consider that, because the defendant had a right to build it there, and if . . . the erection of any business building affected the property, residential property, near that; that, even if that were so, you could not consider that as an element of damage, that is the damage a man has to take who owns a residence, and as the gin was a business house next to him, that is the risk he takes in living in town . . . You must be very careful to eliminate . . . from any damage that you may give to the plaintiff any depreciation in the value of its property, brought about by the building of this gin on the street opposite him, because he had a right to build it there."

Dayton v. Asheville, 185 N.C. 12, 115 S.E. 827, cited and relied on by both parties, correctly construed, is no authority for plaintiffs on the facts in this case except as to the alleged excessive glare caused by the reflection of the rays of the sun. The key or decisive sentence in that opinion is this: "The alleged injury consists in the doing of a lawful act, but in such a manner as to amount to a partial taking of the property in question for a public use." Except as to the alleged excessive rays of the sun reflected by the tank there is no evidence, on this record, of a "manner of use" amounting to a taking.

In a number of instances the court, in its charge, gave the jury instructions as to the law in the form of contentions. As an example, it stated:

"The position taken by the plaintiffs in that respect is that they had a property right, a vested property right in the retention of that area or that district in which they had built their home; that they had a property right in its remaining a residential area, and that property right was a

vested right and that it was violated, impaired or destroyed by the erection of the water tank, and that they are entitled to compensation.

"They also allege and contend that they have been—that the use and enjoyment of that property has been impaired by the erection of that tank which constitutes a taking or an injury or a damaging of their property for which they contend they are entitled to be compensated."

These instructions, though in the form of contentions, must be held for reversible error. *S. v. Hedgepeth,* 230 N.C. 33, 51 S.E. 2d 914; *S. v. Pillow,* 234 N.C. 146, 66 S.E. 2d 657; *McLean v. McLean,* 237 N.C. 122, 74 S.E. 2d 320.

The vice of the quoted excerpt from the charge is twofold: (1) It placed before the jury matters that had been expressly rejected by this Court in its former opinion and which should not be taken into consideration by the jury in arriving at a verdict, *S. v. Pillow, supra,* and cases cited; and (2) it presented an erroneous concept of the law. The adoption of a zoning ordinance does not confer upon citizens living in a Residence A Zone, as therein defined, any vested right to have the ordinance remain forever in force, inviolate and unchanged.

A zoning ordinance is not a contract between the municipality and its citizens. *Realty Co. v. Cincinnati,* 21 N.E. 2d 993. The adoption of such ordinance is a valid exercise of the police power, *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78, which is not exhausted by its use.

It being a law enacted in the exercise of the police power granted the municipality, no one can acquire a vested right therein. *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469; *Pinkham v. Mercer,* 227 N.C. 72, 40 S.E. 2d 690; *Reichelderfer v. Quinn,* 287 U.S. 315, 77 L. Ed. 331; *Reinman v. Little Rock,* 237 U.S. 171, 59 L. Ed. 900. It is subject to amendment or repeal at the will of the governing agency which created it.

We might well overlook as harmless the erroneous statement of the law in the form of a contention if and when the judge forthwith instructs the jury as to the erroneous nature of the contention and gives them the correct rule to be followed by them in arriving at their verdict. But here this was not done either at the time the contention was stated or later in the charge.

There was error in the charge of the court on the issue of damages. The general import of the charge as to the law applicable to the facts in this case may be summarized by quotation of one excerpt of the charge on that issue as follows:

"The only question with which you will be concerned in your consideration of this issue is whether the City in erecting the tank took away from the plaintiffs something of value, be it large or small."

By this instruction the court opened the door for the jury to consider the alleged deprivation of a vested right, the proximity to the premises of plaintiffs, the fact the tank is taller than other buildings in the vicinity and can be seen from plaintiffs' front yard and is a commercial structure erected in a residential section, as well as every other element of consequential damages plaintiffs insist they are entitled to recover. And the vice in the generality of the instruction is emphasized by the fact the court at no time instructed the jury as to what constitutes a taking or in what respect plaintiffs' evidence tends to prove a taking under the law as it exists in this jurisdiction.

Defendant at this time seeks only one new trial, and one prejudicial error is sufficient basis for awarding it. However, we have departed from our usual custom and discussed several errors in the trial, any one of which is sufficient to warrant a new trial. We have done so because these questions would, if not noticed by us, in all probability arise on a retrial and, we trust, our discussion will tend to promote a retrial of the issues in this cause free of substantial error.

We are indebted to counsel for full and comprehensive briefs in which many authorities bearing on the questions presented are cited. They have been of material aid to us. However, in view of our conclusions herein, we have refrained from citing many of the cases to which our attention has been directed.

For the reasons stated there must be a

New trial.

W. J. HAYES, ADMINISTRATOR OF THE ESTATE OF W. J. HAYES, JR., v. CITY OF WILMINGTON, NORTH CAROLINA, TOWLES-CLINE CONSTRUCTION COMPANY; E. B. TOWLES CONSTRUCTION COMPANY AND S. E. COOPER, TRADING AND DOING BUSINESS AS S. E. COOPER COMPANY.

(Filed 15 January, 1954.)

1. **Torts § 6—**

Right of one defendant to have another defendant joined for the purpose of contribution is purely statutory and must be enforced in accordance with the provisions of the statute. G.S. 1-240.

2. **Torts § 5—**

The injured party is entitled to sue one or all of the joint tort-feasors whose negligence concurred in producing the injury, and in so far as he is concerned, when he sues one of them the others are not necessary parties.

3. **Torts § 6—**

In order for one defendant to join another as additional defendant for the purpose of contribution he must show by his allegations facts sufficient

to make them both liable to the plaintiff as joint tort-feasors, and allegations showing only a cause of action which would entitle the plaintiff to recover of such additional party are not sufficient.

4. **Same: Negligence § 8—Allegations of cross action held insufficient to show that defendant joined was liable to plaintiff as joint tort-feasor.**

Intestates were killed by explosion of gas in their house. Plaintiff brought suit against the contractor excavating for street improvements upon allegations that a road machine operated by defendant's employee struck a gas pipe about eleven inches below the surface and then moved on and struck another gas pipe about fifty feet distant which was about fourteen inches below the surface, and that shortly thereafter the explosion occurred. Defendant contractor had the gas company joined upon allegations that the pipes were installed too near the surface of the street, that the gas company failed to remove them or lower them after notice that excavation work on the street was contemplated, and that the meter and governor at the residence was not properly installed, but without allegation of any causal connection between such installation and the explosion. *Held:* Upon the allegations, the acts of the contractor insulated the negligence, if any, of the gas company, since the acts of the contractor did not merely operate as a condition on or through which the negligence of the gas company produced the injury but were intervening acts of a responsible third party which could not have been reasonably foreseen, and further the allegations invoke the doctrine of primary and secondary liability in that the negligence of the gas company, if any, was passive while the negligence of the contractor was active, and therefore upon the allegations the gas company is not liable to plaintiff as a joint tort-feasor and defendant contractor is not entitled to have the gas company retained in the action under G.S. 1-240.

5. **Same—**

Where one defendant seeks to have another defendant retained in the action as a joint tort-feasor, the original defendant must allege facts which, if proven, render such other defendant liable to him for contribution in the event plaintiff recovers, and in so doing he cannot rely upon the allegations of the complaint.

6. **Same—**

When no cause of action is stated either in the complaint or cross action against a codefendant joined on motion of the original defendant for the purpose of contribution, such additional defendant is an unnecessary party and the inclusion of his name is mere surplusage, and he is entitled to have his name stricken from the pleadings on motion.

7. **Pleadings § 31: Parties § 12—**

A person who is made a party to an action but who is an unnecessary party thereto may have his name stricken from the pleadings on motion.

8. **Same: Courts § 5—**

While ordinarily one Superior Court judge may not review the judgment of another, where an order making an additional party is entered without notice or hearing to such party, the order making him an additional party cannot preclude him from thereafter moving that his name be stricken

from the pleadings, since the rule cannot abrogate rights guaranteed by the due process clause of the Constitution.

APPEAL by defendant S. E. Cooper from *Grady, Emergency J.*, February Term, 1953, NEW HANOVER.

Civil action for the wrongful death of plaintiff's intestates, heard on motion of Tide Water Power Company and Carolina Power & Light Company, additional defendants, to strike their names as defendants.

There were two separate actions instituted by W. J. Hayes, administrator, against the same defendants, in which he seeks to recover, in one action, for the wrongful death of W. J. Hayes, Jr., and, in the other, for the wrongful death of Sue H. Hayes. The deaths of the intestates occurred at the same time as the result of the same occurrence. Therefore, the cases were consolidated for the purpose of the hearing in the court below.

In the summer of 1951, defendant City of Wilmington had decided to improve certain of its streets, including grading and paving a part of Barnard Drive between Chestnut and Market Streets, according to plans and specifications furnished by the city.

On 15 August 1951, defendant Towles-Cline Construction Company contracted with the city to do the necessary work, particularly the grading and paving on Barnard Drive. On 2 November, the construction company contracted with defendant Cooper to do the necessary grading and excavating on Barnard Drive and other streets.

At that time, defendant Tide Water Power Company was the public service company which furnished gas for heating, cooking, and other purposes, to the citizens of defendant city. Underground gas pipes led from the gas main on Barnard Drive to residences of customers in that vicinity.

On 31 December, about 7:30 a.m., Cooper's employees were excavating and grading on Barnard Drive. They were to excavate to a depth of twenty inches. The blade of the grader machine struck a gas pipe about eleven inches below the surface. After investigating, the operator moved on, and about fifty feet further the blade of his machine struck another pipe which was about fourteen inches below the surface. One of these pipes was used to convey BTU gas to the residence occupied by the two intestates. Shortly after the pipes were struck by the machine, there was a devastating explosion in or under said residence, which explosion completely destroyed the residence and caused the deaths of plaintiff's intestates.

Cooper filed answer in which he pleads a cross action against the Tide Water Power Company and the Carolina Power & Light Company. The court then, on motion of Cooper, made these two companies parties defendant and they were duly served with summons.

In his cross action against the additional defendants, Cooper alleges that the power company (1) failed to install and maintain said service gas pipes at a depth and in such manner as to insure the safety of persons and property; (2) failed to properly install and fasten the said service or gas line under the residence of plaintiff's intestates in such manner as to prevent injury, and (3) failed to lower said service pipes on Barnard Drive to a depth below the grade to be cut after having been notified that grading and excavating on said street was about to commence.

He further alleges that the meter and the governor which controls the high pressure gas were installed by the power company in such manner that when pressure greater than that provided against by the governor was applied, it would blow out the mercury and permit large quantities of highly volatile gas to escape under the house, and that it failed to install a vent on said governor to prevent this from occurring. He makes certain other allegations to the effect the gas line was not properly installed but was left in such condition that extra pressure would cause large quantities of gas to escape under the house.

He does not allege that at the time of the occurrence complained of excessive pressure was applied, or that the mercury was blown from the governor, or that the striking of the pipe by his machine caused excessive pressure which blew out the mercury. In fact, he alleges no connection between the striking of the pipe and the explosion, other than that the pipes were not laid more than twenty inches below the surface of the street so that, in excavating to a depth of twenty inches, his machine would not have struck the pipes. Moreover, there is no allegation that the pipes were installed in breach of any ordinance, rule, or regulation of the City of Wilmington, or other than in strict accord with its directions.

As a basis for his motion to make the Carolina Power & Light Company a party defendant, he alleges that since the installation of the gas pipes, said company has purchased the assets of the Tide Water Power Company, assumed its obligations, and is now serving its former customers, so that, should Cooper eventually recover over against the power company, the light company would have to pay, and it is therefore the real party in interest as between Cooper and the additional defendants.

The Carolina Power & Light Company, in its own right, and as successor, by merger, to the Tide Water Power Company, entered a special appearance and moved the court to strike its name and the name of Tide Water Power Company as parties defendant for that the cross action contained in Cooper's further answer does not state facts sufficient to constitute a cause of action against them or either of them and does not show that either of the additional defendants are necessary parties to this action.

As the power company is the additional defendant alleged to have committed the acts of negligence set forth in Cooper's cross action, we will, for convenience, hereafter refer to these two defendants merely as the power company.

When the motion came on for hearing in the court below, the court, after hearing the parties, entered judgment striking the names of movants as parties defendant herein and dismissing the cross action. While the judgment entered is entitled "Judgment on motion . . . to strike and on demurrer *ore tenus* to further answer and cross bill of S. E. Cooper," the record fails to disclose elsewhere that the appellees entered a demurrer *ore tenus,* and they assert in their brief that they did not demur, but are relying solely on their motion to strike.

From the judgment entered the defendant Cooper appealed.

McClelland & Burney, R. M. Kermon, and McLean & Stacy for defendant appellant S. E. Cooper.

Hogue & Hogue, Ernest S. DeLaney, Jr., and A. Y. Arledge for Carolina Power & Light Company and Tide Water Power Company, appellees.

BARNHILL, J. Defendant Cooper was entitled, if at all, to have the additional defendants made parties defendant under the statute which permits contribution between joint tort-feasors, G.S. 1-240.

At common law no right of action for contribution existed between or among joint tort-feasors. The question could not be raised either by independent suit, after judgment had been rendered against one of the joint tort-feasors, or in the original action by the party injured against one of them. The right is purely statutory, *Hoft v. Mohn,* 215 N.C. 397, 2 S.E. 2d 23; *Lineberger v. Gastonia,* 196 N.C. 445, 146 S.E. 79, and must be enforced in accord with the provisions of the statute, G.S. 1-240. *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768; *Godfrey v. Power Co.,* 223 N.C. 647, 27 S.E. 2d 736.

When a person has been injured through the concurring negligence of two or more persons, he may sue one or all the joint tort-feasors at his option. *Watts v. Lefler,* 194 N.C. 671, 140 S.E. 435; *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911. In so far as he is concerned, the others are not necessary parties and he may not be compelled to bring them in. *Charnock v. Taylor, supra.* They may, however, be brought in by the original defendant on a cross complaint in which he alleges joint tort-feasorship and his right to contribution in the event plaintiff recovers judgment against him. G.S. 1-240; *Mangum v. Ry. Co.,* 210 N.C. 134, 185 S.E. 644; *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434;

Lackey v. Ry. Co., 219 N.C. 195, 13 S.E. 2d 234; *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335.

Therefore, to retain the additional defendants as parties to the pending action, it must be made to appear that Cooper has alleged a cause of action against them for contribution. Allegations of a cause of action which would entitle the plaintiff to recover will not suffice. *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648; *Freeman v. Thompson, supra; Charnock v. Taylor, supra.* The original defendant has no cause of action for contribution unless the facts alleged by him in his cross action are sufficient to make both of them liable to the plaintiff *as joint tort-feasors. Bost v. Metcalfe, supra.* "This is necessarily so for the very simple reason that one party cannot invoke either of these rights (contribution or indemnity) against another party unless both of them are liable to the same person as joint tort-feasors." *Hunsucker v. Chair Co., supra.*

The allegations of negligence contained in the cross action are summarized in the statement of facts. In short they are: (1) The installation of the gas pipes too near the surface of the street; (2) a failure to remove them or lower them to a proper depth after notice that excavation work on the street was contemplated; and (3) improper installation at the meter. Nowhere is it alleged that the negligence of the power company concurred with the negligence of Cooper in causing the death of the intestates. Instead, he alleges that the negligence of the power company was the sole proximate cause of their injury and death. He does not pray for contribution. He makes no reference to the explosion or the resulting death of plaintiff's intestates or to his acts in relation thereto.

If we concede that Cooper has sufficiently alleged negligence on the part of the power company and that plaintiff will prove the acts of negligence he alleges against Cooper (which Cooper does not even conditionally concede in his cross complaint), it is made to appear that the acts of Cooper were the acts of an "outside agency or responsible third person" which completely insulated the negligence, if any, of the power company. *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197; *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; *McLaney v. Motor Freight, Inc.,* 236 N.C. 714, 74 S.E. 2d 36, and cases cited; *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111.

The negligence, if any, of the power company was passive; that of defendant was active. Without the negligence of Cooper, the negligence of the power company would have caused no harm. The intervening acts of Cooper did not merely operate as a condition on or through which the negligence of the power company operated to produce the injury and deaths of plaintiff's intestates, or merely accelerate or divert the negligence of the power company. It broke the line of causation, *Riggs v. Motor Lines, supra,* so that it cannot be said that the power company

could have reasonably foreseen the negligence of Cooper or that the two are joint tort-feasors.

Moreover, the acts of negligence of the power company alleged by Cooper, when related to the negligence alleged by plaintiff, at least invokes the doctrine of primary and secondary liability, Cooper being the one primarily liable. And it is axiomatic that one who is primarily liable cannot recover over against one who is secondarily liable. On insulated negligence see *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; *Warner v. Lazarus,* 229 N.C. 27, 47 S.E. 2d 496; *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648; *Peoples v. Fulk,* 220 N.C. 635, 18 S.E. 2d 147; *Beaver v. China Grove,* 222 N.C. 234, 22 S.E. 2d 434; and on primary and secondary liability see *Bost v. Metcalfe, supra; Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, 63 S.E. 2d 118; and *Westchester Lighting Co. v. Westchester County Small Estates Corp.,* 278 N.Y. 175, 15 N.E. 2d 567.

Cooper seeks to avail himself of the provisions of G.S. 1-240. In so doing, he cannot rely upon any liability of the power company to plaintiff or borrow from the plaintiff or improve his legal status by leaning upon his (plaintiff's) cause of action. He must allege facts which, if proven, render the power company liable to him in the event plaintiff recovers on his causes of action. This he has failed to do. *Charnock v. Taylor, supra; Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566.

It follows that Cooper's cross action fails to state a cause of action for contribution.

In the absence of a cross action against a third party, made defendant on motion of the original defendant, in which a cause of action for contribution is sufficiently alleged, the additional party is an unnecessary party to the action and may, on motion, have his name stricken from the pleadings.

When no cause of action is stated against a defendant, either in the complaint or in a cross action pleaded by another defendant, he is an unnecessary party and the inclusion of his name is mere surplusage. *Sullivan v. Field,* 118 N.C. 358.

A proper remedy is by motion to strike. *Winders v. Southerland,* 174 N.C. 235, 93 S.E. 726; *Bank v. Gahagan,* 210 N.C. 464, 187 S.E. 580; *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Worth v. Trust Co.,* 152 N.C. 242, 67 S.E. 590; *Fleming v. Light Co.,* 229 N.C. 397, 50 S.E. 2d 45.

"The demurrer was properly overruled. At the most they would have been merely unnecessary parties . . . Such party has his remedy by motion to strike out his name." *Winders v. Southerland, supra.*

We do not mean to say, however, that where there is an unsuccessful attempt, either by the plaintiff or a defendant, to state a cause of action against an additional party defendant, a demurrer will not lie.

The contention of the defendant Cooper that the hearing before Grady, E. J., constituted a review by one Superior Court Judge of the order or judgment of another Superior Court Judge and that, in effect, Grady, E. J., by his judgment reversed the order of Carr, J., making appellees additional parties is untenable. The additional defendants were made parties without notice and without a hearing, and they were entitled to their day in court.

Ordinarily one Superior Court Judge may not review the judgment of another Superior Court Judge. *Davis v. Land Bank,* 217 N.C. 145, 7 S.E. 2d 373; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Newton and Co. v. Manufacturing Co.,* 206 N.C. 533, 174 S.E. 449; *Fleming v. Light Co., supra.* This rule, however, does not apply to orders making additional parties and other orders entered without notice or hearing. The rule does not and cannot abrogate the rights guaranteed by the due process clause of the Constitution.

The judgment entered in the court below is

Affirmed.

STATE v. EDWARD L. TILLEY, R. A. BOWMAN, D. W. SNOW, O. W. CRANDELL AND EVERETTE H. MABE.

(Filed 15 January, 1954.)

1. Criminal Law § 52a (2)—

The unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused.

2. Larceny § 1—

The possession of the custodian of a company's warehouse is in contemplation of law the possession of the company, and therefore the felonious asportation of the goods from the warehouse with the connivance and aid of the custodian constitutes larceny.

3. Criminal Law § 42f: Evidence § 17—

A party cannot impeach his own witness either in a civil or in a criminal case.

4. Same—

A party makes a witness his own within the rule forbidding impeachment by putting him on the stand and examining him as a witness at the trial of the cause.

5. Same—

Since a party calling and examining a witness represents him to be worthy of belief he may not impeach the credibility of such witness even

though the witness be the adverse party. This rule is not invoked merely by the subpoenaing or causing a witness to be sworn or by taking a deposition unless the deposition or part of it is offered in evidence. This rule does not apply where the calling of the witness is required by law, such as attesting or subscribing witnesses to an instrument, and in the examination of a judgment debtor by the judgment creditor to disclose assets.

6. Same—

The rule that a party cannot impeach his own witness precludes him from showing that the general character of the witness is bad or that the witness had made statements at other times inconsistent with or contradictory to his testimony at the trial. Nor may this be done under the guise of corroborating evidence.

7. Same—

The trial court has the discretionary power to permit a party to cross-examine his own witness who is hostile, or surprises him by his testimony, for the purpose of refreshing the memory of the witness and enabling him to testify correctly, but not solely for the purpose of proving the witness to be unworthy of belief.

8. Criminal Law § 42c: Evidence § 22—

It is not permissible for a party to put before the jury under the guise of cross-examination incompetent matter inimical to his adversary.

9. Criminal Law § 42f: Evidence § 17—

The rule that a party may not impeach his own witness does not preclude a party from proving the facts to be different from those to which his witness testifies.

10. Criminal Law § 42f—Held: Trial court committed error in permitting State to impeach its own witness.

In this prosecution for larceny and conspiracy to commit larceny, the solicitor knew that one of the accomplices had repudiated his statement implicating appealing defendant, but nevertheless called him as a witness and on cross-examination interrogated him by questions framed so as to suggest to the jury that the appealing defendant was guilty and that the witness was testifying falsely in giving testimony favorable to appealing defendant, and also introduced in evidence the repudiated statement incriminating defendant. *Held:* Permitting the cross-examination and the introduction in evidence of the repudiated statement was prejudicial error.

APPEAL by defendant D. W. Snow from *Crisp, Special Judge,* and a jury, at March Term, 1953, of FORSYTH.

Criminal prosecution upon an indictment charging both a conspiracy to commit larceny and larceny.

For ease of narration, D. W. Snow is called the defendant, and Edward L. Tilley, R. A. Bowman, O. W. Crandell, and Everette H. Mabe are designated by their surnames.

The facts are summarized in the numbered paragraphs set forth below.

1. The Brown-Rogers-Dixson Company, a corporation, wholesaled television sets at Winston-Salem in Forsyth County.

2. During the calendar year 1951, Bowman was the custodian of the warehouse in which the Brown-Rogers-Dixson Company stored its television sets.

3. During the period beginning on 15 February and ending 4 July, 1951, Tilley surreptitiously and feloniously took and carried away from the warehouse twelve television sets belonging to the Brown-Rogers-Dixson Company of the value of $3,000.00.

4. Bowman, who received cash payments of money from Tilley for so doing, aided and abetted Tilley in the theft by surreptitiously delivering the television sets to Tilley at the warehouse and permitting him to carry them away.

5. On 21 November, 1951, Bowman admitted to an officer of the Brown-Rogers-Dixson Company that Tilley had stolen the twelve television sets and that he had aided and abetted Tilley in the theft.

6. Two days later, to wit, on 23 November, 1951, Bowman signed a written statement susceptible of the construction that the defendant induced him to aid and abet in the theft of some or all of the television sets.

7. Subsequent to this event, Bowman, who reads with much difficulty, stoutly maintained to the district solicitor, the police officers investigating the theft, and others that his statement of 23 November, 1951, "wasn't the truth"; that he did not know it was susceptible of the construction set forth in the preceding paragraph when he signed it; that he and Tilley were the only parties to the theft; and that the defendant had no connection with it. Bowman went so far as to deliver to the district solicitor a document drafted by his counsel and signed by him in which he reiterated his assertion that the defendant did not have anything to do with the crime committed by him and Tilley.

8. Subsequent to 23 November, 1951, the defendant, Tilley, Bowman, Crandell, and Mabe were indicted by the grand jury upon two counts. The first count charged them with a conspiracy to steal television sets belonging to the Brown-Rogers-Dixson Company of the value of more than $100.00; and the second count charged them with the actual larceny of television sets owned by the Brown-Rogers-Dixson Company of the value of more than $100.00. The transcript of the record certified to us shows that Crandell was tried and acquitted before the March Term, 1953, of the Superior Court of Forsyth County, but omits all mention of Mabe except the bare fact of his indictment.

9. The case was called for trial as to the defendant, Tilley, and Bowman at the March Term, 1953, of the Superior Court of Forsyth County. Tilley and Bowman entered general pleas of guilty. The defendant

pleaded not guilty to both counts, and was placed on trial before a petit jury.

10. Tilley, who was called to the stand as a State's witness, testified that the defendant actually hired him and Bowman to steal the television sets from the Brown-Rogers-Dixson Company; that he stole the television sets from the Brown-Rogers-Dixson Company with the assistance of Bowman pursuant to such hiring; and that the defendant received the stolen television sets after they had been removed from the warehouse and disposed of them. The defendant, who testified in his own behalf, denied in emphatic terms that he had any connection with the theft or the stolen property.

11. Despite his knowledge of the matters recited in paragraph 7, the district solicitor put Bowman on the stand as a witness for the State, and drew from him testimony to the effect that he and Tilley were the only parties to the theft and that the defendant had nothing to do with it.

12. After the solicitor had elicited this testimony, the trial judge, who professedly acted in the exercise of his discretion, allowed the solicitor to propound to Bowman over the objections of the defendant numerous argumentative and leading questions concerning the statement of 23 November, 1951, and other matters which were so framed, whatever their true object may have been, as to suggest to the jury that the defendant was undoubtedly guilty and that Bowman was testifying falsely in denying the defendant's participation in the crime. Despite this ordeal, Bowman persisted in his denial of the defendant's complicity.

13. The solicitor was also permitted to put in evidence over the exception of the defendant the written statement signed by Bowman on 23 November, 1951. The statement was offered and admitted generally; and the trial judge did not instruct the jury at any time as to the purpose for which it might be considered. Indeed, the trial judge did not mention Bowman, or his testimony, or the statement during his charge.

14. The jury found the defendant "guilty of conspiracy and larceny as charged in the bill of indictment"; the trial judge sentenced the defendant to imprisonment as a felon; and the defendant appealed, assigning errors.

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

Higgins & McMichael and H. Bryce Parker for defendant D. W. Snow, appellant.

ERVIN, J. The defendant insists primarily that he is entitled to a reversal for insufficiency of testimony. This claim is insupportable. The evidence of the State's witness Tilley was amply sufficient to carry the

case to the jury on both counts of the indictment. *S. v. Bennett,* 237 N.C. 749, 76 S.E. 2d 42.

This is true notwithstanding Tilley claimed to be an accomplice of the defendant, and notwithstanding Bowman, another supposed accomplice, was custodian of the warehouse in which the goods were stored by their owner. It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *S. v. Rising,* 223 N.C. 747, 28 S.E. 2d 221; *S. v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594; *S. v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909; *S. v. Gore,* 207 N.C. 618, 178 S.E. 209; *S. v. Herring,* 201 N.C. 543, 160 S.E. 891; *S. v. Casey,* 201 N.C. 185, 159 S.E. 337; *S. v. Shew,* 196 N.C. 386, 145 S.E. 679; *S. v. Ashburn,* 187 N.C. 717, 122 S.E. 833; *S. v. Bailey,* 179 N.C. 724, 102 S.E. 406; *S. v. Palmer,* 178 N.C. 822, 101 S.E. 506; *S. v. Jones,* 176 N.C. 702, 97 S.E. 32; *S. v. Smith,* 170 N.C. 742, 87 S.E. 98; *S. v. Shaft,* 166 N.C. 407, 81 S.E. 932, Ann. Cas. 1916C, 627; *S. v. Neville,* 157 N.C. 591, 72 S.E. 798; *S. v. Register,* 133 N.C. 746, 46 S.E. 21; *S. v. Barber,* 113 N.C. 711, 18 S.E. 515; *S. v. Miller,* 97 N.C. 484, 2 S.E. 363; *S. v. Stroud,* 95 N.C. 626; *S. v. Holland,* 83 N.C. 624, 35 Am. R. 587; *S. v. Hardin,* 19 N.C. 407; *S. v. Haney,* 19 N.C. 390. Bowman was entrusted at most with the bare custody of the goods, whose possession in contemplation of law remained in the Brown-Rogers-Dixson Company until Tilley feloniously took and carried them away. *S. v. Ruffin,* 164 N.C. 416, 79 S.E. 417, 47 L.R.A. (N.S.) 852; *S. v. Jarvis,* 63 N.C. 556; *S. v. Jones,* 19 N.C. 544; *S. v. Higgins,* 1 N.C. 36; *People v. Goldberg,* 327 Ill. 416, 158 N.E. 680; *Roeder v. State,* 39 Tex. Cr. 199, 45 S.W. 570; Brill: Cyclopedia of Criminal Law, Section 765; 32 Am. Jur., Larceny, Section 59; 52 C.J.S., Larceny, Section 43.

The defendant contends secondarily that he is entitled to a new trial because the trial judge erred in permitting the solicitor to cross-examine the State's witness Bowman, and to put in evidence the written statement signed by Bowman on 23 November, 1951. The question of the validity of this contention turns in large measure on the common law rule which forbids a party to impeach his own witness.

This ancient rule has been roundly condemned by commentators on the law of evidence. Am. Law Inst., Model Code of Evidence, pages 20, 119; Stansbury on North Carolina Evidence, Section 40, note 92; Wigmore on Evidence (Perm. Ed.), Sections 896-899. It is nevertheless accepted as sound law in this State. Indeed, it was given legislative recognition by the General Assembly of 1951. See: G.S. 1-568.25. The rule and its corollaries are thus exemplified in North Carolina decisions:

1. A party cannot impeach his own witness either in a civil or in a criminal case. *Morris v. Service Co.,* 214 N.C. 562, 199 S.E. 922; *Clay v. Connor,* 198 N.C. 200, 151 S.E. 257; *S. v. Neville,* 175 N.C. 731, 95 S.E. 55; *Worth Co. v. Feed Co.,* 172 N.C. 335, 90 S.E. 295; *Smith v. Railroad,* 147 N.C. 603, 61 S.E. 575; *Kendrick v. Dellinger,* 117 N.C. 491, 23 S.E. 438; *Strudwick v. Brodnax,* 83 N.C. 401; *Wilson v. Derr,* 69 N.C. 137; *Shelton v. Hampton,* 28 N.C. 216; *Sawrey v. Murrell,* 3 N.C. 397. Despite an early decision to the contrary (*S. v. Norris,* 2 N.C. 429, 1 Am. D. 564), the rule applies to the State as well as to other litigants. *S. v. Freeman,* 213 N.C. 378, 196 S.E. 308; *S. v. Cohoon,* 206 N.C. 388, 174 S.E. 91; *S. v. Melvin,* 194 N.C. 394, 139 S.E. 762; *S. v. Mace,* 118 N.C. 1244, 24 S.E. 798; *S. v. Taylor,* 88 N.C. 694 (overruling *S. v. Norris, supra*).

2. A party makes a witness his own within the rule forbidding impeachment by putting him on the witness stand and examining him as a witness at the trial of the cause. *Strudwick v. Brodnax, supra.* A party does not make one his witness by subpoenaing him as a witness; or by causing him to be sworn as a witness; or by taking his deposition as a witness, unless he offers the deposition or part of it in evidence at the trial. *Neil v. Childs,* 32 N.C. 195; 58 Am. Jur., Witnesses, Section 793; 70 C.J., Witnesses, Section 992.

3. A party even makes an adverse party in the litigation his own witness, and by reason thereof is not allowed to impeach him if he calls and examines the adverse party as a witness at the trial of the cause. *Helms v. Green,* 105 N.C. 251, 11 S.E. 470, 18 Am. S. R. 893; *Olive v. Olive,* 95 N.C. 485; *Strudwick v. Brodnax, supra.* But a party does not make his adversary his witness by taking his adverse examination before the trial, unless he offers the adverse examination or part of it in evidence at the trial. *Hudson v. Jordan,* 108 N.C. 10, 12 S.E. 1029; *Shober v. Wheeler,* 113 N.C. 370, 18 S.E. 328. Moreover, a judgment creditor does not make a judgment debtor his witness by examining him in a proceeding supplemental to execution to compel him to disclose his assets. *Coates Bros. v. Wilkes,* 92 N.C. 376.

4. The reason ordinarily advanced in support of the rule forbidding a party to impeach his own witness is that in calling the witness the party represents him to be worthy of belief. *Lynch v. Veneer Co.,* 169 N.C. 169, 85 S.E. 289; *S. v. Taylor, supra; Hice v. Cox,* 34 N.C. 315. This reason and the rule grounded on it can have no application where the calling of the witness is required by law. A party may, therefore, impeach a witness, such as an attesting or subscribing witness to a will or other instrument, whom the law compels him to call. *Smith v. Railroad, supra; Hice v. Cox, supra; Bell v. Clark,* 31 N.C. 239; *Crowell v. Kirk,* 14 N.C. 355. A witness of this character is said to be the witness of the

law rather than the witness of the party calling him. *Bell v. Clark, supra.*

5. To impeach a witness is to attack his credibility. *McDowell v. Staley,* 231 N.C. 65, 55 S.E. 2d 798; *Smith v. Railroad, supra; Helms v. Green, supra; Strudwick v. Brodnax, supra; Shelton v. Hampton, supra.* The rule that a party cannot impeach his own witness precludes him from showing that the general character of the witness is bad (*Hice v. Cox, supra; Neil v. Childs, supra*), or that the witness made statements at other times inconsistent with or contradictory of his testimony at the trial. *S. v. Bagley,* 229 N.C. 723, 51 S.E. 2d 298; *S. v. Freeman, supra; S. v. Melvin, supra; S. v. Taylor, supra; Hice v. Cox, supra.* The law will not permit a party to circumvent the rule by introducing the contradictory or inconsistent statements of the witness under the guise of corroborating evidence. *S. v. Bagley, supra; S. v. Melvin, supra.* "In no aspect of the law of evidence can prior contradictory statements of a witness be used as corroborating evidence." *S. v. Melvin, supra; S. v. Lassiter,* 191 N.C. 210, 131 S.E. 577.

6. The trial judge has the discretionary power to permit a party to cross-examine his own witness for a legitimate purpose. *S. v. Buck,* 191 N.C. 528, 132 S.E. 151; *Howell v. Solomon,* 167 N.C. 588, 83 S.E. 609; *S. v. Cobb,* 164 N.C. 418, 79 S.E. 419; *Bank v. Carr,* 130 N.C. 479, 41 S.E. 876; *Crenshaw v. Johnson,* 120 N.C. 270, 26 S.E. 810. Accordingly, the trial judge may let a party cross-examine his own witness, who is hostile or who surprises him by his testimony, for the purpose of refreshing the recollection of the witness and enabling him to testify correctly. *S. v. Vicks,* 223 N.C. 384, 26 S.E. 2d 873; *S. v. Inscore,* 219 N.C. 759, 14 S.E. 2d 816; *In re Will of Williams,* 215 N.C. 259, 1 S.E. 2d 857; *S. v. Noland,* 204 N.C. 329, 168 S.E. 412; *S. v. Taylor, supra.* In so doing, the trial judge may permit the party to call the attention of the witness directly to statements made by the witness on other occasions. *S. v. Noland, supra; S. v. Taylor, supra.* But the trial judge offends the rule that a witness may not be impeached by the party calling him and so commits error if he allows a party to cross-examine his own witness solely for the purpose of proving him to be unworthy of belief. *Morris v. Service Co., supra; S. v. Neville, supra* (175 N.C. 731, 95 S.E. 55); *S. v. Taylor, supra; State v. Scarborough,* 152 La. 669, 94 So. 204; *State v. Scott,* 55 Utah 553, 188 P. 860. And even apart from the rule under present consideration, it is not permissible for a party to put before the jury under the guise of cross-examination incompetent matter inimical to his adversary. *Ingram v. State,* 78 Tex. Cr. 559, 182 S.W. 290; 58 Am. Jur., Witnesses, Section 622.

7. The rule which forbids a party to impeach his own witness does not contemplate that the party is bound by what his witness says. Consequently, he is at liberty to prove by other witnesses or other competent

evidence a state of facts different from that to which his witness testifies. *Matheny v. Motor Lines*, 233 N.C. 673, 65 S.E. 2d 361; *McDowell v. Staley, supra; Ross v. Tel. Co.*, 219 N.C. 324, 13 S.E. 2d 571; *S. v. Cohoon, supra; Clay v. Connor, supra; Worth Co. v. Feed Co., supra; Lynch v. Veneer Co., supra; Smith v. Railroad, supra; S. v. Mace, supra; Kendrick v. Dellinger, supra; Chester v. Wilhelm*, 111 N.C. 314, 16 S.E. 229; *Helms v. Green, supra; McDonald v. Carson*, 94 N.C. 497; *Coates Bros. v. Wilkes, supra; Gadsby v. Dyer*, 91 N.C. 311; *Strudwick v. Brodnax, supra; Hice v. Cox, supra; Shelton v. Hampton, supra; Spencer v. White*, 23 N.C. 236. One of the greatest of jurists, *Chief Justice Thomas Ruffin*, declared that there is in this instance "no attempt to discredit the witness. A party may prove that the fact is not as it is stated to be by one of his witnesses; for that is merely shewing a mistake, to which the best of men are liable." *Spencer v. White, supra.* Another able judge, *Justice Frederick Nash*, said: "The other witnesses, in such case, are not called to discredit the first, but the impeachment is incidental and consequential only." *Hice v. Cox, supra.*

The case on appeal engenders the abiding impression that when he called Bowman to the witness stand as a State's witness, the solicitor knew that Bowman would give substantive testimony favorable to the defendant, and that the prospect of Bowman being influenced by examination or cross-examination to alter such testimony to the State's advantage was so remote as to be virtually nonexistent. Notwithstanding this knowledge, the solicitor put to Bowman by leave of the trial judge numerous leading and argumentative questions concerning the statement of 23 November, 1951, and other matters which were so framed, whatever their true object may have been, as to suggest to the jury that the defendant was undoubtedly guilty and that Bowman was testifying falsely in giving evidence favorable to him. In the very nature of things, the immediate and inevitable result of the solicitor's cross-examination of the State's witness Bowman was to impeach Bowman and place before the jury incompetent matter harmful to the defendant. We are, therefore, constrained to hold in view of the circumstances revealed by the case on appeal now before us that the trial judge erred to the prejudice of the defendant in allowing the solicitor to cross-examine Bowman. We are also obliged to adjudge that the trial judge committed further prejudicial error in admitting in evidence Bowman's repudiated statement of 23 November, 1951, which was incompetent for all purposes. Since they were never instructed as to how they were to consider it, the trial jurors undoubtedly accepted the statement as substantive evidence indicating the defendant's guilt as well as impeaching evidence pointing to Bowman's testimonial unreliability.

These errors necessitate a

New trial.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, v. JULIUS M. FOX, DOING BUSINESS AS FOX TRANSFER COMPANY, GASTONIA, NORTH CAROLINA.

(Filed 15 January, 1954.)

1. Carriers § 5—

The effect of the grandfather clause in the Truck Act of 1947 is to preserve substantial parity between future and prior operations and to preserve to carriers, upon proper application, their rights existing at the time of the effective date of the statute. G.S. 62-121.5, G.S. 62-121.11.

2. Carriers § 2—

The interchange of freight between an intrastate and an interstate carrier, even though the property is being moved in interstate commerce, is left to the state commissions. USCA Title 49, sec. 306.

3. Carriers § 5—Utilities Commission may not promulgate and enforce rule which would have effect of denying carrier his rights under grandfather clause.

At the time of the effective date of the Truck Act of 1947 plaintiff, an irregular route intrastate carrier, was interchanging freight with interstate carriers, and was authorized to continue its operations under the grandfather clause. Thereafter, under the provisions of G.S. 62-121.6, the Utilities Commission promulgated a rule prohibiting the interchange of freight between carriers except upon approval of the Commission. The Interstate Commerce Commission advised plaintiff that he could conduct operations in interstate commerce only to the extent permitted him in intrastate commerce, and thereafter plaintiff's application to the Utilities Commission for authority to exchange freight in intrastate commerce was denied on the ground that applicant did not intend to exercise such right. *Held:* The Utilities Commission was without power to promulgate a rule denying plaintiff the exercise of rights conferred on him under the grandfather clause of the Truck Act, and plaintiff is entitled as a matter of right under the grandfather clause to permission to interchange freight with intrastate carriers whether he intends to exercise such right or not, if such permission is necessary in order for him to retain his right to interchange freight with interstate carriers, without being required to show public convenience and necessity.

APPEAL from *Pless, J.*, January Term, 1953, by North Carolina Utilities Commission, and by Overnite Transportation Company, Great Southern Trucking Company, Fredrickson Motor Express, Helms Motor Express, Inc., and Miller Motor Express, Interveners, and by Julius M. Fox, doing business as Fox Transfer Company, Applicant. From GASTON.

This cause was before us on a former appeal and the opinion filed therein is reported in 236 N.C. 553, 73 S.E. 2d 464. Substantially all the facts involved in the present appeal were stated in the above opinion. However, the facts essential to an understanding of the present appeal are as follows:

1. The applicant in this proceeding, Julius M. Fox, trading as Fox Transfer Company, is an irregular route common carrier, authorized to transport certain designated classes of property in a limited area within the State of North Carolina, pursuant to the terms of Certificate No. C-178, issued to him by the North Carolina Utilities Commission on 3 November, 1950. He has also been granted Certificate No. MC-97873 by the Interstate Commerce Commission, by the terms of which he is authorized to interchange freight with common carriers in interstate commerce, subject to the approval of the North Carolina Utilities Commission. (Unless otherwise designated, the word "Commission," when hereinafter used, shall mean the North Carolina Utilities Commission.)

2. Each of the interveners holds a certificate duly issued by the Commission, which authorizes it to transport general commodities over regular routes.

3. Subsequent to the issuance of the applicant's certificate as an irregular route common carrier by the Commission, which certificate was issued pursuant to G.S. 62-121.11, the Commission adopted what is known as Rule 44, which, among other things, prohibits the interchange of freight between an intrastate regular route common carrier and an intrastate irregular route common carrier, and between two intrastate irregular route common carriers, except after application to and approval of the Commission.

4. After the adoption of Rule 44, which became effective 1 July, 1951, the applicant was advised by the Interstate Commerce Commission, on 5 December, 1951, that under the regulations of that Commission the applicant "may conduct operations in interstate commerce only to the extent permitted in intrastate commerce by his State certificate." Thereafter, on 19 January, 1952, the applicant applied to the Commission for an amendment to his Certificate C-178 so as to permit him to interchange freight of all kinds with four named common carriers of property, each of whom was duly licensed to transport property by the Interstate Commerce Commission and by the North Carolina Utilities Commission.

5. At the hearing before the Commission on the above application, the applicant's evidence established these pertinent facts: That prior to the enactment of the North Carolina Truck Act of 1947, the applicant interchanged interstate freight with certain of the carriers named in his application; that about ninety-eight per cent of his business originates in Gaston County, most of which comes from a single corporation; that all the carriers with whom he seeks to interchange freight are interstate carriers; that he has never interchanged intrastate shipments and does not intend to do so; that he does some intrastate business but no intrastate interchange.

6. The Commission held that upon this evidence it would not grant the applicant the right to interchange intrastate traffic with other carriers, a right the applicant did not intend to exercise, in order to give him the right to interchange interstate traffic with other carriers. The Commission also held as a matter of law that it was without power to grant or deny the applicant the right to engage in interstate commerce and that the interchange of interstate traffic within or without the State of North Carolina is not within its jurisdiction. For the reasons stated, the application was denied and dismissed on 21 March, 1952.

This appeal is from a judgment entered by Judge J. Will Pless, Jr., dated 10 July, 1953, which judgment was entered after a hearing at the January Civil Term of the Superior Court of Gaston County at which time it was stipulated that the judgment could be rendered by the court out of term and out of the District.

The matter was heard on the record as certified to the Superior Court by the Commission, and his Honor held:

"That the North Carolina Utilities Commission is vested with authority to regulate and control the interchange of shipments of freight between irregular route common carriers and other common carriers of freight of all classes when the complete movement and transportation of said freight between the time of its being accepted from the shipper and its delivery to the carrier with whom it is being interchanged is within the confines of the State of North Carolina, so long as the determinations of the Utilities Commission are in compliance with the provisions of the North Carolina Truck Act of 1947 and the provisions of the State and Federal Constitutions.

"WHEREUPON, and pursuant to the foregoing conclusion of law, this cause is remanded to the North Carolina Utilities Commission for their determination as to whether under the facts appearing in this record the public interest and the North Carolina Truck Act of 1947 require that the relief sought by the applicant herein be granted and with the direction that said North Carolina Utilities Commission make a definite determination upon the questions of law arising upon this record to the end that the applicant may be advised as to the forum or tribunal in which his rights are to be determined;

"And it is further ordered that the Utilities Commission in its future order or orders make definite findings of fact and conclusions of law to the end that the Court may properly review said conclusions in the event of subsequent appeal by any of the parties."

From the foregoing judgment the North Carolina Utilities Commission, the interveners, and the applicant appeal, assigning error.

Attorney-General McMullan and Assistant Attorney-General Paylor for the North Carolina Utilities Commission.

Arch T. Allen for Great Southern Trucking Co.

J. Ruffin Bailey for Helms Motor Express, Inc., Miller Motor Express, and Fredrickson Motor Express.

J. Wilbur Bunn for Overnite Transportation Co.

Basil L. Whitener for applicant, Julius M. Fox.

DENNY, J. The North Carolina Truck Act, being Chapter 1008 of the Session Laws of North Carolina, in Section 1 thereof, codified as G.S. 62-121.5, contains a declaration of policy which reads in pertinent part as follows: ". . . that the transportation of property by motor carriers for compensation over the public highways of the State is a business affected with the public interest; that there has been shown a definite public need for the continuation and preservation of all existing motor carrier service, and to that end, it is hereby declared to be the policy of the State of North Carolina to preserve and continue all motor carrier transportation services now afforded this State, and to provide fair and impartial regulations of motor carriers of property in the use of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; . . . to encourage and promote harmony among motor carriers of property; between such carriers and carriers of property by rail or water, and between all carriers of property and the shipping public; to foster a co-ordinated State-wide motor carrier service; to conform with the national transportation policy and the federal motor carrier acts in so far as the same may be found practical and adequate for application to intrastate commerce; and to co-operate with other states and with the federal government in promoting and co-ordinating intrastate and interstate commerce by motor carriers."

Section 2 of the Act, codified as G.S. 62-121.6, vests in the Commission authority to administer and enforce the provisions of the Act and to make and enforce reasonable rules and regulations to that end.

Section 7 of the Act, codified as G.S. 62-121.11, contains, among other things, the following: "Subject to Section 62-121.20, if any carrier or predecessor in interest was in *bona fide* operation as a common carrier by motor vehicle on January 1st, 1947, over the route or routes or within the territory for which application is made under this section, and has so operated since that time, . . . except . . . as to interruptions of service over which the applicant or its predecessor in interest had no control, the commission shall issue a certificate to such carrier without requiring further proof that public convenience and necessity will be served by such

operation . . .;" provided, such carrier furnished certain information to the commission on or before the effective date of the Act. The applicant herein duly qualified as an irregular route common carrier in the manner prescribed by the foregoing statute.

The ordinary meaning and effect of a grandfather clause contained in an act authorizing the transportation of passengers or property by motor vehicle is to preserve substantial parity between future and prior operations. *Utilities Commission v. Fleming,* 235 N.C. 660, 71 S.E. 2d 41; *Crescent Express Lines v. United States,* 320 U.S. 401, 88 L. Ed. 127; *United States v. Carolina Freight Carriers Corp.,* 315 U.S. 475, 86 L. Ed. 971; *Goncz v. Interstate Commerce Commission,* 48 F. Supp. 286; *Chicago, St. P., M. & O. Ry. Co. v. United States,* 50 F. Supp. 249, affirmed 322 U.S. 1, 88 L. Ed. 1093; *Transamerican Freight Lines v. United States,* 51 F. Supp. 405; *Peninsula Corp. v. United States,* 60 F. Supp. 174.

There can be no legitimate dispute about the facts involved in this proceeding. It was clearly established in the hearing before the Commission that the applicant, prior to the adoption of the North Carolina Truck Act in 1947, and until the receipt of the notice from the Interstate Commerce Commission, dated 5 December, 1951, was engaged as an irregular route common carrier of property by motor vehicle in the identical manner he now seeks to continue. He has not applied for any additional rights, but merely requests that those rights preserved to him by Section 7 of the Truck Act, known as the "grandfather clause," be kept inviolate.

The Commission, in recognition of the applicant's rights under the grandfather clause contained in the Act, expressly authorized and approved the operations carried on by him as an irregular route common carrier from the effective date of the Act on 1 October, 1947, until the effective date of its Rule 44, 1 July, 1951.

We are, therefore, confronted with this question: Does the Commission have the power to promulgate a rule, pursuant to the provisions of G.S. 62-121.6, purporting to regulate common carriers of property by motor vehicle under the North Carolina Truck Act, and then to interpret or enforce the rule in such manner as to deny the exercise of rights which the Legislature in clear and express terms preserved to all motor vehicle carriers of property who were in *bona fide* operation on 1 January, 1947, and who have met the additional requirements contained in Section 7 of the Act? The answer must be in the negative.

There is nothing in the North Carolina Truck Act which prohibits the interchange of freight between intrastate carriers or between an intrastate carrier and an interstate one. In fact, the Congress of the United States has recognized the existence of the right of the States acting through a proper agency to authorize the interchange of freight between

an intrastate and an interstate carrier. Section 306, Title 49 of the USCA, points out the manner in which a common carrier by motor vehicle may obtain a certificate under the grandfather clause contained in part two of the Interstate Commerce Act, and also upon a showing of public convenience and necessity. The section, however, contains this significant proviso: "*And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

We think the above proviso clearly shows that the intent of Congress was to leave the question of the interchange of freight between an intrastate and an interstate carrier to the State commissions, even though the property or the passengers were being moved in interstate commerce, provided the intrastate carrier was transporting the property or passengers between places within the State.

In our opinion, there is error in the judgment entered below in so far as it remands the cause to the Commission to determine whether under the facts appearing on the record the public interest and the North Carolina Truck Act require that the relief sought by the applicant be granted, and the judgment is modified to that extent. The applicant herein was not required under the provisions of the North Carolina Truck Act to show public convenience and necessity in order to obtain his certificate pursuant thereto as an irregular route common carrier. Neither will he be required to do so in order to preserve such rights.

We do not express an opinion as to the validity or reasonableness of Rule 44, in so far as its provisions may be applicable to intrastate carriers of property by motor vehicle pursuant to a certificate granted by the Commission upon a finding of public convenience and necessity. However, if the applicant, a holder of a franchise or certificate pursuant to the grandfather clause contained in the North Carolina Truck Act, in light of the provisions contained in Rule 44, must have permission or approval of the Commission to interchange freight with other intrastate carriers, whether he intends to exercise such right or not, in order to retain his right to interchange freight with interstate carriers, he is entitled to such permission or approval. Moreover, he is entitled to this permission or approval not as a matter of discretion or as an act of grace, but as a matter of law.

Let this opinion be certified to the Superior Court immediately, to the end that the cause may be remanded to the Commission for disposition in accord with this opinion.

Modified and affirmed.

DONALD F. ST. GEORGE v. LOUIS HANSON, R. W. CANTWELL, H. S. McGIRT, JOHN M. WALKER AND M. R. SANDERS, CONSTITUTING THE BOARD OF COMMISSIONERS OF NAVIGATION AND PILOTAGE FOR THE CAPE FEAR RIVER AND BAR.

(Filed 15 January, 1954.)

1. **Trial § 55—**

Where the parties waive trial by jury, the findings of the trial judge are as conclusive as the verdict of a jury if they are supported by competent evidence.

2. **Appeal and Error § 6c (8)—**

In the absence of a request that the court find a particular fact, appellant may not object to the failure of the court to find such fact.

3. **Appeal and Error § 6c (2)—**

Where there is no effective exception to the findings of fact, the assignment of error to the signing of the judgment presents the sole question as to whether the facts found support the judgment.

4. **Trial § 55—**

In a trial by the court under agreement of the parties, the court is required to find and state only the ultimate facts. G.S. 1-185.

5. **Constitutional Law § 12—**

The statute prescribing rules and regulations for the licensing of pilots is constitutional. G.S. 76, Art. I.

6. **Mandamus § 1—**

A party seeking a writ of *mandamus* must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be required.

7. **Same: Injunctions § 1b—**

A mandatory injunction to compel a board or public official to perform a duty imposed by law is identical in its function and purpose with that of a writ of *mandamus*.

8. **Mandamus § 2b—**

Mandamus cannot be invoked to control the exercise of discretion in the performance of a judicial or *quasi*-judicial act unless it is clearly shown there has been an abuse of discretion.

9. Mandamus § 1—

The function of *mandamus* is to compel the performance of a ministerial act and not to establish a legal right.

10. Pilots § 6—

Plaintiff sought the reinstatement of his pilot's license under the provisions of G.S. 76-2, and the parties waived jury trial and agreed that the court might find the facts. *Held:* There being no finding or request for finding that plaintiff's license was revoked or his application for reinstatement refused on the ground that there was a sufficient number of pilots for the commerce on the river, or that the license was revoked or reinstatement refused without cause, *mandamus* will not lie to compel the issuance of license, since in such instance the writ would control the exercise of judgment by the licensing board. As to whether plaintiff was barred by laches, *quaere?*

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

APPEAL by plaintiff from *Grady, Emergency J.,* February Term 1953 of NEW HANOVER.

Civil action for a writ of *mandamus* to compel the defendants constituting the Board of Commissioners of Navigation and Pilotage for the Cape Fear River and Bar to issue to the plaintiff a Branch or State pilot's license entitling him to pilot vessels on the Cape Fear River and over the Bar.

Pursuant to G.S. 1-184 a trial by jury was waived. After hearing the evidence the court found the facts and made a conclusion of law, which is here set forth. "JUDGMENT. This action was instituted on November 6, 1951, and complaint filed on the same date, praying for a Mandatory Injunction against the defendant Board, and the members individually, that they be required to issue to, or to restore to the plaintiff a pilot's license, entitling him to pilot vessels on the Cape Fear River and over the Bar. All parties appeared in person and were represented by counsel. A jury trial was waived and it was agreed that the Court might hear and determine the matter at Chambers.

"Evidence was offered and the Court finds:

"That the plaintiff for a number of years in the past was a licensed pilot, acting under the supervision of the defendants and their predecessors in office; that his license was revoked on several occasions; the last revocation being dated December 29, 1931. On several occasions since that date the plaintiff has made application for a renewal of said license; but such renewal has been refused in the discretion of the defendant Board.

"He waited from December 31, 1931, until November 6, 1951, to bring an action for restoration of his license, during about 17 years of which period he was living out of the County.

"It is nowhere alleged in the Complaint that the defendant Board, or that the defendants individually, have acted in such manner towards the plaintiff as to amount to an abuse of discretion; or that their action in denying him a renewal of his license is not in good faith. In fact, as the Court understands the law, the plaintiff does not state facts sufficient to constitute a cause of action.

"The following cases are directly in point, and govern this case: *State v. Perry,* 151 N.C. 661; *State v. Staples,* 157 N.C. 637; *Small v. Edenton,* 146 N.C. 527; *Battle v. Rocky Mount,* 156 N.C. 329; *Ward v. Comrs.,* 146 N.C. 534; *Barnes v. Comrs.,* 135 N.C. 27. And the following citation is pertinent: 'A license issued by a municipal corporation, with a provision in its charter that it may be revoked for any cause which the Board deems sufficient—such proviso in the charter is a part of the contract, and is enforcible.' *Hutchins v. Durham,* 118 N.C. 457.

"Upon the admitted facts and the law, the Court is of the opinion that the plaintiff cannot prevail, and it is now—

"ORDERED AND ADJUDGED that this action be, and the same is dismissed, and the costs will be taxed against the plaintiff and the surety on his prosecution bond."

Counsel for plaintiff and for the defendants entered into this stipulation: "That the plaintiff Donald F. St. George was one of the pilots actively engaged in piloting on the Cape Fear River at the time of the enactment of the amendment of March 7, 1927, G.S. 76-2, referred to in Article 5 of the plaintiff's Complaint; and that all of the pilots referred to in this record as being members of the Wilmington Cape Fear Pilots Association on March 7, 1927, are now dead except the plaintiff Donald F. St. George and I. S. Davis, who retired prior to the institution of this action."

To the judgment the plaintiff excepted and appealed.

Poisson, Campbell & Marshall for defendants, appellees.

McClelland & Burney and Rountree & Rountree for plaintiff, appellant.

PARKER, J. The parties waived trial by jury. Therefore, the findings of fact of the trial judge are as conclusive as the verdict of a jury if there was competent evidence to support them. *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

The plaintiff assigns as errors Nos. 1 to 4, both inclusive, that the court failed to make certain findings of fact. At the hearing in the lower court the plaintiff made no request of the court to make any specific finding of fact or facts. "It is too late for the plaintiff on appeal to complain of failure of the court to find specific facts when no specific request therefor

was made at the hearing." *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133, and cases there cited; McIntosh N. C. Prac. and Proc., p. 555.

The plaintiff has no exception to the evidence, nor does he contend that there is no evidence to support the facts found by the court. Therefore, his assignment of error No. 7 to the signing of the judgment presents the sole question as to whether the facts found support the judgment. *Best v. Garris,* 211 N.C. 305, 190 S.E. 221; *Swink v. Horn,* 226 N.C. 713, 40 S.E. 2d 353; *Cannon v. Blair,* 229 N.C. 606, 50 S.E. 2d 732.

The judge is only required to find and state the ultimate facts under G.S. 1-185. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639, and cases cited.

The judge made these findings of ultimate facts. One, the plaintiff for a number of years in the past was a licensed pilot, acting under the supervision of the defendants and their predecessors in office. Second, that his license was revoked on several occasions; the last revocation being dated 29 December 1931. Three, on several occasions since the plaintiff has made application for a renewal of said license, but such renewal has been refused in the discretion of the defendant Board. Four, the plaintiff waited from 31 December 1931 until 6 November 1951 to bring an action for restoration of his license, though for about 17 years of this period he was living outside New Hanover County.

The plaintiff contends that according to the stipulation entered into by counsel, and set forth above, he was one of the pilots actively engaged in piloting on the Cape Fear River at the time of the enactment of the Amendment of 7 March 1927 to what is now G.S. 76-2 referred to in Article 5 of his Complaint; that G.S. 76-2 has a proviso reading as follows: "Provided, that the present number of eleven pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability or death;" that he, as one of the original eleven pilots, cannot have his license revoked or may not be refused reinstatement of his license except for cause "and that cause must be another cause than simply a cause for the reduction in number of those specific pilots on the Cape Fear River and Bar and that to refuse the appellant his State Pilot's License simply because the Board in its discretion believes that there is a sufficient number of pilots for the commerce on the river flies in the face of the Act, and such action on the part of the defendant, Board of Navigation and Pilotage, constitutes arbitrary and unreasonable action, not permitted by the statute, and therefore the plaintiff should be granted his writ."

G.S., Ch. 76, is entitled Navigation. Art. 1 of this Chapter is captioned Cape Fear River. This act is constitutional. *St. George v. Hardie,* 147 N.C. 88, 60 S.E. 920. When it is shown that pilotage is subject to governmental control, the power and duty of the Legislature to prescribe

rules for ascertaining and declaring who are competent by reason of age, character, skill, experience, etc., follow. This power comes within the principle upon which the State prescribes the qualifications of those who are admitted to practice law, medicine, etc. *St. George v. Hardie, supra.*

G.S. 76-2 reads as follows: "*Rules to regulate pilotage service.*—The board shall from time to time make and establish such rules and regulations respecting the qualifications, arrangements, and station of pilots as to them shall seem most advisable, and shall impose such reasonable fines, forfeitures and penalties as may be prescribed for the purpose of enforcing the execution of such rules and regulations. The board shall also have power and authority to prescribe, reduce, and limit the number of pilots necessary to maintain an efficient pilotage service for the Cape Fear River and Bar, as in its discretion may be necessary: Provided, that the present number of eleven pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability, or death. When, in the opinion of a majority of the board, the best interests of the port of Wilmington, the State of North Carolina, and the pilotage service shall require it, the board shall have power and authority to organize all pilots licensed by it into a mutual association, under such reasonable rules and regulations as the board may prescribe; any licensed pilot refusing to become a member of such association shall be subject to suspension, or to have his license revoked, at the discretion of the board."

We have said in many cases that a party seeking a writ of *mandamus* must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be required. *Hancock v. Bulla,* 232 N.C. 620, 61 S.E. 2d 801; *Laughinghouse v. New Bern, ibid.,* p. 596, 61 S.E. 2d 802; *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620; *Ingle v. Board of Elections,* 226 N.C. 454, 38 S.E. 2d 566; *White v. Comrs. of Johnston,* 217 N.C. 329, 7 S.E. 2d 825; *Mears v. Board of Education,* 214 N.C. 89, 197 S.E. 752; *Person v. Doughton,* 186 N.C. 723, 120 S.E. 481. "A mandatory injunction, when issued to compel a board or public official to perform a duty imposed by law, is identical in its function and purpose with that of a writ of *mandamus.* . . . Such writ (a *mandamus*) will not be issued to enforce an alleged right which is in question." *Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833; *Harris v. Board of Education,* 216 N.C. 147, 4 S.E. 2d 328.

It is well settled law that *mandamus* cannot be invoked to control the exercise of discretion of a board, officer, or court when the act complained of is judicial or *quasi*-judicial, unless it clearly appears that there has been an abuse of discretion. The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established. *Hayes v. Benton,* 193 N.C. 379,

137 S.E. 169; *Wilkinson v. Board of Education,* 199 N.C. 669, 155 S.E. 562; *Harris v. Board of Education, supra.*

The findings of fact do not show that plaintiff's license was revoked simply because the defendant Board believed that there was a sufficient number of pilots for the commerce on Cape Fear River, and that they refused to reinstate him or restore his license on that ground. In the lower court the plaintiff did not request the judge to make such a specific finding of fact, nor did he request that the judge make a specific finding of fact that plaintiff's license was revoked without cause, or that the defendant Board refused to reinstate him, or restore his license without cause. In the judgment it is stated that it is nowhere alleged in the complaint that the defendants, or any of them, acted in such a manner as to amount to an abuse of discretion, or not in good faith.

G.S. 76-2 requires that the defendant Board shall from time to time establish such rules and regulations respecting the qualifications, arrangements and stations of pilots as to them shall seem most advisable. The determination of the qualifications, arrangements and stations of pilots, and as to whether one or more of the eleven pilots actively engaged in service on 7 March 1927 shall be reduced for cause involves judgment on the part of the defendant Board, and generally calls for an examination of evidence and the passing upon questions of fact. It is elemental learning that where such is the case, a court will not interfere with the defendant Board's judgment or discretion, unless it is arbitrarily exercised, and will not attempt by *mandamus* to compel it to decide in a particular way. The plaintiff has not shown that he has a clear legal right to demand a writ of *mandamus* and that the defendant Board which he seeks to coerce is under a positive legal obligation to perform the act sought to be enforced. "Where the right of the petitioner is not clear, and the duty of the officer, performance of which is to be commanded, is not plainly defined and peremptory, *mandamus* is not an appropriate remedy." *U. S. ex rel. Girard Trust Co. v. Helvering,* 301 U.S. 540, 81 L. Ed. 1272.

The plaintiff waited from 31 December 1931, until 6 November 1951 to bring an action for restoration of his license. This presents a serious question as to whether this long delay does not constitute a bar to his action on the ground of laches. 35 Am. Jur., Mandamus, p. 65 *et seq.;* 55 C.J.S., p. 459 *et seq.* The following headnote in *U. S. ex rel. Arant v. Lane,* 249 U.S. 367, 63 L. Ed. 650, correctly summarizes the decision. "A delay of twenty months on the part of the superintendent of a national park before seeking reinstatement by *mandamus* after his removal from office by the Secretary of the Interior, and his forcible ejection from the government office building, under circumstances rendering his return to the service impossible except under a court order, is such laches as will defeat his right to the relief sought."

The plaintiff assigns as errors Nos. 5 and 6 that the judge stated in the judgment "the plaintiff does not state facts sufficient to constitute a cause of action," and that it does not appear whether the court dismissed the case upon the merits upon the testimony and proof introduced or whether the court dismissed plaintiff's action as upon a demurrer *ore tenus* or *ex mero motu.* These assignments of error are without merit. The plaintiff upon the facts found by the judge is not entitled to a *mandamus.*

The judgment of the lower court is

Affirmed.

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

E. F. LYDA AND HIS WIFE, MATTIE E. LYDA, v. TOWN OF MARION, A MUNICIPAL CORPORATION.

(Filed 15 January, 1954.)

1. Waters and Watercourses § 5: Trespass § 1e: Municipal Corporations § 56—

A cause of action against a municipality to recover for the diversion of surface waters upon plaintiff's lots incident to the paving of the street and the construction of gutters, without allegation of negligence, is a cause of action to recover for a continuing trespass and comes within the provisions of the charter of the municipality requiring any claim of damages against it to be filed within 180 days of the infliction of the injury.

2. Pleadings § 24—

Plaintiffs must make out their case *secundum allegata.*

3. Appeal and Error § 8—

An appeal of necessity must follow the theory of the trial in the lower court.

4. Eminent Domain § 3: Municipal Corporations § 56—

Allegations and evidence to the effect that defendant municipality caused drainage ditches to be dug across plaintiffs' land from catch basins on the street to a branch in the rear of plaintiffs' property makes out a cause of action for a partial taking of plaintiffs' land, and such action does not come within the purview of the municipal charter requiring the filing of notice of a claim against the municipality within a specified time.

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

APPEAL by plaintiffs from *Clement, J.,* at July Term, 1953, of McDOWELL.

Civil action to recover damages for alleged injuries to and partial taking of property resulting from street improvements.

The plaintiffs allege in their complaint two causes of action: (1) a "continuing and permanent trespass upon and taking of" the property of plaintiffs by surface waters allegedly gathered and concentrated in artificial drains on defendant's streets and cast on plaintiffs' property; and (2) a "permanent trespass and taking" of plaintiffs' property by digging and leaving open two ditches across plaintiffs' property to carry away surface waters gathered and concentrated on the defendant's streets.

The defendant, answering, denies the material allegations of the complaint and pleads in bar the failure of the plaintiffs to file written notice of their claim within 180 days after the "happening or infliction of the injury complained of," as provided by the charter of the defendant town, as amended by Chapter 253, Section 1, Private Laws of 1941.

The plaintiffs' evidence may be summarized as follows: In 1947, the plaintiffs bought two adjoining lots on Sinclair Avenue in the town of Marion. On one lot they built their residence in 1949; the other lot is still vacant. Sinclair Avenue runs from south to north in front of these lots, which lie along the east side of the Avenue facing toward the west. The residence lot is north of the vacant lot. The lots run back toward Vale Street a depth of 177 feet on one side and 168 feet on the other, and adjoin in the back the residence lots of Elliott and Pittman which face east on Vale Street. A small branch, or natural stream, flows across the rear of the plaintiffs' lots, behind the residence and about 100 feet from Sinclair Avenue. The course of the branch is from north to south, straight across the back of the lots. Thus some 68 to 77 feet of the rear of the plaintiffs' lots lie east of the branch, on the side next to Vale Street. Sinclair Avenue curves sharply west directly in front of plaintiffs' residence, and runs thence almost due west upgrade to Teal Street, a distance of about 300 feet, and dead-ends into Teal Street, which runs north and south. From this dead-end intersection, Teal Street runs northwardly upgrade 155 feet to Lincoln Avenue, which runs east and west.

When the plaintiffs bought their lots in 1947, Sinclair Avenue, Teal Street, and Vale Street were unpaved. They were also unpaved when plaintiffs built their home in 1949. All three of these streets were paved in the spring and summer of 1951. The adjacent land to the north and west is considerably higher than plaintiffs' lots, and a knoll to the south is slightly higher than the parts of the lots facing Sinclair Avenue. To the north, east, and south of the back parts of the plaintiffs' lots the ground is higher, but the rear of the Elliott lot, directly back of plaintiffs', is lower.

Before the streets were paved the rain water soaked in the streets or ran off on adjoining owners "all along." None came on the rear of plain-

tiffs' lots from the direction of Vale Street; it ponded in the rear of the Elliott lot. There was no ponding of water in plaintiffs' front yard before the paving. There was an 8 or 10-inch terra cotta culvert under Sinclair Avenue opposite the vacant lot, but it was crushed in or stopped up, and no substantial amount of water flowed onto the vacant lot. There was no ditch from the culvert across the lot. The former owner, Lawing, had "aimed to build there."

When these three streets were paved in 1951, they were given the usual slope from center downward to the sides. From Lincoln Avenue down Teal Street to Sinclair Avenue, and thence along that Avenue downgrade to beyond the plaintiffs' lots, there are raised-edge curbs about 6 inches high along the outside edge of the pavement, forming rim-shaped gutters in which rain water falling in these streets is channeled to outlets. There is no catch basin or outlet on Sinclair Avenue above plaintiffs' lots. At private driveway entrances above plaintiffs' lots, except at one place, the paving is sloped to about the same height as the top of the curb. This arrangement keeps most of the surface water in the street and channels it past the upper driveways on down toward plaintiffs' lots. However, the entrance to plaintiffs' upper drive, located in the curve, was not sloped up on the sides like most of the others. This entrance is 17 feet wide, and a 4-foot portion of it on the lower side was left flat, the result being that in ordinary heavy rains surface water has overflowed through this 4-foot flat strip of driveway entrance (all of which is on street property and is a part of the paved street), and ponded in plaintiffs' front yard, so that elevated planks and boards had to be put down by the plaintiffs in order to get across the yard without wading. This ponded water has seeped into the basement, cracked the basement walls, and has so wet the floor that things stored in the basement had to be taken off the floor and put on stilts.

When the defendant paved these streets it removed the 8 or 10-inch terra cotta culvert from under Sinclair Avenue and replaced it with an 18-inch concrete culvert and catch basin, located approximately in front of the center of plaintiffs' vacant lot. Without plaintiffs' permission or consent, the defendant's employees dug a ditch from this culvert outlet down through the center of the vacant lot to the bank of the branch about 100 feet away. This ditch, about two feet wide and two feet deep, ended some 15 or 20 feet from the branch channel and 8 or 9 feet above the normal water level. Water coming down the ditch has washed out trenches and gullies in different directions from the end and top of the ditch down to the water level in the branch. This has caused the branch bank to cave in, and shrubs and trees on the branch bank have been undermined. Besides, the ditch does not hold all the water coming into it from

the Sinclair Avenue catch basin and culvert. This water overflows the side banks onto the vacant lot where flowers and shrubs were planted.

On Vale Street, the defendant installed a new culvert on the Pittman-Elliott boundary line, and with their permission dug a ditch from that culvert down their line to the rear of their lots and, without the permission or consent of the plaintiffs, continued the ditch on across plaintiffs' land to the branch.

At the close of the plaintiffs' evidence the defendant moved for judgment as of nonsuit. The motion was allowed, and from judgment of dismissal based on such ruling the plaintiffs appealed.

C. David Swift for plaintiffs, appellants.
Proctor & Dameron for defendant, appellee.

JOHNSON, J. While the judgment does not so state, it is manifest the nonsuit was allowed below on the ground that the plaintiffs failed to file timely notice of claim with the defendant prior to the commencement of the action as required by the charter of the defendant town, as amended by Chapter 253, Section 1, Private Laws of 1941, which, in so far as material, is as follows:

"No action for damages against the Town of Marion of any character whatever, to either person or property, shall be instituted against said town unless within one hundred and eighty days after happening or infliction of the injury complained of, the complainant, his executors or administrators, . . . shall have given notice to the Board of Aldermen of said Town of such injury, in writing, stating in such notice the date and place of happening, or infliction of said injury, the manner of such infliction, the character of the injury, and the amount of damages claimed therefor, . . ."

The plaintiffs' evidence shows that the paving project about which they complain, and all grading and digging in connection therewith, was completed during or prior to July, 1951. The written notice offered in evidence by the plaintiffs was mailed to the defendant 22 July, 1952.

Upon the basis of this evidence the defendant urges that the plaintiffs' failure to prove that notice was given within 180 days after the "happening or infliction of the injury complained of" is a complete bar to both causes of action.

The defendant cites and relies on a line of decisions of which these are representative: *Dayton v. Asheville,* 185 N.C. 12, 115 S.E. 827; *Biggs v. Asheville,* 198 N.C. 271, 151 S.E. 199; and *Wallace v. Asheville,* 208 N.C. 74, 179 S.E. 18, holding in effect that a cause of action based on continuing trespass (G.S. 1-52, subsection 3) accrues and takes its rise at the time the first substantial injury is sustained or when the first appreciable damage is done.

In the case at hand, as shaped by the allegations of the complaint and as developed by the evidence, it would seem that the plaintiffs failed to make out a case for relief of any kind in respect to the alleged casting or ponding of waters on the dwelling-house lot. As to this phase of the case, the plaintiffs seek permanent damages solely on the theory of a continuing trespass. All the evidence discloses that the first substantial injury occurred more than 180 days prior to the date the plaintiffs filed notice of claim with the defendant. Therefore, the plaintiffs' failure to file timely notice as required by the charter of the defendant town bars them from recovering damages to the residence lot on the theory of continuing trespass, as alleged. *Dayton v. Asheville, supra; Biggs v. Asheville, supra; Wallace v. Asheville, supra; Peacock v. Greensboro,* 196 N.C. 412, 146 S.E. 3.

True, the evidence discloses that the street was so paved at the entrance into plaintiffs' driveway as to leave the gutter line flat for a width of about 4 feet at the lower side of the entrance and that defendant continues to maintain the gutter line in that condition, thereby causing the surface water which comes down from the upper reaches of the street to be channeled off through this opening and thrown onto the plaintiffs' residence lot, with no outflow facilities of any kind. But nowhere in the complaint do the plaintiffs allege negligence on the part of the defendant in perpetuating or maintaining this condition. *Shaw v. Greensboro,* 178 N.C. 426, 101 S.E. 27; *Eller v. Greensboro,* 190 N.C. 715, 130 S.E. 851; *Gore v. Wilmington,* 194 N.C. 450, 140 S.E. 71. Nor do the plaintiffs seek by injunction to have the channel closed on the theory of an abatable nuisance.

It was incumbent on the plaintiffs to make out their case *secundum allegata. Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14; *McCoy v. Carolina Cent. R.,* 142 N.C. 383, 55 S.E. 270. See also *Miller v. Grimsley,* 220 N.C. 514, 17 S.E. 2d 642; *Bank v. Caudle, post,* p. 270; and G.S. 1-141. The appeal of necessity must follow the theory of the trial in the court below. *Leggett v. College,* 234 N.C. 595, 68 S.E. 2d 263; *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923.

However, the complaint alleges in the second cause of action, and the evidence discloses, a physical entry upon and partial taking of land by the digging of two drainage ditches across the plaintiffs' vacant lot from the catch basins on Sinclair Avenue and Vail Street to the branch. With us the rule is that a charter provision in respect to notice, like the one involved here, "does not include a claim for compensation arising out of physical appropriation of private property for public use." *Stephens v. Charlotte,* 201 N.C. 258, 261, 159 S.E. 414. See also *Hoyle v. Hickory,* 167 N.C. 619, bot. p. 621, 83 S.E. 738.

This distinguishes the decisions relied on by the defendant. The evidence adduced below was sufficient to take the case to the jury on the issue of partial taking and permanent damages for digging and keeping open the ditches across the vacant lot. *Stephens v. Charlotte, supra.* Therefore, the judgment below dismissing both causes of action *in solido* must be reversed, and it is so ordered.

Reversed.

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

BANK OF WADESBORO, ADMINISTRATOR OF A. L. CAUDLE, DECEASED, v. B. A. CAUDLE.

(Filed 15 January, 1954.)

1. **Pleadings § 24—**

   Both allegation and proof are necessary and must substantially correspond with each other, and the absence of either constitutes a fatal variance which requires dismissal.

2. **Same: Trial § 23f: Taxation § 40b—Substitute plaintiff must file pleading alleging facts entitling him to the relief sought.**

   Where the purchaser of tax sale certificates has himself made substitute plaintiff in lieu of the county which had brought action to foreclose the certificates, but files no complaint or amendment to the original complaint alleging facts which would entitle him to the relief originally sought by the county, nor, upon his death, does his personal representative file any pleadings, nonsuit should be allowed for fatal variance. Motions and orders entered in the cause stating that the individual had purchased the tax sale certificates and had succeeded to the rights of the county cannot supply the deficiency, since a cause must be tried on the pleadings filed therein.

3. **Appeal and Error § 1—**

   The Supreme Court will not decide questions on appeal which have not been adjudicated in the court below.

APPEAL by defendant from *Rousseau, J.,* April Term, 1953, ANSON. Reversed.

Civil action to foreclose tax sales certificates.

Defendant B. A. Caudle and his sister Maggie Caudle, during the period from 1923 to 1927 inclusive and subsequent thereto, owned an $8/9$ interest in a tract of land in Anson County. Taxes thereon for the years 1923 to 1927 both inclusive, were duly assessed.

The tax debtors having defaulted in the payment of the taxes assessed for the year 1927, the sheriff, under direction of the County Board of Commissioners, on 4 June 1928, sold said land at public auction to satisfy the statutory lien therefor as required by law. The county became the purchaser and the sheriff duly issued to it a tax sales certificate. On 22 November 1929, the county instituted this action to foreclose said certificate. In its complaint it alleges that said property was also sold to satisfy the tax liens for the years 1923 to 1926, both inclusive; that it became the purchaser at each of said sales; and that it now holds a tax sales certificate for each of said years. It prays that it have judgment in the sum of the total amount due on the said certificates with interest, penalties, and costs.

The defendants having failed to answer within the time prescribed by law, the clerk, on 6 October 1930, entered an interlocutory judgment of foreclosure in which he appointed T. L. Caudle to offer said property for sale and sell the same at public auction to satisfy the specific liens therein decreed. While it appears that the commissioner advertised said land for sale, it does not appear that he sold the same or did anything further in the discharge of his duties. On 7 June 1952, one A. L. Caudle, through counsel, appeared and moved the court that he be substituted as the plaintiff herein for the reason that he had purchased and then held the tax sales certificates involved in this action. The clerk, upon the showing made, entered an order substituting said A. L. Caudle party plaintiff in lieu of Anson County. On 11 July counsel for the substitute plaintiff suggested the death of the commissioner and moved the appointment of a substitute commissioner.

On 17 July 1952 the clerk entered an order finding that the original commissioner died prior to making sale of the property as directed in the original foreclosure decree and appointing H. P. Taylor, Jr., in his place and stead. He made further directions not material here.

On 4 August 1952, T. L. Caudle tendered his resignation as commissioner, stating therein that he had never sold said land as he was directed to do. On the same date defendant B. A. Caudle moved that the action be dismissed and that the appointment of H. P. Taylor, Jr., as commissioner be revoked.

On 15 August the clerk revoked *in toto* his order of 14 July, 1952, appointed H. P. Taylor, Jr., commissioner, and directed him to proceed to make sale as provided in the interlocutory judgment of foreclosure entered 6 October 1930. He specifically revoked that part of said order which made A. L. Caudle party plaintiff.

Upon hearing the appeal from this order, Pless, J., entered an order (1) making A. L. Caudle party plaintiff in lieu of Anson County, (2) striking "and wife" from the original caption, and (3) granting defend-

ant B. A. Caudle thirty days within which to file answer or other pleadings, reserving, however, the right to rule upon the authority of defendant to file same until such pleading is tendered. Having found that defendant Maggie Caudle was then dead, "the court hereby authorizes her representatives be made party defendant in her stead." It also prescribed the form of the caption of the case to be used in further proceedings in the cause.

On 17 November 1952, A. L. Caudle, through counsel, moved that B. A. Caudle, administrator *c.t.a.* of the estate of Maggie Caudle be made a party in lieu of Maggie Caudle who died 18 November 1948. The record fails to disclose any order granting this motion and making the administrator *c.t.a.* of Maggie Caudle party defendant. However, on 10 December 1952, a summons for "B. A. Caudle, representing the estate of Maggie Caudle, one of the defendants above named" was issued. A copy of the original complaint was attached to and served with the summons on B.A. Caudle. The return endorsed thereon is as follows:

"Received December ...... 1952. Served by reading and delivering a copy of the within summons, together with a copy of the complaint, to the following named defendant: B. A. Caudle on the 13th day of Dec. 1952.

....
Sheriff, Anson County
BY: DELMA T. SULLIVAN, R. P."

Thus it appears that the summons and original complaint were not served on B. A. Caudle in his representative capacity, nor was it returned by or in the name of the sheriff. On 12 January 1953, B. A. Caudle made a "special appearance and motion to dismiss" for that (1) there is no prosecution bond on record; (2) summons served was issued 10 December 1952 while complaint attached was filed 22 November 1929; (3) summons was served only on B. A. Caudle and not on him in his official capacity; (4) the complaint does not "connect with" the caption of the summons but is entitled "Anson County *v.* B. A. Caudle and wife, Maggie Caudle;" (5) the action set out in the complaint has abated; and (6) the court is without jurisdiction.

On 2 March 1953, Rousseau, J., overruled and denied the special appearance and motion "and each and every part thereof" and granted B. A. Caudle, administrator *c.t.a.,* thirty days in which to answer.

On 30 March 1953, B. A. Caudle, individually, filed an answer to the complaint filed 22 November 1929. Among other defenses he pleads the provisions of G.S. 105-392 (a), and that the substitute plaintiff has filed no complaint in this action.

On 10 April 1953, counsel for plaintiff A. L. Caudle appeared and suggested his death on 30 March 1953, and that the Bank of Wadesboro had qualified as his administrator 7 April 1953. Thereupon the clerk entered his order making said administrator party plaintiff.

Finally the cause came on for hearing at the April Term 1953, Anson Superior Court. The plaintiff offered his evidence. Defendant offered no evidence in rebuttal. The court submitted three issues as follows:

"1. Is the action barred by the statute of limitations?

"Answer: No.

"2. Was Maggie Caudle's administrator ever made a party to this action?

"Answer: Yes.

"3. What amount, if any, is the plaintiff to recover?

"Answer: $356.62 with interest from October 6, 1930."

To the submission of said issues defendant excepted.

On each issue the court gave a peremptory instruction in favor of plaintiff. The jury answered the issues in accord with the charge. From judgment on the verdict defendant B. A. Caudle appealed.

Taylor, Kitchin & Taylor for plaintiff appellee.
Fred J. Coxe for defendant appellant.

BARNHILL, J. Counsel for appellant in his brief makes reference to "the confused and muddled mess into which this case has developed." We studiously refrain from commenting upon his observation. Nonetheless, we have experienced great difficulty in ferreting out the chronological order of the various motions and orders which have been made and entered in the case as it wended its leisurely way through the court. Even now, we are not quite certain they are stated in exact and proper order. However, the essential facts, once ascertained, lead to a single and simple conclusion. Defendant's motion to dismiss as in case of nonsuit should have been allowed.

A. L. Caudle, having supposedly acquired the tax sales certificates which are the subject matter of this action, had himself made substitute plaintiff. Thereafter, he filed no complaint or amendment to the original complaint alleging facts which would entitle him to the relief originally sought by Anson County. Nor has the present plaintiff filed any such pleading. Thus we have a complaint alleging a cause of action in favor of Anson County and a verdict and judgment in favor of plaintiff.

Proof without allegation is as unavailing as allegation without proof. *Ingold v. Assurance Co.*, 230 N.C. 142, 52 S.E. 2d 366; *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14. Both are required, *Maddox v. Brown,* 232 N.C. 542, 61 S.E. 2d 613, and each must substantially correspond with

the other. *Wilkins v. Finance Co.,* 237 N.C. 396, 75 S.E. 2d 118. The absence of either constitutes a fatal variance which requires a dismissal of the action.

"A party cannot set up one cause of action or defense and succeed on proof of another and different cause of action not pleaded, and, unless cured by amendment, a material variance between the pleadings and the proof is fatal to a claim or defense." *Ervin, J.,* in *Wilkins v. Finance Co., supra.*

It is quite true that certain of the motions made and orders entered in the cause contain the statement that A. L. Caudle had purchased the tax sales certificates which are the subject matter of this action and had, by reason thereof, succeeded to the rights of the original plaintiff. But this will not suffice. Causes are tried on the pleadings filed therein, and only the issues raised thereby may properly be submitted to the jury.

We may note that only one case is pending. When A. L. Caudle was made party plaintiff he had a summons and a copy of the original complaint served on defendants. However, the circumstances disclosed by the record clearly show that plaintiff adopted this somewhat unorthodox method of giving defendants notice that he had been made plaintiff. Furthermore, it has been treated by the parties as one cause. All motions and orders have been made in the original cause.

It is not appropriate for us to discuss at this time what right, if any, plaintiff has to apply for leave to file a complaint or what effect, if any, filing of such pleading at this late date would have on the applicability of the statute of limitations pleaded by defendant. Those questions must be reserved for decision, in the first instance, by the court below. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888.

The defendant's motion for judgment as of nonsuit should have been allowed. For that reason the judgment entered is

Reversed.

STATE v. JOE TOWERY.

(Filed 15 January, 1954.)

1. Municipal Corporations § 38—

In enacting and enforcing an ordinance for the observance of Sunday, a municipal corporation is vested with discretion in determining the kinds of pursuits, occupations or businesses to be included or excluded, and classifications will be upheld if they are reasonable and affect all within each class equally, the test being whether there is discrimination within a class and not whether there is discrimination as between the classes.

2. Same—

The operator of a market coming within the purview of a municipal ordinance proscribing the carrying on of such business on Sunday may not defend a prosecution for selling prohibited articles by attacking the validity of the ordinance on the ground that some of his items of stock were sold by his competitors who came within a different classification and were permitted to sell such articles on Sunday.

APPEAL by defendant from *Sharp, Special Judge,* September Criminal Term, 1953, of GUILFORD (High Point Division).

Criminal prosecution on a warrant charging the violation of a city ordinance.

The defendant was tried and convicted in the Municipal Court of the City of High Point and from the judgment imposed appealed to the Superior Court.

The warrant charges that the defendant, within the city limits of the City of High Point, or within one mile thereof, did willfully and unlawfully operate a place of business, to wit: a curb market, by remaining open for the purpose of selling and offering for sale goods, wares and merchandise between the hours of midnight Saturday and midnight Sunday by selling tomatoes, peaches and toilet paper, on Sunday, 26 July, 1953, in violation of Section 17.32 of The Code of the City of High Point, as amended 17 June, 1952.

Section 17.32 of The Code of the City of High Point, as amended, in pertinent part, reads as follows:

"It shall be unlawful for any place of business to remain open for the purpose of selling or offering for sale goods, wares, merchandise or services between the hours of midnight Saturday and midnight Sunday, except as follows: hotels; boarding houses; restaurants; cafes, delicatessen and sandwich shops furnishing meals and selling bread, cooked or prepared meats incidental to the operation of such business; filling stations furnishing petroleum products and automobile accessories; garages furnishing repair work or storage; ice cream or confectionary stores, furnishing ice cream, cigars, tobacco, nuts and soft drinks *only;* cigar stands and newsstands furnishing cigars, tobacco, candies, nuts, newspapers, magazines and soft drinks *only;* drugstores furnishing medical or surgical supplies, cigars, tobacco, ice cream, candies, nuts, soft drinks, newspapers and magazines; ice dealers, for the manufacture and sale of ice; dairies, for the manufacture and sale of dairy products; bakeries, for the manufacture, sale and delivery of bakery products; . . ." (Italics ours.)

The State offered evidence tending to show that the defendant made the sales as set out in the warrant. Whereupon, counsel for the defendant stipulated that the defendant "does not operate a hotel, boarding house, restaurant, cafe, a delicatessen and sandwich shop furnishing meals,

filling station or garage or an ice cream and confectionary store as such, or a cigar and newsstand as such, or a drugstore, furnishing medical and surgical supplies, nor is he an ice dealer manufacturing ice, nor does he operate a dairy for the manufacture and sale of dairy products, nor does he operate a bakery for the manufacture and delivery of bakery products, but that he operates exclusively as a curb market operator for the sale of merchandise generally found in curb markets."

The defendant testified: "I was open for business on July 26, 1953. That was a Sunday. I sold the items that day, consisting of tomatoes, peaches and toilet paper, for which I stand charged here. In the operation of my curb market I sell bread, cooked and prepared meats, ice cream, cigars, tobacco, nuts, soft drinks, candies, newspapers, magazines, some medical supplies, . . . and all kinds of salve and stuff like that, bandaids and tape, iodine, merthiolate, mercurochrome—general medical supplies, ice cream, dairy products, butter, milk, eggs and other items normally sold by dairy concerns, bakery products, consisting of cookies, cakes, bread, those items generally sold by bakers. I sell a great many other items as well, items usually found in a grocery store. I sell items usually found in a confectionary store, dairies, tobacco stores, delicatessen stores. I do not sell petroleum products or automobile accessories. I do sell soft drinks. These other businesses are in competition with me." On cross-examination, the defendant testified: "I sell flour in bulk, sugar in bags, various fruit, fresh fruit, canned goods, fresh vegetables, sausage and bacon. I do not prepare meals there. My sale of bread and meat is not incidental to preparation of any meal. I sell practically everything that is sold in a general grocery store or super market. . . . on the date of the 26th of July I was selling any and everything I had in my place."

The jury returned a verdict of guilty, and from the judgment imposed the defendant appeals, assigning error.

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

Schoch & Schoch for appellant.

DENNY, J. Attacks on the validity of Sunday ordinances have been a fruitful source of litigation in this country. In recent years particularly, there seems to be a growing desire on the part of many individuals, who are engaged in commercial enterprises, to completely ignore the observance of Sunday as a day of rest. In fact, in some jurisdictions, the courts seem to have concluded that Sunday closing ordinances are invalid if the mercantile establishments, which are required to close on Sunday, carry items of merchandise similar to those which may be sold on Sunday by the excepted class of business establishments. *Elliott v. State,* 29

Ariz. 389, 242 P. 340, 46 A.L.R. 284; *Allen v. City of Colorado Springs,* 101 Colo. 498, 75 P. 2d 141. In the case of *Mt. Vernon v. Julian,* 369 Ill. 447, 17 N.E. 2d 52, 119 A.L.R. 747, the Supreme Court of Illinois said: "No reason is suggested and we can think of none why the shop of a dressmaker or milliner should be required to close while the cigar store remains open. None is apparent why a dry goods store should be required to close when a newsstand continues to operate. We do not see where the public welfare is served by closing the grocery store and allowing a confectionary store to remain open, nor in closing a notions store while a drug store next door which sells notions is permitted to operate." It would seem that the reasoning of the Illinois Court ignores the right of a municipality in adopting a Sunday closing ordinance to discriminate as between classes, *S. v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198, but instead makes the question of competition or the right generally to conduct a business the determinative factor.

It is generally conceded that the governing body of a municipality, clothed with power to enact and enforce ordinances for the observance of Sunday, "is vested with discretion in determining the kinds of pursuits, occupations, or businesses to be included or excluded, and its determination will not be interfered with by the courts provided the classification and discrimination made are founded upon reasonable distinctions and have some reasonable relation to the public peace, welfare, and safety." 50 Am. Jur., Sundays & Holidays, section 11, page 810; *S. v. McGee,* 237 N.C. 633, 75 S.E. 2d 783.

In *S. v. Trantham, supra, Barnhill, J.,* pointed out that: "Legislative bodies may distinguish, select, and classify objects of legislation. It suffices if the classification is practical. *Magoun v. Bank,* 170 U.S. 283, 42 L. Ed. 1037; *S. v. Davis, supra* (171 N.C. 809, 89 S.E. 40). They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment. *Smith v. Wilkins,* 164 N.C. 135, 80 S.E. 168. The very idea of classification is inequality, so that inequality in no manner determines the matter of constitutionality. *Bickett v. Tax Commission,* 177 N.C. 433, 99 S.E. 415; *R. R. v. Matthews,* 174 U.S. 96, 43 L. Ed. 909. The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination. *City of Springfield v. Smith,* 322 Mo. 1129, 19 S.W. 2d 1."

The defendant here, like the defendant in *S. v. McGee, supra,* does not claim that the ordinance discriminates against him in so far as it applies to any other person or persons similarly situated. He simply claims that the business establishments permitted to remain open on Sunday sell certain articles of merchandise similar to those which he sells, therefore, he says they are his competitors. He falls into error in undertaking to make

competition as between classes the test rather than discrimination within a class.

In the case of *S. v. Medlin,* 170 N.C. 682, 86 S.E. 597, the Town of Zebulon had adopted an ordinance which prohibited keeping any shop or store open on Sunday for the purpose of buying and selling (except ice), but provided that "drug stores may be kept open at all times on Sunday for the sale of drugs and medicines; and from 6 to 9:30 o'clock in the morning and from 1 to 4:30 o'clock in the afternoon, for the sale of drugs, medicines, mineral waters, soft drinks, cigars and tobacco only." The defendant who did not operate a drug store, opened his grocery store between the hours of 6 and 8 o'clock a.m., on Sunday, 18 January, 1915, while the above ordinance was in full force and effect, and sold cigars, cigarettes and Coca-Cola to several purchasers and received cash payments therefor. At this same time, a drug store in Zebulon was open for the sale of these same articles. The Court said: "This ordinance, which prohibits keeping open stores and other places of business for the purpose of buying or selling, except ice, drugs and medicines, and permits the drug stores to sell soft drinks and tobacco for a limited time in the morning and afternoon, as a convenience to public customs, is not an unreasonable exercise of the police power." This decision has been followed and cited with approval in *S. v. Davis,* 171 N.C. 809, 89 S.E. 40; *S. v. Burbage,* 172 N.C. 876, 89 S.E. 795; *Lawrence v. Nissen,* 173 N.C. 359, 91 S.E. 1036; *S. v. Kirkpatrick,* 179 N.C. 747, 103 S.E. 65; *S. v. Weddington,* 188 N.C. 643, 125 S.E. 257, 37 A.L.R. 573, and *S. v. McGee, supra.*

Moreover, it will be noted that in the ordinance under consideration, the exemption as to cafes, delicatessens and sandwich shops is limited to those furnishing meals and selling bread, cooked or prepared meats incidental to the operation of such business. Likewise, the exemption extends to (1) "ice cream or confectionery stores, furnishing ice cream, cigars, tobacco, nuts and soft drinks *only;*" and (2) "cigar stands and newsstands furnishing cigars, tobacco, candies, nuts, newspapers, magazines and soft drinks *only.*" (Italics ours.)

The defendant, according to his own testimony, operates a curb market and sells "practically everything that is sold in a general grocery store or super market." Therefore, he has shown no arbitrary or unreasonable exercise of the police power in the classification and selection of businesses to be closed on Sunday.

As stated by *Stacy, C. J.,* in *S. v. Weddington, supra:* "It must be remembered that we are dealing with the exercise of an unquestioned police power, and whether it transcends the bounds of reason—not with its wisdom or impolicy." *S. v. Vanhook,* 182 N.C. 831, 109 S.E. 65.

After a careful consideration of the question raised on this record, and the authorities bearing thereon, we are of the opinion that the ordinance

in so far as it has been challenged on this appeal, is constitutional and, therefore, the verdict below must be upheld.

No error.

VERN E. COZART v. HARVARD H. HUDSON AND H. H. KING, JR.

(Filed 15 January, 1954.)

1. Trial § 22a—

On motion to nonsuit, all the evidence, whether introduced by plaintiff or defendant, which tends to support plaintiff's claim will be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference that can legitimately be drawn therefrom and resolving any contradictions or discrepancies in his favor.

2. Trial § 22b—

On motion to nonsuit, defendant's evidence in conflict with that of plaintiff is to be ignored.

3. Automobiles § 14—

The driver of a motor vehicle must not follow another vehicle on the highway more closely than is reasonable and prudent, having due regard for the speed of both vehicles, and the traffic upon and the condition of the highway, and negligence in this regard is actionable if it proximately causes injury to the person or property of another. G.S. 20-152 (a).

4. Automobiles §§ 18h (2), 18h (3)—Evidence held for jury in this action to recover for accident occurring when following vehicle collided with rear of plaintiff's car.

Plaintiff's evidence tended to show that a large truck had become disabled on the highway and the driver thereof had set out warning flares, that defendant driver, operating a large tractor-trailer which could not be stopped in less than sixty feet at the speed traveled, was following plaintiff's car on the highway at a distance of only some thirty feet, that as plaintiff approached the disabled truck in his lane of travel, the lights of an oncoming car prevented him from turning aside to pass the disabled truck, and that as plaintiff necessarily slackened speed and brought his car to a stop, the tractor-trailer crashed into his rear, causing the damage in suit. The evidence further showed that plaintiff failed to give the hand signal before stopping. *Held:* Defendants' motion to nonsuit was properly denied, both on the issue of negligence and the issue of contributory negligence.

5. Automobiles §§ 8d, 18b—Omission to perform duty cannot constitute a proximate cause unless its performance would have prevented injury.

A disabled truck was stopped on the highway with warning flares set out, in the lane of plaintiff's travel, and the lights of an oncoming vehicle, blocking the other lane of travel, were visible as plaintiff approached the scene. Plaintiff slackened his speed and stopped, causing his taillights to blink. *Held:* The plainly visible circumstances gave complete and

timely notice to a vehicle following plaintiff's car that plaintiff would have to stop, and therefore plaintiff's failure to give the statutory hand signal could not constitute a proximate cause of the following vehicle's collision with the rear of plaintiff's car. G.S. 20-154.

APPEAL by defendants from *Godwin, Special Judge,* and a jury, at June Term, 1953, of DURHAM.

Civil action for damage to plaintiff's automobile which was struck in the rear by a following tractor-trailer combination owned by one defendant and operated by the other when it stopped on the highway to avoid a collision with a disabled truck and an oncoming car occupying the highway ahead.

The accident culminating in this lawsuit occurred about 8:30 p.m. on 23 November, 1951, upon United States Highway 64 in Wake County, and resulted in harm to both of the colliding vehicles. The tractor-trailer combination was owned by the defendant H. H. King, Jr., and was operated by his employee, the defendant Harvard H. Hudson, on a business mission for him.

The plaintiff Vern E. Cozart sued both defendants for the damage to his automobile under a complaint charging that the damage was occasioned by the actionable negligence of Hudson in the management of the tractor-trailer combination. The defendants answered, denying actionable negligence on the part of Hudson, alleging contributory negligence on the part of the plaintiff, and pleading counterclaims for the damage to King's tractor-trailer combination and for loss of wages allegedly suffered by Hudson on account of a resultant disablement of the tractor-trailer combination. The plaintiff replied, denying the validity of the counterclaims.

Both sides offered evidence at the trial.

These issues were submitted to the jury: (1) Was the plaintiff's automobile damaged by the negligence of the defendants, as alleged in the complaint? (2) Did the plaintiff by his own negligence contribute to his damages, as alleged in the answer? (3) What amount of damages, if any, is the plaintiff entitled to recover of the defendants? (4) Were the defendants damaged by the negligence of the plaintiff, as alleged in the defendants' answer and cross action? (5) What amount of damages, if any, is the defendant Harvard H. Hudson entitled to recover of the plaintiff? (6) What amount of damages, if any, is the defendant H. H. King, Jr., entitled to recover of the plaintiff?

The jury answered the first issue "yes," the second issue "no," and the third issue "$700.00," and left the fourth, fifth, and sixth issues unanswered.

The trial judge rendered judgment for the plaintiff and against the defendants for the damages specified in the verdict, and the defendants appealed, assigning errors.

Jack C. Woodall for plaintiff Vern E. Cozart, appellee.
J. Grover Lee for defendants Harvard H. Hudson and H. H. King, Jr., appellants.

ERVIN, J. The only assignment of error requiring discussion is based on the disallowance of the motion of the defendants to dismiss the plaintiff's action upon compulsory nonsuit after all the evidence on both sides was in.

"In determining the legal sufficiency of testimony to withstand a motion for a compulsory nonsuit after all the evidence on both sides is in, the testimony is interpreted most favorably to plaintiff, and most strongly against defendant. Thus all facts in evidence, whether introduced by plaintiff or defendant, which make for the plaintiff's claim or tend to support his cause of action are assumed to be true. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. Furthermore, plaintiff is given the benefit of every inference favorable to him that can be legitimately drawn from such facts. *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757. If there are contradictions or discrepancies in the testimony offered by plaintiff, they are resolved in his favor. *Bailey v. Michael,* 231 N.C. 404, 57 S.E. 2d 372; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377. Any evidence presented by defendant which contradicts that of the plaintiff, or tends to establish a different state of facts is ignored. *Bundy v. Powell, supra.*" *Register v. Gibbs,* 233 N.C. 456, 64 S.E. 2d 280.

When the testimony at the trial is subjected to these rules, it makes out this case for the plaintiff:

1. United States Highway 64, which connects the Town of Wendell on the east and the City of Raleigh on the west, is a much traveled public highway having two traffic lanes, a northern one for westbound traffic, and a southern one for eastbound traffic.

2. Sometime before 8:30 p.m. on 23 November, 1951, a large motor truck, which was proceeding westward along the highway, became disabled and stalled, blocking the northern traffic lane at a point five miles west of the Town of Wendell.

3. Since he was unable to move his disabled truck from the traveled portion of the highway, the driver put out burning flares to warn approaching motorists of its presence and location in the northern traffic lane.

4. Subsequent to these events, the automobile owned and operated by the plaintiff, which was the forward vehicle, and the tractor-trailer com-

bination owned by the defendant King and operated by the defendant Hudson, which was the following vehicle, traveled westward on the highway at the same moderate speed toward the disabled truck.

5. The tractor-trailer combination and its cargo weighed 50,000 pounds. Although he knew that this great weight rendered it impossible for him to bring the tractor-trailer combination to a stop "in less than 60 feet," the defendant Hudson persisted in following the plaintiff's automobile at a distance of only 30 feet.

6. The burning flares indicating the presence and marking the position of the disabled truck in the northern traffic lane became visible to the drivers of the westbound vehicles when they were 300 feet away. This circumstance was sufficient to notify the defendant Hudson that he should reasonably anticipate that the plaintiff would be compelled to bring his automobile to a sudden stop behind the disabled truck in case his automobile and an eastbound motor vehicle neared the truck at the same time. Despite this, Hudson took no steps to lengthen the space between the tractor-trailer combination and the plaintiff's automobile.

7. On his arrival at a point 150 feet from the disabled truck, the plaintiff applied his brakes and slackened his speed preparatory to stopping his automobile. The plaintiff took this course because the headlights of an approaching motor vehicle moving eastward along the southern traffic lane made it plain to all in view that the plaintiff's automobile and the eastbound motor vehicle would reach the disabled truck at the same time, and that the plaintiff's automobile would collide with either the front of the eastbound motor vehicle or the rear of the disabled truck unless it was stopped on the northern traffic lane behind the disabled truck.

8. The plaintiff did not give a hand signal conforming to the statute embodied in G.S. 20-154 to notify the defendant Hudson of his intention to stop his automobile.

9. The defendant Hudson was confronted, however, by clearly visible circumstances, such as the plaintiff's blinking taillights, the plaintiff's decreasing speed, the blockage of the northern traffic lane by the disabled truck, and the headlights of the motor vehicle moving eastward along the southern traffic lane, which gave him complete notice that he should reasonably anticipate that the plaintiff was actually and necessarily bringing his automobile to a stop on the northern traffic lane behind the disabled truck, and that for this reason it was obligatory for him to increase the distance between the tractor-trailer combination in his charge and the plaintiff's slowing automobile while space and time still permitted if he was to be able to avoid striking the plaintiff's automobile after that vehicle had been brought to the impending and necessary stop.

10. Instead of pursuing the course of action indicated as essential by the surrounding circumstances, the defendant Hudson drove the tractor-

trailer combination along the highway in the wake of the plaintiff's slowing automobile at virtually unabated speed, and in that way constantly narrowed the already meagre space between the two vehicles. As the inevitable consequence of this conduct of the defendant Hudson, the tractor-trailer combination struck the rear of the plaintiff's automobile and substantially damaged that vehicle immediately after it had been brought to a stop in the northern traffic lane just behind the disabled truck.

The statute codified as G.S. 20-152 (a) provides, in substance, that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of both vehicles, the traffic upon the highway, and the condition of the highway. The driver of a motor vehicle is negligent if he violates this statutory requirement, and his negligence in that particular is actionable if it proximately causes injury to the person or property of another. *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; Blashfield: Cyclopedia of Automobile Law and Practice (Perm. Ed), Section 942; Michie: The Law of Automobiles in North Carolina (3rd Ed.), Section 86; 60 C.J.S., Motor Vehicles, Section 323.

The evidence at the trial suffices to show that the defendant Hudson was negligent in that he violated this statutory requirement. It suffices to show, moreover, that his negligence in this respect was the sole proximate cause of the collision and the resultant damage to the plaintiff's automobile. This being so, the evidence at the trial is ample to withstand the motion for a compulsory nonsuit, regardless of whether the motion is predicated on the assumption that the evidence is insufficient to establish actionable negligence on the part of the defendant Hudson, or the postulate that the evidence compels the single conclusion that the plaintiff was contributorily negligent as a matter of law. *Maddox v. Brown,* 232 N.C. 542, 61 S.E. 2d 613; *Tarrant v. Bottling Co., supra; Hobbs v. Mann,* 199 N.C. 532, 155 S.E. 163.

To be sure, the evidence discloses that the plaintiff failed to give a hand signal conforming to the statute embodied in G.S. 20-154 to notify the defendant Hudson of his purpose to stop his automobile. This fact does not impair in any degree the validity of the conclusion that the evidence is sufficient to withstand the motion for a compulsory nonsuit. When it is taken in the light most favorable to the plaintiff, the evidence shows that the defendant Hudson was given complete and timely notice by the plainly visible circumstances surrounding him that the plaintiff was actually bringing his automobile to a stop; and that notwithstanding complete and timely notice of that fact, the defendant Hudson did nothing whatever to avert a collision between the tractor-trailer combination in

his charge and the plaintiff's automobile. This being so, the evidence warrants the inference that there was no causal connection whatever between the failure of the plaintiff to give a hand signal and the subsequent collision. The omission to perform a duty cannot constitute one of the proximate causes of an accident unless the doing of the omitted duty would have prevented the accident. 38 Am. Jur., Negligence, Section 54; 65 C.J.S., Negligence, Section 106.

Careful consideration of the other assignments discloses no error in any matter of law or legal inference.

No error.

MARY M. MEWBORN, WIDOW; LOIS MEWBORN SUTTON, WIDOW; JANE MEWBORN SUTTON AND HUSBAND, HAROLD MILTON SUTTON; PAUL HODGES MEWBORN AND WIFE, LILLIE MAE MEWBORN; UNA MEWBORN SWINSON AND HUSBAND, SIDNEY ALBERT SWINSON; JEWELL MEWBORN UZZELL AND HUSBAND, ROBERT LEE UZZELL; AND SHEPHARD MEWBORN BRANN v. LORETTA LEE MEWBORN, GARY HODGES MEWBORN, PAULETTE WALKER MEWBORN AND CLAUDIA MAE MEWBORN, MINORS; AND UNBORN CHILDREN OF PAUL HODGES MEWBORN AS MAY BE HEREAFTER BORN TO PAUL HODGES MEWBORN, AND ANY CHILD OF CHILDREN OF PAUL HODGES MEWBORN IN ESSE AT THE DEATH OF PAUL HODGES MEWBORN.

(Filed 15 January, 1954.)

1. Wills § 31—

The intent of a testator is to be ascertained, if possible, from a consideration of his will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy.

2. Same—

In order to effectuate the intention of the testator, the court may disregard or supply punctuation, as well as transpose words, phrases, or clauses. Even words, phrases, or clauses will be supplied in the construction of a will when the sense of the phrase or clause in question, as collected from the context, manifestly requires it.

3. Wills § 33g—Devise to persons as tenants in common for life remainder to their children does not provide for survivorship.

Testator devised his wife a life estate in the property and then provided that after her death the lands should go to two of his named children for the term of their natural lives, the lands to be equally divided between them, and after "the death" of the named children the lands should then "go to their children." *Held:* Upon the death of testator the named children became tenants in common for life in the lands subject to their mother's life estate, and the provision that upon their death the lands should go to their children will be construed "upon their respective deaths the lands should go to their respective children," so that upon the death of one

of them without surviving issue his share must be divided *per stirpes* among testator's heirs.

APPEAL by defendants from *Frizzelle, Resident Judge* of the Fifth Judicial District, at Chambers, 21 August, 1953. From GREENE.

This is an action instituted by the plaintiffs against the defendants pursuant to the provisions of the Uniform Declaratory Judgment Act, for the purpose of having Items 3 and 4 of the last will and testament of W. D. Mewborn, deceased, construed by the court in order to determine the title to the lands described therein.

This cause was heard by his Honor by consent of the parties and their respective counsel upon the pleadings and exhibits attached thereto, trial by jury having been waived.

The additional facts necessary to a disposition of this appeal are stated below.

1. W. D. Mewborn, a citizen and resident of Greene County, North Carolina, died on 22 April, 1924, leaving a last will and testament which was duly probated in the office of the Clerk of the Superior Court of the aforesaid county, on or about 6 May, 1924. Items 3 and 4 of said will are as follows:

"3. I give and devise to my beloved wife, Mary M. Mewborn, all of my real estate that I may die seized and possessed of for the term of her natural life.

"4. After the death of my beloved wife, I give and devise to George Washington Mewborn and Paul Hodges Mewborn my home place where I now reside at Jason, North Carolina, containing about 125 acres, and what is known as the Hart Place in Shine, Greene County, North Carolina, and 60 acres of the tract of land known as the Shine's Farm, said 60 acres lying adjacent to the lands hereinbefore devised, for a term of their natural lives; said tracts of land to be equally divided between them and after the death of the said George Washington Mewborn and Paul Hodges Mewborn it is my will and desire that the aforesaid tracts of land go to their children."

2. The will of the decedent contains no residuary clause, or other provision for the vesting of properties not specifically devised.

3. The testator at the time of his death left surviving as his heirs at law, Mary M. Mewborn, his widow, and the following children, to wit: George Washington Mewborn, Paul Hodges Mewborn, Jane Mewborn, Annie Ilene Mewborn, Una Lee Mewborn, Clara Lois Sutton, Laura Jewell Uzzell and Walter D. Mewborn, Jr.

4. W. D. Mewborn, Jr., died intestate on 28 November, 1945, without issue surviving. George Washington Mewborn, one of the devisees named in Item 4 of said will, died 1 July, 1952, without child or children sur-

viving him, having never married. Ilene Mewborn Brann, who is the same person named in paragraph 3 above as Annie Ilene Mewborn, died intestate prior to the death of George Washington Mewborn, leaving surviving as her sole heir at law the plaintiff Shephard Mewborn Brann.

5. Plaintiffs Mary M. Mewborn, widow, Lois Mewborn Sutton, widow, Jane Mewborn Sutton, Paul Hodges Mewborn, Una Mewborn Swinson, Jewell Mewborn Uzzell and Shephard Mewborn Brann, are the sole surviving heirs at law of W. D. Mewborn, deceased.

6. The defendants Loretta Lee Mewborn, Gary Hodges Mewborn, Paulette Walker Mewborn, and Claudia Mae Mewborn, are the minor children of Paul Hodges Mewborn, the other devisee named in Item 4 of the last will and testament of W. D. Mewborn, deceased. These defendants are represented in this proceeding by their duly appointed guardian *ad litem,* George W. Edwards, who, in apt time, filed an answer in behalf of his wards.

On the foregoing facts, his Honor held as a matter of law that Una Mewborn Swinson, Jane Mewborn Sutton, Lois Mewborn Sutton, Paul Hodges Mewborn, Jewell Mewborn Uzzell, and Shephard Mewborn Brann, as tenants in common in the remainder of the portions of said lands devised to George Washington Mewborn for life by Item 4 of the said will, are entitled to have the lands devised in Item 4 of the will, divided into two equal parts, under appropriate proceedings, and one part allotted to the plaintiff Paul Hodges Mewborn, under the terms of the will, and the other one-half set apart to the said Una Mewborn Swinson, Jane Mewborn Sutton, Lois Mewborn Sutton, Paul Hodges Mewborn, Jewell Mewborn Uzzell and Shephard Mewborn Brann, as the sole heirs at law of W. D. Mewborn, deceased, subject to the life estate of Mary M. Mewborn in said lands.

Judgment was entered accordingly and the defendants appeal, assigning error.

Wallace & Wallace for appellees.
George W. Edwards for appellants.

DENNY, J. The intent of a testator is to be ascertained, if possible, from a consideration of his will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy. *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

In order to effectuate the intention of the testator, the court may disregard or supply punctuation, as well as transpose words, phrases, or clauses. Even words, phrases, or clauses will be supplied in the construction of a will when the sense of the phrase or clause in question, as collected from the context, manifestly requires it. *Coppedge v. Coppedge, supra; Williams v. Rand, supra; Heyer v. Bulluck, supra; Washburn v. Biggerstaff,* 195 N.C. 624, 143 S.E. 210; *Gordon v. Ehringhaus,* 190 N.C. 147, 129 S.E. 187.

"It is very generally held that, where the gift is to several persons for life and at 'their death' to 'their' children, the fact that the phrase 'their death' must be read 'their respective deaths' may warrant the reading of the phrase 'their children' as 'their respective children.'" *Bool v. Mix,* 17 Wend. (N.Y.) 119, 31 Am. Dec. 285; Anno: 16 A.L.R. 123; 57 Am. Jur., Wills, section 1315, page 870; *Horne v. Horne,* 181 Va. 685, 26 S.E. 2d 80; *Cook v. Cook,* 292 Ky. 53, 165 S.W. 2d 971.

In the case of *Horne v. Horne, supra,* the Supreme Court of Virginia passed upon a provision in a deed involving the same question posed on this appeal. The deed dated 2 May, 1903, executed by R. R. Horne and wife, reserved a life estate in themselves in the lands involved and conveyed remainders therein for life to their sons, George R. Horne and C. R. Horne, with remainders after their deaths "to their lawful children." C. R. Horne died 15 April, 1930, leaving four children. George R. Horne died without issue on 19 August, 1941. The court held that "the words 'their children' when employed in gifts of future estates after life estates given to two or more brothers or sisters with remainder 'to their children' invariably means to 'their respective children,' . . ." Whereupon, the Court affirmed the ruling of the lower court to the effect that George R. Horne having died without issue, the portion of the estate conveyed to him for life reverted to the estate of the original grantor.

In the instant case, the testator not only contemplated an equal division of the devised tracts of land between his sons George Washington Mewborn and Paul Hodges Mewborn, but he directed that upon the death of his wife the lands should be so divided. Therefore, upon the death of the testator they became tenants in common for life in the devised lands, subject to the life estate of their mother, Mary M. Mewborn.

Ordinarily where the will or deed creates life tenancies in common, it is held to indicate an intent on the part of the testator or grantor that the remainders shall pass *per stirpes* and not *per capita.* *Horne v. Horne, supra,* 57 Am. Jur., Wills, section 1315, page 870; Anno: 16 A.L.R. 17, 78 A.L.R. 1387, 126 A.L.R. 159, 13 A.L.R. 2d 1031. *Cf. Haywood v. Rigsbee,* 207 N.C. 684, 178 S.E. 102.

We think the provision in Item 4 of the will of W. D. Mewborn, directing an equal division of the lands devised therein between the two life

takers, indicates a clear intent on the part of the testator that upon the death of his wife, the first taker for life, the sons should hold their shares in the devised lands in severalty. Therefore, upon their respective deaths their respective shares would go to their respective children, if each one of them had children. But, since George Washington Mewborn died without issue, the interest in the lands devised to him for life reverted to the estate of W. D. Mewborn. Moreover, this conclusion is consonant with the terms and provisions of the entire will. It contains nothing that indicates an intent to give to the children of Paul Hodges Mewborn any more than he undertook to provide for the children of his other heirs at law.

The judgment of the court below is

Affirmed.

SARAH YOUNG v. THE ANCHOR COMPANY, INC.

(Filed 15 January, 1954.)

1. Negligence § 3½—

Where the thing causing injury is under the exclusive management and control of defendant, and the occurrence is such as does not happen in the ordinary course of things if the person having the management and control uses the proper care, the doctrine of *res ipso loquitur* applies.

2. Same—

Proof of circumstances invoking the doctrine of *res ipsa loquitur* merely constitutes a mode of proving negligence sufficient to make out a case for the jury, but does not affect the burden of proof, and plaintiff still has the burden of showing by the preponderance of the evidence that her injuries were proximately caused by the negligence of the defendant.

3. Same: Negligence § 4f—

Evidence tending to show that an escalator under the exclusive management and control of the defendant store suddenly jerked, stopped and then moved forward, causing the plaintiff patron to fall to her injury, *is held* sufficient to make out a case for the jury under the doctrine of *res ipsa loquitur.*

4. Negligence § 4f—

A store providing an escalator for the use of its customers is under duty of continuous inspection and maintenance and due care in its operation.

5. Negligence §§ 3½, 20—

An instruction to the effect that a finding by the jury of facts sufficient to constitute a predicate for the application of the doctrine of *res ipsa loquitur* was sufficient to warrant a judgment for plaintiff must be held for reversible error in failing to instruct the jury to the effect that such

circumstance must have been the proximate cause of plaintiff's injury in order to warrant such a verdict.

APPEAL by defendant from *Hatch, Special Judge,* May Term, 1953, of DAVIDSON. New trial.

This was an action to recover damages for a personal injury resulting from a fall from an escalator in the defendant's department store. It was alleged this was due to the negligence of the defendant.

The defendant operates a large department store in Winston-Salem, and for the convenience of customers has installed and maintains as a means of ascent from the first to the second floor an escalator or moving stairway. The escalator had been in use about nine months before the injury complained of.

There was evidence on behalf of the plaintiff tending to show that on 9 June, 1952, the plaintiff, who was then seventy-two years of age, in company with her daughter and her granddaughter entered defendant's store as prospective purchasers and undertook to use the escalator, which was in motion, in order to reach the second floor. Both plaintiff and her daughter had used the escalator a number of times before. The daughter first stepped on the escalator and the plaintiff a few steps behind her, each with hand on the rail. After the escalator had ascended a short distance there was a sudden jerk, a stop, and a quick move forward which plaintiff testified threw her on her side and caused her to fall with her head down and feet up. The escalator was stopped and she was removed. There was evidence that the plaintiff sustained serious and permanent injury. The plaintiff's daughter also testified that the escalator gave a sudden jerk, stopped, and then moved forward, and that this caused her to fall to her knees, though no permanent injury resulted to her.

The defendant offered evidence tending to show that the escalator which it had installed in its store was one in approved and general use in department stores, and that it was properly constructed, maintained, inspected and operated. The defendant offered evidence tending to contradict plaintiff's evidence as to the fact of a sudden jerk and stoppage of the escalator on the occasion alleged.

On the issues submitted the jury for its verdict found that plaintiff was injured by the negligence of the defendant, that plaintiff did not by her own negligence contribute to her injury, and awarded damages in a substantial sum.

From judgment on the verdict the defendant appealed, assigning errors.

Walser & Brinkley and Charles W. Mauze for plaintiff, appellee.

Hubert Olive, McNeill Smith, Braxton Schell, and Smith, Sapp, Moore & Smith for defendant, appellant.

DEVIN, C. J. Defendant's appeal brings up for consideration the question whether plaintiff's evidence was sufficient to support her allegations of negligence on the part of the defendant, and to carry the case to the jury. It was insisted that defendant's motion for judgment of nonsuit should have been allowed, or that the court upon all the evidence should have given instruction to the jury to answer the issue of negligence in its favor, as prayed.

Undoubtedly, on this record, the defendant was entitled to the allowance of its motion unless the facts shown by plaintiff's evidence were such as to call for the application of the doctrine of *res ipsa loquitur.*

This doctrine has been considered by this Court in a number of well considered opinions and is generally understood to designate a rule of the law of evidence which may be applied to the inference from the nature of the occurrence to be drawn in certain classes of injury alleged to have been caused by negligence. *Justice Hoke* in *Jones v. Bland,* 182 N.C. 70, 108 S.E. 344, has stated the nature of the principle involved, from which we quote: "It is the accepted position here and elsewhere 'that where a thing which causes an injury is shown to be under the management of the defendant, and the occurrence is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care.' This was held in the recent case against *The Texas Company,* reported in 180 N.C. 546-561, and the principle has been approved and applied in many of our decisions on the subject. (Cases cited.) In the citation to Labatt, quoted with approval in *Womble's case,* it is said: 'The rationale of the doctrine, spoken of in the cases as *res ipsa loquitur,* is that in some cases the very nature of the occurrence may itself, and through the presumption it carries, supply the requisite proof. It is applicable when under the circumstances shown the accident presumably would not have happened if due care had been exercised. Its essential import is that on the facts proved, the plaintiff has made out a *prima facie* case without direct proof of negligence. . . .' "

This statement of the law is in accord with the uniform decisions in this jurisdiction. *Womble v. Grocery Co.,* 135 N.C. 474, 47 S.E. 493; *Stewart v. Carpet Co.,* 138 N.C. 60, 50 S.E. 562; *Fitzgerald v. R. R.,* 141 N.C. 530, 54 S.E. 391; *Isley v. Bridge Co.,* 141 N.C. 220, 53 S.E. 841; *Deaton v. Lumber Co.,* 165 N.C. 560, 81 S.E. 774; *Ridge v. R. R.,* 167 N.C. 510, 83 S.E. 762; *White v. Hines,* 182 N.C. 275, 109 S.E. 31; *Harris v. Mangum,* 183 N.C. 235, 111 S.E. 177; *Baker v. International Shoe Co.,* 199 N.C. 379, 154 S.E. 667; *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477. See also *Hesemann v. May Dept. Stores Co.,* 225 Mo. App. 584, 39 S.W. 2d 797; *Welch v. Rollman & Sons Co.,* 70 Ohio

App. 515, 44 N.E. 2d 726; *Petrie v. Kaufmann & B. Co.*, 291 Pa. 211, 152 A.L.R. 562.

In cases where the plaintiff's evidence is such as to justify the application of the doctrine of *res ipsa loquitur* the nature of the occurrence itself and the inferences to be drawn therefrom are held to supply the requisite degree of proof to carry the case to the jury and to enable the plaintiff to make out a *prima facie* case without direct proof of negligence. However, this does not dispense with the requirement that the plaintiff who alleges negligence must prove negligence, but relates only to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury and does not relieve the plaintiff of the burden of showing negligence. Before the plaintiff can be entitled to a verdict he must satisfy the jury by the preponderance of the evidence that the injuries complained of were proximately caused by the negligence of the defendant in the respects alleged. *Stewart v. Carpet Co., supra; White v. Hines, supra; Mitchell v. Saunders,* 219 N.C. 178, 13 S.E. 2d 242. "The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be sufficient for the consideration of the jury, even in the absence of any additional evidence. (Citing authorities.) In all other respects the parties stand before the jury just as if there were no such rule." *Stewart v. Carpet Co., supra.*

"'*Res ipsa loquitur,*' if we may use the phrase to represent the doctrine—is itself a mere mode of proof. After rebutting testimony is offered, it is still evidence to be reckoned with by the jury, just as any other evidence, according to its probative force." *Covington v. James,* 214 N.C. 71, 197 S.E. 701.

We think the plaintiff's evidence, which on the motion to nonsuit must be accepted as true, is such as to invoke the application of the doctrine of *res ipsa loquitur,* and hence sufficient to carry the case to the jury.

The mechanical device known as an escalator, which the defendant furnished to its customers and invitees as a means of ascent to the second floor of the department store, was installed by the defendant and was under its exclusive management and control, imposing upon it the continuous duty of inspection and maintenance, and due care in its operation, and the facts as testified by plaintiff of the sudden jerk, stoppage and unusual movement on the occasion alleged was such as to raise the inference that the accident complained of would not have occurred unless there had been negligent failure to inspect and maintain. *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251. The jury absolved the plaintiff of the imputation of contributory negligence. The fact of the occurrence in the manner and under the circumstances described by plaintiff's evidence required consideration by the jury on the issue of negligence.

The decisions in *Watkins v. Furnishing Co.,* 224 N.C. 674, 31 S.E. 2d 917, and *Jones v. Elevator Co.,* 234 N.C. 512, 67 S.E. 2d 492, are not controlling on the facts of this case.

The defendant has brought forward in its assignments of error exceptions noted to the rulings of the court in respect to the testimony and in giving instructions to the jury as to the issues submitted.

The defendant noted exception to the following portion of the court's charge: "The plaintiff contending in this case that the acts of negligence was the extraordinary operation of the escalator the morning of June 9, 1952, in that without any warning or notice to the plaintiff that the escalator jerked, stopped and then started again. Now lady and gentlemen, the burden of the issue of negligence does not shift to the defendant. However, from the plaintiff's testimony in this case that the escalator jerked, stopped and then started makes out a case for you, the jury, to determine whether or not by reason of its sudden jerking, stopping and starting was the proximate cause of her injury and damage."

From an examination of this portion of the court's instruction, and other similar expressions in the charge, we think the court inadvertently gave the jury the impression that the fact that the escalator jerked, stopped and started again, causing plaintiff to fall, if found, was sufficient to warrant a verdict for the plaintiff on the first issue, and that the court did not adequately instruct the jury that before they could answer the first issue in favor of the plaintiff they must find from the evidence and by its greater weight that plaintiff's fall on the escalator proximately resulted from the defendant's negligence in that it failed to exercise due care in the performance of its duty in the maintenance, inspection and operation of the escalator as alleged in the complaint.

In this, we think, there was error sufficiently prejudicial to require a new trial. As there must be another hearing, we have not considered other exceptions noted in the record.

New trial.

JOHNSON COTTON COMPANY OF CONWAY, INC., v. CARL J. FORD AND CONNIE M. FORD, TRADING AS FORD PRODUCE COMPANY; AND RICHARD BRIGMAN.

(Filed 15 January, 1954.)

1. Evidence § 19—

The driver of plaintiff's vehicle, which was following the truck owned by one of defendants, testified for plaintiff that the truck was being driven on its right side of the highway shortly before the collision, and the owner of the truck offered a written statement by the witness to the same effect.

Held: The other defendant is entitled to introduce the testimony of a declaration made by the witness shortly after the accident that "the truck ran the car off the road" in order to impeach the witness' testimony by showing the former inconsistent statement.

2. Automobiles §§ 18b, 18h (2)—

Evidence tending to show that the driver of the truck belonging to one defendant was driving to the left of the center line of the highway upon entering a bridge, forcing the other defendant, who was driving his car in the opposite direction and who had just cleared the bridge, to turn to his right and run off the pavement, causing him to lose control of his vehicle and hit plaintiff's car, which was following the truck, *is held* sufficient to be submitted to the jury on the issue of negligence, both in plaintiff's action and the cross action of the other defendant, even though the truck did not strike either vehicle.

APPEAL by defendants Ford from *McLean, Special Judge,* January Term, 1953, of ROBESON. No error.

This action grew out of a collision on the highway involving three motor vehicles.

The time was 1 May, 1950, 5:45 p.m., and the location was on Highway #301, about 14 miles south of Fayetteville. The highway at this point descends to the south by easy grade, curves slightly to the right and crosses Little Marsh Swamp. There are two bridges over this swamp, each about 50 feet long, with concrete sidewalls, and the distance between them was about 250 feet. The pavement of the highway is 20 feet wide and shoulders extend out on either side 6 feet. The width of the pavement on the bridges is the same as that of the highway.

On the occasion alleged the plaintiff's automobile, driven by its agent McLellan, was proceeding south. Also proceeding in the same direction, in front of plaintiff's automobile, was the tractor-trailer truck of the defendants Ford. As the truck approached the northernmost bridge, the defendant Brigman, driving a Plymouth automobile, was coming from the opposite direction going north. Brigman crossed the southernmost bridge and drove on across the northernmost bridge just before the truck reached it. After crossing the bridge, just ahead of the truck, Brigman drove to the right off the pavement onto the shoulder, nearly into the ditch, then righted his automobile but skidded into and collided with plaintiff's automobile which was in rear of the truck. As result both automobiles were damaged and defendant Brigman sustained a personal injury. Neither automobile came in contact with the truck of defendants Ford, and it proceeded on its way south.

Plaintiff Cotton Company sued both Ford and Brigman, alleging concurrent negligence on the part of each. It was alleged that Ford's truck had been driven to its left over the center of the highway in the path of Brigman's automobile; and that Brigman driving at high speed attempted

to turn to his right in passing the truck and, in consequence, lost control of his automobile, resulting in the collision complained of.

Defendants Ford denied any negligence on the part of the driver of their truck.

Defendant Brigman denied negligence on his part, and as an affirmative defense and cross action alleged that his injuries were due to the concurring negligence of both the plaintiff and the defendants Ford, in that plaintiff's driver followed so closely behind the truck he was unable to see the condition on the highway immediately in his front, thus contributing to the injury; and that Ford's truck was at the moment being driven at an unlawful speed, and to its left of the center of the highway, making it necessary for Brigman to turn to his right off the pavement to avoid being struck.

There was conflicting evidence as to the speed of the truck and as to whether it was being driven to the left of the center of the highway; and there was also conflicting evidence as to the speed of Brigman's automobile and as to whether he had increased his speed in order to cross the bridge before the truck and had lost control in attempting to turn to his right.

At the close of all the evidence the plaintiff Cotton Company submitted to a voluntary nonsuit as to Brigman, and Brigman took a nonsuit as to his cross action against the plaintiff.

The jury rendered verdict that both the damage to plaintiff's automobile, and the personal injury and property damage to defendant Brigman were caused by the negligence of the defendants Ford as alleged. Substantial damages were awarded. The defendants Ford excepted and appealed.

W. A. Johnson and Varser, McIntyre & Henry for defendants Ford, appellants.

John S. Butler and F. D. Hackett for defendant Brigman, appellee.

DEVIN, C. J. The determinative question of fact upon which the case turned was whether the driver of the truck of defendants Ford as he approached the bridge on the highway, and just as defendant Brigman was emerging therefrom, drove the truck to the left of the center of the highway so as to make it necessary for Brigman to turn to his right and drive off the pavement to avoid being struck by the truck.

While the truck did not come in contact with either of the automobiles which collided, it was the contention of the plaintiff and the defendant Brigman that the driver of the truck was negligent in driving to the left of the center of the highway in meeting an automobile coming from the opposite direction, and that his negligence in this respect was the real

efficient cause of the injuries sustained. The jury adopted this view and returned verdict against the defendants Ford on the issues submitted. From the judgment rendered thereon the defendants Ford have appealed assigning numerous errors in the rulings of the trial judge.

The appellants excepted to the court's admission of certain testimony from Sheriff McMillan, who was offered as a witness by defendant Brigman. This witness testified that he reached the scene shortly after the collision occurred, and that he heard McLellan (the driver of the plaintiff's automobile) make the statement that "the truck ran the car off the road." It was argued that this statement was incompetent, hearsay and prejudicial. It appeared, however, that McLellan had testified, as a witness for the plaintiff, that he had traveled behind the truck for two miles before the collision, and noticed it was being driven on its right side of the highway in a normal way at about 45 miles per hour; that on the down-grade as it approached the bridge the truck driver increased its speed; that "after he went down the hill and turned the curve, I don't know how he was driving then."

After the plaintiff rested, the defendants Ford, with other testimony, offered a written statement by McLellan to the effect that he drove plaintiff's automobile about 75 yards in the rear of the truck, and that near the bottom of the grade, just before beginning the curve to the right, as the truck was about to go onto the bridge, it slowed up a bit. "As the truck was going onto the bridge I saw a Plymouth car coming toward me on the east shoulder of the highway. He was off on the shoulder when I first saw it about 75 yards in front of me and he looked to me to be gradually going off the fill. . . . I saw the truck approaching the bridge and noticed the truck stayed on the right side as he approached the bridge, although I'm not sure of the position of the truck when he entered on the bridge."

Thereafter the defendant Brigman offered the testimony of Sheriff McMillan that he heard McLellan say "the truck ran the car off the road," to which the defendants Ford objected. The court overruled the objection and admitted this testimony, not against the defendants Ford, but only for the purpose of contradicting the witness McLellan. The defendants Ford excepted on the ground that this statement was incompetent for any purpose.

The objection to this evidence cannot be sustained. *S. v. Britt,* 225 N.C. 364, 34 S.E. 2d 408; *Hubbard v. R. R.,* 203 N.C. 675, 166 S.E. 802; Stansbury, secs. 46-47. It was competent for defendant Brigman to offer for the purpose of contradicting the testimony of McLellan that he had previously made a statement inconsistent with his testimony as offered by plaintiff and by the defendants Ford.

We have examined the other exceptions to the court's ruling in the admission and exclusion of testimony and find them without substantial merit. The motion of defendants Ford for judgment of nonsuit was properly overruled. *Wallace v. Longest,* 226 N.C. 161, 37 S.E. 2d 112; *Hoke v. Greyhound Corp.,* 226 N.C. 692, 40 S.E. 2d 345.

The appellants noted numerous exceptions to the court's instructions to the jury. In their brief they say "The court's charge, by the foregoing exceptions, is challenged throughout, except as to a few formal statements which did not affect the parties one way or the other." We have examined the court's charge to the jury in the light of these exceptions and are unable to perceive any material error therein which would justify the award of a new trial.

The jury's verdict on the evidence offered and the judgment thereon will not be disturbed.

No error.

MARY B. JOHNSON v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 15 January, 1954.)

Insurance § 34d—

Where, in an action upon a certificate under a group policy to recover for disability, plaintiff testifies that after the termination of her employment covered by the group policy, she worked over a month and a half at a regular hourly wage in a class of employees not covered by the group policy, and introduces testimony of her employer's medical officer, who had examined her, that she was able to work at that time, although she was suffering from some physical ills, nonsuit is properly entered, notwithstanding the testimony of insured and her friend that she was physically disabled at the time of the termination of her employment.

APPEAL by plaintiff from *Bobbitt, J.,* September Term, 1953, of FORSYTH. Affirmed.

This was an action to recover permanent disability benefits under group insurance policy.

From judgment of involuntary nonsuit, the plaintiff appealed.

H. H. Leake and Robert M. Bryant for plaintiff, appellant.
Womble, Carlyle, Martin & Sandridge for defendant, appellee.

DEVIN, C. J. The plaintiff was an employee of R. J. Reynolds Tobacco Company and was insured under a group insurance policy issued by the defendant Assurance Society. Incorporated in the insurance policy and in the plaintiff's individual certificate thereunder disability benefits were

provided as follows: "In the event that any Employee while insured under the aforesaid policy and before attaining age 60 becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of its commencement, the Society will, in termination of all insurance of such Employee under the policy, pay equal monthly Disability-installments, the number and amount of which shall be determined by the Table of Installments below; . . ."

It was further provided in the policy and certificate that insurance upon the life of an employee should automatically cease upon the termination of employment with the Employer in the specified classes of Employees.

It was admitted that the plaintiff's employment by the Tobacco Company in the specified classes of employees under the policy terminated 29 June, 1951. Hence before the plaintiff could recover under the above quoted clause she was required to show that she was totally and permanently disabled by injury or disease on or before that date. There was no evidence of injury.

The plaintiff was then 51 years of age and had been employed by the Reynolds Tobacco Company for several years. According to the testimony her work was to sit on a stool in front of a conveyor belt and pick out foreign substances from the leaves of tobacco on the belt.

On 29 June, 1951, the employment of plaintiff by the Tobacco Company was terminated. She and a number of others were "laid off" as she termed it. On 13 July, following, she applied to the Company for other employment of a similar nature, referred to as "seasonal work" with new tobacco. She was given pre-employment medical examination by the Tobacco Company's medical director, Dr. Bunn, and began work 23 July at a wage of 83c an hour and so continued until 12 September, when she stopped work. During that period she received as compensation for her services $235. She instituted this action 13 November, 1952.

The plaintiff was examined by several physicians whose testimony appears in the record. She was examined by Dr. Bunn, for the Tobacco Company, 14 August, 1950, and 13 July, 1951; by Dr. Allen 10 May, 1951, and September, 1953; by Dr. Welfare March, 1952; and by Dr. Bahnson, at the request of the defendant, September, 1952.

The diagnosis of Dr. Allen, 10 May, 1951, was "obesity, rheumatic arthritis, hypertension, and benign adenomatous condition of her thyroid gland of her neck." This, Dr. Allen explained, meant she was overweight, had high blood pressure, rheumatism, and goiter. No other disease was discovered. From his examination and that of the other physicians no

cancerous condition appeared. The heart, lungs and kidneys were normal. All the physicians testified they found similar conditions at the time of their examinations. Each declined to say she was disabled to work, except Dr. Welfare, who said that when he examined her in March 1952 he was of opinion she was physically unable to work "at that time."

Dr. Bunn's examination of the plaintiff in August, 1950, was made pursuant to the rule of the Tobacco Company requiring medical examination of all employees who had been treated by a private physician before returning to work. On 13 July, 1951, he gave her under the Company's rule a pre-employment examination upon her application for re-employment. As result of his medical examination on both occasions he testified she was able to work, and, according to the testimony did work for a substantial wage until she left employment with the Tobacco Company 12 September.

The plaintiff testified she was disabled by disease on 29 June, 1951, and had been for some time prior thereto, and another witness, a neighbor, testified, "As far as I know, Mary is not able to perform any work for compensation of financial value. She hasn't worked in between three and four years to my knowledge."

We have considered only the evidence offered by the plaintiff, and in the light most favorable to her. From this it appears that while the plaintiff was suffering from some of the ills that afflict humanity and has offered evidence of physical conditions which might cause pain, discomfort and serious impairment of health, the evidence fails to show that on 29 June, 1951, the day on which her employment terminated, she was totally and permanently disabled by disease from performing any work for compensation of financial value. Over against her own opinion and that of her friend, as to her inability to work, she has testified that subsequent to the date of termination of her employment and right to policy benefits she was gainfully employed for an appreciable time, and she has offered the testimony of her employer's medical officer that at that time she was able to work and to earn compensation of financial value.

We think Judge Bobbitt's ruling that the plaintiff's evidence was insufficient to justify submission of the case to the jury should be upheld. *Thigpen v. Ins. Co.*, 204 N.C. 551, 168 S.E. 845; *Boozer v. Assurance Soc.*, 206 N.C. 848, 175 S.E. 175.

Counsel for plaintiff insist that the judgment of nonsuit was improperly entered, and call our attention to *Ingram v. Assurance Soc.*, 230 N.C. 10, 51 S.E. 2d 903, as supporting the appellant's position. But we think the facts in that case, where the plaintiff was suffering from silicosis in an advanced stage, are distinguishable from the facts in the case at bar.

Judgment affirmed.

THE TOWN OF FUQUAY SPRINGS, A MUNICIPAL CORPORATION, v. W. I. ROWLAND, JUDGE OF THE FUQUAY SPRINGS RECORDER'S COURT, AND W. O. COUNCIL, CLERK OF THE FUQUAY SPRINGS RECORDER'S COURT.

(Filed 15 January, 1954.)

1. Judges § 4—

A judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties, and therefore an action under the Declaratory Judgment Act against a judge to determine the correctness of his adjudication as to what items should be included in a bill of costs in a criminal action will be dismissed, even *ex mero motu*, for failure to state a cause of action.

2. Appeal and Error § 6c (1): Pleadings § 16—

The failure of the complaint to state a cause of action is a defect upon the face of the record proper requiring dismissal in the Supreme Court *ex mero motu* in the absence of an assignment of error.

3. Declaratory Judgment Act § 1—

The failure of a clerk of a local court to collect and account for moneys rightfully belonging to a municipality because of alleged error in the taxing of costs in criminal prosecutions in his court may not be instituted under the Declaratory Judgment Act, since that statute does not vest in the Superior Court the general power to oversee, supervise, direct or instruct officials of inferior courts in the discharge of their official duties.

APPEALS by plaintiff and defendant Rowland from *Harris, J.*, October Term, 1953, WAKE.

Civil action purportedly instituted under the Declaratory Judgment Act, G.S. ch. 1, art. 26, to determine what items of cost should be included in the bill of cost in a criminal action tried in the Fuquay Springs Recorder's Court.

It is the duty of defendant W. O. Council as clerk of said court to tax the bill of cost in each and every criminal action tried in said court. "The fees charged in the bill of cost shall be the same as the fees allowed in courts of justices of the peace in Wake County, except there shall be charged, in lieu of the trial fee, a recorder's fee in such case of three dollars, and fee in each criminal case of five dollars for each defendant which fee shall be a prosecuting attorney's fee . . ." Sec. 17, ch. 280 P.L.L. 1917, as amended by sec. 6, ch. 496 P.L.L. 1929. The costs to be taxed by justices of the peace in Wake County are listed in ch. 866 S.L. 1951. Certain other fees are to be taxed as provided by law, to wit:

(1) Law Enforcement Officers' Benefit and Retirement Fund . . . $2.00.
(2) Wake County Officers' Pension Fund . . . $1.00.
(3) Arrest fee . . . $2.00.
(4) Jail fees of $1.50 per day, plus $1.00 turnkey fee.

(5) Jury fee, when applicable . . . $18.00.

On or about 22 April 1953, defendant Rowland, as judge of said court, directed defendant Council, as clerk, not to tax in any bill of cost the arrest fee of $2.00 when the arrest was made by a salaried officer, or the $1.00 for uncontested judgment, or the $2.00 for contested judgment, on the theory the $3.00 recorder's fee "in lieu of the trial fee" allowed by law was a substitution of the judgment fees listed in the costs to be taxed by a magistrate.

Plaintiff, alleging that it "has a vital financial interest in said bills of cost in all cases tried in said court, as under the various acts regulating fees, certain items are paid over to said Town of Fuquay Springs to cover expenses of furnishing courtroom, heat, lights, water and a clerk for said court, and other clerical services and jail, and also costs of printing forms, *et cetera,*" instituted this action for judgment (1) adjudging that the items of cost set forth in paragraphs 7 and 8 of its complaint are the proper and legal costs to be assessed in criminal actions tried in said court, and (2) directing defendant Council as clerk to charge the same in each and every bill of cost in criminal actions tried in said court and collect and distribute same according to law.

Defendant Council, answering, admitted all the allegations of the complaint. Defendant Rowland first demurred to the complaint for that (1) the complaint does not state a cause of action for the reasons therein stated, (2) there is a misjoinder of parties, (3) the plaintiff is without capacity to sue the defendant in his official capacity, and (4) it is not made to appear that plaintiff has any interest in any particular item of cost listed by it. The demurrer was overruled.

Thereupon, said defendant filed answer in which he contests the right to tax certain fees contended for by plaintiff and pleads certain defenses and denies the right of plaintiff to maintain this action.

When the cause came on for hearing in the court below, the trial judge entered judgment listing the items of cost to be charged in bills of cost in said court, including both the fees for judgment allowed magistrates and the recorder's fee of $3.00; adjudging that the prosecuting attorney's fee of $5.00 should not be taxed in a case where the defendant pleads guilty or *nolo contendere* or where the the offense charged is within the jurisdiction of a justice of the peace; and "authorizing" defendant Council as clerk to follow the schedule of fees set forth in the judgment in preparing bills of cost in criminal cases tried in said court. Both plaintiff and defendant Rowland excepted and appealed.

Mordecai & Mills for plaintiff appellant.

Wm. B. Oliver for defendant appellant Rowland.

BARNHILL, J. Defendant Rowland fails to assign as error the order overruling his demurrer or to bring the exception forward and discuss the same in his brief. Even so, in the light of our conclusion herein, this is immaterial.

A judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties. Consequently no cause of action is stated against defendant Rowland, and as to him the action is dismissed *ex mero motu.*

"When . . . the complaint fails to state a cause of action, that is a defect upon the face of the record proper, of which the Supreme Court on appeal will take notice, and when such defects appear the Court will *ex mero motu* dismiss the action." *Denny, J.,* in *Hopkins v. Barnhardt,* 223 N.C. 617, 27 S.E. 2d 644, and cases cited; *S. v. Ivey,* 230 N.C. 172, 52 S.E. 2d 346; *Dare County v. Mater,* 235 N.C. 179, 69 S.E. 2d 244; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911.

While we concede that the Declaratory Judgment Act, G.S. ch. 1, art. 26, is comprehensive in scope and purpose, it does not, and was not intended to, embrace an action such as this. We cannot perceive that the Legislature, in enacting that statute, intended to vest in the Superior Courts of the State the general power to oversee, supervise, direct, or instruct officials of inferior courts in the discharge of their official duties.

The defendant Council did not appeal. Even so, he is an official of the court. If he fails to collect and account for moneys rightfully belonging to plaintiff, or taxes items of cost which should not be taxed, or fails to tax items which should be taxed, the law provides an adequate and expeditious remedy in behalf of those who have the right to raise the issue in any of these particulars.

Under the circumstances it is unnecessary for us to discuss errors in the judgment in respect to certain items of cost.

The appeals are dismissed and the cause is remanded with direction that it be dismissed from the docket.

Appeals dismissed.

STATE v. EARL THOMAS PETTIFORD.

(Filed 15 January, 1954.)

Assault §§ 9a, 14b—Evidence held not to require submission of issue of self-defense to the jury.

The evidence favorable to defendant tended to show that after an altercation at defendant's house defendant told the prosecuting witness to leave and not return, that sometime later the prosecuting witness returned in company with defendant's cousin, that they knocked on the door and were

admitted by defendant's sister-in-law, that they asked where defendant was, that defendant called from the bedroom "You all have a seat, I will be in there after a while," whereupon prosecuting witness pushed defendant's wife aside and both he and his companion went to the bedroom door where, without further exchange of words, they were fired upon by the defendant from within. There was no evidence that the prosecuting witness or his companion were armed. *Held:* The evidence fails to show that defendant was acting within the permissive bounds of the principles of self-defense or defense of family or home, or facts sufficient to invoke the right of defendant to eject a trespasser as applicable to the law of self-defense, and therefore it was not error for the court to fail to charge on these principles or submit the issue of self-defense to the jury.

APPEAL by defendant from *Morris, J.*, and a jury, at April Term, 1953, of PERSON.

Criminal prosecution tried on appeal from County Recorder's Court on a warrant charging the defendant with assault with a deadly weapon upon one Jasper Pettiford.

The evidence of the State discloses that late on a Sunday afternoon the defendant met State's witness Otis Cameron at a service station and asked Cameron to carry him home. Cameron did so, and on arriving at the defendant's home was given a drink of whiskey. Shortly thereafter the defendant borrowed Cameron's car and went to a nearby grocery store. Cameron remained at the home with the defendant's wife and her sister. When the defendant returned his wife accused Cameron of making an improper proposal to her. The defendant asked Cameron if this was true. Cameron denied it, and according to his testimony there was no argument or ill-will engendered by the incident. Cameron testified: "We didn't have any words about it; . . . he didn't tell me to leave; he didn't tell me not to come back to his house." But shortly afterwards Cameron was given another drink and he then left.

After leaving the house, Cameron met Jasper Pettiford, a cousin of the defendant, and they decided to return to the defendant's home for a drink. They did so, and according to the witness Jasper Pettiford, they knocked on the door and the defendant's wife invited them in. They entered and as this witness reached the middle of the front room, the defendant fired with a shotgun from the darkness of an adjoining bedroom. Cameron was in front; he had just asked the defendant's wife where the defendant was and she had said he was in the other room. The shot was fired just as Cameron started into the other room, and both State's witnesses testified there was no argument or further exchange of words between them and the defendant before the shot was fired. Both Cameron and Jasper Pettiford were wounded in the legs by the blast.

The defendant did not go upon the stand. His wife, testifying in his behalf, stated that when Cameron went to her home the first time that

afternoon he made an improper proposal to her while her husband was away at the store. When he returned, she told him about it, and he ordered Cameron "to get out of his house and not come back . . . any more." Cameron left immediately. She stated that an hour or so later she heard a knock on the door. Her sister answered it and opened the door. Cameron and Jasper Pettiford came in. Jasper asked where her husband was. The defendant answered from the bedroom: "You all have a seat, I will be in there after a while." Whereupon, Cameron pushed her aside and both he and Jasper went on "in the bedroom door . . . and that's when they got shot." She said her husband "didn't give Otis Cameron a drink that day."

There was no evidence indicating that Cameron or Jasper were armed at the time of the shooting.

The jury returned a verdict of guilty as charged. From judgment pronounced, imposing penal servitude of twelve months, the defendant appealed, assigning errors.

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

D. Emerson Scarborough for defendant, appellant.

JOHNSON, J. The defendant places chief stress on his exceptions (1) to the refusal of the court to submit to the jury the issue of self-defense, and (2) to the failure of the court to charge as to one's right to remove a trespasser from his home.

There is no evidence in the record upon which to base a reasonable inference that the defendant in firing the blast was acting within the permissive bounds of the principles of law governing the rights of a person to fight in self-defense or in defense of his family or home. See *S. v. Matthews,* 78 N.C. 523; *S. v. Barrett,* 132 N.C. 1005, 43 S.E. 832; *S. v. Glenn,* 198 N.C. 79, 150 S.E. 663; *S. v. Bryant,* 213 N.C. 752, 197 S.E. 530.

Nor does the record disclose any evidence which brings into focus the defendant's legal rights in respect to the removal of a trespasser, as applicable in the law of self-defense. There is no evidence that Jasper Pettiford was ever asked to leave the defendant's home, or that Otis Cameron was asked to leave on the occasion of his second visit. According to the defendant's evidence, both visitors were invited into his house by a member of his household. Following this, the defendant asked them to be seated. On this record, they had no intimation from the defendant that they were not welcome until they were fired upon from a dark room. The court rightly refrained from discussing the principles of law respecting the eviction of a trespasser. See *S. v. Goodson,* 235 N.C. 177, 69 S.E. 2d

242; *S. v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142; *S. v. Roddey,* 219 N.C. 532, 14 S.E. 2d 526.

Similarly the court properly refused to submit the issue of self-defense. *S. v. Deaton,* 226 N.C. 348, 38 S.E. 2d 81; *S. v. Davis,* 223 N.C. 381, 26 S.E. 2d 869; *S. v. Dunlap,* 149 N.C. 550, 63 S.E. 164.

We have examined the rest of the defendant's assignments of error and find them to be without substantial merit. Prejudicial error, as distinguished from harmless error (*S. v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39), has not been made to appear. The verdict and judgment below will be upheld.

No error.

J. GLOD, MRS. W. H. SHEARIN, JOHN GYMTRUK, JR., A. SCHLEGEL, A. SONDEY, C. L. GREER, MRS. E. R. JONES, W. DYMTRUK, R. BRAAK, A. LUDEKE v. CASTLE HAYNE GROWERS AND SHIPPERS, INC.

(Filed 15 January, 1954.)

1. **Corporations § 47—**

   In an action to dissolve a corporation under the provisions of G.S. 55-125 the stockholders may not be represented by officers of the corporation, but must be made parties and served with process as required by G.S. 55-131.

2. **Courts § 1: Constitutional Law § 21: Judgments § 25: Appeal and Error § 6c (1)—**

   Where necessary parties are not joined and served with process the judgment is a nullity for want of jurisdiction and may be disregarded or quashed *ex mero motu.*

APPEAL by defendant from *Grady, Emergency Judge,* at March Civil Term, 1953, of NEW HANOVER.

Civil action by group of stockholders for dissolution of corporation, heard below on plaintiffs' exceptions to report of referee. The report of the referee was set aside *in toto,* facts were found by the trial court, and judgment was entered (1) declaring the rights of the plaintiffs, (2) appointing a receiver, and (3) directing dissolution of the corporation and distribution of its net assets among its stockholders.

The defendant appeals, assigning errors.

McClelland & Burney and Isaac C. Wright for plaintiffs, appellees.
Stevens, Burgwin & McGhee for defendant, appellant.

JOHNSON, J. This action, one to dissolve the defendant corporation under the procedure prescribed by G.S. 55-125 for failure to earn and pay dividends, was instituted by ten stockholders of the corporation. The

record discloses there are some thirty or more stockholders. Yet it nowhere appears in the record that any of the rest of the stockholders have been made parties to the action or served with process. And the rule is that in an action like this one to dissolve a corporation, all the stockholders are necessary parties. This is necessarily so for the reason that the duties resting upon the principal officers of a corporation do not comprehend representation of the stockholders in a proceeding for dissolution. G.S. 55-125; G.S. 55-131; *McKleroy v. Gadsden Land Co.,* 126 Ala. 184, 28 So. 660; *Decatur Land Co. v. Robinson,* 184 Ala. 322, 63 So. 522. See also 13 Am. Jur., Corporations, sec. 1299; 19 C.J.S., Corporations, sec. 1710b, p. 1475; 14a C.J., p. 1142; Annotation: 15 Ann. Cas. 428, s. Ann. Cas. 1918E, 431; 31 Am. Jur., Judgments, sections 405 and 410; Annotation: 91 Am. St. Rep. 362.

G.S. 55-131 provides in part: "In an action for the dissolution of a corporation, or for the appointment of a receiver thereof, the summons must be served on the corporation by service on an officer or agent upon whom other process can be served, and shall be served on the stockholders, creditors, dealers and any others interested in the affairs of the company by publishing a copy at least weekly for two successive weeks in some newspaper printed in the county in which the corporation has its principal place of business, or if there is no such newspaper published, by posting a copy of the summons at the door of the courthouse in such county, and publishing a copy for the time and in the manner aforesaid in a newspaper published nearest the county seat of the county in which the corporation has its principal place of business or in a newspaper published in the city of Raleigh."

It is also noted that G.S. 55-125 expressly provides that before a corporation may be dissolved under its provisions "the court shall enter an order requiring all persons interested in the corporation to appear before a referee to be appointed by the court, at a time and place named in the order, service of which may be made by publication for such time as may be deemed proper by the court, and show cause why the corporation should not be dissolved."

The record fails to disclose compliance with the provisions of the foregoing statutes which require service of process on the stockholders. It thus appears that the court below was without jurisdiction to enter judgment dissolving the corporation. The judgment is a nullity for failure to comply with the requirements of due process as fixed by our statute law. G.S. 55-125; G.S. 55-131; Article I, Section 17, Constitution of North Carolina; Fifth Amendment to the U. S. Constitution. "Notice and an opportunity to be heard are prerequisites of jurisdiction, and jurisdiction is a prerequisite of a valid judgment." *Boone v. Sparrow,*

235 N.C. 396, bot. p. 403, 70 S.E. 2d 204; *Commrs. of Roxboro v. Bumpass,* 233 N.C., 190, 63 S.E. 2d 144.

"A lack of jurisdiction or power in the court entering the judgment always avoids the judgment. This is equally true when the court has not been given jurisdiction of the subject matter, or has failed to obtain jurisdiction on account of a lack of service of proper process." *Clark v. Homes,* 189 N.C. 703, 708, 128 S.E. 20. A void judgment is not a judgment; it is a nullity to be disregarded or quashed *ex mero motu.* The practice with us is to quash such judgments. It is so ordered here. See *Lewis v. Harris,* 238 N.C. 642, 78 S.E. 2d 715, for collection of cases and comprehensive discussion by *Winborne, J.* See also *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709; *Carter v. Rountree,* 109 N.C. 29, 13 S.E. 716; McIntosh, N. C. Practice and Procedure, sec. 651.

Whether the plaintiffs may pursue further in this action, as presently constituted, their alleged voting rights and creditor-claims against the corporation are questions not presented for review by this record.

Reversed and remanded.

W. H. FOUST v. CITY OF DURHAM.

(Filed 15 January, 1954.)

1. Pleadings § 15—

In passing upon a demurrer, the court is confined to a consideration of the complaint without reference to any fact not alleged therein.

2. Municipal Corporations § 12—

A municipality may not present the defense of governmental immunity by demurring unless the facts alleged in the complaint disclose that the acts complained of were committed by it in furtherance of a governmental function.

3. Same—

This action was instituted to recover damages resulting to plaintiff's goods stored in a basement when the basement was flooded with water from defendant municipality's main. Plaintiff alleged that the city owned and operated its water system in its proprietary capacity. *Held:* The allegation is not a mere conclusion, but is an allegation of an ultimate fact admitted by the demurrer.

4. Pleadings § 3a—

Ordinarily the complaint should state the material and ultimate facts upon which plaintiff's rights depend, and should not include allegation of evidentiary facts.

APPEAL by defendant from *Carr, J.,* September Term, 1953, DURHAM. Affirmed.

Civil action *ex delicto* to recover compensation for damages to personal property, heard on demurrer.

The plaintiff in his complaint alleges in substance that (1) on 11 March 1953 he had stored in the basement of Hopper's Jewelry Store, located on West Main Street in Durham, numerous articles of personal property; (2) defendant is a municipal corporation; (3) it owns and operates, in its proprietary capacity, a water department and supply mains for the purpose of supplying, and does supply water to the inhabitants of the city as a business enterprise for profit; (4) in connection with its water works system it maintains a ten-inch water main, over sixty years old, under the surface of West Main Street, for the purpose of supplying water to its citizens; (6) on 11 March 1953, this water main burst, as a result of which water in large volume escaped to the surface of the street and flooded the basement of the mercantile building where he had his personal property stored; (7) as a result thereof, his property was damaged to the amount of $1,243.15; and (8) he gave timely notice of his claim to defendant.

He further alleges that the bursting of the water main was due to the negligence of the defendant in the particulars detailed in the complaint, and that after notice of the situation, the defendant (1) negligently failed to cut off the supply of water to said main, thus increasing the flooded condition of the store; (2) failed to exercise due diligence in removing the water from the basement; and that (3) the negligence alleged was the sole proximate cause of the damage to his property. He prays judgment in the sum of $1,243.15.

The defendant appeared and demurred to the complaint for that the complaint fails to state a cause of action for the reason the city, in committing the acts complained of, was acting in its governmental capacity, and is therefore exempt from liability.

The court below overruled the demurrer and defendant excepted and appealed.

A. A. McDonald and Victor S. Bryant, Jr., for plaintiff appellee.
Claude V. Jones for defendant appellant.

BARNHILL, J. Defendant relies on the doctrine of governmental immunity, and both parties quote from the charter of the city. But in reviewing a judgment overruling a demurrer, we are confined to a consideration of the complaint, without reference to any fact not alleged therein. *Towery v. Dairy,* 237 N.C. 544, 75 S.E. 2d 534. Unless the facts alleged disclose, as a matter of law, that the acts complained of were committed in furtherance of a governmental function, governmental immunity is an affirmative defense which may not be presented for deci-

sion by demurrer. *White v. Charlotte,* 209 N.C. 573, 183 S.E. 730. And here there is no allegation that the main that burst was a "trunk water main" or that it was and is maintained for any purpose other than to deliver to its customers water for which it makes a charge and from which it realizes a profit. These allegations will not justify or support a reasonable inference that the main was and is maintained in promoting the public health, or sanitation, or fire protection. *White v. Charlotte, supra.* That is a question that will be presented for decision at the trial.

The defendant in its brief contends that the allegations in the complaint that defendant operates its water works system in its proprietary capacity for the purpose of supplying water to the inhabitants of the city for profit is a mere conclusion not admitted by the demurrer. We do not so construe it.

Subject to certain exceptions, the rules relating to the contents of a complaint limit the facts to be alleged to the material, ultimate facts upon which the plaintiff's rights depend. *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615; *Wilmington v. Schutt,* 228 N.C. 285, 45 S.E. 2d 364; *Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47. A plaintiff should refrain from including in his complaint facts which are purely evidentiary in nature. *Guy v. Baer, supra; Chason v. Marley,* 223 N.C. 738, 28 S.E. 2d 223.

Here plaintiff has adhered to this salutary rule of pleading. If, at the trial of this cause, he produces competent evidence of the ultimate facts alleged, he will have made out a case for the jury. His allegations are sufficient to entitle him to an opportunity to offer his testimony in support thereof. Determination of its sufficiency must await the trial. *Munick v. Durham,* 181 N.C. 188, 106 S.E. 665; *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849. See also *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371, and cases there cited.

McKinney v. High Point, 237 N.C. 66, 74 S.E. 2d 440, and the other decisions cited and relied on by defendant are distinguishable.

The judgment overruling the demurrer is

Affirmed.

WALTER R. PARKER, SR., v. JAMES R. UNDERWOOD AND THOMAS HUGH UNDERWOOD.

(Filed 15 January, 1954.)

1. Judges § 2b—

A Special Judge has jurisdiction in the county of his residence to hear and determine in chambers a demurrer to the complaint in an action pending in the county.

2. Automobiles § 24½a—

The provisions of G.S. 20-71.1 do not relieve a party of the necessity of alleging facts supporting the application of the doctrine of *respondeat superior* when relied upon, and allegations that the driver of defendant's vehicle was defendant's son, who was operating the vehicle with the express consent, knowledge and authority of defendant is insufficient to resist such defendant's demurrer.

APPEAL by plaintiff from *Hall, S. J.*, at Chambers, 23 November, 1953, of DURHAM.

Civil action to recover damages to plaintiff's automobile sustained in a collision between it and the truck of defendant Thomas Hugh Underwood, operated by the defendant James R. Underwood.

Plaintiff alleges in his complaint that the collision occurred at the intersection of Hyde Park Avenue, which runs in north-south direction, and Liberty Street, which runs in east-west direction, in the city of Durham, North Carolina; that at the time of the collision plaintiff's automobile was being operated by his son, in an easterly direction along Liberty Street, toward the said intersection, and the truck of defendant Thomas Hugh Underwood was being operated in a southerly direction along Hyde Park Avenue toward the said intersection, by defendant James R. Underwood, eighteen-year-old son of defendant Thomas Hugh Underwood, "with the express consent, knowledge and authority of the defendant Thomas Hugh Underwood"; and that the collision and resultant damage to plaintiff's automobile was caused by various acts of negligence of defendant James R. Underwood "and as the sole and proximate results thereof."

Defendant Thomas Hugh Underwood in apt time on 5 August, 1953, demurred to the complaint, for that the complaint does not allege a cause of action against him, in that "there is no allegation that connects the driver of the motor vehicle in question at the time of the collision in question with said Thomas Hugh Underwood as servant, agent or employee acting within the scope of his employment."

Thereafter on 23 November, 1953, attorneys for defendant Thomas Hugh Underwood gave notice to attorney for plaintiff that on that day at five o'clock p.m., they would appear before the Honorable C. W. Hall, one of the special judges of the Superior Court of the State of North Carolina who resides in Durham County and in the Tenth Judicial District of North Carolina, in the Chambers of Judge Hall in the city of Durham, North Carolina, and request him to hear and pass upon defendant's demurrer that had been filed in this cause.

The attorney for plaintiff accepted service of the notice so given to him, and waived the requirement of ten days' notice provided for in the statute. And thereupon plaintiff and demurring defendant agreed, "subject to the

right of the plaintiff to object to the jurisdiction of the court," that the demurrer so filed be heard by Judge C. W. Hall, a special judge as aforesaid, as a proceeding not requiring the intervention of a jury pursuant to the provision of G.S. 7-65,—plaintiff reserving the right to object to the jurisdiction, and to except to any order which the judge might enter in respect to his jurisdiction, and to appeal from such order to the Supreme Court.

The matter coming on for hearing before Judge Hall, in Chambers, in Durham, North Carolina, plea of plaintiff to the jurisdiction of the judge was overruled, and the demurrer was sustained on the grounds upon which it was predicated. And in accordance therewith the judge entered an order sustaining the demurrer.

Plaintiff excepted thereto, and appeals to Supreme Court, and assigns error.

Arthur Vann for plaintiff, appellant.
Edwards, Sanders & Everett for defendant, appellee.

WINBORNE, J. Two questions are presented on this appeal:

1. Did the Honorable C. W. Hall, a special judge of the Superior Court of North Carolina, residing in the Tenth Judicial District, have jurisdiction in Chambers to hear and rule upon the demurrer of defendant filed in this action then pending in the District of his residence?

A similar question was considered and decided affirmatively in opinion this day delivered in the case of *Spaugh v. City of Charlotte,* 238 N.C. 149, from the Fourteenth Judicial District. And on authority of the decision there made, the question above stated and here presented merits, and is given an affirmative answer.

2. Is the demurrer well taken, and, hence, the action of the court in sustaining it correct? We so hold.

Plaintiff, appellant, contends that under the provisions of G.S. 20-71.1, sub-paragraph "A," the allegations of the complaint are sufficient to make out a *prima facie* case against the defendant Thomas Hugh Underwood. On the other hand, the appellee contends, and properly so, that the provisions of this statute are a rule of evidence, *S. v. Scoggin,* 236 N.C. 19, 72 S.E. 2d 54, and do not relieve the plaintiff of alleging the ultimate facts on which to base a cause of actionable negligence.

Hence, for the reasons stated in the demurrer, the complaint fails to state a cause of action against the demurrant.

Therefore, the judgment below is

Affirmed.

F. K. WATKINS v. MAUDE S. JONES, P. FORREST JONES AND WINGATE R. JONES.

(Filed 15 January, 1954.)

APPEAL by plaintiff from *Hatch, Special Judge,* April Term, 1953, of DURHAM.

Civil action to recover commissions alleged to be due the plaintiff pursuant to the terms of an oral agreement for the sale of certain real estate owned by the defendants and situate on the west side of Orange Street in the City of Durham.

The plaintiff alleged in his complaint that the property was listed with him for sale in November, 1950, and that he made the contacts which eventually resulted in its sale.

The defendants denied in their answer that they had any contract with the plaintiff with respect to the sale of their Orange Street property, and alleged that they sold the property themselves without the intervention or assistance of the plaintiff.

The evidence was in sharp conflict on the question as to whether the plaintiff and the defendants had entered into a contract for the sale of property.

The issue which was determinative of this question was answered by the jury in favor of the defendants, that is, that the defendants had not entered into a contract with the plaintiff for the sale of their property as alleged in the complaint. Judgment was entered accordingly and the plaintiff appeals, assigning error.

J. Grover Lee for appellant.

Victor S. Bryant and Victor S. Bryant, Jr., for appellees.

PER CURIAM. Due and careful consideration has been given to each assignment of error presented by the appellant on this appeal, and we find no error in the trial below of sufficient merit to warrant a disturbance of the verdict rendered by the jury. Hence, we find

No error.

TRUSTEES OF THE REX HOSPITAL, A CORPORATION; FRANK DANIELS, CHAIRMAN, T. A. UPCHURCH, EARL JOHNSON, GEORGE L. H. WHITE, AND MRS. ROBERT G. YANCEY, THE INDIVIDUAL MEMBERS CONSTITUTING SAID TRUSTEES OF THE REX HOSPITAL, v. BOARD OF COMMISSIONERS OF THE COUNTY OF WAKE; RUSSELL O. HEATER, CHAIRMAN, W. W. HOLDING, JOHN P. SWAIN, L. W. UMSTEAD, AND CAREY N. ROBERTSON, INDIVIDUAL MEMBERS CONSTITUTING AND COMPRISING THE BOARD OF COMMISSIONERS OF THE COUNTY OF WAKE, NORTH CAROLINA; AND THE COUNTY OF WAKE; THE CITY OF RALEIGH; SALLIE K. QUINCY, A CITIZEN OF THE CITY OF RALEIGH, WAKE COUNTY, NORTH CAROLINA, AND ONE OF THE SICK AND AFFLICTED POOR OF THE CITY OF RALEIGH, AND A BENEFICIARY OF THE TRUST SET UP BY JOHN REX; STELLA K. BARBEE, A CITIZEN AND TAXPAYER OF THE CITY OF RALEIGH AND OF THE COUNTY OF WAKE; RALPH CRUSER, A CITIZEN AND TAXPAYER OF THE COUNTY OF WAKE; AND ALL OTHER CITIZENS, RESIDENTS AND FREEHOLDERS OF THE CITY OF RALEIGH AND THE COUNTY OF WAKE, NORTH CAROLINA, AND ELSEWHERE, WHO CONSTITUTE THE PUBLIC IN GENERAL, WHO HAVE, OR MAY CLAIM TO HAVE, AN INTEREST IN THE CONTROVERSIAL MATTERS INVOLVED IN THIS ACTION, EITHER GENERALLY AS CITIZENS, OR SPECIALLY AS INDIVIDUAL PROPERTY OWNERS, ALL OF WHOM ARE SO NUMEROUS THAT THEIR NAMES, CONTENTIONS AND SPECIAL INTERESTS, IF ANY, ARE UNKNOWN TO THE PLAINTIFFS AND CANNOT BY THE EXERCISE OF DUE DILIGENCE, BE ASCERTAINED; AND ARMISTEAD J. MAUPIN, GUARDIAN AD LITEM FOR THE HEIRS AT LAW OF JOHN REX, AND ALL PARTIES WHO HAVE OR MIGHT HAVE ANY RIGHT, TITLE OR INTEREST WHATSOEVER IN THE PROPERTY INVOLVED IN THIS CONTROVERSY, WHETHER IN ESSE OR NOT IN ESSE, KNOWN OR UNKNOWN, AS WELL AS FOR THE SICK AND AFFLICTED POOR OF THE CITY OF RALEIGH, AND THE CITIZENS, TAXPAYERS AND OTHER INTERESTED PERSONS OF THE CITY OF RALEIGH AND THE COUNTY OF WAKE, NORTH CAROLINA; AND SUCH OF SAID UNKNOWN CITIZENS, RESIDENTS AND FREEHOLDERS OF THE CITY OF RALEIGH OR THE COUNTY OF WAKE, OR ELSEWHERE, AS ARE, OR MAY BE, INCAPACITATED OR UNDER LEGAL DISABILITY.

(Filed 29 January, 1954.)

1. **Trusts § 10: Hospitals § 6½—**

A devise and bequest of property in trust for the erection and equipment of a hospital for the sick and afflicted poor of a city "and for no other use or purpose whatsoever" limits the use of such funds to the purpose stipulated, but, these funds being exhausted for this purpose, the will does not limit the use of other donations and contributions from public, charitable and individual sources, which may be used for the maintenance and operation of the hospital as a public institution open to all citizens of the county, pay patients as well as the sick and afflicted poor.

2. **Hospitals § 1: Taxation § 5—**

The expenditure of tax funds for a general county hospital is for a public purpose, and, when authorized by statute, a county has authority, with the approval of its voters, to issue bonds to provide hospital facilities for those able to pay for the services rendered them as well as for the sick and afflicted poor. Constitution of N. C., Art. V, Sec. 3; G.S. 131-28.3; G.S. 131-28.4.

3. Hospitals § 6½—

A county which has acquired an existing hospital facility is authorized to lease same to any nonprofit association or corporation for operation on such terms as will carry out the provisions of G.S. 131, Art. 13B. G.S. 131-126.20 (c).

4. Trusts § 14b—

Trustees of a charitable trust may not convey or encumber the trust property in the absence of authority granted them by the trust indenture even to effectuate the purposes of the trust without the approval of a court of competent jurisdiction.

5. Counties § 14—

A county may accept deed from the trustees of a charitable hospital upon condition that the property be used for general hospital purposes under the same name, notwithstanding that the instrument conveys a base, qualified or determinable fee.

6. Appeal and Error § 1—

Where there is no contention or evidence of breach of a contract between the parties, the Supreme Court will not determine the rights of the parties in the event of a breach.

7. Hospitals § 6½: Counties § 18—

While a county may not contract away its power involving the exercise of judgment and discretion, a provision in a lease by a county of hospital facilities that differences under the contract should be arbitrated does not invalidate the lease when it is further provided that the findings of the arbitrators should not be binding but should be merely recommendatory, since such provision is not an agreement for arbitration in the legal sense, but such clause should be deleted since its purpose can be accomplished as effectively by direct negotiations between the parties or by a committee or committees appointed for such purpose.

8. Trusts § 14b—

A court of equity has power to authorize a conveyance of trust property when change in conditions and circumstances make such conveyance necessary to more fully utilize the trust facilities to accomplish the purposes of the trust.

9. Appeal and Error § 29—

Exceptions not brought forward, assigned as error and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by all the defendants, except Ralph Cruser, from *Paul, Special Judge,* August Term, 1953, of WAKE.

This is an action instituted on 9 April, 1953, by the plaintiffs for the purposes hereinafter set out.

The complaint filed in the action and the exhibits attached thereto cover 104 pages of the record, which contains 342 pages.

When this matter came on to be heard before his Honor, trial by jury was waived, and it was agreed by counsel for plaintiffs and counsel for all defendants, and Armistead J. Maupin, Esquire, guardian *ad litem,* that the court might hear the evidence, find the facts, and render judgment thereon out of term and out of the county and district.

Prior to the hearing below, the defendants Stella K. Barbee and Sallie K. Quincy, acting through their counsel, moved that the plaintiffs be required to separate the several causes of action, which they contend the plaintiffs attempted to set out in their complaint. The motion was denied at the May Civil Term, 1953, of the Superior Court of Wake County. These defendants entered an exception to the ruling. They then filed a demurrer to the complaint, on the grounds (1) that the complaint does not state a cause or causes of action; (2) that the complaint on its face discloses a misjoinder of parties and causes of action; and (3) that the complaint on its face discloses a misjoinder of parties and causes of action, for that the plaintiffs are seeking to invoke the equity jurisdiction of the court and obtain its approval with respect to several enumerated and unrelated matters. The demurrer was overruled. To this ruling, they also entered an exception.

These same defendants, at the hearing below, moved to strike each and every exhibit attached to the complaint, being A through R, and to strike all reference thereto in the respective paragraphs of the complaint. The motion was denied and they likewise entered an exception thereto.

The findings of fact and conclusions of law, together with the judgment entered thereon, cover thirty-five pages of the record. Since these findings of fact, conclusions of law and the judgment are of record in the office of the Clerk of the Superior Court of Wake County, we shall endeavor to limit our references to the allegations in the pleadings and to state only such facts as we deem necessary to an understanding and proper disposition of the questions presented by the exceptions. A summary of the facts are stated below.

1. That summonses have been served on all defendants mentioned in the title of this cause; that answers have been filed by all the aforesaid defendants, and that all said parties are now properly before the court. That Armistead J. Maupin, who is found to be a suitable and discreet person, has been duly appointed guardian *ad litem* for the heirs at law of John Rex and others, as set forth in the caption of this case, and that said guardian *ad litem* has filed an answer for all the defendants that he was appointed to represent.

2. That the plaintiffs are all *sui juris* and are residents of Wake County, North Carolina, except the plaintiff corporation, trustees of the Rex Hospital, which is a nonprofit corporation, organized for the purpose of conducting, operating and maintaining a hospital in or near the City

of Raleigh, North Carolina, said hospital being known as Rex Hospital, which corporation was chartered by the General Assembly of North Carolina, under Chapter 6, Private Laws of North Carolina, 1840-41, as amended by Chapter 98 of the Public-Local Laws of North Carolina, 1939; that Saint Agnes Hospital in the City of Raleigh, hereinafter referred to, is also a nonprofit corporation, organized for the purpose of conducting, operating and maintaining a hospital in the City of Raleigh.

3. That during the month of February 1839, John Rex, of the County of Wake, died, leaving a last will and testament which was duly probated and recorded in Will Book 24, page 261, in the office of the Clerk of the Superior Court of Wake County, North Carolina. This will devised certain property, in trust, to be "appropriated for the erection thereon of an infirmary or hospital for the sick and afflicted poor of the City of Raleigh and to and for no other use or purpose whatsoever."

4. The General Assembly of North Carolina duly passed an Act authorizing the Commissioners of the City of Raleigh to appoint trustees, capable in law of holding the property devised and bequeathed in the will of John Rex, subject to the approval of the Supreme Court of North Carolina, said Act being found in Private Laws of North Carolina, 1840-41, Chapter 6. Thereafter, the trustees of Rex Hospital, so appointed, after full investigation, finding that the 21-acre tract of land devised to them under said will, was unsuitable for a hospital site or hospital purposes, thereupon petitioned the Court of Equity at the October Term, 1892, of the Superior Court of Wake County, to allow said trustees to sell the original 21-acre tract of land and use the proceeds therefrom in the purchase of other property and the erection of a hospital thereon. In said proceeding, the court, after full consideration of the matter, entered judgment approving the sale of the 21-acre tract of land, which judgment is recorded in Judgment Docket 7, page 171, in the office of the Clerk of the Superior Court of Wake County, North Carolina.

5. The sum of approximately $10,000 was realized from the sale of the 21-acre tract of land, which money, together with private contributions made by various citizens of the City of Raleigh and Wake County, was used in the purchase of a lot or parcel of land located on South Street in the City of Raleigh. The deed thereto was in fee simple without any restrictions whatever, and the trustees of Rex Hospital erected and equipped a hospital building on said property in 1909, and continued the use of these hospital facilities until the erection of the present facilities on Saint Mary's Street in Raleigh.

6. In the year 1933, the Rex Hospital building located on South Street in the City of Raleigh, was old and in a dilapidated condition, unsuitable for the practice of modern surgery, and inadequate to provide for the hospitalization needs of the City of Raleigh and Wake County, whereupon

the trustees of Rex Hospital applied for a loan and grant of $350,000 from the United States of America through its subsidiary The Federal Emergency Administration of Public Works, for the purpose of the construction of a new hospital building and the installation of modern hospital equipment therein, on a new site on Saint Mary's Street in Raleigh. At the March Term, 1934, of the Superior Court of Wake County, the court authorized, empowered and directed the trustees of Rex Hospital to consummate said loan and grant and to execute the necessary notes, bonds, mortgage, or deed of trust, pledging the properties of the corporation as security therefor. An appeal was taken from the judgment in the Superior Court to the Supreme Court and the judgment of the lower court was affirmed in the case of *Raleigh v. Trustees,* 206 N.C. 485, 174 S.E. 278.

7. In 1935, the Board of Commissioners of Wake County, hereinafter called "Commissioners" unless otherwise designated, pursuant to the authority contained in Chapter 65, Public Laws of North Carolina, 1935, the same being G.S. 153-152, and pursuant to resolution duly and regularly adopted by said Commissioners, entered into a contract or agreement with the trustees of Rex Hospital, under the terms of which agreement the trustees of Rex Hospital agreed to furnish proper hospital facilities for the indigent sick and afflicted poor of Wake County for a period of thirty years, beginning on the 1st day of July, 1935, and Wake County in consideration of services rendered, agreed to pay the trustees of Rex Hospital the sum of $10,000 annually for a period of thirty years, the first payment to be made on the 1st day of July, 1935. In an action entitled *Martin v. Board of Commissioners of Wake County,* the court, after full consideration of the matter, entered judgment at the April Term, 1935, of the Superior Court of Wake County, upholding the validity of the contract as aforesaid, and upon appeal to the Supreme Court the judgment of the court below was affirmed and the opinion reported in 208 N.C. 354, 180 S.E. 777.

8. A similar arrangement for the annual payment of $10,000 by the City of Raleigh for a period of thirty years, pursuant to the provisions of Chapter 64, Public Laws of North Carolina, 1935, the same being G.S. 160-229, was approved by the Superior Court in an action entitled *Martin v. City of Raleigh,* and upon appeal therefrom to the Supreme Court the judgment of the lower court was affirmed and the opinion reported in 208 N.C. 369, 180 S.E. 786.

9. The trustees of Rex Hospital thereupon proceeded with the plans for the consummation of said loan and grant from the Federal Emergency Administration of Public Works. From the proceeds of the loan and grant and from voluntary contributions made by private citizens of the City of Raleigh and Wake County, the trustees of Rex Hospital erected and equipped a modern hospital building on land acquired by the corpora-

tion on Saint Mary's Street in Raleigh, at a total cost of $485,000. The new hospital building was opened for use in May, 1937. In order to secure the indebtedness due the Federal Emergency Administration of Public Works, in the principal amount of $287,000, evidenced by "4% First Mortgage Bonds," the trustees of Rex Hospital executed and delivered a deed of trust of date July 1, 1935, to the Raleigh Branch of the Security National Bank of Greensboro, trustee, to cover the old hospital building, properties and equipment situate on South Street, the new hospital building, properties and equipment situate on Saint Mary's Street, and pledged the revenue received annually from Wake County and the City of Raleigh for hospitalization of the sick and afflicted poor, according to the terms of the contracts hereinabove described in paragraphs seven and eight, for the payment of said indebtedness.

10. Thereafter, the trustees of Rex Hospital found it necessary for the continued efficient operation of the hospital to erect a nurses' home at the new location, and in order to finance the erection of said home, obtained the approval of a loan from the Reconstruction Finance Corporation in the sum of $90,000. Arrangements were made to sell and convey to Wake County the properties situate on South Street, which were no longer necessary or needed for hospital purposes, for the sum of $40,000. In an *ex parte* proceeding entitled *In the matter of Trustees of The Rex Hospital, a corporation,* judgment was entered at the Second May Civil Term, 1939, of the Wake County Superior Court approving the consummation of said loan from the Reconstruction Finance Corporation in the sum of $90,000, the sale of the South Street property to Wake County for the sum of $40,000, and the erection of said nurses' home on the Saint Mary's Street property, which judgment is duly recorded in Judgment Docket 47, page 119, in the office of the Clerk of the Superior Court of Wake County. In order to secure said indebtedness to the Reconstruction Finance Corporation, the trustees of Rex Hospital executed and delivered a second deed of trust of date July 1, 1939, covering the hospital building, properties, equipment, and the nurses' home situate on Saint Mary's Street, and pledged the revenue received from pay patients at Rex Hospital, together with the sum received annually from Wake County and the City of Raleigh for hospitalization of the sick and afflicted poor, according to the terms of the contracts hereinabove set forth, for the payment of said indebtedness. Pursuant to the authority of the judgment hereinabove referred to, the trustees of Rex Hospital proceeded to construct a nurses' home on Saint Mary's Street, at a cost of approximately $130,000.

11. In the year 1944, the hospital facilities at Rex Hospital had again become inadequate and it was necessary and desirable to erect and equip additional hospital facilities, provide more beds for pay patients and for

the sick and afflicted poor of the City of Raleigh and Wake County, the trustees of Rex Hospital having exhausted their ability to borrow or otherwise raise additional capital for the expansion of said hospital facilities by the erection of an addition thereto and to provide the necessary equipment for the same, a grant was obtained from the Duke Foundation for the expansion of said hospital facilities by the erection to the then existing hospital building of an addition to provide for approximately fifty additional beds for patients and other necessary hospital facilities; on condition that the trustees of Rex Hospital show that the hospital properties were not mortgaged or otherwise encumbered. It therefore became necessary to procure the cancellation of the lien to the Federal Emergency Administration of Public Works and the Reconstruction Finance Corporation. This was accomplished by obtaining a loan of $290,000 on the 1st day of March, 1945, from the Durham Life Insurance Company, payable in monthly installments in the sum of $1,166.66 until paid in full, and secured by an assignment of even date therewith under the terms of which the trustees of Rex Hospital assigned and transferred and set over unto the Durham Life Insurance Company all rights to the annual payments now due and thereafter becoming due under those two certain contracts of date 1 July, 1935, entered into by and between Wake County and the City of Raleigh, respectively, hereinabove referred to; and the trustees of Rex Hospital covenanted not to sell, convey or mortgage any of the real properties of the trustees of Rex Hospital prior to the payment of said note, or bond. Upon the consummation of this transaction, the mortgages or deeds of trust referred to hereinabove were duly canceled of record. From the proceeds of the grant from the Duke Foundation, and from other funds, the trustees of Rex Hospital proceeded to complete the erection of an addition to the hospital and provide equipment therefor, which provided beds for approximately fifty patients, at a cost of approximately $251,679.51.

12. In the year 1952, the trustees of Rex Hospital, from the proceeds of a grant from the North Carolina Medical Care Commission, and from funds made available through the Hill-Burton Act, erected upon the Saint Mary's Street premises a power plant and a laundry and other improvements, at a cost of approximately $278,577.79, for use in connection with the operation of the hospital.

13. The land owned in fee simple by the plaintiff corporation at the present site of Rex Hospital without any restrictions whatever upon the power of alienation or encumbering said property other than the covenant on the part of the trustees of Rex Hospital not to sell, convey, or transfer the same unless and until the indebtedness to the Durham Life Insurance Company, referred to in paragraph eleven above, has been paid in full, consists of 15.5 acres, and the land, buildings, and equipment thereon,

known as Rex Hospital, cost in excess of $1,144,000, although the replacement cost would be greatly in excess of such amount. Of this investment, the sum of only $10,000 was derived from the estate of John Rex. The expense, maintenance, and upkeep of Rex Hospital has been paid largely through the patronage of pay patients, with the exception of private contributions, grants, and income derived from the contracts entered into with Wake County and the City of Raleigh, respectively, as described hereinabove.

14. The court below found as a fact that the demand for beds and space in Rex Hospital for the treatment of the sick and afflicted poor of the City of Raleigh and Wake County, and for pay patients, has increased to the point that the present hospital facilities are entirely inadequate to meet the demands made upon it; that at the present time there is dire need for an expansion of said hospital facilities by the construction of an addition thereto to provide for approximately 150 additional patients, together with the necessary hospital facilities and services incident thereto. That the trustees of Rex Hospital have made diligent efforts to obtain the necessary funds from private sources, and otherwise, for the necessary expansion and improvements to said hospital, and it is impossible for the trustees of Rex Hospital to obtain a loan from a private lending agency in an amount sufficient to provide the necessary expansion and improvements to the hospital; that at the present time there are no funds available in the trust created under the will of John Rex for the expansion of said hospital facilities, or to provide necessary hospital services; and the income of the trustees of Rex Hospital from pay patients, contributions from Wake County and the City of Raleigh, pursuant to the contracts referred to herein, from the Duke Foundation, and other sources, is barely adequate to meet the current operating expenses without providing for the expansion of the hospital facilities.

15. At the time of the death of John Rex in 1839, the City of Raleigh had an estimated population of 2,244 and the County of Wake had an estimated population of 21,818. In the year 1940 Raleigh had a population of 46,897, and Wake County 109,544. In 1950, Raleigh had a population of 65,679, and Wake County 136,450, according to the Federal Census for said years; and that as the population of the City of Raleigh and Wake County has increased and the demand for medical attention has increased due to the improvement in medical science and treatment for patients, the facilities of Rex Hospital have become correspondingly more and more crowded, and the cost of operation has followed the national economic trend and increased tremendously over former cost of operation, to the end that it has become impossible for the trustees of Rex Hospital, with the present hospital facilities, to meet the increasing needs and demands for the treatment of patients in said hospital; that

this increase in patients has necessarily resulted in an increased demand upon Rex Hospital and the use of its facilities. The increase in the various services performed in Rex Hospital between the year 1930 and the year 1952, is shown by the following table:

	1930	1940	1945	1950	1952
Number of beds	110	177	247	307	307
Number of bassinets	16	26	26	58	58
In-patients treated	2,980	5,394	9,616	13,485	14,276
Number of Hospital Care	27,567	50,136	89,212	108,291	108,752
Out-patients treated	2,087	3,704	4,413	9,611	12,106
Out-patients visits	8,194	7,002	7,781	16,840	19,283
Live births	231	520	1,018	1,732	1,890
Major operations	638	1,149	1,689	1,943	1,892
Minor operations	1,030	1,517	2,418	2,915	2,973
Laboratory tests	7,479	27,624	47,303	122,408	129,704
X-ray use (patients)	385	1,408	2,981	7,592	7,948

Frequently during recent years, the daily census of the hospital shows in excess of 360 patients, with a normal bed capacity for 307 patients, or more than twenty per cent above normal capacity, and in 1952 for the entire year, the hospital had an occupancy rate of eighty-eight per cent of capacity. The hospital facilities at Saint Agnes Hospital for the treatment of Negro patients are even more inadequate and overtaxed than are the facilities at Rex Hospital. In the event of an epidemic or disaster in the City of Raleigh or Wake County, there would not be sufficient beds in the hospitals for treating acute medical conditions in Wake County, which would aggravate to a high degree any such epidemic or disaster.

16. In order to remedy the need for adequate hospital facilities in Wake County, the trustees of Rex Hospital presented the situation to the Commissioners in the year 1950; and as a result of said presentation and after extensive public hearings the said Commissioners introduced a bond ordinance in August, 1951, to provide for a bond issue in the sum of $2,800,000 to provide needed hospital facilities in Wake County including the expansion and improvement of the facilities of Rex Hospital and of Saint Agnes Hospital. In addition thereto the trustees of Rex Hospital and the trustees of Saint Agnes Hospital obtained a commitment from the North Carolina Medical Care Commission in May, 1951, for a gift or grant to aid in the above expansion program to the extent of up to but not exceeding forty-four per cent of the cost thereof. (It appears from the testimony of Dr. John A. Ferrell, Executive Secretary of the North Carolina Medical Care Commission, that the commitment by this Com-

mission has not been rescinded. It is still considered an eligible project subject to the availability of necessary funds.) Following the introduction of the bond order hereinabove referred to, a resolution was adopted by the Local Government Commission on 13 September, 1951, finding among other things that seriously overcrowded conditions at Rex and Saint Agnes Hospitals in the City of Raleigh were a matter of general information, and need for the planned expansion of the facilities for those hospitals appear to be clearly obvious, and that the amount of the proceeds of said proposed bonds to be expended at Rex and Saint Agnes Hospitals is not excessive, but declining to approve the bond issue on the ground that the title to Rex and Saint Agnes Hospitals was not in Wake County.

17. Thereafter, on 23 June, 1952, the trustees of Rex Hospital proposed to the Commissioners that in order to provide assurance that Rex Hospital will continue to operate as a public hospital and to furnish hospitalization to the people of Wake County and provide for the care and maintenance of the indigent sick and afflicted poor of Wake County and the City of Raleigh, in consideration of the approval of an issue of bonds by Wake County for the expansion of existing hospital facilities, the trustees of Rex Hospital will convey title to all properties of the hospital to Wake County by good and sufficient deed on the following terms and conditions:

"1. That said property shall be used by Wake County solely for hospital purposes, and shall provide care and maintenance for the sick and afflicted poor of the City of Raleigh and Wake County.

"2. That any hospital on said property shall be known as Rex Hospital.

"In the event that said property should cease for a period of six months either to

"(a) be used by Wake County for hospital purposes to provide medical care for the indigent sick and afflicted poor of the City of Raleigh and Wake County or

"(b) bear the name of Rex Hospital,

"the conveyance of said property to Wake County by Trustees of the Rex Hospital shall be void, and title to the property so conveyed to Wake County shall revert to Trustees of the Rex Hospital, its successors and assigns."

Such conveyance to be subject to a deed of trust on said properties securing the balance of the Hospital's indebtedness to the Durham Life Insurance Company.

17. The Commissioners acting upon this proposal introduced and finally adopted on 1 December, 1952, a bond order authorizing the issuance of $3,060,000 hospital bonds of the County of Wake for the purpose of erecting, enlarging, improving and equipping public hospitals of said

county, including the acquisition of necessary land; the hospitals so to be erected, enlarged, improved and equipped as follows:

"(a) The existing hospitals known as Rex Hospital and Saint Agnes Hospital, in the City of Raleigh.

"(b) A new hospital to be erected in or in the vicinity of the Town of Fuquay Springs.

"(c) A new hospital to be erected in or in the vicinity of the Town of Wake Forest.

"(d) A new hospital to be erected in the Town of Zebulon or in the Town of Wendell, or in the vicinity of said two towns.

"(e) A new hospital to be erected in the Town of Apex or in the Town of Cary, or in the vicinity of said two towns.

"Not more than $2,110,000 of the proceeds of the sale of the bonds hereby authorized shall be expended for Rex Hospital and Saint Agnes Hospital; and not more than $950,000 of the proceeds of the sale of said bonds shall be expended for said new hospitals. No bonds shall be issued under this bond order unless and until the lands and buildings of Rex Hospital and Saint Agnes Hospital shall have been conveyed to the County of Wake for county Hospital purposes."

The usual provisions for the levy of taxes sufficient to pay the principal of and the interest on said bonds when due are contained in the order. The order further provides that it was not to be effective until approved by the voters of Wake County at an election as provided in The County Finance Act. The issuance of said bonds, subject to the conditions set out in the order, was duly approved by the Local Government Commission on 29 October, 1952.

19. In addition to conveying the properties referred to above to Wake County, it is contemplated that the facilities shall be leased to the trustees of Rex Hospital for actual operation under the terms and conditions set out in the proposed lease, copy of which appears in the record. It is also contemplated that these instruments will be executed and deposited in escrow to be delivered to the proper parties if and when the necessary funds as contemplated under the proposed plan become available, and a contract or contracts are let for the proposed expansion and improvement of the hospital. The title to the property of Saint Agnes Hospital is to be conveyed to Wake County on the same terms and conditions and a lease agreement is to be executed, providing for the operation of the hospital by the trustees of Saint Agnes Hospital under similar terms and conditions as that outlined with respect to Rex Hospital.

Upon the facts found by the court below, pertinent parts of which are hereinbefore set out, and the conclusions of law drawn therefrom, all of which are set out in the judgment the court entered a decree as follows:

"A. The Trustees of the Rex Hospital be, and they are hereby authorized and empowered, in its discretion, prior to the execution and delivery of the Escrow Agreement, deed and operational lease herein referred to, to execute and deliver unto Durham Life Insurance Company a note secured by a first deed of trust on the properties described in Paragraph 27 of the Complaint, to evidence and secure the amount of the indebtedness then due and owing Durham Life Insurance Company by reason of the bond, assignment and agreement attached to the complaint marked Exhibit F and Exhibit G.

"B. That the properties described in Paragraph 27 of the Complaint are owned by Trustees of the Rex Hospital in fee simple without any restrictions whatsoever, upon the power of alienation or of encumbering said property, and that Trustees of the Rex Hospital have the power to convey the same, subject to the approval of the Court in its equitable jurisdiction, in the manner set forth in the proposed deed (Exhibit P).

"C. That the trust created under the will of John Rex be, and the same is hereby modified, revised and amended in so far as it may be necessary to do so to carry out and effectuate the plan for the expansion and improvement of the Rex Hospital facilities in the manner herein set forth; and Trustees of the Rex Hospital be, and they are hereby authorized and empowered, in its discretion, to do and perform all acts as may be necessary to effectuate said plan for the expansion and improvement of the Rex Hospital facilities in the manner set forth herein.

"D. That Trustees of the Rex Hospital be, and they are hereby authorized and empowered, in its discretion, to execute and deliver unto the Raleigh Branch of the Security National Bank of Greensboro, as Trustee, the Escrow Agreement (Exhibit R), to execute and deliver the proposed deed to Wake County (Exhibit P), and to enter into with Wake County the proposed operational lease (Exhibit Q), or other suitable operational lease, upon fulfillment of the terms and conditions contained in said escrow agreement.

"E. That the Trustees of the Rex Hospital be, and they are hereby authorized and empowered, in its discretion, to proceed with the expansion and improvement of the hospital facilities at Rex Hospital to provide for the erection and equipping of an addition thereto, according to the plan herein set forth.

"F. That nothing contained in said plan for the expansion and improvement of the Rex Hospital facilities affects the validity of the agreements of date July 1, 1935, entered into by and between Trustees of the Rex Hospital and Wake County and the City of Raleigh, respectively, referred to in Paragraphs 9 and 10 hereof, and the obligations of Wake County and the City of Raleigh, respectively, to pay unto Trustees of the Rex Hospital the sum of $10,000.00 annually for the care and treatment

of the indigent sick and afflicted poor of Wake County and the City of Raleigh, respectively, for the full term thereof, so long as Trustees of Rex Hospital operate the hospital facilities known as Rex Hospital and comply with the terms and conditions of said agreements, and said agreements remain in full force and effect.

"G. That the proposed deed from Trustees of Rex Hospital to Wake County (Exhibit P) to be deposited with the proposed Escrow Agreement (Exhibit R) would convey to the County of Wake a fee simple title to the property described therein, subject only to the conditions set forth in said deed, and the County of Wake is hereby fully authorized and empowered to accept said deed under the terms and conditions set forth therein, freed of the trust created under the will of John Rex.

"H. That the Board of Commissioners of Wake County is fully authorized and empowered, in its discretion, to call a bond election for the purpose of issuing bonds proposed in the bond order (Exhibit O), and to expend the proceeds therefrom, in the event of approval of the same by the voters of Wake County at a referendum called for that purpose, for hospital purposes in the manner set forth in said bond order, including the expansion and improvement of the facilities of Rex and Saint Agnes Hospitals, and if said bond election is approved by the voters of Wake County, said Board of County Commissioners is fully authorized and empowered to supervise the expenditure of the net proceeds from the sale of any bonds voted in such bond election, either as a Board or under the terms of G.S. 131-126.21; and that the said Board of County Commissioners is further fully authorized and empowered, under the terms of G.S. 131-126.20 (c) and 131-126.26 to enter into the proposed operational lease with Trustees of the Rex Hospital (Exhibit Q), or such other operational lease for the operation of Rex and Saint Agnes Hospitals, with the respective Trustees thereof, upon such terms and for such period or periods as said Board of County Commissioners may deem advisable.

"I. The Board of County Commissioners for Wake County, Trustees of the Rex Hospital, and any other parties to this action, are fully authorized and empowered to carry out the plan set forth herein for the conveyance of the Rex Hospital property and of the Saint Agnes Hospital property under the terms and conditions of said plan, and said parties are hereby fully authorized and empowered in doing so to take such steps as may be necessary to carry out the terms of said plan so long as the same are not inconsistent with the terms of this Judgment.

"J. The approval of the Court is specifically given to the acceptance by the Board of County Commissioners of Wake County of said proposed deed from Trustees of the Rex Hospital (Exhibit P), to the acceptance of a similar deed from Trustees of Saint Agnes Hospital property, to entering into the proposed operational lease with Trustees of the Rex

Hospital (Exhibit Q), and a similar operational lease with Saint Agnes Hospital, or other operational leases for Rex and Saint Agnes Hospitals, with the respective Trustees thereof, upon such terms and for such period or periods as said Board of County Commissioners may deem advisable; and to enter into a proposed Escrow Agreement with Trustees of the Rex Hospital (Exhibit R) and a similar Escrow Agreement with Trustees of Saint Agnes Hospital.

"K. That the costs of this action are hereby taxed against the Trustees of the Rex Hospital."

All of the defendants, except Ralph Cruser, excepted to the judgment and appealed, assigning errors.

Arch T. Allen and Edward B. Hipp for appellees, Trustees of Rex Hospital.

Paul F. Smith for appellant, City of Raleigh.

Thomas A. Banks for appellants, Board of Commissioners of Wake County, with William Henry Hoyt, of Counsel, and Armistead J. Maupin, guardian ad litem.

Vaughan S. Winborne and Samuel Pretlow Winborne, for appellants, Stella K. Barbee and Sallie K. Quincy.

DENNY, J. The primary purpose of this litigation is to determine whether the trustees of the Rex Hospital, a corporation, acting through its trustees, and Wake County, acting through its Board of County Commissioners, have the legal right to execute the proposed deed, lease, and escrow agreement, referred to hereinabove, for the purposes indicated.

The appellants contend, particularly Wake County and the guardian *ad litem* for the heirs at law of John Rex, *et al.*, that there is nothing in the record to support the view that the hospital plant and the facilities now owned and operated by the trustees of Rex Hospital would need any expansion or improvement if the hospital were operated solely for the care and treatment of the sick and afflicted poor of the City of Raleigh, and that there is nothing in the record to indicate that the present income and assets of the corporation are not sufficient to enable the trustees to operate the hospital for that limited purpose. They contend further that only in the event the income and assets of the hospital are insufficient to provide for the care and treatment of the sick and afflicted poor of the City of Raleigh, is it permissible under the law to modify the trust. Furthermore, even in that event, the modification, it is contended, should be only to the extent necessary to permit the trustees to take care of as many of the sick and afflicted poor of the City of Raleigh as can be cared for by means of the income and assets of the trust and should not be modified so as to permit the consummation of the proposed plan.

These contentions are based on certain provisions contained in the will of John Rex and Chapter 6 of the Private Laws of North Carolina, 1840-41, which are as follows:

1. "It being my desire to provide a comfortable retreat for the sick and afflicted poor belonging to the city of Raleigh, in which they may have the benefit of skillful medical aid and proper attention, it is my will that a lot or parcel of land containing twenty-one acres adjoining the city of Raleigh on the southwest side, being the same purchased by me of the commissioners appointed for selling a part of the public lands, and which is comprised in the general devise of all my lands to the aforesaid Duncan Cameron and Geo. W. Mordecai in trust as before mentioned, be appropriated for the erection thereon of an infirmary or hospital for the sick and afflicted poor of the city of Raleigh and for no other use or purpose whatsoever.

"And for the endowment of said hospital as far as I have the ability to do so, it is my will that all the money belonging to me, all the debts due me, and all the rest and residue of my estate hereinbefore given, devised and bequeathed by me to the said Duncan Cameron and Geo. W. Mordecai in trust and not otherwise specially appropriated be, and they are hereby appropriated to the endowment of said hospital, and whenever the constituted authorities of the city of Raleigh shall legally appoint trustees capable in law of holding the same, then the said Duncan Cameron and Geo. W. Mordecai or the survivor of them or the executor or executors of the survivor of them, shall convey the said lot or parcel of land and the funds accruing from the money belonging to me, the debts due and the rest and residue of my estate as above described to the said trustees, or their successors duly appointed in trust forever, for the execution and endowment of such hospital and no other use or purpose whatsoever."

2. The above Act prescribes the method for the appointment of five trustees to take and hold the assets devised under the will of John Rex. Such trustees, according to the Act, must be approved by the Supreme Court, now changed by the amendment hereinabove referred to, to the Superior Court. The Act further provides that when the trustees were nominated and affirmed, they would be "a body corporate and politic by the name of the 'Trustees of the Rex Hospital,' and shall be able and capable in law to receive and hold the property and effects, devised and bequeathed by the said John Rex in and by his said will and to use and apply the same to and for the purposes (and none other) specified in said will, and also to receive donations of lands or personal estate either by deed or will for the purposes aforesaid (and none other) and to have succession, to sue and be sued, and to have the other powers incident to corporation in regard to the charity created by the said will and for no other purposes."

The appellants place great stress upon the provisions of the devise and the statute enacted in connection therewith, which require that the property devised and donations received shall be used for the construction of an infirmary or hospital for the sick and afflicted poor of the City of Raleigh, and for the endowment of the hospital, and *for no other purpose.* (Emphasis added.) They take the position that when these provisions are rightly construed the trustees of Rex Hospital are not authorized to expend any funds received by them to provide hospital facilities in excess of those required for the care of the sick and afflicted poor of the City of Raleigh. We do not concur in this view. In our opinion it was the intention of John Rex to limit the use of the funds to be derived from his estate, but not to limit the use of the hospital facilities to be provided so as to prevent their use as a general public hospital. In expressing his desire to provide a comfortable retreat for the sick and afflicted poor of the City of Raleigh in which they might have the benefit of skillful medical aid and proper attention, he did not limit the use of the proposed infirmary or hospital to the sick and afflicted poor of Raleigh and for no other purpose. He devised his property for the purpose of providing such infirmary or hospital for the sick and afflicted poor of the City of Raleigh and to endow the institution in so far as he could do so, and directed that the funds derived from his estate were to be used for the accomplishment of the above objectives, and for no other purpose.

If the contentions of the appellants were correct and should be upheld, it would be necessary to conclude that the facilities of Rex Hospital are already far in excess of the needs of the indigent sick and afflicted poor of the City of Raleigh even though it appears from Plaintiffs' Exhibit 19, that during the last five years the cost of caring for charity patients has averaged $158,775.32 annually. Furthermore, for the trustees of Rex Hospital and the courts to have construed the trust in the manner now contended, it would have been impractical if not impossible from an economic standpoint to have provided the facilities and the staff necessary to render competent medical services even to the sick and afflicted poor of the City of Raleigh.

These appellants seem to have overlooked the provisions contained in paragraph three of the above Act, as well as the former decisions of this Court involving the John Rex trust.

Section 3 of the above Act reads as follows: "And be it further enacted: That the commissioners of the city of Raleigh, . . . may, . . . by petition in equity in the Supreme Court (now the Superior Court), call on the said trustees for an exhibition of their accounts and doings in discharge of this trust, and such proceedings shall be summary, and the Court may make any order or orders thereupon from time to time as may be necessary to enforce a strict compliance with the design of the testator,

. . . and generally to do and order what shall seem to the said Court best in the premises."

In the case of *Raleigh v. Trustees,* 206 N.C. 485, 174 S.E. 278, being an action to restrain the trustees of Rex Hospital from obtaining a grant and loan from the Federal Emergency Administration of Public Works, referred to hereinabove, the Superior Court, among other things, found as a fact that unless the facilities of the hospital were improved the institution would cease to function and the entire property belonging to said corporation would escheat to the University of North Carolina as provided by law; that not only would the small fund of $10,000, donated by John Rex, be forfeited, but also the sum of $212,000 contributed by the public generally and the City of Raleigh, would be lost in so far as the beneficiaries named in the will of John Rex were concerned. The court likewise found that Rex Hospital is a public body corporate, in contemplation of the law and also within the purview of the ruling of the Federal Emergency Administration of Public Works. Upon the facts found, the court concluded, as a matter of law, that the trustees of the Rex Hospital, a corporation, "is a public charitable institution rather than a strictly charitable trust," and approved the request for the loan and grant. This Court on appeal affirmed the judgment of the court below.

In the case of *Martin v. Commissioners of Wake County,* 208 N.C. 354, 180 S.E. 777, this Court said: "The Trustees of Rex Hospital, as a corporation, created by the General Assembly of North Carolina, own and maintain a hospital in the City of Raleigh, Wake County, North Carolina, for the medical treatment and hospital care of the indigent sick and afflicted poor of the City of Raleigh and of Wake County. This hospital is supported by donations of property and money by individuals and by the City of Raleigh and Wake County, and also by sums paid by patients who are able to pay for services rendered to them. It is a public hospital, and is maintained, primarily, as a charitable institution." The Court, thereupon, in the above case and in *Martin v. Raleigh,* 208 N.C. 369, 180 S.E. 786, approved the execution of the contracts referred to in paragraphs seven and eight of the statement of facts herein, pursuant to the provisions of G.S. 153-152 and G.S. 160-229, and upon a finding that the respective annual payments required by said contracts would amount to less than fifty per cent of the actual cost of caring for the sick and afflicted poor in Wake County and the City of Raleigh according to the actual annual cost for such services during the previous three years.

It is well to note that Rex Hospital has no endowment as contemplated by the will of John Rex, but is supported by donations by individuals, the Duke Endowment, the North Carolina Medical Care Commission, and by the City of Raleigh and Wake County, and also by sums paid by patients who are able to pay for the services rendered to them. *Martin v. Com-*

missioners of Wake, supra. It follows, therefore, that all the assets of the corporation are invested in land, buildings, and hospital facilities.

The expenditure of tax funds for the construction of a general county hospital is for a public purpose; and a county, when authorized by the General Assembly and with the approval of a majority of the voters voting in an election held as provided by law, has as much right to issue its bonds to provide hospital facilities for those citizens who are able to pay for the services rendered to them as it does to provide such facilities for the sick and afflicted poor. Article V, Section 3 of the Constitution; G.S. 131-28.3 and 131-28.4; *Hospital v. Commissioners of Durham,* 231 N.C. 604, 58 S.E. 2d 696; *Burleson v. Board of Aldermen,* 200 N.C. 30, 156 S.E. 241; *Nash v. Monroe,* 198 N.C. 306, 151 S.E. 634. Moreover, when a county acquires an existing hospital facility by purchase, gift, or otherwise, it is expressly authorized by G.S. 131-126.20 (c) to lease such facility to any nonprofit association or corporation for operation on such terms as will carry out the provisions of Article 13B of Chapter 131 of the General Statutes, *Hospital v. Commissioners of Durham, supra.* We hold, therefore, that any lease executed by Wake County for the operation of Saint Agnes and Rex Hospitals must be on such terms as will carry out the provisions of the above Article.

The appellants except to and assign as error the finding of fact to the effect that the trustees of Rex Hospital, a corporation, owns land which its trustees propose to convey to Wake County, in fee simple without any restriction whatever upon the power of alienation or encumbering said property other than the covenant on the part of the trustees not to sell or convey the premises or any part thereof until the debt due the Durham Life Insurance Company has been paid in full.

The above finding is tantamount to a conclusion of law and will be modified to this extent. The property in question is held by the corporation in fee simple and may be conveyed or encumbered with the approval of a court of competent jurisdiction. *Raleigh v. Trustees, supra; Shannonhouse v. Wolfe,* 191 N.C. 769, 133 S.E. 93. *Cf. Hall v. Quinn,* 190 N.C. 326, 130 S.E. 18.

The appellants also assign as error the conclusion of law to the effect that Wake County has the power to accept the proposed deed from the trustees of Rex Hospital free of the trust created under the will of John Rex.

It is said in *Hospital v. Commissioners of Durham, supra:* "The deeds from the Trustees of Watts Hospital and the heirs and residuary devisees of George W. Watts and Annie Louise Hill convey to Durham County a base, qualified, or determinable fee. *Paul v. Willoughby,* 204 N.C. 595, 169 S.E. 226; *Henderson v. Power Co.,* 200 N.C. 443, 157 S.E. 425, 80 A.L.R. 497; *West v. Murphy,* 197 N.C. 488, 149 S.E. 731. Notwithstand-

ing this fact, the court rightly authorized Durham County to accept these deeds. For all practical purposes, they vest in Durham County title to the Watts Hospital property in fee simple absolute; for the estate which they convey will endure forever unless Durham County voluntarily ceases to use the property for hospital purposes or voluntarily changes the name of the hospital standing thereon. Indeed, the statute does not make the acquisition of title by the county a condition precedent to the extension of aid. G.S. 131-126.26."

We likewise hold that Wake County has the power to accept the proposed deed on the terms and conditions set out therein. However, the property will revert to the trustees of Rex Hospital if it ceases to be used for hospital purposes and to provide care and maintenance for the sick and afflicted poor for both the City of Raleigh and Wake County. It follows, therefore, that the hospital must continue to be operated as a public charitable institution which will include the primary purpose for which the Rex trust was created. With respect to a similar deed from trustees of Watts Hospital to Durham County, *Ervin, J.*, in speaking for the Court in *Hospital v. Commissioners of Durham, supra,* said: "Under the statutes originally enacted as Chapter 933 of the 1937 Session Laws and now codified as Article 13B of Chapter 131 of the General Statutes, Durham County has plenary power to construct, operate and maintain nonprofit hospital facilities. For this reason, the sanctioned conveyance of the Watts Hospital property to Durham County upon the condition 'that the . . . property shall be used for hospital purposes' insures the preservation of the trust estate for the benefit of the ultimate beneficiaries of the trust and the carrying out of the primary purpose of the creator of the trust for all time so far as these things can be done by human foresight and ingenuity in an uncertain world." We do not, however, construe the conditions contained in the proposed deed to increase or diminish the duties imposed by law on Wake County for the care and maintenance of the sick and afflicted poor of the city of Raleigh and Wake County.

In *Hospital v. Cone,* 231 N.C. 292, 56 S.E. 2d 709, the factual situation is distinguishable from that in the instant case, but with respect to the execution of the deed involved therein which contained a reverter clause, this Court, speaking through *Barnhill, J.*, said: "This agreement, in the form of a deed of conveyance, assures the continued maintenance of the property as a memorial park for the use of the public in substantial compliance with the terms of the trust indenture and in a manner equal, if not superior, to that which would be possible by the trustee. Thus the objective of the trust is preserved and its accomplishment is assured."

The City of Raleigh in its brief suggests that the contracts between the trustees of Rex Hospital and the City of Raleigh and Wake County, to which reference has been heretofore made, are not binding on the trustees

of Rex Hospital. These contracts were negotiated pursuant to statutory authority and approved by this Court. There is no evidence of their breach. In fact, the evidence is to the contrary. Hence, we will express no opinion with respect to their validity or as to the rights of the parties thereunder in the event of a breach.

Wake County, in its assignment of error No. 11, raises a question as to the power of the Commissioners to agree to the arbitration of differences that may arise between Wake County and the trustees of Rex Hospital in the interpretation of the operational lease referred to herein, as well as the arbitration of any other dispute that may arise between the parties. Under the provision for arbitration contained in the proposed lease, the findings of the arbitrators are to be submitted in the form of a report or recommendations to both the Commissioners and the trustees of Rex Hospital. It is stated in the lease that "the report shall be given every consideration, but shall not necessarily bind either Wake County or the trustees of the Rex Hospital, it being contemplated that the legal rights of both may be preserved."

"A county may not delegate its power involving the exercise of judgment and discretion." 20 C.J.S., Counties, section 89, page 862. Moreover, to call the provision under consideration an agreement for arbitration is a misnomer. It is merely a prescribed method for obtaining a recommendation for settlement of any dispute that may arise between the parties during the term of the proposed lease, or any renewal thereof. It would seem this purpose could be accomplished as effectively by direct negotiations between the parties, or by appointing a committee or committees for such purpose. Hence, in our opinion, the so-called arbitration clause in the lease should be eliminated therefrom.

Did the Superior Court in the exercise of its equitable jurisdiction, have the power to authorize the trustees of Rex Hospital to convey its property to Wake County, subject to the terms and conditions set out in the proposed deed? We think so. *Devin, J.*, now *Chief Justice,* said in the case of *Johnson v. Wagner,* 219 N.C. 235, 13 S.E. 2d 419: "One of the most important subjects of equitable jurisdiction is that of trusts, and the construction of charitable trusts created by wills, the determination of the duties imposed upon trustees, the powers granted, and the means of effectuating the ultimate benefits conferred, constitute matters peculiarly within the province and jurisdiction of courts of equity. In the exercise of the supervisory power of the courts of equity over trusts, trustees and those interested in the administration of trusts are permitted to apply to the court for plenary and authoritative advice in relation thereto." *Brooks v. Duckworth,* 234 N.C. 549, 67 S.E. 2d 752.

It is said in *Holton v. Elliott,* 193 N.C. 708, 138 S.E. 3, "Courts of equity have jurisdiction to order, and in proper cases do order, the aliena-

tion of property devised for charitable uses. *Keith v. Scales,* 124 N.C. 497; *Vidal v. Girard,* 43 U.S. 127; 2 How., 127; 11 Law Ed., 205; 11 C.J. 323; Eaton on Eq. 349. The power is not infrequently exercised where conditions change and circumstances arise which make the alienation of the property, in whole or in part, necessary or beneficial to the administration of the charity."

A court of equity has the power to authorize the conveyance of trust property, where, on account of changed conditions the charity would fail, or its usefulness would be materially impaired. *Church v. Ange,* 161 N.C. 314, 77 S.E. 239.

In the final analysis of the factual situation involved on this appeal, it clearly appears that for fifty-three years after the death of John Rex, no steps were taken to effectuate the purposes for which the Rex trust was created except to procure the passage of Chapter 6 of the Private Laws in 1840-41. It was not until 1892 that it was determined that the site devised by John Rex was not suitable for the location of a hospital. In May of that year, authority of the Superior Court was obtained for the sale of the property. This was done and the sum of $10,000 was obtained therefor. However, seventeen more years were to elapse before Rex Hospital opened its doors for the reception of patients. As a consequence of this delay, the beneficiaries under the will of John Rex had to wait seventy years before any benefits were received from the trust. This was as long as the children of Israel were held in Babylonian captivity. Beginning in 1909 and continuing for a period of twenty-eight years the trustees of Rex Hospital operated a general hospital on South Street in the City of Raleigh. In the meantime, the character of the Rex trust was not judicially determined by the courts until May, 1934, in the case of *Raleigh v. Trustees, supra.* Since it was judicially determined that Rex Hospital was a public institution, gifts, grants, and loans of more than a million dollars have been received by the trustees of the hospital in an effort to provide hospital facilities for all the people of Wake County. Most of this money could not have been obtained if the use of the facilities had been limited to a particular class. Moreover, none of the assets of the John Rex trust, including all the donations received by the trustees of the institution, prior to the time it was decided to build the present facilities on Saint Mary's Street, has been used in providing the present facilities, except the nurses' home. Two years after Rex Hospital moved to its present site, the property owned by the trustees on South Street in Raleigh was sold to Wake County, with the approval of the Superior Court, for the sum of $40,000. This sum, together with the $90,000 borrowed from the Reconstruction Finance Corporation, was used for the construction of the nurses' home on Saint Mary's Street. Thus, the present facilities of Rex Hospital, with a replacement value of several

million dollars, were made possible by the generosity of individuals, firms, corporations, benevolent organizations, and others who participated in the enterprise with the understanding that Rex Hospital would be maintained as a public institution, open to all the citizens of Wake County, pay patients as well as the sick and afflicted poor. Now, in order to provide much needed additional hospital facilities for the people of Wake County, for both white and colored, should the taxpayers of Wake County be denied the right to utilize these facilities and to expand and improve them, if they desire to do so? The answer is no.

The exceptions and assignments of error based thereon to the overruling of the demurrer and the motions interposed in the court below, by Stella K. Barbee and Sallie K. Quincy, are overruled.

The record contains a number of exceptions which were not brought forward and assigned as error. Even so, it contains more than one hundred such assignments. Some of these have not been discussed in the briefs and are, therefore, under our rules, deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562. These assignments of error, as a matter of course, have not been discussed *seriatim.* However, all of them which have been brought forward in the several briefs and discussed have been considered, but we have of necessity discussed only those questions raised by the exceptions and assigned as error that we felt warranted discussion.

In view of the findings of the court below, and in light of the authorities cited, we hold that the judgment entered below, except as modified herein, must be upheld.

Modified and affirmed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. STATE OF NORTH CAROLINA AND THE DEPARTMENT OF JUSTICE OF THE STATE OF NORTH CAROLINA.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Filed 29 January, 1954.)

1. Telephone and Telegraph Companies § 1a—

In return for the privileges granted a *quasi*-public utility, the State reserves the right to supervise and regulate its operations and fix or approve the rates charged by it for intrastate service.

2. Same: Constitutional Law § 8c: Utilities Commission § 1—

The power to grant franchises to public service corporations and to fix their rates rests in the General Assembly, which power the General Assem-

bly may delegate to an administrative agency provided the General Assembly prescribes rules and standards to guide such agency in the exercise of the delegated authority. The statute delegating to the Utilities Commission this authority is constitutional in fixing adequate rules and standards. G.S. 62-66, G.S. 62-124.

3. Telephone and Telegraph Companies § 1c—

In determining the just and reasonable rate to be charged by a public service corporation, the Utilities Commission must ascertain the value of the utility's investment, which constitutes the rate base, and then calculate the rate which will yield the desired net return upon the basis of the utility's gross income from its operations, less operating expenses, including the amount of capital investment currently consumed in rendering the service.

4. Same—

In fixing the value of the property of a utility for the purpose of fixing rates, it is the duty of the Utilities Commission to arrive at its own independent conclusion as to the fair value of the property, and not accept any particular formula advanced by the parties.

5. Same—

It is improper for the Utilities Commission, in ascertaining the value of a utility's property for rate-making purposes, to use solely the book value, or cost less depreciation, or solely the replacement cost, since the statute requires that both of these factors as well as other factors should be considered in determining the fair value of the utility's investment for rate-making purposes. G.S. 62-124.

6. Same—

In determining the value of the property of a utility for rate-making purposes, the Utilities Commission must ascertain the value of the utility's property in use as a composite public utility, and not its market value as second-hand property.

7. Same—

In fixing intrastate rates for a telephone company operating in several states, the Utilities Commission should take into consideration the net return such utility earns on its properties in such other states to the extent of not requiring customers in North Carolina, in order to maintain the utility's financial condition, to pay a substantially higher rate than permitted in other states.

8. Same—

When a factor in maintaining the operations of a public utility, the Utilities Commission should consider the financial condition of the utility to the extent the demand for its bonds and securities affect its capacity to compete for capital in the open market.

9. Same—

For rate-making purposes a public utility is allowed to deduct annually as an operating expense so much of its capital investment as is actually consumed during the current year in rendering the service required of it,

but such depreciation must be based upon actual cost and not replacement value, and must represent as near as may be the actual investment currently consumed not provided against by maintenance.

10. Same—

The Utilities Commission is not compelled to provide a 6% rate of return to a public utility, nor is its former allowance of a rate of return *res judicata* barring the Commission from fixing a lesser rate in a subsequent proceeding.

11. Same: Utilities Commission § 5—

When the Utilities Commission fixes a schedule of rates under the standard prescribed by the Legislature, such schedule is binding upon the interested parties and the courts, provided it is within the bounds of reason.

12. Telephone and Telegraph Companies § 1c—

Where, as a matter of custom, a public utility uses for operating capital moneys collected by it in taxes for the Federal Government which it is not required to pay to the Federal Government until a later date, the Utilities Commission should take such capital into consideration in fixing rates, which action is neither a condemnation nor condonement of the practice.

13. Utilities Commission § 5—

The duty to fix rates is imposed by law upon the Utilities Commission, and where its order fixing a rate is erroneous because of misconstruction of the applicable law, the cause must be remanded to the Commission for further proceedings in accordance with the opinion of the Supreme Court.

14. Telephone and Telegraph Companies § 1c—

In fixing the rate for a telephone company, the Utilities Commission must take into consideration the net income to be produced by the increase in the number of telephones in service at the end of any test period adopted by the Commission.

APPEAL by protestants, the State of North Carolina and the Department of Justice of North Carolina, from *Bobbitt, J.*, in Chambers at Charlotte, N. C., 24 August 1953. Modified and affirmed.

Amended application filed by Southern Bell Telephone and Telegraph Company before the Utilities Commission for an order permitting and approving an increase of its rates and charges for intrastate service rendered in this State.

On 21 July 1952 the applicant, by amended petition, applied for an order approving and permitting applicant to put into effect the schedule of rates and charges set out in its Exhibit A attached to the application. This schedule provides for a total gross increase in the rates for intrastate service rendered by the applicant in the amount of $3,426,000.

The State of North Carolina and the Department of Justice of North Carolina, through the Attorney-General, intervened and protested in behalf of the public the allowance of the proposed increase in rates.

For convenience and brevity in stating the pertinent facts and discussing questions presented for decision on this appeal, we will hereafter refer to Southern Bell Telephone and Telegraph Company as Southern Bell or the applicant, to the Utilities Commission as the Commission, to the American Telephone and Telegraph Company as A T & T, and to the State of North Carolina and the Department of Justice of said State as the protestant or appellant. As the United States Government, in respect to taxes levied and the disposition of the fund derived therefrom and the amount allowed for depreciation in accounting for taxes, is indirectly involved in the case, we will refer to it as the government.

The case came on for hearing before the Commission 28 October 1952 on the amended application filed by Southern Bell, and the hearing was concluded on 30 December 1952. On 21 April 1953 the Commission entered its preliminary order fixing a rate base and directing the applicant to file a schedule of rates in accord therewith which would produce additional gross revenue of $891,000 from its toll service and $757,056 from other classes of service, making a total additional gross annual income of $1,648,056. The applicant was directed to base such schedule on stations and operations as of 31 July 1952.

Southern Bell operates in nineteen southern States including North Carolina. In this State it operates in 67 counties throughout the State. Its properties include exchange and toll switchboards located in 70 exchanges having the capacity of 184,200 lines, approximately 1,700 miles of toll pole lines, approximately 86,200 miles of exchange and toll open wire, and approximately 1,388,200 miles of exchange and toll wire in cable, approximately 366,700 telephones, and a large quantity of land, buildings, underground conduits, furniture and office equipment, motor vehicles, and work equipment, material and supplies and other items of property necessary and useful in the rendition of telephone service. As of 31 August 1952 the original cost of petitioner's properties used and useful in rendering interstate and intrastate telephone service in North Carolina, as taken from its books and records, amounted to $101,074,814.

It is a member of the Bell System which renders both intrastate and interstate service throughout the United States. A T & T is the parent company of the Bell System, and Southern Bell is a wholly owned subsidiary.

From 1945 to April 1952 Southern Bell was granted applications for increases in its rates five separate times. The total amount heretofore allowed is $7,146,000. The last order allowing an increase was entered 28 April 1952, and this application for still another increase was filed 21 July 1952, only about three months thereafter.

During this period, appropriately referred to as the postwar period, the net return of Southern Bell in the nineteen States in which it operates

has been approximately 4.8%, while in North Carolina, according to its figures, it has been 5.40%. During this period it has increased its capital stock from 175,000,000 shares in 1945 to 615,000,000 shares as of 31 July 1952. The ratio of debt capital to equity capital has dropped from about 43% in 1947 to 22% in 1952—the lowest in twenty-five years. It has increased its surplus from $3,871,433 in 1947 to $18,622,000 on 31 July 1952, after adjustment for the 6.5% dividend paid in 1952. Surplus per share has increased from $1.55 in 1947 to $3.10 at the end of 1952, notwithstanding the large increase in capital stock. And in addition thereto, it has paid an annual dividend of 6%, except in 1952 when the dividend was 6.5%.

During the postwar period Southern Bell has collected and had on hand a monthly average of $2,723,738 in Federal tax accruals over a thirteen-month period ending 31 July 1952. This is money which Southern Bell is not required to transmit to the government for more than a year after collection. It is actually used freely by Southern Bell for all corporate purposes, particularly as working capital and for the payment of current bills for materials and supplies, and it is mixed with all other corporate funds, and costs the company nothing for its use. If no consideration is given to this amount in fixing the rate base, it would not mean that the company does not have the same amount of working capital, for it would continue to have and use any part or all of the tax accrual money it cared to. Notwithstanding these facts, the Commission declined to "condone or encourage" the use of the fund for working capital or other corporate purposes and, instead, allowed as a deductible expense a large sum for working capital and almost $900,000 for the payment of current bills for materials.

The A T & T, the parent company, maintains a money pool for the use of its subsidiaries. Southern Bell has the privilege and does borrow, from time to time, from this pool such funds as it may need for improvements, enlargements, and other purposes. When the debt thus created grows to an amount out of proportion to the capital stock of the company, Southern Bell then issues its common capital stock and delivers the same to A T & T, at par, as a credit on the debt account, notwithstanding the fact that the stock so delivered could be sold on the market at a price largely in excess of par, and then pays A T & T a dividend of 6% on both its old and its new stock over and above the interest it pays upon the money borrowed, if any. The A T & T reaps the benefit of the difference between the par and the market value of such stock, and the customers of Southern Bell must bear the burden of the loss to the applicant.

Wage contracts entered into with its employees, the increase in the cost of materials, supplies, and construction have increased since the entry of the last order. Southern Bell is a rapidly growing public utility and now

has anxiously waiting for service more than 16,000 applicants for telephones, and the number of its employees has increased from 4,815 in 1950 to 5,905 in July 1952.

During the postwar period, through the indicated procedure, Southern Bell has decreased the ratio of borrowed money investment from 43% to 22%. According to the evidence, one-third to one-half of the total invested capital could safely be obtained through borrowed money, depending upon which witness you believe. The present per cent is much below either estimate.

The frequent grants of permission to Southern Bell to increase its rates has caused the monthly charges for telephones, during this postwar period, to increase by approximately 100%—in Raleigh from $5.25 to $10.25.

The bonds and obligations of Southern Bell now enjoy on the present market and upon the basis of its present income the high rating of Aa or A 1 plus.

The record contains 523 pages. Naturally, therefore, it contains many detailed facts and circumstances which it was the duty of the Commission to take into consideration in arriving at its conclusion as to what constitutes a fair net return on the investment of the applicant for intrastate purposes. It is not necessary for us to detail these facts at this time.

The additional gross revenue Southern Bell asserts is necessary to afford a fair return on its investment apparently does not include or take into consideration the additional income which results from the fact its total number of telephones has increased from 159,951 in 1946 to 336,668. It does include an allowance of $161,572 for cash working capital and $759,079 for materials and supplies.

The Commission in its order discussed different phases of the questions presented and found facts in part as follows:

"It will be observed from the above tabulation that there is a very wide difference between AVERAGE net investment for either 7 months or 12 months ending July 31, 1952, and the ACTUAL net investment on said date, the actual investment being $69,153,380.

"The investment in intrastate service shown above is the depreciated original cost of the applicant's investment on the dates shown, that is, $69,153,380 is the depreciated original cost of the company's property devoted to the public use as of July 31, 1952. *This depreciated original cost, or depreciated book cost, is very different from the current fair value of this property.* The testimony is to the effect that the current cost value of this property as of July 31, 1952, less depreciation, was $80,142,950, as compared with book cost, less depreciation, of $69,153,380, a difference of $10,989,570. (Italics supplied.)

"It should also be noted that July 31, 1952, the end of the test period, was two months prior to the date the application was filed, and that it is

now well into April 1953. Public utility rates are never made retroactive. Any increase in rates in this case must apply to the future, and cannot be published and put into effect without some further delay after authority is given. If the applicant continues to increase its intrastate net investment on an average of $775,928 per month, and its investment program for 1953 exceeds that for 1952, its actual net investment as of April 1, 1953, will amount to $75,327,885, and the current cost value of its property on said date will amount of $86,350,376. Summarizing the testimony with respect to the fairness of a rate base in this case for the purpose of fixing rates that will be just and reasonable for the present and immediate future, we have the following four rate bases for consideration:

"1. Average net for one year ending July 31, 1952	$64,317,910
2. Average net for 7 months ending July 31, 1952	66,297,406
3. Net investment as of July 31, 1952	69,153,380
4. Current cost value as of July 31, 1952	80,142,950

"Under normal conditions in which prices are stabilized and may be depended upon to remain reasonably constant, a rate of return found to have been earned on average net investment for a period of a year may be relied upon as approximately the rate of return that will continue in the future. But conditions are not normal. Depreciation which is based on original cost will not replace property retired. Additional capital is required for that purpose. As already stated, the high cost of construction under present conditions increases the average per telephone cost and decreases the rate of return at the rate of .033% per month. In an effort to provide some compensation for this loss in earnings, this Commission in prior Southern Bell rate cases has adopted as a rate base the actual net investment of the company at the end of the test period for the purpose of fixing rates to apply in the future.

"The Commission's staff and the applicant's staff do not agree as to the period to be considered in arriving at the amount of average net investment. They differ to the extent of $1,979,496, but both used test periods ending July 31, 1952, and in so far as the record shows they agree upon the amount of net investment on said date. Conditions have not materially changed since the last two Southern Bell rate cases were decided and the Commission is of the opinion that it can better consider the problems involved in this case *by again adopting for rate making purposes the net investment of the company* at the end of the test period which it finds to be $68,599,569 after making adjustments hereafter explained. Whether average net investment, net investment, or present fair value is adopted as a rate base, the Commission must give consideration, among other things, to original cost and present fair value of the appli-

cant's property, as required by G.S. 62-124, in its determination of just and reasonable rates.

"RATE OF RETURN

"In arriving at a rate of return which the Commission finds to be within the zone of reasonableness for this particular company under the exigencies shown to exist, it is necessary to first pass upon certain items in controversy some of which relate to the rate base and some to operating expense. These items and the Commission's findings in respect thereto are as follows:

"1. CONSTRUCTION WORK IN PROGRESS ON WHICH INTEREST IS CAPITALIZED . . . (Omitted part not material on this appeal.)

". . . This Commission's last two decisions on this point are in accord with the decisions which exclude this item from the rate base, and it still supports this view. *However, the Commission having adopted net investment at the end of the test period as a rate base in this case,* it is of the opinion that it should exclude from the rate base only the construction in progress on which interest was capitalized on that date. The Commission finds this amount to be $520,591, plus $33,220 for premature transfers subject to capitalization of interest, or a total of $553,811. (Italics ours.)

. . . .

"This Commission has consistently included in the rate base an allowance for cash working capital and material and supplies in such sums as it finds to be reasonable, depending upon the nature of the utility, the time between the rendition of service and the payment therefor, and the average operating expenses during said time, and it very seriously questions the advisability of changing its practice and policy based solely on the fact that a utility has on hand Federal tax funds.

. . . .

"Excluding $553,811, the amount of construction work in progress on which interest is capitalized, and including working capital in the sum of $920,596 in the rate base for rate making purposes, reduces the amount of net investment at July 31, 1952, the end of the test period, to $68,599,569.

"4. PENSION COSTS. The applicant maintains a pension plan for its employees which applies to all employees regardless of period of service or age. The plan is non-contributory . . . (Not challenged on this appeal.) . . . The Commission finds no valid reason for excluding this pension cost from current operating expenses.

"Disallowing the rent items of $23,427 as an operating expense, allowing the two pension expense items of $46,400 and $30,750, and making adjustment for savings in taxes, results in an adjusted net operating income of $3,427,611, which the Commission finds to be the operating

income for the purpose of computing return on investment. Computing the rate of return on the adjusted rate base of $68,599,569, the net investment at July 31, 1952, shows a rate of return as of said date of 4.99%, and a rate of return of 4.27% on $80,142,950, the current cost value of applicant's property as of the same date. If the applicant's rate of return has continued to decline since October 1952 at the rate of .033%, as it did during the first ten months of 1952, the rates of return of 4.99% and 4.27% will be reduced to 4.72% and 4.00% respectively at the end of March 1953.

"Upon consideration of all the testimony in this case, the briefs submitted and the contentions of the parties, and particularly the contention of the Attorney-General of North Carolina with respect to the adequacy of a return of 6% under the facts in this particular case, the Commission is of the opinion and finds from the testimony that additional gross revenue sufficient to yield a return of 6% on said net investment of $68,599,569, or additional gross of $1,648,056 based upon stations and volume of business as of July 31, 1952, will be required to give the applicant a reasonable return on its North Carolina intrastate investment devoted to the public use, and that additional gross revenue in said sum will be fair and just to the applicant and to the public. In arriving at this conclusion the Commission has given careful consideration to the capital structure of the company, its debt ratio, its surplus account, its dividend payments and the earnings of the company as of July 31, 1952, and as of March 31, 1953, on each of the four rate bases to which the testimony relates, as shown below.

"Rate Base	Return 7/31/52	Return 3/31/53
"1. $64,317,910, Average Net for one year	6.40%	6.136%
2. 66,297,406, Average Net for 7 months	6.21%	5.946%
3. 68,599,569, Net at end of period	6.00%	5.736%
4. 80,142,950, Current Cost at end of period	5.14%	4.876%

"The Commission has some reservations as to the ability of the applicant to carry out its expansion in North Carolina for the year 1953 and earn a return of 6% for the year on any of the above rate bases under the rates herein approved.

"APPORTIONMENT OF RATE INCREASE

"The Commission has given very careful consideration to the differential between existing toll rates and local exchange rates in relation to the return on investment in these classes of service, and is of the opinion that the toll service should bear a greater portion of the total cost of

telephone service, to the end that local exchange service may be relieved of such a large portion of rate increases.

"The Commission has also given consideration to the spread between rates at the larger and smaller exchanges. The applicant owns and operates exchanges in most of the larger cities of the State, including Raleigh, Wilmington, Greensboro, Winston-Salem, Charlotte, Asheville, and others. These large exchanges, cost and value of the service considered, appear to be carrying more than their pro rata part of exchange service cost, and the average subscriber, in so far as ability to pay is concerned, is about the same at all exchanges.

"For the reasons stated, the Commission is of the opinion that the full amount of the requested increase in toll rates amounting to $891,000 should be approved, and that (the) remainder, or $757,056, should be equitably apportioned among the other classes of service, giving consideration to reducing the differential in subscriber rates between exchanges.

"IT IS THEREFORE ORDERED:

"1. That the applicant, Southern Bell Telephone and Telegraph Company, be, and it is hereby authorized to increase its North Carolina intrastate telephone rates and charges to produce additional annual gross revenue not exceeding $1,648,056 based upon stations and operations as of July 31, 1952.

"2. That the applicant prepare and submit to the Commission for approval a revision of its intrastate rates and charges to produce not in excess of $1,648,056 additional annual gross revenue, of which $891,000 shall be obtained from toll service, and the remainder, or $757,056, shall be apportioned equitably among other classes of service in keeping with the opinion herein expressed.

"3. That this cause be retained for final order after the applicant shall have complied with paragraph 2 of this order."

This order was entered 21 April 1953.

Thereafter Southern Bell filed with the Commission a schedule of intrastate charges as allowed in said order. On 24 April 1953 the Commission filed its final order authorizing, approving, and putting into effect the schedule as filed.

On 18 May 1953 the protestant filed a motion to dismiss Southern Bell's appeal, notice of which was filed 14 May 1953, more than ten days after the order of 21 April. The motion was overruled 29 May 1953.

On 8 May 1953 the protestant filed a petition for a rehearing for the reasons therein stated. The petition was denied. Southern Bell also filed a petition for rehearing but it did not appeal from the judgment entered in the court below. It is therefore bound by the rulings in that court which were raised by its petition for a rehearing filed with the Commission as well as by the judgment as a whole, as it may be modified by this Court.

The protestant excepted to the judgment entered as appears of record and appealed.

Attorney-General McMullan and Assistant Attorneys-General Paylor and Lake for appellants.

Joyner & Howison, Taylor, Kitchin & Taylor, and Pierce & Blakeney for appellee, and Dan M. Byrd, Jr., Norman C. Frost, Jefferson Davis, and E. W. Smith appearing by brief.

BARNHILL, J. The judgment of the court below, together with the explanatory statement and conclusions of law incorporated therein, evidences a very careful study and analysis of the record. In many respects its discussion might well be adopted as the opinion of this Court.

The primary questions posed by appellant's assignments of error may be boiled down to one simple issue: Did the Commission, in the consideration of the application of Southern Bell, follow the clear mandate of this statute, G.S. 62-124? The court below answered in the negative. A full consideration of the record compels an affirmance.

A *quasi*-public utility receives well-defined and valuable privileges not accorded a private, unregulated corporation. The government purposely grants it monopolistic rights and vests in it some of the powers of government such as the right of eminent domain. By no means the least of these governmental benefits is the assurance that its stockholders shall have a fair return on their investment.

In return the State reserves the right to supervise and regulate its operations and fix or approve the schedule of rates to be charged by it for its intrastate service.

This right to grant franchises to public service corporations and to fix or approve the rates to be charged by them for the services rendered the public rests in the Legislature. The General Assembly may act directly or it may delegate its authority to an administrative agency or commission of its own creation. However, no Act undertaking to delegate the rate-making function of the Legislature is valid unless the General Assembly prescribes rules and standards to guide the legislative agency in exercising the delegated authority. *Motsinger v. Perryman,* 218 N.C. 15, 9 S.E. 2d 511; *S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854; *Hospital v. Joint Committee,* 234 N.C. 673 (concurring opinion at p. 684), 68 S.E. 2d 862; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310.

There is no defect in this respect in the Act delegating to the Utilities Commission the authority to grant franchises to, and fix the charges to be made for services rendered by, telephone and other public service corporations.

Having provided that "Every rate made, demanded or received by any public utility . . . shall be just and reasonable," G.S. 62-66, the Legislature then prescribed the considerations which should be weighed by the Commission in determining what is a just and reasonable rate in any particular case in the following language, to wit:

"In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter, the Commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier . . . used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the State; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier . . . and all other facts that will enable it to determine what are reasonable and just rates, charges and tariffs." G.S. 62-124.

This statute has been characterized as an "old, rambling, and misty statutory declaration of the matters to be taken into account by the commission . . ." 12 N.C.L. 298. Be that as it may, it is the law in this State and will continue to be the law until amended, revised, or repealed by the Legislature. We have no intention to shut our eyes to its provisions or to circumvent the clear import of its language.

Necessarily, what is a "just and reasonable" rate which will produce a fair return on the investment depends on (1) the value of the investment—usually referred to in rate-making cases as the Rate Base—which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined Rate Base. When these essential ultimate facts are established by findings of the Commission, the amount of additional gross revenue required to produce the desired net return becomes a mere matter of calculation. Due to changing economic conditions and other factors, the rate of return so fixed is not exact. Necessarily it is nothing more than an estimate.

In finding these essential, ultimate facts, the Commission must consider all the factors particularized in the statute and "all other facts that will enable it to determine what are reasonable and just rates, charges and tariffs." G.S. 62-124. It must then arrive at its own independent conclusion, without reference to any specific formula, as to (1) what consti-

tutes a fair value, for rate-making purposes, of applicant's investment used in rendering intrastate service—the Rate Base, and (2) what rate of return on the predetermined Rate Base will constitute a rate that is just and reasonable both to the applicant and to the public. While both original cost and replacement value are to be considered, neither constitutes a proper Rate Base.

In its order of 21 April the Commission discussed many, if not all, the factors which must be considered in determining the proper Rate Base, and concluded that there are four Rate Bases (set out in the foregoing statement of facts), any one of which it might accept. It then adopted the "book value" or "cost less depreciation" as the proper Rate Base.

Clearly this was in conflict with the express terms of the standard prescribed by the Legislature in G.S. 62-124. The conclusion is inescapable that by accepting the book value as the Rate Base, it, *ex necessitate,* excluded consideration of present cost of replacement and all other factors from effective consideration.

" 'Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension.' Crawford, Stat. Constr., 276, sec. 174; *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505;" *Perry v. Stancil,* 237 N.C. 442. The Legislature, in using the term "value" in G.S. 62-124, was not referring to the original or the replacement cost or to the exchange or sales price it would command, as used or second-hand property, on the market. It had reference to the value of the property actually in use, serving its purpose as a part of a composite public utility, earning an income for its owner. It is, of course, in the main, "used" or "second-hand" but it is not for exchange or sale, as such. It is actually in use and will continue in use until it becomes obsolete or outworn. Its value, under these circumstances, is the value the Commission must seek to determine as the Rate Base for ascertaining what is a just and reasonable schedule of rates to be approved by it.

Smyth v. Ames, 169 U.S. 466, 42 L. Ed. 819, is the parent of G.S. 62-124. The language of our statute is lifted almost verbatim out of the opinion in that case. The subject here under consideration is there fully discussed. It is also discussed in *Corporation Com. v. Mfg. Co.,* 185 N.C. 17, 116 S.E. 178, and in numerous other cases cited by the appellant and appellee. As the case must be remanded for further hearing, we refrain from citing all the cases bearing directly upon the question. They are available to counsel and open to anyone interested in a further study of the subject.

Strictly speaking what is the fair value of applicant's investment in its intrastate business in this State and what constitutes a fair return thereon

are the primary questions before the Commission for decision. Yet this corporation operates in eighteen other states and is a part of a nationwide system, controlled by one parent corporation, the capital stock of which occupies a commanding position on the market. It functions as one corporation. And, necessarily, its financial condition is affected by the rates charged and income received from its intrastate business in each and every one of the nineteen states in which it functions.

The record discloses that the applicant is in excellent financial condition, notwithstanding its net average return is only 4.8%. Since it is at least 5.4% in North Carolina, the net return in some of the other states must be lower than the average. North Carolina users of telephones are not to be required to furnish revenue to maintain applicant's financial condition which other states refuse to provide or to pay at rates materially higher than those charged in other territory served by the same corporation. A substantial differential might be considered some evidence that the rates charged in this State are unreasonable and unjust to the local public.

Furthermore, the financial condition of a public utility and the demand for its bonds and securities which affect its capacity to compete, on the open market, for additional equity and debt capital are ordinarily material considerations. But these factors are of little moment here, for the applicant has available at all times a fund provided by its parent company from which it may borrow at will for needed improvements or enlargements. Under the circumstances here disclosed, what it has to pay for its borrowings from this fund is of more importance.

These are some of the "other facts" the statute requires the Commission to consider. They may cause it to pause and consider whether the applicant is in the right forum.

The court below directed the Commission "in its determination of net operating income to allow depreciation as an expense of operation in such amount as in its judgment will be reasonably sufficient to restore currently the portion of capital investment currently consumed."

It is apparent the parties construe this instruction to mean that the current rather than the cost value shall be the basis for estimating depreciation allowances. If this is the correct interpretation of the language used by the trial judge, the instruction must be held for error.

For rate-making purposes a public utility is allowed to deduct annually as an operating expense so much of its capital investment as is actually consumed during the current year in rendering the service required of it. But the cost represents the amount of the investment, and it is the actual cost, not theretofore recouped by depreciation deductions, that must constitute the base for this allowance.

Broadly speaking, depreciation is the loss *not restored by current maintenance* which is due to all the factors causing the ultimate retirement of

the property. "While property remains in the plant, the estimated depreciation rate is applied to the book cost and the resulting amounts are charged currently as expenses of operation." *Lindheimer v. Illinois Bell Teleph. Co.,* 292 U.S. 151, 78 L. Ed. 1182; *Water Co. v. Alexandria,* 177 S.E. 454 (Va.); *Federal Power Com. v. Hope Nat. Gas Co.,* 320 U.S. 591, 88 L. Ed. 333.

"An annual depreciation allowance cannot logically or consistently be based upon fair value and reproduction cost, but rather the basis for computation should be upon the book cost of depreciable and depletable property." *Equitable Gas Co. v. Public Utility Com'n.,* 51 A. 2d 497; *Utah Power & Light Co. v. Public Service Commission,* 152 P. 2d 542; *City of Pittsburgh v. Public Util. Com'n.,* 90 A. 2d 607.

The whole purpose of the allowance is to maintain the integrity of the investment—to prevent a loss, not to assure a profit.

In this connection we note that the rate of depreciation allowed by the government for income tax purposes is not necessarily the proper rate to be allowed for rate-making purposes. Indeed, for rate-making purposes it would ordinarily be excessive, especially in respect to buildings and like permanent improvements.

Of necessity the government is required to adopt somewhat arbitrary rates for estimating allowable deductions in an income tax return as a result of which property is not infrequently fully depreciated before it is exhausted by its use. No doubt the applicant now has property that has been fully depreciated and yet has a "fair value" for use in its business.

The applicant is entitled to deduct each year as an operating expense only such depreciation as represents the investment currently consumed and not provided against by maintenance. Thus the integrity of the investment is maintained, and this is all the applicant has a right to demand. The rate should be fixed, as near as may be, so that it will extend over the usable life of the property being depreciated. Otherwise the allowance will be unjust either to the corporation or to the public.

Oftentimes property, particularly buildings and other structures, has a fair value long after it has been fully depreciated for income or ordinary bookkeeping purposes. Yet it cannot be gainsaid that such property still possesses and will continue to possess for many years a fair value for the purposes for which it is being used. It follows that it would be unfair to Southern Bell, under our rule, not to take into consideration the present fair value of property now in use but which has been fully depreciated for other purposes.

On the other hand, if the rate of depreciation allowed for rate-making purposes is in excess of the investment currently consumed, over and above maintenance costs, it is unfair to the public, for then the company

is permitted to recover annually a part of its investment which is not currently consumed.

We fully realize that this problem cannot be reduced to a mathematical certainty. For that reason it might be well for the Commission to promulgate a schedule of allowable rates of depreciation, for rate-making purposes, for different classes of property which will be as fair to all parties concerned as it is humanly possible to make it. However, that is a question for the Commission to decide. It may prefer to deal with each case as it arises.

The former allowance of a 6.50% rate of return is not *res judicata,* barring the Commission from fixing a lesser rate in this proceeding. Nor is the Commission compelled to provide a 6% rate of return which, under present conditions, may be considered by some a high rate for a corporation that is in effect assured a "reasonable and just" rate of return on its investment in good times and bad. It is only required to fix rates that are reasonable and just under the conditions as they now exist. And when it fixes a schedule of rates under the standard prescribed by the Legislature which is within the bounds of reason, it is as binding upon the courts as it is upon the interested parties.

Presently we are not prepared to say that a net return of 5.40%—over and above all taxes—is inadequate. That is a question for the Commission to decide.

Neither the Utilities Commission nor the courts are the keepers of the morals of a public utility. When, in fixing rates which will produce a fair return on the investment of a utility, it is made to appear it has on hand continuously a large sum of money it is using as working capital and to pay current bills for materials and supplies, that is a fact which must be taken into consideration. And if the fund on hand is sufficient, no additional sum should be allowed at the expense of the public.

The action of the public utility is neither condemned nor condoned, approved or disapproved. The question of any impropriety or illegality involved in such conduct is one that rests strictly between the public utility and the government to which the fund eventually will be paid. And, incidentally, we understand it is a common practice known to the government. In any event we do not feel that we are condoning improper conduct in approving this part of the judgment of the court below.

The appellant insists that this Court should reverse the judgment entered in the court below. But this we may not do. A reversal, in effect, would affirm the order of the Commission fixing a rate under a misconstruction of the applicable law. And it is for the Commission to say whether, on the showing made, considered in the light of the controlling statutory standard as here construed, Southern Bell should be permitted. at this time, to increase its schedule of rates for intrastate service.

It is the prerogative of that agency to decide that question. It is an agency composed of men of special knowledge, observation, and experience in their field, and it has at hand a staff trained for this type of work. And the law imposes on it, not us, the duty to fix rates.

Of course, in determining the net operating income of applicant the Commission must take into consideration the net income to be produced by the greater number of telephones in service at the end of any test period adopted by it. Of this fact we assume the Commission is fully aware. Perhaps that is why the court below declined to incorporate a direction to that effect in its judgment.

The judgment entered in the court below must be modified in accord with this opinion. Thereupon the cause will be remanded to the Commission for further proceedings in accord therewith. It is so ordered.

Modified and affirmed.

EUGENE H. WILSON v. COMMERCIAL FINANCE COMPANY AND MIKE DISHER.

(Filed 29 January, 1954.)

1. Sales § 11—

A cash sale is one in which the title to the property and the purchase price pass simultaneously, and title remains in the seller until the purchase price is paid, even though possession of the property is delivered to the buyer.

2. Same—

Even though the contract be for a cash sale, title will pass to the buyer without payment if the seller waives his right to immediate cash payment by language or conduct manifesting an intention on his part to abandon or relinquish this right, but acceptance of a check is not such a waiver, and if the check is dishonored title does not pass.

3. Payment § 2—

In the absence of an agreement to the contrary, the delivery and acceptance of a check does not constitute payment of the item covered by it until the check itself is paid by the bank on which it is drawn.

4. Sales § 12—

If the possessor of a chattel has no title, a *bona fide* purchaser from him acquires no property right therein unless the true owner authorizes or ratifies the sale, or is estopped to assert his title.

5. Same: Chattel Mortgages § 13—

In the absence of estoppel, the true owner who is induced to part with possession by fraud may reclaim his chattel from a *bona fide* purchaser from or under the person obtaining such possession; but if the true owner is induced to part with title by fraud he may not reclaim the chattel from

a *bona fide* purchaser from the fraudulent buyer. This rule applies to a mortgagee of the person obtaining possession or title from the owner by fraud.

6. Same: Estoppel § 6d—

The fact that he has entrusted the bare possession of a chattel to another does not estop the true owner from denying such possessor's authority to sell or encumber it, but if the true owner invests the possessor with *indicia* of title, the true owner is estopped to claim ownership of the chattel as against an innocent purchaser or encumbrancer who pays value or loans money to the possessor in reliance thereon.

7. Same: Automobiles § 5—Owner held not estopped to assert title as against mortgagee of purchaser giving worthless check for cash sale.

The purchaser of an automobile under agreement for a cash sale gave his check for the purchase price, and the owner surrendered possession of the car and the unsigned registration card, but retained the certificate of title constituting the sole evidence of title under the law of the State of the owner's residence. The purchaser mortgaged the car. The check was dishonored. Upon repeated demand of the owner by long distance telephone, the purchaser made assurances that he would make the check good, and then advised the owner, while allegedly talking from the mortgagee's office, to draw a sight draft on the mortgagee. The mortgagee refused to pay the draft and took possession of the automobile. *Held:* Title did not pass to the mortgagee even though he took the mortgage in good faith, for value, and without notice, and the owner is not estopped to assert his title, since the unsigned registration card could in no event be an *indicium* of title, and the owner's conduct did not manifest an intent on his part to abandon or relinquish his right to cash payment.

8. Estoppel § 11b—

The burden of proof on the issue of estoppel is on the party asserting this defense.

9. Appeal and Error § 39e—

The admission of evidence over objection cannot be held prejudicial when substantially the same evidence is admitted without objection.

10. Evidence § 46—

Reference by a witness to his certificate of title to his automobile as "the title" to his car will not be held prejudicial when it appears that the witness was merely identifying the certificate preparatory to its introduction in evidence and was not testifying as to its contents or legal effect.

11. Sales § 11: Estoppel § 11b—

Whether the seller under a contract for a cash sale abandoned or relinquished his right to demand immediate cash payment was put in issue. *Held:* Testimony that upon dishonor of the check given in payment of the purchase price, the seller caused a sight draft to be drawn on the purchaser's mortgagee at the instance of the purchaser, and the draft itself, are competent in evidence to show the seller's state of mind after he learned of the nonpayment of the purchaser's check.

12. Trial § 7—

Where there is evidence that the mortgagee took his mortgage immediately after the mortgagor obtained possession, applied a large part of the proceeds of the loan to a pre-existing debt of the mortgagor, and falsely denied possession of the chattel when the true owner sought information after the disappearance of the mortgagor, *held* argument of counsel that the mortgagee attempted to practice a fraud upon the true owner is not beyond the bounds of propriety.

13. Appeal and Error § 6c (6)—

A misstatement of the contentions must be brought to the trial court's attention in apt time.

APPEAL by defendant Commercial Finance Company from *Godwin, Special Judge,* and a jury, at June Term, 1953, of FORSYTH.

Civil action for the recovery of an automobile.

Mike Disher, who was originally a party defendant, has been dismissed from the action by a voluntary nonsuit. For ease of narration, Eugene H. Wilson is called the plaintiff; the Commercial Finance Company is characterized as the defendant; and Paul Allen Duncan and Robert E. Bush are designated by their surnames. The defendant is a corporation which maintains an office at Winston-Salem, North Carolina, where it loans money on the security of motor vehicles.

Certain matters antedating this litigation are virtually undisputed. They are summarized in the numbered paragraphs set forth below.

1. The plaintiff, a resident of Radford, Virginia, owned a Chrysler automobile, which was registered with the Virginia Division of Motor Vehicles in conformity with Virginia law. As a consequence, the Chrysler was covered by a Virginia certificate of title and a Virginia registration card.

2. On 18 November, 1952, the plaintiff authorized Duncan to drive his Chrysler automobile from Virginia to North Carolina, and sell it in his behalf to any North Carolina automobile dealer who would pay him not less than $1,450.00 in cash for it. The plaintiff entrusted to Duncan in addition to the Chrysler and its operating keys his Virginia registration card, but he left the notice of transfer form on the reverse side of such card unsigned. He retained his Virginia certificate of title.

3. Pursuant to the authority given him by the plaintiff, Duncan drove the Chrysler to Winston-Salem, North Carolina, where he had the following transaction with Bush, a second-hand automobile dealer, who was a stranger to him and the plaintiff: Duncan and Bush made an oral agreement whereby Duncan agreed to sell Bush the plaintiff's automobile for a cash price of $1,450.00. Bush tendered Duncan his check for that amount drawn to the order of the plaintiff on the Bank of Kernersville, of Kernersville, North Carolina. Duncan believed the check to be good,

and accepted it as the means of payment of the sale price. As a consequence, Duncan delivered the Chrysler, the keys necessary to its operation, and the unsigned Virginia registration card to Bush. The transaction between Duncan and Bush occurred at 8:00 o'clock p.m. on 18 November, 1952.

4. These events took place the next day: (1) Bush displayed the Chrysler on his sales lot at Winston-Salem; (2) Bush executed to the defendant a chattel mortgage for $1,900.00 upon the Chrysler and another motor vehicle; and (3) the plaintiff delivered Bush's check to the First and Merchants National Bank at Radford, Virginia, for transmission through other banks to the Bank of Kernersville for payment. At the time of the execution of the chattel mortgage, Bush owed the defendant about $20,000.00. The defendant inspected the Chrysler at Bush's sales lot before taking the chattel mortgage from him, and Bush kept the vehicle there until the event specified in paragraph 9.

5. When Bush's check was presented to the Bank of Kernersville for payment, it proved to be worthless.

6. The plaintiff was informed of the worthlessness of Bush's check by the First and Merchants National Bank on 24 November, 1952. On that day and each of the four ensuing days, the plaintiff called Bush by long distance telephone, demanded of him that he make his check good at once, and received from Bush absolute assurances that he would make his check good without delay.

7. These assurances did not materialize. For this reason, the plaintiff called Bush again on 1 December, 1952, and held a colloquy with him by long distance telephone while he was allegedly in the office of the defendant. As the result of this colloquy, the plaintiff forwarded to the First National Bank of Winston-Salem through the First and Merchants National Bank a sight draft drawn on the defendant for the sale price of the Chrysler, to wit, $1,450.00. The Virginia certificate of title covering that vehicle was attached to the draft, and bore an assignment executed by the plaintiff purporting to transfer his title to that vehicle to Bush.

8. The First National Bank of Winston-Salem notified the defendant of its receipt of the sight draft, and held it for several days at the request of the defendant, which then refused to pay it. The First National Bank of Winston-Salem thereupon returned the sight draft and the attached certificate of title to the First and Merchants National Bank, which advised the plaintiff of the nonpayment of the draft on 9 December, 1952.

9. Meantime on some undesignated day between 1 December and 9 December, 1952, Bush vanished, and the defendant took into its possession the Chrysler and certain other motor vehicles which Bush had allegedly mortgaged to it. The defendant has retained the Chrysler ever since.

10. Upon being advised of the nonpayment of the sight draft, the plaintiff undertook to contact Bush by long distance telephone, and thereby ascertained that he had disappeared. On the next day, 10 December, 1952, the plaintiff visited the office of the defendant at Winston-Salem, and made inquiries of the defendant concerning the whereabouts of Bush and the Chrysler.

On the day after his visit to the office of the defendant, the plaintiff brought this action against the defendant for the recovery of the Chrysler. He sued out ancillary claim and delivery process in the action, but the defendant retained the automobile under an undertaking for replevy. The pleadings of the parties, which consisted of a complaint, an answer, and a reply, placed in issue the title to the Chrysler, and the right to its possession. They also put in issue the allegations of the answer pleading waiver and estoppel on the part of the plaintiff.

When the action was tried before Judge Godwin and a jury at the June Term, 1953, of the Superior Court of Forsyth County, both sides offered evidence consistent with the matters recited in numbered paragraphs 1 through 10.

The plaintiff added testimony indicating that when he visited its office on 10 December, 1952, the defendant denied having the Chrysler in its possession; that he did not learn of the supposed chattel mortgage until after that time; and that the Chrysler was worth at least $1,450.00 at the time of its retention by the defendant under the undertaking for replevy.

The defendant presented additional evidence tending to show that it believed in good faith that Bush was the absolute owner of the Chrysler because he had the car, its keys, and the Virginia registration card in his possession; that it was induced by this belief to loan $1,900.00 to Bush upon the chattel mortgage covering the Chrysler and another motor vehicle; that Bush applied $1,350.00 out of the proceeds of the loan upon his pre-existing debts to the defendant, and devoted the remaining $550.00 to purposes not known to it; that $1,300.00 remains unpaid on the loan secured by the chattel mortgage upon the Chrysler and the other motor vehicle; that the defendant had no contemporary or subsequent knowledge of the supposed colloquy of 1 December, 1952, between the plaintiff and Bush by long distance telephone while Bush was allegedly in its office; that the defendant did not authorize Bush or the plaintiff or any other person to cause the sight draft to be drawn upon it, and had no knowledge of its existence until it received notice of the fact from the First National Bank of Winston-Salem; that the defendant requested the bank to hold the sight draft until it could ascertain whether any of its officers had authorized its drawing; and that the defendant instructed the bank to return the sight draft unpaid just as soon as it completed its inquiry and learned that none of its officers had sanctioned its drawing.

The issues submitted to the jury, and the responses of the jury thereto, were as follows:

1. Is the plaintiff the owner and entitled to the immediate possession of the Chrysler automobile, as alleged in the complaint? Answer: Yes.

2. Is the plaintiff estopped to claim ownership of said Chrysler automobile as against the Commercial Finance Company, as alleged in the answer? Answer: No.

3. What was the fair market value of said automobile on 11 December, 1952? Answer: $1,450.00.

The trial judge thereupon adjudged that the plaintiff should recover the Chrysler, if delivery could be had, and that the plaintiff should recover the value of the Chrysler, *i.e.*, $1,450.00, from the defendant and the surety on its undertaking for replevy, with appropriate interest, if delivery could not be had. The defendant excepted to this judgment and appealed, assigning errors.

John D. Slawter and Womble, Carlyle, Martin & Sandridge for plaintiff Eugene H. Wilson, appellee.

William S. Mitchell for defendant Commercial Finance Company, appellant.

ERVIN, J. The defendant insists initially that it is entitled to a reversal of the judgment because all of the testimony disproves the plaintiff's claim. The defendant advances these four independent and successive arguments to sustain this position:

1. The entire evidence compels the single conclusion that the plaintiff, acting through his agent, accepted Bush's check as absolute payment of the purchase price of the Chrysler, and that in consequence the ownership as well as the possession of the automobile passed to Bush at the time of its delivery to him.

2. The entire evidence compels the single conclusion that the plaintiff waived the immediate cash payment of the purchase price of the Chrysler by his conduct after learning of the dishonor of Bush's check, and in that way permitted the title to the automobile to pass to Bush, even if the contract between the plaintiff's agent and Bush did contemplate a cash sale of the Chrysler, and even if the plaintiff's agent did originally take Bush's check as a mere conditional payment of its purchase price.

3. The entire evidence compels the single conclusion that the defendant took its chattel mortgage on the Chrysler from Bush in good faith, for value, and without notice of the plaintiff's claim, and that in consequence it is entitled to be treated as a *bona fide* purchaser and as such protected against the claim.

4. The entire evidence compels the single conclusion that the plaintiff entrusted the possession of his Chrysler to Bush; that the plaintiff also invested Bush with an *indicium* of title to the Chrysler, namely, its registration card; that the defendant took its chattel mortgage on the Chrysler from Bush for value in reliance on Bush's possession of the Chrysler and its registration card; and that in consequence the plaintiff is estopped to claim ownership of the Chrysler as against the defendant.

In passing on this phase of the appeal, we must read the testimony in the light of the relevant rules of law. These rules are stated in the numbered paragraphs which immediately follow.

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. *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391; *Little v. Fleishman,* 177 N.C. 21, 98 S.E. 455; *Davidson v. Furniture Co.,* 176 N.C. 569, 97 S.E. 480; *Hughes v. Knott,* 138 N.C. 105, 50 S.E. 586; Williston on Contracts (Rev. Ed.), Sections 730-733; 77 C.J.S., Sales, section 262. See, also, in this connection: *Grandy v. Small,* 48 N.C. 8; *Grandy v. McCleese,* 47 N.C. 142.

2. The seller may waive his contractual right to the immediate cash payment of the purchase price in a sale for cash and permit the title to pass to the buyer before the payment of the purchase price is made by language or conduct manifesting an intention on his part to abandon or relinquish his contractual right rather than to insist upon it. 46 Am. Jur., Sales, Section 446; 77 C.J.S., Sales, Sections 232, 262; 67 C.J., Waiver, Section 6. See, also, in this connection: *Manufacturing Co. v. Lefkowitz,* 204 N.C. 449, 168 S.E. 517; *Murphy v. Insurance Co.,* 167 N.C. 334, 83 S.E. 461. But he does not waive his contractual right by taking a check, which subsequently proves to be worthless, in payment for the property sold for cash. *Johnson v. Iankovetz,* 57 Or. 24, 110 P. 398, 29 L.R.A. (N.S.) 709.

3. In the absence of an agreement to the contrary, the delivery and acceptance of a check does not constitute payment of the item covered by it until the check itself is paid by the bank on which it is drawn. *South v. Sisk,* 205 N.C. 655, 172 S.E. 193; *Lumber Co. v. Hayworth,* 205 N.C. 585, 172 S.E. 194; *Raines v. Grantham,* 205 N.C. 340, 171 S.E. 360; *Moore v. Construction Co.,* 196 N.C. 142, 144 S.E. 692; *Dewey v. Margolis & Brooks,* 195 N.C. 307, 142 S.E. 22; *Hayworth v. Insurance Co.,* 190 N.C. 757, 130 S.E. 612; *Ins. Co. v. Durham County,* 190 N.C. 58, 128 S.E. 469; *Graham v. Warehouse,* 189 N.C. 533, 127 S.E. 540; *Bank v. Barrow,* 189 N.C. 303, 127 S.E. 3; *Thomas v. Prudential Ins. Co. of America,* 104 F. 2d 480. It necessarily follows that 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, no title whatever passes from the seller to the buyer until the check is paid; and the seller may reclaim the chattel from the buyer in case the check is not paid on due presentation. *Weddington v. Boshamer,* 237 N.C. 556, 75 S.E. 2d 530; *Parker v. Trust Co.,* 229 N.C. 527, 50 S.E. 2d 304; 28 N.C.L. Rev. 132-137.

4. 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 party's authority to make it. *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391; *Ellison v. Hunsinger,* 237 N.C. 619, 75 S.E. 2d 884; *Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312; *Land Co. v. Bostic,* 168 N.C. 99, 83 S.E. 747; *Lance v. Butler,* 135 N.C. 419, 47 S.E. 488; *Millhiser v. Erdman,* 98 N.C. 292, 3 S.E. 521; *Belcher v. Grimsley,* 88 N.C. 88; 56 Am. Jur., Sales, Section 464; 77 C.J.S., Sales, Section 295.

5. "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. *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391; *Williams v. Lewis,* 158 N.C. 571, 74 S.E. 17; *Durant v. Crowell,* 97 N.C. 367, 2 S.E. 541; *Wharton v. Moore,* 84 N.C. 479; *Winborn v. Gorrell,* 38 N.C. 117, 40 Am. D. 456; *Polk v. Gallant,* 22 N.C. 395, 34 Am. D. 410; *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. *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391; *Ellison v. Hunsinger, supra; Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312; 42 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. *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391; *Thomas E. Hogan, Inc., v. Berman,* 310 Mass. 259, 37 N.E. 2d 742; Williston on Contracts (Rev. Ed.), Section 1531; 46 Am. Jur., Sales, Section 471; 77 C.J.S., Sales, Section 294; Restatement of the Law of Restitution, Section 13. See, also, in this connection this decision:

Railroad v. Barnes, 104 N.C. 25, 10 S.E. 83, 5 L.R.A. 611. A mortgagee may occupy the status of a *bona fide* purchaser within the purview of these rules. "Accordingly, it is well established that, where a sale of personal property is induced by fraud, and the fraudulent purchaser mortgages the property to one who takes without notice of the fraud, and for a present consideration, the mortgagee occupies the position of a *bona fide* purchaser, and will be protected against the claim of the defrauded seller to the extent of the mortgage debt . . . Where, however, title to the property did not pass to the mortgagor, the mortgagee does not occupy the position of a *bona fide* purchaser and will not be protected against the claim of the rightful owner, at least where the owner has not clothed the mortgagor with the *indicia* of ownership to the extent of estopping him as against a mortgagee of the one in possession." 14 C.J.S., Chattel Mortgages, Section 307.

6. A conflict of authority exists in the several jurisdictions whose courts have had occasion to make direct pronouncement on the subject as to whether the seller can reclaim a chattel from a *bona fide* purchaser from or under the buyer where the seller delivers the chattel to the buyer under an agreement for a cash sale and takes from the buyer for the cash payment a check which afterwards proves to be worthless. "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 . . . 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." *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391.

7. Pursuant to the rules which prevail in the legal field known as the conflict of laws, this Court has applied the first line of authority to transactions occurring in Pennsylvania, South Carolina, and the District of Columbia. *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391; *Ellison v. Hunsinger, supra; Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312. It has apparently had no occasion, however, to make a ruling in a worthless check case arising in North Carolina in which the seller undertook to

reclaim a chattel from a *bona fide* purchaser from or under the buyer. 28 N.C.L. Rev. 135. But this Court has 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 the seller accepts a check from the buyer as a means of payment of the cash and delivers the property to the buyer. This being true, North Carolina necessarily belongs among the jurisdictions where the first line of authority obtains.

8. The possession of a chattel is not of itself an *indicium* of authority on the part of its possessor to sell or encumber it. Consequently the true owner of a chattel is not estopped to deny the authority of its possessor to sell or encumber it merely because he entrusted its possessor with its possession. But where the true owner entrusts the possession of his chattel to another and at the same time invests such other with the *indicia* of title to it, he is estopped to claim ownership of the chattel as against an innocent purchaser or encumbrancer who pays value or loans money to the possessor in reliance on the *indicia* of title. *Hawkins v. Finance Corp.,* 238 N.C. 174, 77 S.E. 2d 669; *Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312; *Ellison v. Hunsinger, supra; Bank v. Winder,* 198 N.C. 18, 150 S.E. 489; 46 Am. Jur., Sales, Sections 460, 463; 77 C.J.S., Sales, Section 295.

When the evidence is interpreted favorably to plaintiff in the light of these rules, it makes out this case:

The plaintiff contracted to sell his Chrysler automobile to Bush for cash. Thus the payment of the purchase price in cash and the passing of the title were concurrent conditions. When he accepted the check from Bush as a means of payment of the purchase price in cash, and delivered his Chrysler automobile to Bush, the plaintiff parted with the possession of his Chrysler car, and no more. As the check proved to be worthless on its due presentation to the drawee bank for payment, no title, either valid or voidable, passed from the plaintiff to Bush under the terms of their contract. The plaintiff did not waive his contractual right to the cash payment of the purchase price by his conduct after learning of the dishonor of the check. All he did was to insist that Bush comply with his contractual obligation and make immediate payment. Since no title, either valid or voidable, passed from the plaintiff to him, Bush did not confer upon the defendant by his chattel mortgage any right whatever as against the plaintiff, even if the defendant's assumption that it took the mortgage in good faith, for value, and without notice be valid. Although he entrusted the possession of the Chrysler automobile to Bush, the plaintiff did not invest Bush with any *indicium* of title to it. This is true because the plaintiff retained his Virginia certificate of title, and under the law of Virginia the sole evidence of the ownership of a motor

vehicle is the registered title as exemplified in the certificate of title. Virginia Code 1950, Sections 46-49 to 46-87; *Staunton Industrial Loan Corp. v. Wilson,* 190 F. 2d 706; *Sauls v. Thomas Andrews & Co.,* 163 Va. 407, 175 S.E. 760; *Thomas v. Mullins,* 153 Va. 383, 149 S.E. 494; *Holt Motors v. Casto* (W. Va. 1951), 67 S.E. 2d 432. The doctrine of estoppel would avail the defendant nothing on the present record even if we should ignore the law of Virginia and accept as valid the defendant's thesis that the plaintiff's registration card constituted an *indicium* of title to the Chrysler car. Since the notice of transfer form on the reverse side of the card was blank and unsigned, the registration card indicated that the plaintiff and not Bush owned the vehicle.

In leaving this phase of the appeal, we note that the burden of proof on the issue of estoppel rested on the defendant, and that the plaintiff did not introduce any evidence tending to show that the defendant took the chattel mortgage on the faith of Bush's possession of the plaintiff's registration card. *Aldridge Motors, Inc., v. Alexander,* 217 N.C. 750, 9 S.E. 2d 469. The jury rejected the defendant's evidence to that effect.

The defendant contends secondarily that it is entitled to a new trial because the trial judge erred in admitting evidence offered by the plaintiff; in permitting counsel for the plaintiff to argue to the jury that the defendant attempted to practice a fraud upon the plaintiff; and in stating one of the plaintiff's contentions to the jury.

The defendant noted two objections to the admission of the plaintiff's evidence that he held a colloquy with Bush by long distance telephone while Bush was at the office of the defendant. The defendant waived these objections, however, by allowing the plaintiff to give substantially the same testimony without objection in other portions of his examination. *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326; *Powell v. Daniel,* 236 N.C. 489, 73 S.E. 2d 143; *Lipe v. Bank,* 236 N.C. 328, 72 S.E. 2d 759; *Spivey v. Newman,* 232 N.C. 281, 59 S.E. 2d 844. We are unable to see how the defendant can justly complain of the receipt of the plaintiff's evidence that his Virginia certificate of title was "the title" to his car. The plaintiff was merely identifying the document preparatory to its introduction in evidence. He was not testifying to its contents or legal effect. 32 C.J.S., Evidence, Section 625. The trial judge did not err in permitting the plaintiff to testify to facts tending to show that at Bush's instance he caused a sight draft to be drawn on the defendant for the amount of the purchase price of the Chrysler automobile, and to be forwarded to a Winston-Salem bank for collection with the Virginia certificate of title bearing his assignment to Bush attached. The trial judge did not err, moreover, in admitting the sight draft in evidence. This testimony had a logical tendency to reveal the state of mind of the plaintiff after he learned of the nonpayment of Bush's check, and to refute the

allegation of the defendant that he intentionally abandoned or relinquished his contractual right to the payment of the purchase price as a condition concurrent with the passing of title. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639; *S. v. Black,* 230 N.C. 448, 53 S.E. 2d 443; *S. v. Mull,* 196 N.C. 351, 145 S.E. 677. Since there was evidence at the trial tending to show that Bush was largely indebted to the defendant at the time Bush received the possession of the Chrysler car, that the defendant took a chattel mortgage from Bush on the Chrysler car immediately after its receipt by Bush, that the defendant compelled Bush to apply the major portion of the sum allegedly secured by the chattel mortgage on the Chrysler car to his pre-existing indebtedness to it, and that the defendant falsely denied its possession of the Chrysler car when the plaintiff sought information as to its whereabouts preparatory to reclaiming it after the disappearance of Bush, we are constrained to hold that counsel for the plaintiff did not exceed the bounds of propriety in arguing to the jury that the defendant attempted to practice a fraud upon the plaintiff. 64 C.J., Trial, Section 268. The trial judge did not err in his statement of the contention of the plaintiff. The contention had legitimate support in testimony. Moreover, the exception to its statement was noted for the first time in the case on appeal. *Powell v. Daniel, supra; S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608.

Since no error in matter of law or legal inference appears, the judgment will be sustained.

No error.

JOHN MARTIN SMITH v. GULF OIL CORPORATION.

(Filed 29 January, 1954.)

1. Evidence §§ 6, 26—

Evidence that on a certain date three leaks were discovered in underground pipes connecting buried gasoline tanks to service station pumps, that the equipment was installed in rocky soil in ground that had been partially filled in, and that motor vehicles and trucks frequently drove over the buried equipment, *held* not to raise an inference or presumption that the leaks existed at the time the equipment was installed almost two years prior thereto.

2. Negligence § 3½—

The doctrine of *res ipsa loquitur* does not apply when the instrumentality causing the injury is not under the exclusive control or management of the defendant.

3. Same—

The operator of a service station made a contract with an oil company under which the company installed storage tanks, pumps and connecting

pipes, retaining title to all the equipment, and defendant was obligated to maintain the equipment in good condition and repair so long as he continued to use same. *Held:* The doctrine of *res ipsa loquitur* does not apply to leaks discovered in the pipes connecting the storage tanks and pumps, since the instrumentality was not under the exclusive control of the company.

4. Negligence § 19a (1)—Evidence held insufficient for jury on issue of defendant's negligence in installing gasoline equipment.

Under the contract between plaintiff, a filling station operator, and defendant oil company, defendant agreed to install gasoline pumps and underground storage tanks with connecting pipes, and plaintiff contracted to use the equipment only for the sale of defendant's products and to keep the equipment in good condition and repair. The evidence favorable to plaintiff tended to show that the underground pipes were installed in partially filled ground in rocky soil, that vehicles frequently drove over the underground equipment, that when one of the pumps was first used in the mornings it would run from five to six minutes before it would start pumping gasoline, that plaintiff later found there was a difference between the number of gallons of gasoline he purchased and the number of gallons he sold and was under the impression that defendant's truck drivers were not delivering to him the full quantity purchased, that some time later gasoline was found in a branch into which the terrain drained, and that almost two years after installation, when the pipes were uncovered, leaks were found in the ells of the underground pipes. *Held:* The evidence was insufficient to be submitted to the jury on the issue of defendant's negligence in the installation of the equipment, the doctrine of *res ipsa loquitur* being inapplicable and the evidence raising no presumption that the leaks in the pipes existed at the time of installation.

5. Same:—Evidence held insufficient on issue of defendant's negligence in failing to discover leaks in underground pipe.

Evidence tending to show that, after the installation of gasoline pumping equipment by defendant, plaintiff reported a number of times the failure of one of the pumps to pump gasoline immediately it was put into operation, that each time defendant sent out men to work on the pump, and that more than a year later gasoline was found in a branch into which the terrain drained, and that leaks were discovered in the pipe connecting the underground tank to the pump, when the pipe was uncovered, with further evidence that plaintiff was under contract at his own expense to maintain equipment in good condition and repair and could have uncovered the pipes if he desired to do so, is *held* insufficient to be submitted to the jury on the question of defendant's negligence in failing to use due care to discover the leaks.

6. Negligence § 17—

The general rule is that an injury neither raises a presumption nor is it evidence of negligence.

7. Trial § 23a—

There must be legal evidence of every material fact necessary to support the verdict, and if there be no evidence of each such fact or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue

or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury.

8. Election of Remedies § 1—

The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress of a single wrong.

9. Election of Remedies § 7—

When a party elects which remedy he will pursue, such election is final and irrevocable, since the adverse party should not be twice vexed for one and the same cause.

JOHNSON, J., dissenting.

APPEAL by plaintiff from a judgment of nonsuit from *Rudisill, J.*, March Civil Term 1953. GUILFORD.

This is a civil action in which the plaintiff, operator of a service station, seeks to recover alleged damages for alleged leakage of gasoline from pipes at his station. The plaintiff declared upon two causes of action: (1) Breach of contract by the defendant in failing to install pipes so as to avoid leakage; (2) negligence of the defendant in installing the pipes to prevent leakage, and failure to use due care in discovering leakage. At the close of the plaintiff's evidence the court granted the defendant's motion to require the plaintiff to elect which cause of action he relied upon. The plaintiff elected tort as a cause of action.

Plaintiff's testimony tended to show these facts. He desired to purchase petroleum products from the defendant for resale at a service station in the City of Greensboro operated by him, and leased from his father, and he requested the defendant to loan and install equipment owned by the defendant for the better storage and handling of such products. For such purpose he and the defendant entered into a written agreement on 31 December 1949. The provisions of the agreement material in the case are these: (1) The defendant retained title of all equipment installed; (2) the equipment shall be used solely for handling defendant's products; (3) the plaintiff "shall at his own cost and expense maintain said equipment in good condition and repair so long as he shall continue to use the same."

Pursuant to the agreement the defendant furnished and installed the necessary equipment, including two 20 barrel underground tanks and two Bennett Computor Pumps, connecting the tanks to the pumps by means of pipes. The equipment was installed in extra rocky soil. The pipes were covered with dirt. The plaintiff was not present when the equipment was installed.

Plaintiff began operating the station about the middle of April 1950. He sold Gulf No-Nox (high test) and Good Gulf (regular) gasoline.

The plaintiff had no trouble with the No-Nox pump and the pipes leading to this pump. When he began operations the pump on the regular line the first time it was used in the morning would run anywhere from 5 to 6 minutes before it would start to pumping gas. The motor would run, but no gasoline would flow. At different intervals during the day the time the motor would run before it started to pump gasoline would vary, depending on how long the pump set. The plaintiff reported this to the defendant 12 or 15 times or more. Each time it was reported the defendant sent men out to work on the pump, but it was not corrected until the defendant uncovered the pipes and found a leakage, in February 1952.

In the Fall of 1950 the plaintiff found there was a difference in the amount of gasoline he sold and the amount he had bought from the defendant. He reported this to the defendant who advised him to keep a better check on the drivers delivering gasoline. The plaintiff was under the impression the drivers were not delivering as much gasoline as he was paying for.

In February 1952 the plaintiff inspected a small branch about 150 feet north of the station, and discovered gasoline in the branch. The branch is 2 or 3 feet wide, and the terrain between the station and the branch slopes downward at about 15 degrees. The soil from the station to the branch is a hard, claylike substance. The gasoline was bubbling in the branch.

Earl Redding was a witness for the plaintiff. The branch is about midway between his place and the plaintiff's station. In 1951 he found "oily stuff" on the waters of the branch. In February 1952 he went to this branch again, and saw bubbles with all the colors of the rainbow, which smelled a lot like gasoline.

Immediately after seeing this gasoline in the branch the plaintiff reported it to the defendant. The same day, which was Friday, the defendant sent there its pump mechanic, Mr. Gray. Gray went to the branch, got a can full of its water, put fire on the water, and it burned. He said "that's gasoline all right." Later that day two other employees of the defendant went to the branch, and they also "lit the water there."

On the following Monday the defendant sent two mechanics to the station. They dug up both pipe lines. On the regular line at an ell gasoline was shooting up about 10 inches when they uncovered it. About two feet on the same line at another ell gasoline was streaming down the pipe. The pipe on the regular line holds 6½ gallons between the first leak and the pump. On the high test line there was a small seepage at a filling. The soil around the pipes was wet—a match was applied to a handful of it, and it blazed up and started burning. After the lines had been repaired, and covered up the pump on the regular tank of gasoline started pumping gasoline immediately as soon as the motor began. The

defendant had done nothing to that pump after discovering the leaks and repairing them.

From the day the plaintiff began operating the station until the leaks were repaired in February 1952, he bought 82,328 gallons of gasoline from the defendant. During that time he sold 69,665 gallons. After allowing a half per cent for evaporation, the difference is 12,663 gallons. He paid the defendant 24c per gallon for this gasoline, and its value was $3,023.76.

On cross-examination of plaintiff he testified in substance as follows: He calculated the number of gallons which had leaked by adding the number of gallons shown by the invoices made by the defendant and subtracted the number of gallons sold by him. He determined the number of gallons sold from the tape of his adding machine cash register, upon which tape there were various other items. He distinguished the items of gasoline sold because the letter "F" was placed by each item of gasoline. The number of gallons sold was determined by dividing the amount of the item by the price per gallon of gasoline. The tape had been run through the machine twice, and sometimes three times. At times undesignated items were marked "F," and the designation of other items were changed to and from "F."

On redirect examination the plaintiff testified: "I bought $20,494.28 worth of gas from Gulf Oil Company. I sold $24,589.39 worth of gas. I added a mark-up of 19% to the amount of gas I bought from Gulf, and subtracted that from the amount of gas I sold. That gave me in dollars and cents the amount of gas that leaked out. In computing the amount in dollars and cents, I used an average selling price of regular gas."

Worth Moser, a witness for the plaintiff, testified in substance: I have installed and worked on suction pumps off and on ten years. I have used the pump on the regular gasoline line at plaintiff's station. It is an electrically operated suction pump. I saw the leaks in the line when it was uncovered—there were three leaks, which would cause the pump to run several minutes before it started sucking gasoline.

Mrs. J. M. Smith, wife of the plaintiff, M. M. Smith, his father, and Glenn Pittman testified as to the failure of the pump on the regular gasoline line to pump gasoline immediately it was started, and M. M. Smith and Glenn Pittman testified that they saw leakage when the lines were uncovered; and M. M. Smith testified in February 1952 he saw gasoline in the branch.

The plaintiff's evidence further tended to show that the pipes between the pumps and the tanks were placed in ground that had been partially filled in, and that motor vehicles and the Gulf truck drove over the spot where the broken ell that spouted gasoline was located.

A summation of the defendant's evidence tended to show the following: There was no leak in any ell or pipe or fitting when they were installed in April 1950. After the installation of the equipment by the defendant the pumps were primed and drew out gasoline. If there was a leak in either line when the pumps were primed, it would have been discovered. In February 1952 there was gasoline in the branch north of the station. In February 1952 the defendant uncovered the pipes to make repairs. No leak was found in the No-Nox pipe. In the Good Gulf pipe there was only one leak coming from a crack in the ell. The crack was in the threads. This leak was draining back on the line which was dripping from a coupling. It wasn't leaking much—just moisture seeping out. When first uncovered you could wipe it off with a rag. When you cranked the pump up and when the motor was running, it caused it to leak a little more. When the wrench was put on the ell to take it off, it leaked more because it made it crack more. After the wrench was put on the pipe, gasoline gushed out. The ell was replaced with a new one. The ground around the leak was wet and smelt of gasoline. A break in the line between the pump and the tank would cause the pump to jerk on a start, hesitate. It would not make the pump run any length of time before it sucked up gasoline. The pump could not draw air. If it drew air, the pump would not operate and would not put out any gasoline. The plaintiff complained to the defendant several times about the operation of the Good Gulf pump. In February 1952 the plaintiff said something about the manner in which the defendant's mechanics installed the equipment. C. L. Osmint, who was stipulated by counsel to be an expert witness on Bennett Gasoline Pumps testified as follows: "The pump itself creates the power to suck the gasoline up through the line and out the nozzle. Now, in cases where you have a broken line and you are drawing air through the line, air, being much lighter than liquid, is drawn first, the liquid being heavier than air, and the pump draws from the source of the least resistance and will draw air into the line. This air, when it is thrown into the air chamber by the pump, will not hold the float up; it allows the float to come down, operating the valve mechanism of this air eliminator. When this valve is opened by the float, it allows the air to escape through an escape port or vent tube, which is vented to the recess that the nozzle is set into. Any time a service man is servicing a pump of this type, if the pump is not pumping, his first action usually is to put his ear to this vent which escapes into the atmosphere to check to see if there is any air coming out. Of course, he knows if there is, there is a break in the line."

At the close of the plaintiff's evidence the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted. At the

close of all the evidence the defendant renewed its motion for nonsuit, which was allowed, and the plaintiff excepted.

From the judgment entered the plaintiff appeals to the Supreme Court.

J. J. Shields for plaintiff, appellant.
Hoyle & Hoyle for defendant, appellee.

PARKER, J. The plaintiff contends that considering the evidence in the light most favorable to him, it makes out a case for the jury that the defendant was negligent in failing to install the pipes so as to prevent leakage. Considered in that light the evidence tended to show these facts: In the middle of April 1950 the defendant installed the pipes, pumps, etc., at his filling station. The pipes were installed in partially filled in ground, extra rocky soil, and covered with dirt. Automobiles and the Gulf truck frequently drove over the place. The plaintiff had no trouble with the No-Nox pump. When he began operations the pump on the Good Gulf line the first time it was used in the morning would run anywhere from 5 to 6 minutes before it would start to pumping gasoline. When the Good Gulf line was uncovered in February 1952, it had three leaks in it, which would cause the pump to run several minutes before it started to sucking gasoline. In the Fall of 1950 the plaintiff first found out there was a difference between the number of gallons of gasoline he paid for and sold. He was under the impression the truck drivers were not delivering to him the number of gallons of gasoline he was buying. In February 1952 the pipes were uncovered and three leaks were discovered in the Good Gulf pipes, and gasoline was found in a branch about 150 feet north of the station. The terrain between his station and the branch slopes downward at about 15 degrees. The equipment installed was not under the exclusive control and management of the defendant.

The evidence tending to show that three leaks were discovered in the Good Gulf line in February 1952, does not raise an inference or presumption that the same state of facts existed in April 1950. *Childress v. Nordman,* 238 N.C. 708, 78 S.E. 2d 757, where numerous cases are cited.

We are of the opinion that the evidence does not make out a case for the jury on this contention, unless the doctrine of *res ipsa loquitur* applies.

The plaintiff invokes this doctrine. The principle of *res ipsa loquitur* has been so often stated by this Court, and so recently in *Young v. Anchor Co., ante,* 288, 79 S.E. 2d 785, by *Devin, C. J.,* where the cases are assembled, that it needs no restatement. The plaintiff cites in support of his argument on this point these cases from our Reports: *Harris v. Mangum,* 183 N.C. 235, 111 S.E. 177; *Saunders v. R. R.,* 185 N.C. 289, 117 S.E. 4; *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251; *Howard v. Texas Co.,* 205 N.C. 20, 169 S.E. 832; and *Covington v. James,* 214 N.C. 71, 197 S.E. 701.

The doctrine does not apply when the instrumentality causing the injury is not under the exclusive control or management of the defendant. *Harris v. Mangum, supra; Saunders v. R. R., supra; Springs v. Doll, supra; Howard v. Texas Co., supra.*

The cases relied upon by the plaintiff are not in point. In *Harris v. Mangum,* and *Howard v. Texas Co.,* the instrumentalities causing the damage were under the exclusive control or management of the defendants; *Covington v. James* is a malpractice case; in *Saunders v. R. R.,* it was held that the doctrine did not apply as the thing causing the injury was not under the exclusive control of the defendant; and in *Springs v. Doll,* it was held the doctrine did not apply to an injury from a skidding automobile. Under our decisions the doctrine of *res ipsa loquitur* does not apply to the facts of this case.

The plaintiff also contends that the evidence makes out a case for the jury of negligence on the part of the defendant in failing to use due care to discover the leakage.

The contract between the plaintiff and the defendant provides that the plaintiff "shall at his own cost and expense maintain said equipment in good condition and repair so long as he shall continue to use the same."

In support of his contention the defendant cites one case, *Andrews v. Oil Co.,* 204 N.C. 268, 168 S.E. 228 (trial of case by a judge and jury found without error in a *per curiam* decision in 206 N.C. 900, 172 S.E. 526). In the 204th Report the case was before this Court on the overruling of a demurrer to the complaint.

The complaint has these words: "The said service station was equipped with three gasoline tanks buried under ground and covered with concrete . . . Plaintiff had no right to tear up concrete and inspect the tanks which were the property of the defendant, and no duty to do so, and relied upon the assurances made to him by the defendant in continuing to let the defendant put gasoline into the said tanks." The plaintiff in his brief quotes from the case in the 204th Report as follows: "The defendant was in possession of a gasoline filling station. It had buried underground and covered with concrete three gasoline tanks for the purpose of housing gasoline. In the pipes of one gas tank was a leak which was unknown to the plaintiff. The defendant had sole control of the tanks and pipes. They were installed by and the property of the defendant. The defendant knew or, in the exercise of due care, ought to have known of the leak." This quotation is not *verbatim.* The opinion shows that the Court used these words: "The defendant was in possession of a gasoline filling station. It had buried underground, concealed in the earth and covered with concrete, three gasoline tanks for the purpose of housing gasoline. Two of these had one gasoline pump each and the other had two gasoline pumps, connected with the tank by underground pipes through a T-joint.

In the pipe at the T-joint to the gasoline tanks was a leak, which was unknown to plaintiff. Defendant had the sole control over the tanks, pipe and T-joint. They were installed by and the property of defendant. Defendant knew, or in the exercise of due care ought to have known, of the leak." This case does not support the defendant's contention.

The evidence tends to show that the plaintiff reported to the defendant 12 or 15 times or more the failure of the pump on the Good Gulf line to start pumping gasoline immediately the motor on the pump was put in operation, and each time the defendant sent men out to work on the pump. That when gasoline was found in the branch on a Friday in February 1952, the defendant the same day sent a man out, and on the following Monday the defendant uncovered the pipes, found leaks and repaired them. Under the contract the plaintiff at his own expense was to maintain the equipment in good condition and repair so long as he continued to use it. The plaintiff could have uncovered the pipes by removing the dirt, if he had desired to do so.

We think the evidence is not sufficient to carry the case to the jury that the defendant failed in the exercise of due care to discover the leaks in the pipes. The general rule is that an injury neither raises a presumption nor is it evidence of negligence. There is a well recognized exception to this rule which has no application to this case. *Shaw v. Mfg. Co.*, 143 N.C. 131, 55 S.E. 433; *Orr v. Rumbough,* 172 N.C. 754, 90 S.E. 911; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Patton v. R. R.,* 179 U.S. 658, 45 L. Ed. 361. "There must be legal evidence of every material fact necessary to support the verdict and the verdict 'must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities.'" *Mills v. Moore, supra.* In *Mfg. Co. v. R. R.*, 233 N.C. 661, 65 S.E. 2d 379, the Court quotes these words from *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12: "'The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury.'"

At the close of the plaintiff's evidence the Court, upon motion of the defendant, required the plaintiff to elect what cause of action he relied upon in seeking damages, breach of contract or for negligence. The plaintiff selected "tort as a cause of action." The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. The plaintiff having made his election it is final and irrevocable: the underlying basis of the rule being the maxim which forbids that one shall be twice vexed for one and the same cause. *Friederichsen v. Renard,* 247 U.S. 207, 62 L. Ed. 1075; *U. S. v. Oregon Lumber Co.,* 260 U.S. 290, 67 L. Ed. 261; 18 Am. Jur., Election

of Remedies, Sec. 20; 28 C.J.S., Election of Remedies, Sec. 29. "Where he has two remedies, he may choose between them and select that one which he deems the best for him, but he must abide the result of his choice. This is not only legally but morally right." *Baker v. Edwards,* 176 N.C. 229, 97 S.E. 16.

The judgment of the Superior Court is
Affirmed.

JOHNSON, J., dissenting: The installation here complained of was made by the defendant in the Spring of 1950. The evidence discloses that one pump unit did not function properly the first day. The pump would run five or six minutes before it would start pumping gas. This indicated that air was getting in the gas line somewhere below the pump. It is evidence of faulty installation. It would seem that the defendant's repairman should have been put on notice that this condition likely came from a leak in the gas line, and in the exercise of due care he should have sought out the leak and repaired it. Yet, this was not done. The plaintiff repeatedly notified the defendant—"12 or 15 times or more"—that the pump was not working properly, and each time the defendant sent men out to work on the pump. These repairmen failed to locate and correct the trouble. Finally, the leak was located and repaired in February, 1952. Conceding that under the contract it was the duty of the plaintiff "to maintain the equipment," even so, when the defendant undertook from time to time to correct the faulty installation as reported by the plaintiff, and sent men out to the plaintiff's place to work on the pump, the defendant became chargeable with failure of these men to exercise due care in locating the leak. This assumption of responsibility on the part of the defendant dilutes the legal effect of the contract provision which required the plaintiff to maintain the equipment. It is elemental that the law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another, to exercise due care and skill in the performance of the undertaking, and for the nonperformance of such duty an action will lie. Nor may a duty voluntarily assumed be carelessly abandoned without incurring liability for injury resulting from the abandonment.

I am constrained to the view that the evidence relied on by the plaintiff is sufficient to support the inference that the defendant was actionably negligent, both in respect to the original installation and for failure to exercise due care in discovering the leak after the plaintiff notified the defendant about the malfunctioning pump. It seems to me the plaintiff made out a *prima facie* case on each of these grounds, and this, without calling to his aid the principle of *res ipsa loquitur.* Therefore my vote is to reverse the judgment of nonsuit.

JUANITA B. FULLER, RUTH B. BRANCH, THETA MAE B. FREEMAN AND FANNIE B. PREVATTE v. INGRAM P. HEDGPETH, EXECUTOR AND TRUSTEE UNDER THE WILL OF ENOCH BRITT, EDNA BRITT, ANNIE BRITT, HORACE BRITT, WANDA LOU BRITT, LINDA GAYLE BRITT AND BETTY ANN BRITT, THE LAST THREE NAMED, CHILDREN OF HORACE BRITT, AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO HORACE BRITT, AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO BETTY ANN BRITT, ESTHER MAE BRITT NYE, AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO ESTHER MAE BRITT NYE, ELLEN LOUISE B. ROWAN, AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO ELLEN LOUISE B. ROWAN, E. H. BRANCH, AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO E. H. BRANCH, DIANE FULLER, AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO DIANE FULLER, ELVIN FREEMAN, AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO ELVIN FREEMAN, WILBER BRITT, AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO WILBER BRITT, MILDRED PREVATTE ALLEN, AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO MILDRED PREVATTE ALLEN.

(Filed 29 January, 1954.)

1. **Wills § 31—**

When the validity of an item in a will is challenged on the ground of uncertainty, it will be declared void on that ground only when its terms are so indefinite and uncertain that the court, in applying the usual rules of construction, is unable to declare the intention of the testator for the reason that in legal contemplation there was no expression of intention on his part.

2. **Trusts § 3b—**

A devise and bequest of property to a named trustee to be managed by him, with direction that he pay the entire net income to testator's widow for life or widowhood, with further direction that the use of designated parcels of the residue be set over to named children or grandchildren of testator, and that upon the death of the life beneficiaries the trustee should convey to designated ultimate beneficiaries, *is held* to create an active trust.

3. **Wills § 34b: Trusts § 3a—**

Where there is no uncertainty or vagueness in the provisions of the trust devising and bequeathing certain property to the trustee with direction that the net income thereof be paid to testator's widow during the term of her life or widowhood, *held* the trust will not be declared void for asserted uncertainty or vagueness in the final disposition of the property, since if the trust provisions are good in any respect or to any extent a broadside challenge thereto must fail.

4. **Wills § 39—**

The courts will not consider questions relating to possible uncertainties as to who will take portions of testator's property upon the happening of certain events, since such questions are premature and speculative questions of interpretation to be determined if and when they arise in the future.

5. Wills § 31½—

Where a codicil makes a disposition of property at variance with provisions made in the will respecting the same property, the inconsistent provisions are not void for repugnancy since, even though the codicil does not in express language revoke the corresponding item of the will, it revokes such inconsistent provision of the will by implication.

6. Wills § 33h—

Under the rule against perpetuities, no devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not less than twenty-one years, plus the period of gestation, after some life or lives in being, at the time of the creation of the interest.

7. Same—

The controlling factor in the application of the rule against perpetuities is the time when a future interest vests, rather than the time when it comes into enjoyment.

8. Same—Trust held not to violate rule against perpetuities.

Testator devised certain property to a named trustee with provision that the entire net income therefrom be paid to testator's widow during her life or widowhood, and that upon the termination of her estate, use of designated parcels of the residue should be set over to named children and grandchildren of testator for life, with further direction that upon the death of these life beneficiaries the property should be conveyed in fee simple to the children or heirs of named life tenants. *Held:* The trust does not violate the rule against perpetuities, since the fee simple title vests in the ultimate beneficiaries as at the time of the death of testator, with enjoyment postponed during the preceding life estates.

APPEAL by plaintiffs from *Carr, J.*, at February-March Civil Term, 1953, of ROBESON.

Civil action under the Declaratory Judgment Act (G.S. 1-253 *et seq.*) to determine whether the trust provisions of the will of Enoch Britt are void.

After the testator's death in October, 1952, his will, and two codicils thereto, were admitted to probate in the office of the Clerk of the Superior Court of Robeson County as his last will and testament. Following this, the plaintiffs, who are heirs at law of the testator and devisees and legatees under the residuary clause of his will, instituted this action alleging that: "The trust provisions of said will, and codicils thereto, are vague, indefinite, uncertain, contradictory, violate the rule against perpetuities, and are therefore void." The defendants filed answers denying these allegations.

The trust provisions under attack are set out in summary and in pertinent part as follows:

"ITEM II. I will, devise, and bequeath all of my property, of every sort, kind and description, both real and personal, which is left after

carrying out the provisions of Item One hereof, unto INGRAM P. HEDGPETH, as Trustee, to be by said Trustee held, managed and disposed of in the manner and for the uses and purposes following (another item of the will provides for successor trusteeship):

"(a) The said Trustee shall, at all times during the continuance of this trust, keep all property in his hands in a reasonable state of repair and preservation, and pay all taxes not hereinafter provided, insurance premiums and other charges thereon.

"(b) My said Trustee shall, during the term of the natural life or widowhood of my beloved wife, Edna Britt, pay to her the net income arising from my said Estate, and in addition thereto my said Trustee is hereby directed to provide her the use of my said home, together with the furniture and fixtures therein contained, together with such other of my personal property as may be necessary for her comfort and support.

"(c) After the death of my said wife, or in the event she should remarry, my said Trustee aforesaid is hereby directed to convey and deliver to my son, Horace Britt, any and all farming tools and equipment, including tractors and trucks belonging to my said estate; and my said Trustee is likewise authorized and directed to set over and deliver to the said Horace Britt, the possession and use of the following described real estate belonging to my said Estate for and during the term of his natural life, conditioned upon his paying the annual taxes thereon: (Then follows description of four tracts of land aggregating 172 acres, more or less.)

"(d) Upon the death of my son, Horace Britt, my said Trustee shall convey the lands set forth in the preceding paragraph (c) hereof, in fee simple, share and share alike, to my daughter, Esther Mae Britt, and to my daughter, Ellen Louise Britt, and to my granddaughter, Betty Ann Britt. However, in the event that my said daughters, Esther Mae Britt and Ellen Louise Britt, and my granddaughter, Betty Ann Britt, be not living at the time of death of my son, Horace Britt, then in that event I direct my said Trustee to convey the interest to their heirs at law.

"(e) After the death of my said wife, or in the event she should remarry, my said Trustee is hereby authorized and directed to set over and deliver to my beloved daughter, Ellen Louise Britt, the "Home Place" where I now reside, and the Second Tract containing one-fourth (¼) of an acre (description follows), the possession and use of said lands to be during the terms of her natural life, conditioned upon her paying the annual taxes thereon.

"(f) Upon the death of my said daughter, Ellen Louise Britt, my said Trustee is hereby authorized and directed to convey the lands referred to in paragraph (e) hereof, in fee simple, share and share alike, to the children born to my said daughter, Ellen Louise Britt, and to the representative of any deceased child of the said Ellen Louise Britt."

The foregoing provisions of paragraph (e) and (f) were modified by Second Codicil, Item 1, as follows:

"ITEM I. In Item 2, Subdivision "E" of my last will and testament, executed on the 15th day of February, 1951, I devised to my beloved daughter, Ellen Louise Britt, a certain tract or parcel of land known as the "Home Place" where I now reside and the Second Tract containing one-fourth (1/4) of an acre (description follows), the possession of and use of said lands to be during the term of her natural life, conditioned upon her paying the annual taxes thereon, and it is now my will and desire that after the death of my said wife or in the event that she should re-marry, my said Trustee is hereby authorized and directed to set over and deliver to my beloved daughters, Ellen Louise Britt Rowan and Esther Mae Britt as tenants in common, the "Home Place," where I now reside, and the Second Tract containing one-fourth (1/4) of an acre (same description), the possession and use of said lands to be during the term of their natural lives, conditioned upon their paying the annual taxes thereon. Upon the death of my said daughters, Ellen Louise Britt Rowan and Esther Mae Britt, my said Trustee is hereby authorized and directed to convey the lands referred to in fee simple, share and share alike, to the children born to my said daughters, Ellen Louise Britt Rowan and Esther Mae Britt, and to the representative of any deceased child of the said Ellen Louise Britt Rowan and Esther Mae Britt."

"(g) After the death of my said wife, or in the event she should remarry, my said Trustee is hereby authorized and directed to set over and deliver to my said daughter, Esther Mae Britt, all that certain First Tract or parcel of land, containing 25 acres (description follows), the possession and use of said lands to be for the term of her natural life, conditioned upon her paying the annual taxes thereon.

"(h) Upon the death of my said daughter, Esther Mae Britt, my said Trustee is hereby authorized and directed to convey the lands referred to in paragraph (g) hereof, in fee simple, share and share alike, to the children born to the said Esther Mae Britt, and to the representative of any deceased child of the said Esther Mae Britt."

The foregoing provisions of Paragraphs (g) and (h) were modified by Second Codicil, Item 2, as follows:

"ITEM 2. In Item 2, Subdivision "G" of my said last will and testament executed the 15th day of February 1951, I devised all that certain . . . tract or parcel of land containing 25 acres (description follows), to my daughter, Esther Mae Britt, the possession of said land to be for the term of her natural life, conditioned upon her paying the annual taxes thereon, and it is now my will and desire that after the death of my said wife or in the event that she should remarry, my said Trustee is hereby authorized and directed to set over and deliver to my said son, Horace

Britt, all that certain . . . tract or parcel of land containing 25 acres (same description) and the possession and use of said lands to be for the term of his natural life, conditioned by his paying the annual taxes thereon. Upon the death of my said son, Horace Britt, my said Trustee is hereby authorized and directed to convey the lands herein referred to in fee simple, share and share alike to the children born to the said Horace Britt and to the representative of any deceased child of the said Horace Britt."

"(i) After the death of my said wife, or in the event she should remarry, my said Trustee is hereby authorized and directed to set over and to deliver to my grandson, E. H. Branch, son of my daughter, Ruth, the following described real estate, the possession and use of said lands to be for the term of his natural life, conditioned upon his paying the annual taxes thereon. (Then follows description of two parcels of land.)

"(j) Upon the death of my said grandson, E. H. Branch, my said Trustee is hereby authorized and directed to convey the lands referred to in paragraph (i) hereof, in fee simple, share and share alike, to the children born to the said E. H. Branch and to the representative of any deceased child of the said E. H. Branch.

"(k) After the death of my said wife, or in the event she should remarry, my said Trustee is authorized and directed to set over and deliver to my granddaughter, Diane Fuller, child of my daughter, Juanita Fuller, and to Elvin Freeman, my grandson, a certain lot or parcel of land situate in the City of Lumberton, North Carolina (description follows). The possession and use of said land to be for the terms of their natural life, conditioned upon their paying the annual taxes thereon.

"(l) Upon the death of the said Diane Fuller and Elvin Freeman, my said Trustee is hereby authorized and directed to convey the lands referred to in paragraph (k) hereof, in fee simple, share and share alike, to the children born to the said Diane Fuller and Elvin Freeman, and to the representative of any deceased child of the said Diane Fuller and Elvin Freeman.

"(m) After the death of my said wife, or in the event she should remarry, my said Trustee is hereby authorized and directed to set over and deliver to my daughters Wilbur (*sic*) Britt and Mildred Prevatte, my farm known as the "Moody Place," containing 40 acres, and my tract of land in the swamp across Joel's Lake known as Brumbles Island, containing 50 acres, the same to be divided equally between them (provision not pertinent to decision omitted), the possession and use of said lands and such possession and use thereof to be for and during the term of the life of the said Wilbur (*sic*) Britt and Mildred Prevatte, conditioned upon their paying the annual taxes thereon.

"(n) Upon the death of my said daughters Wilbur (*sic*) Britt and Mildred Prevatte, my said Trustee is hereby authorized and directed to convey the lands referred to in paragraph (m) hereof, in fee simple, share and share alike, to the children born to the said Wilber Britt and Mildred Prevatte, and to the representative of any deceased child of the said Wilber Britt and Mildred Prevatte.

"(o) After the death of my said wife, or in the event she should remarry, my said Trustee is hereby authorized and directed to set over and deliver to my daughter, Esther Mae Britt and to my daughter, Ellen Louise Britt, all that certain tract or parcel of land situate in the City of Lumberton, Robeson County, North Carolina (description follows). The possession and use of said lands to be for the term of their natural life, conditioned upon their paying the annual taxes thereon.

"(p) Upon the death of my said daughters, Esther Mae Britt and Ellen Louise Britt, my said Trustee is hereby authorized and directed to convey the lands referred to in paragraph (o) hereof, in fee simple, share and share alike, to the children born to the said Esther Mae Britt and Ellen Louise Britt, and to the representative of any deceased child of the said Esther Mae Britt and Ellen Louise Britt.

"(q) After the death of my said wife, or in the event she should remarry, my said Trustee is hereby authorized and directed to set over and deliver to my granddaughter, Betty Ann Britt, those two certain lots (description follows). The possession and use of said lands to be for the term of her natural life, conditioned upon her paying the annual taxes thereon.

"(r) Upon the death of my said granddaughter, Betty Ann Britt, my said Trustee is hereby authorized and directed to convey the lands referred to in paragraph (q) hereof in fee simple, share and share alike, to the children born to the said Betty Ann Britt, and to the representative of any deceased child of the said Betty Ann Britt.

"(s) Such of my property, either real, personal or mixed, not herein specifically devised, which shall remain upon the death of my wife, I hereby direct that my said Trustee shall cause the same to be equally divided between all of my said children who may be living at that time, or the representative of any who may have died, *per stirpes* and not *per capita,* and convey and deliver to each his or her respective share and portion thereof."

By codicil, the testator made provisions as follows for the disposition of certain lands acquired after the execution of the will:

"1. After the death of my said wife, or in the event she should remarry, my said Trustee is hereby authorized and directed to convey to my granddaughter, Betty Ann Britt, in fee simple, . . . two certain lots (description follows).

"3. After the death of my said wife, or in the event she should remarry, my said Trustee is hereby authorized and directed to convey to my son, Horace Britt, in fee simple . . . five certain lots (description follows).

The court below held that the trust provisions were not void and entered judgment decreeing that the will, with the codicils thereto, "constitutes a valid disposition of the property of the testator . . ."

From the judgment so entered the plaintiffs appealed.

L. J. Britt and McLean & Stacy for plaintiffs, appellants.

Varser, McIntyre & Henry and Frank D. Hackett for defendants, appellees.

JOHNSON, J. It is to be noted that this action is not one for advice and instruction in connection with the settlement of an estate (*Trust Co. v. Barrett,* 238 N.C. 579, 78 S.E. 2d 730); nor is it an ordinary suit for the construction of specific items of a will (*Cansler v. McLaughlin,* 238 N.C. 197, 77 S.E. 2d 618). The plaintiffs in their complaint challenge the validity of the trust provisions of the will. They assert that these provisions are void *in toto.* The attack is general and broadside. They allege, without further elaboration, that the trust is void, for that its provisions are (1) uncertain, (2) repugnant, and (3) violate the rule against perpetuities. We discuss these grounds of attack *seriatim.*

1. *The question of uncertainty.*—When the validity of an item in a will is challenged on the ground of uncertainty, it will be declared void on that ground only when its terms are so indefinite and uncertain that the court, in applying the usual rules of construction, is unable to declare the intention of the testator for the reason that in legal contemplation there was no expression of intention on his part. 57 Am. Jur., Wills, Sec. 34. See also *White v. University,* 39 N.C. 19; *McLeod v. Jones,* 159 N.C. 74, 74 S.E. 733; *Reid v. Neal,* 182 N.C. 192, 108 S.E. 769.

No such uncertainty appears in connection with the trust provisions of this will. Under "Item II" of the will the residuary estate of the testator is devised and bequeathed to "Ingram P. Hedgpeth, as Trustee." The trust so created is an active one (*Fisher v. Fisher,* 218 N.C. 42, 47, 9 S.E. 2d 493), under which the widow, Edna Britt, "during the term of her life or widowhood" is to receive the entire net income.

It seems to be conceded, and rightly so, that there is no uncertainty or vagueness as to the provisions made for the widow during her life or widowhood. This being so, the allegation that the trust is void for uncertainty may not be sustained. This is so for the reason that if the trust provisions are good in any respect, or to any extent, the plaintiffs' broadside challenge must fail. Therefore for the purpose of decision we pursue the question of uncertainty no further.

However, we note in passing certain questions raised in the plaintiffs' brief respecting possible uncertainties as to who will take portions of the property in the event of the death of one or more of the testator's children without leaving children. These are premature, speculative questions of interpretation to be determined if and when they arise in the future. They are not presented for review by this record. See *Burchett v. Mason,* 233 N.C. 306, 308, 63 S.E. 2d 634.

2. *The question of repugnancy.*—There is no merit in the plaintiffs' contentions that the trust provisions are void for repugnancy. These contentions are too unsubstantial to require extended discussion. Illustrative of these contentions: Plaintiffs point to the provisions of Paragraph (f) of Item II of the will and Item 1 of the second codicil, both of which deal with the same property, with the codicil making a disposition of the property entirely different from the will. Here the plaintiffs make the contention that both provisions are void for repugnancy because the codicil does not in express language revoke the corresponding item of the will. As to this, it is enough to say that the provisions of the codicil revoke the corresponding provisions of the will by clear implication. It is elemental that "a codicil plainly inconsistent with the provisions of the will operates, to the extent of the inconsistency, as a revocation of the will even in the absence of any express words of revocation." 57 Am. Jur., Wills, Sec. 485; *Armstrong v. Armstrong,* 235 N.C. 733, 735, 71 S.E. 2d 119. See also *Jenkins v. Maxwell,* 52 N.C. 612; *Dalton v. Houston,* 58 N.C. 401; Annotations, 51 A.L.R. 712; 123 *Id.* 1406.

3. *The rule against perpetuities.*—The essential elements of this rule are stated succinctly by *Barnhill, J.,* in *McQueen v. Trust Co.,* 234 N.C. 737, 741, 68 S.E. 2d 831, as follows: ". . . no devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not less than twenty-one years, plus the period of gestation, after some life or lives in being, at the time of the creation of the interest." Dean Mordecai states the rule in abbreviated form this way: "Every estate must vest during a life or lives in being and twenty-one years—plus the usual period of gestation—thereafter." Mordecai's Law Lectures, Section Edition, p. 589.

The controlling factor in the application of the rule against perpetuities is the time when a future interest vests, rather than the time when it comes into enjoyment. *McQueen v. Trust Co., supra.*

Here it is provided that on termination of the widow's estate *durante viduitate* the fee simple title to specifically designated portions of the trust realty shall vest immediately in certain named children and grandchildren of the testator, with direction that the possession and use of designated parcels of the residue of the trust realty be set over to named children and grandchildren of the testator living when the will was made,

for the period of their lives, with further direction that upon the death of these life beneficiaries the trust shall terminate and the various parcels of realty held by them shall be set over and conveyed in fee simple to the ultimate beneficiaries of the trust.

It is manifest that all interests created by the trust provisions of this will vest within the time allowed by the rule against perpetuities. *McQueen v. Trust Co., supra,* and cases there cited.

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

Affirmed.

IN THE MATTER OF ADELE B. DUNN.

(Filed 29 January, 1954.)

1. Insane Persons

An inquisition of lunacy as regards the person whose sanity is in question is a proceeding *in personam;* as it affects his property it is a proceeding *in rem.* It is neither a criminal action, G.S. 1-5, nor a civil action as defined in G.S. 1-2, nor a special proceeding under G.S. 1-3, though it is of a civil nature.

2. Clerks of Court § 3—

The clerk of the Superior Court has only such jurisdiction as is given him by statute.

3. Insane Persons § 15—

Where there has been no inquisition of lunacy, a lunatic may defend by a guardian *ad litem.*

4. Insane Persons § 9e—

An insane person is liable, under an obligation imposed by law, for the reasonable value of the necessaries furnished him under an intent to charge therefor.

5. Insane Persons § 1—

An inquisition in lunacy is for the benefit of the alleged insane person, and necessary for the protection of his person and property, and every reasonable safeguard should be thrown around a person whose sanity is inquired into.

6. Insane Persons § 4—

When the court is called upon to make an allowance for attorneys, guardians *ad litem,* etc., such allowances shall be fair and reasonable.

7. Insane Persons § 9e—Allowances to attorney and guardian ad litem for services rendered in inquisition may be made as for necessaries.

Where a person is committed to a hospital for observation and treatment under G.S. 122-79 without notice being served upon her or upon anyone on her behalf, and in her absence, and thereafter a petition in accord with

G.S. 35-2 is filed by a relative requesting an inquisition of lunacy and the appointment of a trustee, *held*, upon the rendition of a judgment in the inquisition of lunacy that the person to be committed back to the hospital for treatment, the court, upon proper petition, should make a reasonable allowance to the guardian *ad litem* appointed by the clerk therein, who acted in good faith in representing her in the hearing, as well as allowance to the attorney employed by the guardian *ad litem* and to a psychiatrist and a stenographer for services performed in connection with the sanity proceeding, which allowance may be made as for necessaries without regard to whether the appointment of the guardian *ad litem* is void or not.

APPEAL by Sam M. Millette, guardian *ad litem* of Adele B. Dunn, an incompetent, from *Sharp, Special J.,* August Special Civil Term 1953. MECKLENBURG.

The estate of Adele B. Dunn consists of real and personal property, and has a value in excess of $500,000.00. On 24 March 1953 Chase Brenizer, David S. Citron and P. M. King filed a verified petition under the provisions of G.S. 122-79 with the Clerk of the Superior Court of Mecklenburg County setting forth these facts: (1) Chase Brenizer is a brother of Mrs. Adele B. Dunn, and a resident of Mecklenburg County; (2) David S. Citron and P. M. King are duly licensed and practicing physicians in Charlotte; (3) Adele B. Dunn is now, and has been for many years, a resident of Mecklenburg County; (4) the undersigned have carefully examined Adele B. Dunn, and find that she is mentally ill, and believe her to be a fit subject for commitment to Highland Hospital, Asheville, where her estate can pay for treatment, and that her detention and treatment there will be to her benefit; (5) that Drs. Citron and King have no connection with Highland Hospital.

On the same day the petition was filed in his office the Clerk of the Superior Court of Mecklenburg County without the petition being served on Adele B. Dunn, or upon anyone for her, and in her absence, heard the petition. The clerk's order states that this matter coming on to be heard upon the petition, and after making a full and careful investigation of the facts, he, the Clerk, finds as a fact that Adele B. Dunn is a fit subject for commitment to a private hospital, and that her detention for observation and treatment will be to her benefit; that she is a *bona fide* citizen of Charlotte, and that her remaining at large is injurious to her, and disadvantageous, if not dangerous to the community. Thereupon, the Clerk approved the petition, which he called a certificate, and ordered Adele B. Dunn to be committed to, and detained in Highland Hospital, Asheville, for observation and treatment until further orders of this Court, or until released by the superintendent of the hospital.

On 30 April 1953 Dr. R. Charman Carroll made and sent to the Clerk of Superior Court of Mecklenburg County an affidavit stating that she is Medical Director of the Highland Hospital at Asheville, that Adele B.

Dunn is confined in the hospital, that she is familiar with Adele B. Dunn's mental condition and that Adele B. Dunn is of insane mind and memory, and is unable to manage her affairs; and that this certificate of incompetency is issued pursuant to the provisions of G.S. 35-3.

On 13 May 1953, under the provisions of G.S. 35-2, Chase Brenizer filed a petition before the Clerk of the Superior Court of Mecklenburg County stating that Adele B. Dunn under a former order of the Clerk had been committed to Highland Hospital for treatment, where she still is; that she is mentally disordered, and he prayed that an inquisition be had; that a notice to show cause be served upon her to show cause, if she could, as to why a trustee should not be appointed to manage her affairs; and that a jury be impaneled to inquire into the state of her mind, and that if the jury find that she is incompetent by reason of mental disorders to manage her affairs, a trustee be appointed to manage her affairs.

On 15 May 1953 a copy of the petition and a notice to show cause was served upon Adele B. Dunn in Highland Hospital by the Sheriff of Buncombe County.

On 15 May 1953 Grace Garrison, a close friend of Adele B. Dunn, and interested in her welfare, filed with the Clerk of the Superior Court of Mecklenburg County a verified application for the appointment of a guardian *ad litem* for Adele B. Dunn. This application sets forth in substance the contents of the petitions of 24 March 1953 and 13 May 1953 and the orders of the Clerk based on said petitions, and then states: (1) That on or about 27 March 1953, so Grace Garrison is informed and believes, Adele B. Dunn, against her will was physically removed from her home in Charlotte, and carried to Highland Hospital, where, since then, she has been held incommunicado; (2) that none of her friends have been permitted to see her; (3) that in one communication gotten out of the hospital by Adele B. Dunn, she has implored her friends to secure her release; (4) that it is vital to Adele B. Dunn that some suitable person be appointed by the court as guardian *ad litem* for her, to have her examined by competent psychiatrists, and to prepare her defense in her absence and physical detention under the previous ruling of this Court.

Pursuant to said application the Clerk made an order on 15 May 1953 stating that Adele B. Dunn is entitled to defend the charges made concerning her, and appointed Sam M. Millette, an attorney at law of Charlotte, her guardian *ad litem*. Millette employed Richard M. Welling of the Charlotte Bar to represent him as guardian *ad litem*.

Grace Garrison, acting for herself and other friends of Adele B. Dunn, had theretofore employed Richard M. Welling to appear for Adele B. Dunn, and agreed to advance him a fee of $500.00, of which amount he has been paid $200.00 by Grace Garrison.

In the Record appears an affidavit of J. Spencer Bell, an attorney of Charlotte and past president of the North Carolina Bar Association. This affidavit may be summarized as follows: He makes this affidavit to be presented to the Clerk of Superior Court of Mecklenburg County in connection with a matter now pending before the Clerk in regard to the appointment of a trustee for Adele B. Dunn. That on numerous occasions various friends of Mrs. Dunn called on him in regard to having Mrs. Dunn's interest represented—the proceedings under which she had been committed to Highland Hospital having been *ex parte* without an opportunity to be heard, and the proceedings next instituted for the appointment of a trustee being *ex parte*. Mrs. Dunn was then under restraint in Highland Hospital. The friends of Mrs. Dunn were of the opinion she should be released from the hospital. On some occasions prior to these requests he had been requested by Mrs. Louise Brenizer, on behalf of her husband Chase Brenizer, to represent them in bringing a petition to have a trustee appointed for Mrs. Dunn. He refused to take any action because of his personal acquaintance with Mrs. Dunn and, therefore, when called upon by Mrs. Dunn's friends to appear for Mrs. Dunn and resist such a petition, he felt that he should not accept employment on either side. He believes that in these proceedings against Mrs. Dunn, she was entitled to representation, as she was then under forceable restraint in a mental institution and that her friends had a right on behalf of Mrs. Dunn to employ counsel to represent her interests, especially in view of the fact that her liberty was concerned. That he recommended to her friends that Richard M. Welling was a suitable and competent counsel to represent Mrs. Dunn at the suggestion of such friends. That these friends following his suggestion employed Welling. This affidavit is dated 12 June 1953.

On 23 May 1953 Millette and Welling went to Asheville, and saw Adele B. Dunn in the Highland Hospital, where she was held in physical restraint. She told them she wanted to do everything she could to protect herself and that she was in favor of Millette representing her as guardian *ad litem* and Welling as her attorney.

On 25 May 1953, Millette as guardian *ad litem* and Welling as her attorney, filed a motion with the Clerk stating that the inquisition was coming on for a hearing before him and a jury on 29 May 1953, and praying that an order issue directing that Highland Hospital have Adele B. Dunn present at the office of Dr. W. D. Holbrook, a psychiatrist, in Charlotte at 5:00 p.m., 28 May 1953, so that Dr. Holbrook may make an examination of Adele B. Dunn, which is needed in her defense.

On the same day the Clerk made an order granting the prayer of the motion.

On 27 May 1953 the guardian *ad litem* filed an answer to the petition dated 13 May 1953.

On 29 May 1953 the jury summoned in accordance with the provisions of G.S. 35-2, after hearing the evidence found that Adele B. Dunn by reason of mental disorders was incompetent to manage her affairs. Whereupon on the same day the clerk entered judgment appointing the Wachovia Bank & Trust Company, trustee, to manage the affairs of Adele B. Dunn, and ordered that it be vested with all the powers of a guardian in administering the estate. The guardian *ad litem,* Millette, and Welling were present at the hearing, and took part in it.

On 3 June 1953 the Clerk entered an order committing Adele B. Dunn back to Highland Hospital for treatment, until further order of the court. On the same day Pless, J., presiding over the courts of the Fourteenth District approved the proceedings.

On 3 June 1953 Millette, guardian *ad litem,* through Richard M. Welling, his attorney, filed a motion with the Clerk praying that an order be entered directing the trustee of Adele B. Dunn to pay the following amounts from her estate for services rendered to Adele B. Dunn, which amounts are alleged to be fair and reasonable and he recommends that they be paid: (1) $150.00 to Dr. W. D. Holbrook for examining Adele B. Dunn 28 May 1953; (2) $6.00 to Miss Neva Cox for taking the deposition of Chief Frank N. Littlejohn during the proceedings and supplying a copy to the guardian *ad litem;* (3) that Grace Garrison be paid $200.00 which she paid to Richard M. Welling. The guardian *ad litem* further prayed that a reasonable allowance be made to himself for his services as guardian *ad litem,* a reasonable fee be paid to his attorney Richard M. Welling, and that his attorney be reimbursed $32.58 for expenses incurred in representing him and paid by Welling.

The Wachovia Bank & Trust Company, as trustee, filed an answer resisting payment of any amount.

On 15 June 1953 the Clerk entered orders that the appointment of Sam M. Millette as guardian *ad litem* for Adele B. Dunn by himself was contrary to law, and denied *in toto* the motion to pay the aforesaid amounts. To these orders Millette, guardian *ad litem,* excepted and appealed to the Superior Court.

On 5 August 1953 Sharp, Special J., entered judgment affirming the Clerk's orders.

To the judgment entered Sam M. Millette, guardian *ad litem* for Adele B. Dunn, excepted and appealed.

Welling & Welling for Sam Millette, guardian ad litem of Adele B. Dunn, Appellant.

Tillett, Campbell, Craighill & Rendleman for Wachovia Bank & Trust Company, Trustee of Adele B. Dunn, Appellee.

PARKER, J. The appellee briefly states its position thus: (1) Our law does not require or contemplate the appointment of a guardian *ad litem* for an alleged incompetent in lunacy proceedings; (2) No one, and especially an outsider, should be allowed, however worthy his motives, to inject himself into a lunacy proceeding, and whether under the guise of a purported (*ex parte*) appointment as guardian *ad litem*, or otherwise, expect to collect money for his time and trouble out of the incompetent's estate.

The appellee on page 12 of its brief says: "In this connection, it should be noted that there is a statute permitting the appointment of a guardian or a guardian *ad litem* in a proper case upon a certificate from the superintendent of a hospital to the effect that a person in the hospital is 'of insane mind and memory.' G.S. 35-3." It seems that the appellee has completely overlooked the certificate of incompetency filed with the Clerk of the Superior Court of Mecklenburg County by Dr. R. Charman Carroll. This appears to be very near, if not, an admission by the appellee that the appointment of the guardian *ad litem* in this proceeding was proper.

The appellee contends that G.S. 1-65, which provides that infants, lunatics, persons *non compos mentis*, etc., defend by a guardian *ad litem* applies only to actions and special proceedings, and an inquisition of lunacy under G.S. 35-2 is neither, quoting McIntosh N. C. Prac. & Proc., Sec. 98, p. 96: "An inquisition of lunacy would seem to be neither a civil action nor a special proceeding." Dr. McIntosh cites as his authority C.S. 2285, now G.S. 35-2, which is captioned "Inquisition of Lunacy; Appointment of Guardian."

An inquisition of lunacy as regards the person whose sanity is in question is a proceeding *in personam*; as it affects his property is a proceeding *in rem*. 44 C.J.S., Insane Persons, Sec. 8. Such an inquisition is certainly not a criminal action. G.S. 1-5. It is not a civil action as defined in G.S. 1-2. G.S. 1-3 states: "Every other remedy is a special proceeding." Certainly such an inquisition is of a civil nature, though it would seem it is not a special proceeding under G.S. 1-3. *In re Cook*, 218 N.C. 384, 11 S.E. 2d 142.

The Clerk of the Court has only such jurisdiction as is given him by statute. *Beaufort County v. Bishop*, 216 N.C. 211, 4 S.E. 2d 525; *High v. Pearce*, 220 N.C. 266, 17 S.E. 2d 108; *Johnston County v. Ellis*, 226 N.C. 268, 38 S.E. 2d 31. The appellee contends that as the inquisition in lunacy was not a civil action or special proceeding, the Clerk's appointment of the guardian *ad litem* for Adele B. Dunn in the proceeding was void.

We said in *Smith v. Smith*, 106 N.C. 498, 11 S.E. 188, ". . . we think it well settled that where there has been no inquisition the lunatic may

sue by next friend" (citing in support decisions of the English Chancery Court). We think the reverse is equally true that where there has been no inquisition the lunatic may defend by a guardian *ad litem.*

The appellant contends that the case of *Smith v. Smith, supra,* refers only to actions and special proceedings.

However, in deciding this matter, it is not necessary for us to decide whether the Clerk's order appointing Sam M. Millette, guardian *ad litem* for Adele B. Dunn, was void or not.

It is well settled law that an insane person is liable, under an obligation imposed by law, for necessaries furnished to him, provided there was an intent to charge therefor and credit was extended to him. 44 C.J.S., Insane Persons, Sec. 115. The obligation is to pay the reasonable value of the necessaries furnished. 28 Am. Jur., Insane and Other Incompetent Persons, Sec. 62. *Ruffin, C. J.,* speaking for the Court in *Richardson v. Strong,* 35 N.C. 106, says: "There is, therefore, no absurdity in the case of lunatics more than in that of infants in implying a request to one rendering necessary services or supplying necessary articles, and implying also a promise to pay for them." As to necessaries furnished infants see *Cole v. Wagner,* 197 N.C. 692, 150 S.E. 339; *Jordan v. Coffield,* 70 N.C. 110.

This question is presented: Were the services rendered in this case for which the guardian *ad litem* in his motion seeks payment from the estate of Adele B. Dunn necessaries for Adele B. Dunn?

An inquisition in lunacy is for the benefit of the alleged insane person, and necessary for the protection of his person and property. Depriving a person of his liberty and his freedom to do with his property as he deems proper and putting him under the stigma of insanity or of being a person *non compos mentis* is a grave matter. Every reasonable safeguard should be thrown around a person whose sanity is inquired into. An incompetent person is helpless and the law must think and act for him.

"It is generally agreed that insanity proceedings are for the benefit of the alleged incompetent, and necessary to the protection of his person and property. Since legal services are required in the proper prosecution and defense of the proceedings the fees of counsel involved on both sides have been held recoverable from the incompetent's estate on the principle that an incompetent is liable for necessaries furnished him." Anno. 22 A.L.R. 2d, p. 1439, where the cases are cited. This statement has been quoted verbatim in Cumulative Supplement to Vol. 28 Am. Jur., p. 116.

"On the theory that one alleged to be incompetent is entitled to a defense, as essential to the protection of his rights, it has been frequently held that an attorney who defends him is entitled to compensation even though the verdict is against his client." Anno. 22 A.L.R. 2d, p. 1447, citing cases from Kentucky, Louisiana, Missouri, New Jersey, New York, Pennsylvania and England.

In *Field v. Tarner* (1855, Eng.), 3 Eq. Rep. 1012, 3 Week R 469, a solicitor was held entitled to recover from the estate of his client, after the latter's death, the costs of an unsuccessful opposition to an inquiry into the client's state of mind. The court said that an insane person was entitled to be represented in the investigation into his sanity, and that no solicitor would represent him if costs were refused.

Buswell on Insanity, Sec. 284, is as follows: "Costs and counsel fees reasonably incurred by either party in proceedings to establish the lunacy of a person are regarded, both at law and in equity, as necessary expenses incurred for the benefit of the lunatic, and are recoverable against him or his estate."

"As a general rule, in some jurisdictions affirmed by express statutory provisions, where there is a finding of insanity, the costs of the inquiry are to be paid by the insane person or his estate, it being considered that these are in the nature of necessary expenses incurred for the benefit of the person and for which he or his estate is impliedly bound. . . . The costs include any expenses reasonably and properly incurred. Commissioners' and attorneys' fees are proper items of costs; but the items of costs are restricted to those incurred in the lunacy proceeding, and therefore expenses incurred before or after the inquest generally are not allowable." 44 C.J.S., Insane Persons, Sec. 34, pp. 98-99. In addition to the authorities cited in support of the text, see *Re Freshour,* 174 Mich. 114, 140 N.W. 517, 45 L.R.A. (N.S.) 67, Ann. Cas. 1915A 726, where additional authorities are cited. The authorities are not entirely agreed on this subject but it would seem that the better rule and the one apparently followed by a majority of the courts is as we have quoted it above.

It is the rule with us that when the court is called upon to make an allowance for attorneys, guardians *ad litem,* etc., such allowances should be fair and reasonable. *Hood, Comr. of Banks, v. Cheshire,* 211 N.C. 103, 189 S.E. 189.

On 24 March 1952 the Clerk of the Superior Court of Mecklenburg County acting under G.S. 122-79 committed Adele B. Dunn to Highland Hospital, Asheville, for observation and treatment, finding as a fact that her remaining at large was injurious to her, and disadvantageous, if not dangerous, to the community. That was done without any notice served upon her, or upon anyone in her behalf, and in her absence. On 13 May 1953 a petition in accord with G.S. 35-2 was filed with the Clerk by a brother of Adele B. Dunn requesting an inquisition of lunacy in respect to Adele B. Dunn and the appointment of a trustee for her property. On 15 May 1953 Grace Garrison, a close friend of Adele B. Dunn, acting for herself and other friends of Mrs. Dunn, employed Richard M. Welling of the Charlotte Bar to represent Mrs. Dunn in the sanity hearing, and Grace Garrison agreed to advance him a fee of $500.00 and paid him

$200.00. Grace Garrison filed a written application with the Clerk requesting him to appoint a guardian *ad litem* in said proceeding for Mrs. Dunn to protect her interests. It would seem reasonable to infer that Welling drafted the petition for her. The Clerk appointed Millette as guardian *ad litem,* and he employed Welling as his attorney. It is apparent that Grace Garrison, Dr. W. D. Holbrook, Miss Neva Cox, Richard M. Welling and the guardian *ad litem* acted in good faith under the Clerk's appointment of Millette as guardian *ad litem,* particularly in the light of the affidavit of J. Spencer Bell. The guardian *ad litem,* his attorney Welling, Dr. W. D. Holbrook, Miss Neva Cox and Grace Garrison have performed services in the sanity proceeding, which resulted in the protection of the incompetent and the preservation of her estate valued in excess of $500,000.00, and certainly there was an intent on their part, with the exception of Grace Garrison, to charge for such services, for which they expected pay from the estate of Mrs. Dunn.

We think, under the facts of this proceeding, that the services rendered by Dr. W. D. Holbrook, Miss Neva Cox, Sam M. Millette, guardian *ad litem,* and Richard M. Welling, his attorney, are in the nature of necessary expenses incurred for the benefit of Adele B. Dunn, for which her estate is impliedly bound, and for such services incurred in the lunacy proceeding, and this includes reasonable expenses of Welling necessarily incurred and paid by him in the proceeding (which it is alleged amount to $32.58), the court should make such allowances to them as are fair and reasonable. When the court has fixed the allowance to Richard M. Welling, it shall deduct $200.00 therefrom, and pay it to Grace Garrison.

This proceeding is ordered remanded to the lower court, where judgment shall be entered in accordance with this opinion.

Error and remanded.

BURLEY CLAYTON AND WIFE, CORINNA CLAYTON, LACY CLAYTON AND WIFE, ELIZABETH COUCH CLAYTON, BERNICE CLAYTON ASHBY AND HUSBAND, MELVIN McGRUDER ASHBY, BEVELY CLAYTON HILL AND HUSBAND, WELDON DELONEY HILL, PHILLIP CLAYTON BY HIS NEXT FRIEND, SILAS DANIEL CLAYTON, MONA CLAYTON PASS AND HUSBAND, JOHN PASS, ABNER W. CLAYTON, BARBARA CLAYTON AND WILLIAM GALE CLAYTON BY THEIR NEXT FRIEND, MONA FREDERICK CLAYTON, v. O. L. BURCH AND WIFE, ONIE B. BURCH.

(Filed 29 January, 1954.)

1. Wills § 31—

When necessary to accomplish the testator's intent as ascertained from the context of the will, the court may disregard improper use of capital letters, punctuation, misspelling and grammatical inaccuracies, especially

where the will is written by an unlearned person. Thus, to this end, the words "if not then *if* my Grand Sound" may be changed to read "if not then *to* my Grand Sound" and the words "if Ether one of my grand-Sons shold die *any* my grand Soun Stanley be living" may be changed to read "if Ether one of my grand Sons shold die *and* my gran Sound Stanley be living," etc.

2. Same—

Testator's intent must be given effect as it is set forth in his will, since the written and not the unexpressed intent must control.

3. Wills § 33b—Where "heirs" is used as descriptio personarum and not in technical sense, rule in Shelley's case does not apply.

A devise to a named grandson of testator for life and to his bodily heirs, but if he should die without heirs then to another named grandson, with further provision that if either one of these grandsons should die without leaving a bodily heir, a third named grandson should have their share, *is held* to devise a life estate only to the first named grandson, and not a fee defeasible upon his death without issue, it being apparent that testator used the words "bodily heirs" as *descriptio personarum* and not in the technical sense so that the words mean that if the first named grandson should die without "children" the land should be taken out of the first line of descent and then put back into the same line in a restricted manner and therefore the rule in *Shelley's case* does not apply.

4. Wills § 33i—

A provision annexed to a devise that the land devised should not be sold for any purpose whatsoever is void, but such provision does not defeat the estate to which it is annexed.

5. Wills § 33h—

A provision in a will that the land devised to a named person for life should go to the life tenant's heirs "to the Tenth Jenerration" is void as being within the rule against perpetuities.

APPEAL by defendants from *Carr, J.*, August Mixed Term 1953 of PERSON.

Controversy without action submitted to the court, pursuant to provisions of G.S. 1-250, for decision and determination. A summation of the agreed statement of facts necessary for decision of the question presented follows:

One. John S. Clayton died testate 4 December 1916 seized in fee simple and in possession of the lands in controversy.

Two. His will was duly probated in common form on 27 May 1925, and is recorded in the office of the Clerk of the Superior Court of Person County in Will Book 21, pp. 63-64. These are the material parts of the will: "I give to My Beloved Wife Euphenia Clayton, all of my Estate Real and personal her life time, or my widow hood, and at hear deth or hear deth or marrig then I give to My Grand Sound John W. Clayton the

Land on the west side of my home tract Beginen in the Midel of the road and Runing half way beteen too Tobacco Barnes on the North Side of the Road Leeding from Roxboro to Sural thence a Strat line to the hedero to a Rock Corner the Rebacer Barrett tract thence Down Sed line to the neaxt Rock Corner John W. Wilkerson and my corner to have and to hold his life time, thence to his Body ars if he has Eney and if not then if my Grand Sound Silus Daynel Clayton if he a living but if J. W. Clayton Shold hav a body hir it Shall go to them down to the Tenth Jenerration and shal never be Sold for Eney pupus what Sover . . . and if Ether one of my grand-Sons Shold Die any my grand Soun Stanley be living and thay Shold not leave a Body heir he Shal hav thair Share."

Three. Euphenia Clayton did not remarry, and died 23 August 1933.

Four. When John S. Clayton died he had eight granddaughters and four grandsons—John W. Clayton, Silas Daniel Clayton, Stanley Clayton and Jack Clayton, who was born the day his grandfather died. All these grandchildren are living, except John W. Clayton, and one granddaughter.

Five. John Clayton was first married to Annie Mae Oakley who died 1 August 1926. By this marriage he had five children, all now over 21 years of age. He was married second to Mona Frederick, and of this marriage there are four children, all living.

Six. On 28 August 1928 John W. Clayton and wife, Mona, executed and delivered a deed of trust to R. P. Burns, Trustee, covering the land devised to him by his grandfather's will to secure an indebtedness of John W. Clayton to W. C. Bullock, Trustee for Mrs. John Bullock in the sum of $1,500.00, as evidenced by his bond in that amount which he had executed and delivered to W. C. Bullock, Trustee; which deed of trust is properly recorded in the Public Registry of Person County.

Seven. R. P. Burns foreclosed the deed of trust in November 1935 and by *mesne* conveyances O. L. Burch acquired a deed dated 11 December 1943 for said land from W. C. Bullock, Trustee, which deed is recorded in the Person County Registry in Book 54, p. 462, and purports to convey the fee to the land in controversy to him: O. L. Burch has been in possession of the land since, and is still in possession.

Eight. From the date of John S. Clayton's death until Euphenia Clayton's death on 23 August 1933, either she or John W. Clayton were in possession of the land in controversy.

Nine. John W. Clayton was killed in an automobile wreck 3 April 1949. There have been no conveyances of the land in controversy by his children and they have never been in possession.

Ten. All the children of John W. Clayton are plaintiffs and O. L. Burch and wife are defendants.

This question was presented to the lower court for decision: "Under the foregoing statement of facts is title to the property described therein presently vested solely in O. L. Burch or is it vested equally in the nine children of John W. Clayton as tenants in common?"

The lower court entered judgment deciding (1) That title to the land is vested equally in fee simple in the nine children of John W. Clayton as tenants in common and that they are entitled to immediate possession; (2) that the provision in the will restricting the land devised "down to the tenth generation" is void as coming within the rule against perpetuities, but that the prior estate to which it is annexed is valid and that the plaintiffs take a fee simple title to the land; (3) that the provision in the will that the land devised "shall never be sold for any purpose whatsoever," is void as against public policy; that such invalid provision does not defeat the estate to which it is annexed, but the estate is a valid subsisting estate and the invalid provision is rejected.

To the judgment entered the defendants excepted and appealed.

Davis & Davis for Plaintiffs, Appellees.

Burns & Long, R. B. Dawes, and Royster & Royster for Defendants, Appellants.

PARKER, J. When necessary to accomplish the testator's intent as ascertained from the context of the will, the court may disregard improper use of capital letters, punctuation, misspelling and grammatical inaccuracies, especially where the will is written by an unlearned person. *Bell v. Thurston,* 214 N.C. 231, 199 S.E. 93; *Mewborn v. Mewborn, ante,* p. 284, 79 S.E. 2d 398.

To carry out the testator's intent it is apparent that the words in the will "if not then *if* my Grand Sound Silus Daynel Clayton if he a living" should read "if not then *to* my Grand Sound Silus Daynel Clayton if he a living." (Italics ours.) The appellants contend this on p. 7 of their brief. It is also apparent that the words in the will "if Ether one of my grand-Sons Shold die *any* my grand Soun Stanley be living, etc." should read "if Ether one of my Grand Sons Shold die *and* my Gran Sound Stanley be living, etc." (Italics ours.)

This question is presented: Was John W. Clayton devised a life estate in the land in controversy or a defeasible fee? The answer must be sought in the testator's intent as set forth in his will; for under the accepted rules of construction the written and not the unexpressed intent must control. *West v. Murphy,* 197 N.C. 488, 149 S.E. 731. "It is elementary that a will must be construed as it is written." *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404.

In *West v. Murphy, supra,* the testator devised land to his granddaughter, Bertie Hill, so long as she should live, and if no children, then to her brother, Frank Hill, the granddaughter being a child at the date of the will. The granddaughter died leaving her surviving a child. We quote from the opinion. "A gift to a person absolutely, with a provision that if he die without leaving children the property shall go to another, vests in the primary devisee a common-law fee conditional, which is defeasible upon his death without leaving a child. *Sadler v. Wilson,* 40 N.C. 296; *Whitfield v. Garris, supra* (134 N.C. 24); *Dawson v. Ennett,* 151 N.C. 543; *Perrett v. Bird,* 152 N.C. 220; *Smith v. Lumber Co.,* 155 N.C. 389. In the cited cases the devisees took an estate in fee defeasible upon the happening of a subsequent event; but the principle upon which they are founded has no application to devises in which by the terms of the will the first taker acquires only a life estate. To this rule there is an exception. A life estate thus given may be enlarged into a fee when the particular disposition is to be determined, not as a rule of construction, but, as in *Shelley's case,* as a rule of law or a rule of property, regardless of an intent to the contrary appearing in the will. *Reid v. Neal,* 182 N.C. 192; *Nobles v. Nobles,* 177 N.C. 243. But as shown in many of our decisions the exceptions serve to clarify and impress the rule. For example, a father having devised to his daughter Mary an estate during her natural life and to the heirs of her body, on condition if she had no heirs of her body the estate should go to his son, it was held that Mary took a life estate. *Bird v. Gilliam,* 121 N.C. 326. In *May v. Lewis,* 132 N.C. 115, it was held that Benjamin May was given a life estate by the following devise: 'I loan unto my son Benjamin May my entire interest in the tract of land . . . to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to his next of kin.' In a later case the following clause was construed: 'I leave Martha Morgan, wife of James Morgan, 48½ acres of land . . . during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters.' The Court said that Martha thereby acquired an estate for her natural life. *Puckett v. Morgan,* 158 N.C. 344. On this point the following cases of later date are equally conclusive: *Jones v. Whichard,* 163 N.C. 241; *Blackledge v. Simmons,* 180 N.C. 535; *Wallace v. Wallace,* 181 N.C. 158; *Reid v. Neal, supra; Welch v. Gibson,* 193 N.C. 684. The principle pervades all the recent decisions in which the question is discussed; and, indeed, so rigidly is it applied that a devise for life with power of disposition takes an estate, not in fee, but only for his natural life. *Chewning v. Mason,* 158 N.C. 578; *Roane v. Robinson,* 189 N.C. 628. It is obvious, therefore, that Bertie Hill was given only a life estate under the fifth item of the will."

In *Hampton v. Griggs,* 184 N.C. 13, 113 S.E. 501, the testator in Item 6 of his will gave "unto the lawful heirs of my son Nathaniel Pierce Hampton all of the lands and chattel property that belongs to me at the death of me and my wife, Nancy, and if my son should die without a bodily heir, then my property to go back into the Hampton family." The Court said: "Members of the Hampton family, of course, are potentially among the heirs general of the first taker, but they are not all, and this ulterior limitation would exclude others among his heirs who were not of the blood of the original stock." The rule in *Shelley's case* was held not applicable.

In *Williams v. Johnson,* 228 N.C. 732, 47 S.E. 2d 24, these were the material items of the will. In Item 3 the testator gave a life estate in said tract of land to Mrs. Odie Phillips, wife of Mat Phillips, who was testator's son, provided she remain a widow. In Item 4, after the death of the said Odie Phillips he devised to his grandchildren, to wit: the children of Mat Phillips, for and during the term of their natural lives the said land, and after the death of the said grandchildren, then to their bodily heirs, or issue surviving them, and in the event any of said grandchildren shall die, without leaving him surviving issue or issues, then to his next of kin in fee simple forever. In this case the Court said: "The term 'next of kin,' when used in a deed or will in connection with a limitation over upon the failure of issue, nothing else appearing to the contrary, means 'nearest of kin' or 'nearest blood relation,' and restricts its meaning to a limited class of nearest blood relations, to the exclusion of those enumerated as next of kin in the statute of distribution." Citing authorities. The Court held that the rule in *Shelley's case* did not apply.

Stacy, C. J., speaking for the Court in *Welch v. Gibson,* 193 N.C. 684, at p. 691, 138 S.E. 25, says: "When there is an ulterior limitation which provides that upon the happening of a given contingency, the estate is to be taken out of the first lines of descent and then put back into the same line, in a restricted manner, by giving it to some, but not to all, of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker, this circumstance may be used as one of the guides in ascertaining the paramount intention of the testator, and, with other *indicia,* it has been held sufficient to show that the words 'heirs' or 'heirs of the body' were not used in their technical sense." The *Chief Justice* then goes on to state that herein lies the distinction between *Rollins v. Keel,* 115 N.C. 68, 20 S.E. 209; *Puckett v. Morgan,* 158 N.C. 344, 74 S.E. 15; *Jones v. Whichard,* 163 N.C. 241, 79 S.E. 503; *Pugh v. Allen,* 179 N.C. 307, 102 S.E. 394; *Blackledge v. Simmons,* 180 N.C. 535, 105 S.E. 202; *Wallace v. Wallace,* 181 N.C. 158, 106 S.E. 501; *Reid v. Neal,* 182 N.C. 192, 108 S.E. 769, and *Hampton v. Griggs, supra,* and *Benton v. Baucom,* 192 N.C. 630, 135 S.E. 629.

In *Tynch v. Briggs,* 230 N.C. 603, 54 S.E. 2d 918, the testator devised to his wife S., all the remainder of his real estate for the term of her natural life and after her death to his son J., for the period of his natural life, in remainder to his lawful heirs, and in the event the said J. should die without lawful heirs then in remainder to his daughter Sallie Ann for her life, and after her death to the heirs of her body lawfully begotten—and in the event of the death of the said Sallie Ann without heirs of her body lawfully begotten then said lands shall be exposed to public sale and the proceeds from the sale shall be equally divided among all his children then alive and the lawful heirs of any child that may be dead. The Court went on to say that our first concern is to determine who were meant by the testator as "lawful heirs" of J. as second takers, and that J. could not die without heirs in the general sense as long as Sallie Ann his sister lived. The Court said: "On a contextual reading we must regard the language employed in the devise not as referring to general heirs, but as *descriptio personarum,* and find it impossible to reconcile its use with the rule in *Shelley's case.* It does not apply. *Hampton v. Griggs, supra; Puckett v. Morgan, supra; Francks v. Whitaker,* 116 N.C. 518, 21 S.E. 175; *Rollins v. Keel,* 115 N.C. 68, 20 S.E. 209; *Bird v. Gilliam,* 121 N.C. 326, 28 S.E. 489; *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662."

The defendants in their brief contend that *Whitfield v. Garris,* 131 N.C. 148, 42 S.E. 568 (petition to rehear denied in 134 N.C. 24, 45 S.E. 904); *Morrisett v. Stevens,* 136 N.C. 160, 48 S.E. 661; and *Sessoms v. Sessoms,* 144 N.C. 121, 56 S.E. 687, support their position. In *Jones v. Whichard,* 163 N.C. 241, 79 S.E. 503, the deed employed this language in substance: Witnesseth, that the said Major Jones in consideration of love and affection conveys unto his son, Robert M. Jones, his heirs and assigns, a tract of land, to have and to hold said land to him the said Robert M. Jones and his wife during their natural life, and then to their legal bodily heirs, provided they leave any, and if not, to be equally divided among his nearest of kin. This Court held the rule in *Shelley's case* did not apply. *Hoke, J.* (later *C.J.*), speaking for the Court, said: "The cases of *Morrisett v. Stevens,* 136 N.C. 160, and *Whitfield v. Garris,* 134 N.C. 24, and others cited by counsel, when properly understood, do not militate against this construction.

"In *Whitfield's case* and in *Morrisett's case* the ulterior disposition of the property was not and was not intended as a limitation on the estate conveyed to the first taker, but was a provision whereby one stock of inheritance on certain contingencies was substituted for another, the second to hold as purchasers direct from the grantor or original owner. *Sessoms v. Sessoms,* 144 N.C. 121."

The other cases cited in defendant's brief have been examined, and are distinguishable.

The case states that Euphenia Clayton has been dead many years, that when John S. Clayton died he had eight granddaughters and four grandsons living—one grandson born the day he died.

When the testator used these words "I give to My Grand Sound John W. Clayton the land (which he describes) to have and to hold his lifetime, thence to his Body ars if he has Eney and if not then *to* (we have changed *it* to read *to*—Italics ours) my Grand Sound Silus Daynel Clayton if he a living but if J. W. Clayton Shold hav a body hir it shall go to them down to the Tenth Jenerration," and when later on in his will he used these words "if Ether one of my grand-Sons Shold Die *and* (*any* has been changed to read *and*—Italics ours) my grand Soun Stanley be living and thay Shold not leave a Body heir he Shal hav thair Share," it is obvious that John W. Clayton was given only a life estate under the will. The words of the will do not give the land to John W. Clayton absolutely with a provision that if he die without bodily heirs it shall go elsewhere, but give it to him "to have and to hold his life time, thence to his Body ars if he has Eney and if not then to my Grand Sound Silus Daynel Clayton, etc." Reading the will from its four corners, we think that it is clear and plain that John S. Clayton's intent and purpose when he used the words "thence to his (John W. Clayton's) Body ars if he (John W. Clayton) has Eney" and the words "but if J. W. Clayton Shold hav a body hir it shall go to them down to the Tenth Jenerration" and the words "if Ether one of my grand-Sons Shold Die and my grand Soun Stanley be living and thay Shold not leave a Body heir he Shal hav thair Share" was to use the words "Body ars," "body hir" and "Body heir" of John W. Clayton as *descriptio personarum,* and not to use the words in their strict and technical sense of heirs, for these words obviously mean that if John W. Clayton die without children, the land is to be taken out of the first lines of descent, and then put back into the same line in a restricted manner by giving the land first to Silas Daniel Clayton, and then if he dies without children by giving it to Stanley Clayton, when the testator had eight granddaughters and four grandsons living, when he died. Therefore, the rule in *Shelley's case* does not apply. *Whitson v. Barnett,* 237 N.C. 483, 75 S.E. 2d 391 (where numerous cases are cited); *Tynch v. Briggs, supra; Williams v. Johnson, supra; Welch v. Gibson, supra.*

The words in the will the land 'shal never be Sold for Eney pupus what Sover" are void. *Lee v. Oates,* 171 N.C. 717, 88 S.E. 889; *Williams v. Sealy,* 201 N.C. 372, 160 S.E. 452; *Williams v. McPherson,* 216 N.C. 565, 5 S.E. 2d 830. Provisions against alienation in a deed or will do not defeat the estate to which they are annexed. In such case the conveyance or devise stands and the invalid provision is rejected. *Lee v. Oates, supra.*

The words in the will the land "Shall go to them down to the Tenth Jenerration" are void, being within the rule against perpetuities. *Jackson v. Powell,* 225 N.C. 599, 35 S.E. 2d 892.

After stating that *Shelley's case* was decided in 1581 Dean Samuel F. Mordecai, one of the greatest and wittiest law teachers our State has had, says in his Law Lectures, Vol. One, p. 654: "We see gathered around the 'Rule in *Shelley's Case*' Coke, Blackstone, Mansfield, Fearne, Junius and Lord Campbell—all great names in the history of our law and literature—not to mention many other great legal luminaries whose participation in fixing and unfixing this 'settled' rule, which will not remain settled, I have not time to tell about."

It is interesting to read what two of our brethren have said about *Shelley's case*. *Stacy, C. J.*, in *Welch v. Gibson, supra,* says: "The origin of the rule (in *Shelley's case*) as well as the wisdom of its adoption, has been the subject of much curious and learned speculation. Though found among the remains of feudality, it is neither a relic of barbarism nor a part of the rubbish of the dark ages, but rather a Gothic column, as it were, which has been preserved to aid in sustaining the fabric of our modern social system." *Douglas, J.*, in *Stamper v. Stamper,* 121 N.C. 251, 28 S.E. 20, calls *Shelley's case* "the Don Quixote of the law, which, like the last knight-errant of chivalry, has long survived every cause that gave it birth and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous."

The judgment of the lower court is

Affirmed.

CHRISTIAN E. MAPLES v. MATTIE V. HORTON AND HUSBAND, W. T. HORTON.

(Filed 29 January, 1954.)

1. Deeds § 16b—

Where the owner subdivides a tract of land and sells lots therein by deeds containing covenants restricting the use of the land pursuant to a general plan of development, such restrictions are valid and are enforceable by any grantee against any other grantee.

2. Same—

Where the owner, in subdividing and selling lots in a development, inserts restrictive covenants in his deeds, but provides that such restrictions are inserted for the benefit of the remaining land of the grantors, their heirs and assigns, and retains the right in grantors to release any of the restrictions and sell any part of the remaining land free from such restrictions, *held* the development is not according to any general plan or scheme, and such restrictions may not be enforced by the grantees *inter se*.

3. Same—

Restrictive covenants in a deed may be enforced as personal covenants only by the grantor or his executor or administrator, and may not be enforced by an heir, devisee or assignee of the grantor.

4. Same—

In the husband's deed containing restrictive covenants the wife joined for the purpose of relinquishing her inchoate right of dower. The husband died leaving a will devising the remaining lands in the development to the wife. *Held:* The wife, as devisee, may not enforce the restrictions as personal covenants.

5. Same: Husband and Wife § 12c—

Where a married woman joins in her husband's deed solely for the purpose of relinquishing her inchoate right of dower, she is not bound by any covenants contained therein, nor may she enforce as personal covenants restrictions contained therein, since she conveys nothing by the deed but merely relinquishes her dower right.

APPEAL by plaintiff from *Pless, J.*, at Chambers in Carthage, 30 September, 1952. From MOORE.

This action was instituted on 6 August, 1951, for the purpose of enforcing certain restrictive covenants and obtaining equitable relief by way of permanent injunction against the defendants to restrain them from violating such covenants.

The facts essential to an understanding of the questions involved in this appeal are as follows:

1. By deed dated 30 April, 1920, recorded in the office of the Register of Deeds of Moore County, North Carolina, W. A. Blue and others conveyed to Frank Maples a tract of land containing 66.12 acres in Sandhills Township, Moore County, North Carolina. In 1927, Frank Maples subdivided a portion of the above tract of land into lots and blocks, and caused a plat thereof, designated as "Map of Pine Ridge, Southern Pines, N. C.," to be recorded in Map Book 1, Section 1, page 41, in the office of the Register of Deeds in the aforesaid county and state, on 20 June, 1927.

2. By deed dated 31 May, 1929, executed by M. N. Sugg and wife, and duly recorded, Frank Maples acquired title to a tract of land consisting of 37.35 acres, more or less, which lies immediately adjacent to and northeast of said 66.12 acre tract.

3. In March, 1930, Frank Maples caused all of the 66.12 acre tract and all of the 37.35 acre tract to be laid off in lots and blocks, which included the subdivision referred to in paragraph one above. The larger subdivision was also known as Pine Ridge, Southern Pines, N. C., and a map thereof was recorded in Map Book 2, at page 59, in the office of the Register of Deeds in the aforesaid county and state, on 20 February, 1936.

4. At the time of acquiring the 37.35 acre tract, Frank Maples executed a purchase money deed of trust thereon which was later foreclosed by suit and sold by a commissioner and purchased by Harold Green and others. The deed therefor was executed by the commissioner on 19 June, 1936,

and duly recorded in the office of the Register of Deeds in the aforesaid county and state, on 15 July, 1936.

5. Frank Maples and wife, Christian E. Maples, sold a substantial number of lots in that portion of the subdivision which lies within the boundaries of the 66.12 acre tract. No lots were sold in the area of the subdivision which lies within the 37.35 acre tract.

6. The deeds for all the lots sold, except two, contain certain restrictions, and those pertinent to this appeal are as follows:

"(1) Whenever at any time the party of the second part, her (his or their) heirs, assigns, or lessees shall erect a dwelling on the premises hereby conveyed, the same shall cost not less than $3,500.00, and the plan or design shall first be submitted to and approved by the parties of the first part.

"(2) The party of the second part shall not conduct or permit to be conducted on said premises any mercantile business of any description, or use said premises for anything except dwelling house and garage purposes."

The deeds containing restrictions, also contain the following:

"(5) The foregoing conditions are deemed as inserted herein as restrictions for the benefit of the remaining land of the parties of the first part, their heirs or assigns, and said parties of the first part, their heirs and assigns, retain, however, the right to release any of said conditions and to sell any part of its (*sic*) remaining land free from all or any conditions at their discretion."

7. Lot 13 in Block 2 of the subdivision was sold without restrictions, but later repurchased by the grantor, Frank Maples, and thereafter sold with restrictions. Lot 9 in Block 2 was sold without restrictions and combined into a single curtilage with other lots sold with restrictions.

8. Frank Maples died in November, 1949, leaving a last will and testament which has been duly probated in the office of the Clerk of the Superior Court of Moore County, North Carolina, in which the testator devised all his property of every kind and descriptions to his wife, Christian E. Maples, the plaintiff herein.

9. On 3 March, 1950, the plaintiff entered into an agreement with Wm. F. Bowman whereby she undertook to release the restrictions contained in the deeds from Frank Maples and wife, Christian E. Maples, for Lots 3 and 4 in Block 1 of the subdivision. After the institution of this action, the plaintiff purchased Lots 3 and 4 from Wm. F. Bowman and wife, and filed of record in the office of the Register of Deeds of the aforesaid county and state, a Declaration of Intent in which she states it to be her purpose when she sells the lots to impose the identical restrictions in her deed or deeds which were originally contained in the conveyances from Frank Maples and his wife, Christian E. Maples, to Wm. F. Bowman.

10. Frank Maples and wife, Christian E. Maples, on 28 August, 1945, conveyed to Marian Nidy of Summit County, State of Ohio, Lots Nos. 1, 2, 3, 4, 5, 6 and 7 in Block 1 of the subdivision as shown on the map of "Pine Ridge, Southern Pines, N. C.," and modified the restrictions therein so as to permit the grantees to carry on their profession as chiropractors in any dwelling they might erect on the premises. Thereafter, on 3 July, 1951, Marian Nidy, acting by and through an attorney in fact, conveyed the above lots to the defendant, Mattie V. Horton.

11. Mattie V. Horton and her husband, W. T. Horton, immediately after the purchase of the property, undertook to establish and maintain a camp for transients traveling in trailers and did begin the construction and maintenance of such a camp.

The plaintiff obtained a temporary order on 8 August, 1951, restraining the defendants from maintaining on their premises in the Pine Ridge Subdivision a trailer camp, or using the property for similar purposes, and the order directed the defendants to remove the trailers and the camp located thereon from the premises. The order further directed the defendants to appear in Carthage, North Carolina, 12:00 o'clock noon on 15 August, 1951, to show cause why the order should not be made permanent. The hearing on the show cause order was continued by consent to be heard in Monroe, North Carolina, to 21 September, 1951, before his Honor Dan K. Moore, who signed the original order, and who continued the restraining order until the final hearing.

The cause came on for final hearing before Pless, J., upon an agreed statement of facts, the essential parts of which are hereinabove set out. It was agreed his Honor might take the matter under consideration and render his decision later out of the county and the district. Thereafter, the trial judge filed his judgment, dated 7 April, 1953, holding the restrictions contained in the deed to defendants are not enforceable, dismissing the restraining order and taxing the costs against the plaintiff. The plaintiff appeals, assigning error.

McKeithen & McConnell for appellant.
Rowe & Rowe for appellees.

DENNY, J. This appeal requires the determination of two questions: (1) Do the covenants and restrictions in the deeds for lots sold by the developer, Frank Maples, negative a general plan or scheme for the development of the area of land in question for residential purposes? (2) If so, may the plaintiff enforce such restrictions as personal covenants? In our opinion the answer to the first question must be in the affirmative, and to the second question, in the negative.

The law generally applicable to a plan or scheme for imposing restrictions upon land for particular purposes is succinctly stated in 26 C.J.S., Deeds, section 167, page 548, *et seq.*, as follows: "Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created." *Craven County v. Trust Co.*, 237 N.C. 502, 75 S.E. 2d 620; *Sedberry v. Parsons,* 232 N.C. 707, 62 S.E. 2d 88; *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Vernon v. Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710; *Brenizer v. Stephens,* 220 N.C. 395, 17 S.E. 2d 471; *Franklin v. Elizabeth Realty Co.*, 202 N.C. 212, 162 S.E. 199; *Bailey v. Jackson,* 191 N.C. 61, 131 S.E. 567; *Johnston v. Garrett,* 190 N.C. 835, 130 S.E. 835; *Homes Co. v. Falls,* 184 N.C. 426, 115 S.E. 184. "That covenants reasonably restricting the ownership, use, or occupancy of land, inserted in deeds as a part of a general scheme or plan of development, for the benefit of all owners of property within the development, are valid is conceded." *Vernon v. Realty Co., supra;* 14 Am. Jur., Covenants, Conditions and Restrictions, section 206, page 616.

In the instant case, it will be noted that in each deed in which restrictions were inserted, it was also provided that the restrictions or conditions in the deed were inserted therein for the benefit of the remaining land of the grantors, their heirs or assigns, and further that the grantors retain "the right to release any of said conditions and to sell any part of its (*sic*) remaining land free from all or any conditions at their discretion." It follows, therefore, that the subdivision involved on this appeal has never been subject to any general plan or scheme whereby the restrictive covenants in the deeds referred to above could have been enforced by the grantees *inter se*. *Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895; *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918.

In the case of *Humphrey v. Beall, supra, Winborne, J.,* in speaking for the Court said: "The right to change the restrictions as to lots sold, and the right to sell the unsold lots without restrictions, . . . refute the idea of a general plan for residential purposes to be exacted alike from all purchasers, and to be for the benefit of each purchaser." *Higdon v. Jaffa, supra; Phillips v. Wearn, supra;* 14 Am. Jur., Covenants, Conditions and Restrictions, section 202, page 613; 26 C.J.S., Deeds, section 167 (c), page 555; *Ringgold v. Denhardt,* 136 Md. 136, 110 A. 321.

In light of the conclusion we have reached on the first question posed, it is not necessary to discuss what effect the loss of part of the subdivision by foreclosure, the modification of the restrictions contained in the deeds

to Wm. F. Bowman, conveying to him Lots 3 and 4 in Block 1, or the execution of deeds to Lots 9 and 13 in Block 2 without restrictions, had on the purported general plan or scheme for development and sale of the property for residential purposes. *Phillips v. Wearn, supra; Humphrey v. Beall, supra; DeLaney v. Hart,* 198 N.C. 96, 150 S.E. 702; *Ivey v. Blythe,* 193 N.C. 705, 138 S.E. 2; *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697; *Snyder v. Heath,* 185 N.C. 362, 117 S.E. 294.

The decision in the case of *Starmount Co. v. Memorial Park,* 233 N.C. 613, 65 S.E. 2d 134, relied upon by the appellant, involved a factual situation distinguishable from that on the present record. Hence, it is not controlling on this appeal.

It is apparent that the restrictions contained in the deed from Frank Maples and wife, Christian E. Maples, to Marian Nidy, and incorporated by reference thereto in the deed from Marian Nidy to the defendant Mattie V. Horton, are not enforceable except as personal covenants. *Phillips v. Wearn, supra; Thomas v. Rogers,* 191 N.C. 736, 133 S.E. 18; *Snyder v. Heath, supra.*

The present plaintiff is the owner of all the unsold lots in the development known as Pine Ridge, Southern Pines, N. C., under and by virtue of the provisions in the last will and testament of her late husband, Frank Maples. However, if she has the right to enforce the restrictions under consideration, it must be as a grantor in the deed to Marian Nidy and not by reason of the fact she is the present owner of the unsold lots in the subdivision. "One cannot at common law maintain any action upon a personal covenant merely by force of the fact that he is the successor in title of the owner with whom such covenant was made." 14 Am. Jur., Covenants, Conditions and Restrictions, section 39, page 514; *Parker v. Beasley,* 40 N. Mex. 68, 54 P. 2d 687; *Willcox v. Kehoe,* 124 Ga. 484, 52 S.E. 896, 4 L.R.A. (N.S.) 466, 4 Ann. Cas. 437; *Asher Lumber Co. v. Cornett,* 22 Ky. L. Rep. 569, 58 S.W. 438, 56 L.R.A. 672.

It is further stated in 14 Am. Jur., Covenants, Conditions and Restrictions, in section 43, page 515, that: "The general rule is that only the covenantor or his executors or administrators are bound on a personal covenant. Hence, a personal covenant does not bind the assignee of the covenantor. A personal covenant will not descend to the heir, upon the theory that all personal covenants made by an ancestor terminate with his death. A personal covenant, upon the death of the obligee, goes to his administrator, and he alone is entitled to maintain suit upon the agreement." *Houston v. Zahm,* 44 Ore. 610, 76 P. 641, 65 L.R.A. 799; *Sturgeon v. Schaumburg,* 40 Mo. 482, 93 Am. Dec. 311; *Fitzsimmons v. South Realty Corp.,* 162 Md. 108, 159 A. 111.

The authorities seem to hold that a married woman who joins her husband in the execution of a deed to his property, merely to release her

inchoate right of dower, conveys nothing and is not bound by the covenants in such deed. 26 Am. Jur., Husband and Wife, section 180, page 801.

Likewise, in 41 C.J.S., Husband and Wife, section 39, page 494, *et seq.*, it is said: "As a general rule a married woman joining her husband in the execution of a conveyance of his lands for the sole purpose of releasing her inchoate rights therein is not bound by the covenants contained in such deed, and a title afterward acquired by her will not by force thereof pass to the grantee therein; nor is there any liability thereon in jurisdictions in which the statutes providing for liability of a married woman on her covenants of title are limited to conveyances of her separate estate, . . . Her joinder in the execution of the instrument does not operate as to her by way of passing an estate; it operates as to her, not as a conveyance, but as a release, and does not constitute her a grantor of the premises or vest in the grantee any greater or other estate than such as is derived from the conveyance of the husband, nor, in such case, is the wife a surety or guarantor." *Snoddy v. Leavitt,* 105 Ind. 357, 5 N.E. 13; *Weidler v. Floran,* 105 Ind. App. 564, 13 N.E. 2d 330; *Shelton v. Deering,* 49 B. Monroe's Rep. (Ky.) 405; *Williams v. Thomas,* 285 Ky. 776, 149 S.W. 2d 525; *Warner v. Flack,* 278 Ill. 303, 116 N.E. 197, 2 A.L.R. 423; *Sunfield v. Brown,* 171 Okla. 395, 42 P. 876; *Humbird Lumber Co. v. Doran,* 24 Idaho 507, 135 P. 66; *Agar v. Streeter,* 183 Mich. 600, 150 N.W. 160, L.R.A. 1915D, 196, Ann. Cas. 1916E, 518. See also *Deans v. Pate,* 114 N.C. 194, 19 S.E. 146.

In *Shelton v. Deering, supra,* it is said: ". . . a wife uniting with her husband in a conveyance of his land, in which she has no interest but the potential right of dower, incurs no obligation by reason of any collateral and merely personal covenant which may be inserted in the deed, and much less by any representation which it may contain. Such covenants or representations, though in form joint, must be regarded as intended to be the acts of the husband alone, and as operative upon him only and not upon the wife, who unites in the deed for the purpose of barring her right of dower, and cannot be presumed to have entered into all the particulars of a contract in which she has so remote and indirect an interest."

In the case of *Weidler v. Floran, supra,* the Indiana appellate Court said: "It can hardly be said that the act of the wife in joining her husband in the execution of a deed in his lands for the sole purpose of releasing her inchoate right (of dower) constitutes her a grantor of the premises or vests in the grantee any greater or other estate than such as is derived from the conveyance of the husband." The Court then quoted with approval the following statement from *Snoddy v. Leavitt, supra:* "Her joinder in the deed operated, not as a conveyance, but as a release of her inchoate right (of dower). The whole title was in the husband.

His deed without the wife joining therein would have carried the whole and the perfect legal title. If the husband make a deed of his lands, that deed carries the perfect legal title; and hence the joinder of the wife therein is of no consequence at all, unless she survives the husband. Her joinder in the deed is a release of her right to claim one-third of the land in case she survives the husband, and nothing more."

It is clear that the plaintiff, Christian E. Maples, at the time she joined her husband, Frank Maples, in the execution of the deed to Marian Nidy, on 28 August, 1945, conveying to the latter the lots involved in this controversy, had no title interest in the lots that was capable of assignment or transfer. She only had an inchoate right of dower in the lots conveyed which she had the capacity to release, but not to convey.

Therefore, in applying the law to the facts revealed by this record, we hold that the restrictions contained in the deed from Marian Nidy to the defendant Mattie V. Horton are not enforceable by this plaintiff.

The judgment of the court below is

Affirmed.

CARRIE P. BAKER, ADMINISTRATRIX OF DAVID HENRY BAKER, DECEASED, v. CITY OF LUMBERTON.

(Filed 29 January, 1954.)

1. Municipal Corporations § 12—

In the absence of statutory provision to the contrary, a municipality is not liable for the tortious acts of its officers or agents in discharging a duty imposed upon the municipality solely for the public benefit in the exercise of police power, or of judicial, discretionary or legislative authority.

2. Same—

In maintaining wires used in transmitting electricity solely for street lighting purposes, a municipality exercises a governmental function, and is not liable for any negligence of its officers and agents in the installation and maintenance of such wires.

3. Electricity § 11: Negligence § 19d—Act of third person in moving fallen wire so that it became charged held to insulate defendant's negligence.

Evidence tending to show that a wire maintained by defendant municipality broke and fell into the yard of a residence, that the broken wire was "dead," but that the owner of the residence threw it toward a pole so that it came in contact with and was energized by another wire, and that plaintiff's intestate then came in contact with the wire so charged, resulting in his death by electrocution, *is held* to disclose intervening negligence on the part of the owner of the residence insulating as a matter of law any negligence on the part of the municipality, since, as far as it appears

from the evidence, no injury would have resulted from the fallen wire had it not been moved so as to come in contact with the live wire.

4. Electricity § 10: Negligence § 19c—

Evidence tending to show that intestate, in the face of warnings, walked toward a fallen wire, which was emitting sparks, and stopped some five feet from the wire, looking at it, and that the wire suddenly moved and came in contact with his body, resulting in his death by electrocution, *is held* to show contributory negligence on the part of intestate, barring recovery as a matter of law.

5. Negligence § 11—

The law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided.

APPEAL by defendant from *Carr, J.*, at June Term, 1953, of ROBESON.

Civil action to recover for alleged wrongful death.

Plaintiff alleges in her complaint, and on the trial offered evidence tending to show that on 23 June, 1952, while her intestate was visiting at the home of one Prentiss Gaddy on S. Chestnut Street in the city of Lumberton, N. C., at about five o'clock in the afternoon, his attention was called to a wire that had broken, and was hanging or dangling from a pole and lying on the ground in the front yard of said house; that Prentiss Gaddy picked up the wire, and threw it on the ground at a distance from the house and at a point in the outer edge of said yard; that thereupon plaintiff's intestate drew nearer to the wire, and the wire began to emit sparks and blue flame at the point of contact with the ground and began to writhe and swing about in a wide arc, and swung against him, causing his death by electrocution, before aid could reach him.

Plaintiff also alleges in her complaint that the death of her intestate was proximately caused by the negligence of defendant, in that defendant, in operating the system of electric wires and apparatus in the vicinity where plaintiff's intestate was killed, failed (a) to properly repair and inspect or to keep same in proper and safe condition; (b) to exercise due care to inspect the said line to determine whether the same was free from obstruction or contact with any tree or other object that might cause the same to break and fall to the ground; (c) to exercise care commensurate with the danger arising from its operation of wires for the transmission of high voltage of electricity that was without insulation, or from which the insulation had been rubbed off; (d) to respond to notice furnished it on numerous times prior to 23 June, 1952, that something was wrong with the wires in that particular locality and place so as to cause them to emit sparks and fire unnaturally, and permitted the condition to remain unattended to and unremedied; and (e) to exercise due care to keep its

said electric lighting system in reasonably safe condition and free from danger of exposed live wires.

Plaintiff further alleges in her complaint that she has duly filed claim with defendant, and it has failed to pay any part of it; and that this action was instituted within one year from date of death of her intestate.

Defendant, answering the complaint, admits the allegations in respect to (1) plaintiff filing claim with defendant, and its failure to pay same, and (2) the institution of this action within one year from the date on which the death of her intestate occurred, but denies, in material aspect, other allegations as above detailed.

And defendant, further answering, and as a further defense, avers:

"15. That the city of Lumberton furnishes electric current to its citizens and, in so doing, said defendant is engaged in a public or governmental function, and was, at the time of the matter herein complained of, acting as a governmental agency and not in a proprietary capacity, and by reason thereof, if the court should find that defendant's employees were negligent in any manner, as alleged in the complaint, which is denied, defendant would not be responsible for any such negligence.

"16. At the time of the matters herein complained of, there had occurred in the city of Lumberton, and in the surrounding country, a severe windstorm causing a dead electric wire to blow down in the yard of Prentice Gaddy. The said Prentice Gaddy picked up said dead wire without any injury to himself, and if plaintiff's intestate was thereafter killed by coming in contact with said wire, he did so with the full knowledge that said wire had been contacted with a live electric wire, and was emitting electricity. Though he had been warned to stay away from said wire as it was then charged with electricity, he carelessly, heedlessly and in disregard of his own safety, approached said dangerous wire, and his negligence in so doing was the sole proximate cause of the injury he received, thereby resulting in his death.

"17. If the court should find that defendant was negligent in any manner, as alleged in the complaint, which is denied, plaintiff's intestate, by his own negligence, contributed to his injury resulting in death.

"18. Defendant pleads the negligence and contributory negligence of plaintiff's intestate, as herein alleged, as a bar to any recovery herein."

Also by permission of the court, defendant first filed an amendment to its answer by inserting between paragraphs 15 and 16 of its answer a paragraph designated as 15½ as follows:

"15½. The electric wire which plaintiff's intestate came in contact with, causing his death, was a wire used by the city of Lumberton in transmitting electricity to its street lights only. The erection and maintenance of said wire which plaintiff's intestate came in contact with, thus causing his death, was a governmental function of the city of Lumberton

and, by reason thereof, if the court should find that defendant's employees were negligent in any manner with respect to said wire, as alleged in the complaint, which is denied, defendant would not be responsible for any such negligence."

(2) And further by permission of the court, defendant next filed an amendment to its answer by inserting between paragraphs 17 and 18 another paragraph designated 17½ as follows:

"17½. If the court should find that defendant was negligent, as alleged in the complaint, which is denied, the active negligence of a third party, to wit: Prentis Gaddy, in moving a dead electric wire so that it came in contact with a live wire, thus energizing with electricity and dead wire which came in contact with plaintiff's intestate, thereby causing his death, was the real efficient cause of the injuries resulting in the death of plaintiff's intestate, and the negligence of said third party intervened and insulated any prior negligence of defendant, if any, which is denied, and thereby became the sole proximate cause of the injuries resulting in the death of plaintiff's intestate."

Upon the trial in Superior Court plaintiff offered testimony of witnesses, briefly stated, as follows: A. B. Sansbury, City Manager of Lumberton, after testifying on direct examination as to profits made by the city of Lumberton in the business of distributing for gain electric energy to patrons in and outside of the city, continued on cross-examination: "The city of Lumberton not only furnishes electricity to its citizens and customers within and without the corporate limits, but furnishes electricity for the streets. The electricity that lights the homes of customers is on a different wire from the electricity that goes to light the streets; the current of electricity that goes into the homes doesn't go from any wire that lights the streets of the city of Lumberton." And on redirect examination witness concluded in these words: "I cannot give the exact date when I examined the S. Chestnut Street area. I did have knowledge of the conditions in June, 1952. That knowledge is from my own observation and also maps of the distribution of current of the city of Lumberton. The street lighting circuit is an entirely different circuit."

And Prentiss Gaddy gave this narrative: "I was living in the city of Lumberton on the 23rd of June, 1952 . . . down across the railroad on Chestnut Street . . . On that day David Henry Baker was killed at my house by a fallen wire, or met his death there . . . 5 or 5:30 in the afternoon. At the time . . . he was standing by the side of a tree in the yard. That evening it was misting rain and the wind was blowing. I was cutting grass. A wire broke in the yard and I moved it away. Me and him were looking at it. The wire started moving and went toward David Henry and he couldn't get out of the way. I don't know where the wire was before it broke. The wire fell right at the door step at the front. I

walked over and picked the wire up and moved it away from the house to the side of the light pole. I did not receive a shock at the time I picked up the wire . . . David Henry . . . cutting the grass . . . saw the wire down. Fire started popping from the wire and blowed into him. He was about four feet from the wire when it came in contact with him, and when it started moving around. I saw the wire when it hit David Henry. The wire hit his hand and when he fell it went across his chest. The wire hit the hand that was in a case . . . David Henry Baker did not grab the wire . . . touch the wire . . . pick the wire up or grab hold of it. The first contact with the wire was when it blowed toward him. He threw his hands out and the wire wrapped around his hands . . . the wind was pretty rapid and the trees were shaking. I was cutting grass with a sling blade. When the wire broke I stopped cutting grass. I stopped cutting because the wire broke. When I picked up the wire David Henry was cutting the grass . . . The place where David Henry came in contact with the wire is as far as from here to the gentleman sitting at the table from a light pole. It is a good piece from the other pole. It would be . . . not more than five feet. The other pole was . . . back toward town away from the house . . . There was a tree sitting in the edge of the yard,—a sycamore tree . . . The wires pass right through . . . the top of the tree. The limbs had grown around the wires in the top of the tree . . . There was more than one line . . ."

And this witness, under cross-examination, continued, "When I first picked up the wire, it was a dead wire. There was no current about it . . . It was after I had picked the wire up and put it down, that it began emitting electricity. When it began emitting electricity, Baker came toward the wire . . . Baker was a pretty good distance from the electric wire . . . When he started coming toward the wire . . . He didn't come right up to the wire . . . All the time he was being warned not to come near that wire . . . I didn't touch the wire after it was moving on the ground . . . When the wire was laying on the ground, the fire started coming . . . about five minutes after I left the wire."

Then Anna Wilkins gave the following as her version: ". . . My yard and Prentiss Gaddy's yard join . . . We live in adjoining houses on the same side of the street. That afternoon I was sewing on my front porch until it started thundering and lightning. I had an electric machine. I was just sitting there on the porch. I saw Prentiss and this young man, Baker, in the next yard . . . I saw the wire break. The wire was on the same side of Chestnut Street that I lived on. The wire broke right about in the tree top, at the corner of Prentiss' house. From time to time I had seen fire fly from that wire in the tree top. I had called the Power Company, it, or one of the men who work for the town. I had been seeing sparks coming from the wire for three and a half years . . . I called one

night about one o'clock . . . After that sparks still came from the wire. I called . . . four or five times . . . over a period of as much as three years . . . There was not a bad storm that day . . . I saw this wire fall and the *next thing* I observed was Prentiss walked and picked the wire up and threw it off. When he picked it up we hollered at him. He threw the wire and in just a minute it was on fire . . . in flames. At first the wire didn't do anything, but as it burned it began to move. When Gaddy threw the wire down, somebody called the Baker boy and told him: 'Look at that fire, it has caught fire and Prentiss had just thrown the wire down.' The Baker boy walked as near the wire as from me to you,—eight or ten feet. He said to me, 'That boy didn't have a bit of sense' . . . He was talking about Prentiss Gaddy who had picked the wire up first. I told him not to pick it up and he said he wasn't. He was standing still then. He then took a step or two which did get him a little nearer to the wire. He stopped five feet from the wire and was standing there looking at it. The wire all at once began to move; it went in a twisting shape and swayed toward the Baker boy. Baker threw his hands up . . . to protect his face it looked like, and the wire struck him . . . The light pole was almost half-way between Prentiss' house and our house and the tree was back at the other corner of Prentiss' house. I would say almost as far as from here to the back of the courtroom from the pole. I believe the next pole was a little further away than this one. I have never counted the wires that pass through that tree. I know there were several, five or six . . . At the place where I observed sparks emitting from the wire, wires passed near the limbs in the trees. The wires did go through the limbs in the tree, right through the tree."

And this witness, on cross-examination, continued, in pertinent part: ". . . I saw David Henry Baker come toward the wire and I warned him, but he kept coming. He stopped as much as eight feet from it; then he moved from the tree, walked toward another tree, not where the wire was through the top . . . I said he first walked down side of the wire between their yard and ours. He stopped and I told him then about the wire being dangerous and not to walk close to it, and he said 'I am not.' He did not leave going in the direction of the wire; went toward another tree which put him a little nearer the wire. I warned him then and he stopped as much as five feet from the wire then. I called the Light and Power Company, and they didn't come for some few minutes. I called again, I would say they came in twenty-five minutes at least . . ."

Plaintiff was allowed to offer in evidence: (1) That portion of paragraph 16 of defendant's answer, reading as follows: "At the time of the matters herein complained of, there had occurred in the city of Lumberton, and in the surrounding country, a severe windstorm, causing a dead electric wire to blow down in the yard of Prentice Gaddy. The said

Prentice Gaddy picked up said dead wire without any injury to himself, and if plaintiff's intestate was thereafter killed by coming in contact with said wire, he did so with full knowledge that said wire had been contacted with a live electric wire, and was emitting electricity." And (2) so much of paragraph 15½ of the amendment to the answer, reading as follows: "The electric wire which plaintiff's intestate came in contact with, causing his death, was a wire used by the city of Lumberton in transmitting electricity to its street lights only."

Defendant, reserving exception to denial of its motion for judgment as of nonsuit, entered when plaintiff first rested her case, offered testimony of witnesses tending to show (1) the performance of duty by the city in connection with the electric wire in question; and (2) that the wire which came in contact with plaintiff's intestate carried electricity only for lighting streets, and is on a different circuit from the circuit for lighting homes.

And the witness Willie McNeill, assistant superintendent of the Light and Water Department of the City, testified in pertinent part: "When I got down there my examination revealed that the wire that carried current for street was being energized. It was crossed up with a 2300 volt wire, going into a private home. This had caused the energizing of this street lighting wire. That wire that lights the street at that point was a dead wire, that is before it came in contact with a live wire. It stays off all day at the plant and is energized at night, that is the street lighting wire. That 2300 volt wire is one of our lead wires that we use for commercial purposes going into the house . . ."

Plaintiff offered, in rebuttal, testimony of the City Manager, recalled to the stand, in respect to the system of distributing electricity to patrons, and for street lighting.

Motion of defendant for judgment as of nonsuit renewed at the close of all the evidence was denied. Defendant excepted.

The case was submitted to the jury on three issues,—as to negligence of defendant, contributory negligence of plaintiff, and damages. The jury answered all favorably to plaintiff. Whereupon judgment for plaintiff was signed by the court.

Defendant appeals therefrom to Supreme Court and assigns error.

R. L. Campbell and F. D. Hackett for plaintiff, appellee.
McLean & Stacy for defendant, appellant.

WINBORNE, J. The only assignment of error is based upon exception to denial of defendant's motions, aptly made, for judgment as of nonsuit.

1. It is contended, and rightly so, that the evidence shows affirmatively that the death of plaintiff's intestate resulted from contact with a wire

used by the city in transmitting electricity for street lighting purposes only, a governmental function, in the performance of which the city is not liable for tortious acts of its officers and agents. *Hodges v. Charlotte,* 214 N.C. 737, 200 S.E. 889; *Beach v. Tarboro,* 225 N.C. 26, 33 S.E. 2d 64; *Alford v. Washington,* 238 N.C. 694; *Hamilton v. Hamlet,* 238 N.C. 741.

The decisions of this Court uniformly hold that, in the absence of some statute which subjects them to liability therefor, when cities 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, supra;* also *Hamilton v. Hamlet, supra,* and numerous cases there cited.

And it has been held by this Court that the installing and maintaining of traffic light system in and by a city is in the exercise of a discretionary governmental function. See *Hodges v. City of Charlotte, supra; Beach v. Tarboro, supra; Alford v. Washington, supra; Hamilton v. Hamlet, supra.*

II. If it be conceded that the city of Lumberton were negligent in any respect alleged in the complaint, it affirmatively appears from the evidence offered by plaintiff that the injury to and death of the intestate of plaintiff was "independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person." See *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; also *Alford v. Washington, supra,* and cases there cited.

The fallen wire was dead until it was picked up by Prentiss Gaddy and moved away from the house to the side of the light pole. So far as it appears from the evidence, there would have been no injury to anyone but for this intervening act which insulated any negligence on the part of defendant. See *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849; *Alford v. Washington, supra.*

III. Also, if it be conceded that the city of Lumberton were negligent in any of the respects alleged in the complaint, it affirmatively appears from the evidence offered by plaintiff that the intestate of plaintiff was negligent in approaching the wire—when he saw, and was warned, that it had become alive with electricity,—thereby he contributed proximately to his injury and death. The law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided. *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543; *Mintz v. Murphy, supra.*

Hence this Court is constrained to hold that on any, and all of the grounds so stated, plaintiff has failed to make out a case of liability against defendant city of Lumberton. Therefore the judgment below is

Reversed.

STEPHEN G. DOBIAS AND WIFE, GRACE DOBIAS, v. C. S. WHITE AND WIFE, GEORGIA M. WHITE.

(Filed 29 January, 1954.)

1. Pleadings § 28—

Plaintiffs' motion for judgment on the pleadings should be allowed only if the answer admits every material averment in the complaint and fails to set up any defense or new matter sufficient in law to avoid or defeat the plaintiffs' claim.

2. Same—

A motion for judgment on the pleadings admits for its purposes the truth of the allegations in the pleading of the adverse party.

3. Mortgages §§ 2e, 36—

A purchase money deed of trust must be made as a part of the same transaction in which the debtor purchases land, embrace the land so purchased, and secure all or part of its purchase price. Therefore, where a purchaser, to secure the balance of the purchase price for land, executes a deed of trust on land other than that purchased from the grantor, the instrument is not a purchase money deed of trust and G.S. 45-21.38 relating to deficiency judgments is inapplicable.

4. Accord and Satisfaction § 1—

Agreements constituting an accord and satisfaction fall into two categories (1) where the parties agree that the agreement itself shall operate as the satisfaction of the old right, (2) where the parties agree that it is only the performance of the agreement that shall have that effect.

5. Same—

An accord and satisfaction is compounded of two elements: An accord which is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, something other than or different from what he is or considers himself entitled to; and a satisfaction which is the execution or performance of such agreement.

6. Accord and Satisfaction § 3—

An agreement to convey the land purchased in satisfaction of notes given for the purchase price of the land does not operate as a satisfaction of the notes unless and until the accord is fully performed, and the tender of deed in conformity with the agreement does not bar a suit on the notes if the payee violates his agreement for the accord and refuses to accept the deed.

7. Same—

An accord is as much a contract as any other agreement, and an action may be maintained against the party in default for the breach or nonperformance of an accord under the ordinary principles of the law of contracts.

8. Same—

If an accord is not performed by the debtor, the creditor may enforce his original claim or recover damages for the breach of the accord.

9. Same—

If the creditor breaches the agreement for the accord, the debtor's original obligation to him is not discharged, but the debtor acquires a right of action against the defaulting creditor for damages for breach of the agreement for the accord, or the alternative right to specific enforcement of the agreement, if this remedy is practicable, which would discharge the original obligation.

10. Same: Pleadings § 10—

Where a creditor who has breached his agreement for an accord sues the debtor to enforce the original claim, the debtor may set up as a counterclaim either a demand for damages for the breach of the accord or a demand for its specific enforcement. G.S. 1-137.

11. Accord and Satisfaction § 3: Estoppel § 3—

Where, in the creditors' suit on the original claim, the debtor sets up breach of an accord and satisfaction by the creditor, and demands either damages for such breach or specific enforcement of the accord, *held* the debtor by necessary implication asserts that the accord is fair in substance and honest in origin, and is estopped thereafter to assume any subsequent inconsistent position to the prejudice of the creditor.

12. Accord and Satisfaction § 3: Pleadings § 28—Answer held to allege facts entitling defendant to specific performance of accord.

Where, in the payees' suit on the notes given for the purchase price of lands, the makers allege that the parties had agreed that the makers should reconvey the land to the payees in satisfaction of the notes and also other notes executed at the same time, and that the makers had tendered deed in performance of the agreement, and that they are still able, ready and willing to perform the accord in full, and that plaintiffs still hold all the notes evidencing the original claim, *held* the answer sets up facts entitling the makers to specific performance of the accord even though the answer does not demand such relief in explicit terms, and therefore the payees' motion for judgment on the pleadings should not be allowed.

13. Pleadings § 5—

The facts alleged in a pleading and not the prayer for relief is determinative.

APPEAL by defendants from *Sink, J.*, at June Term, 1953, of McDOWELL.

Civil action by creditors on promissory notes in which the debtors plead an unexecuted accord as a basis for affirmative relief.

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

1. The plaintiffs Stephen G. Dobias and Grace Dobias brought this action against the defendants C. S. White and Georgia M. White on 7 November, 1952, to recover a personal judgment for $4,500.00 with interest on $5,000.00 from 5 October, 1951, until 3 January, 1952, and on $4,500.00 from 3 January, 1952, until paid at the rate of six per cent per annum. The complaint claims the right to such judgment on the basis

of these allegations: On 5 October, 1951, the defendants, for value received, made two sealed promissory notes, negotiable in form and dated on that day, to the plaintiffs, who still hold and own the same. Each note is for $2,500.00, and bears interest from date until paid at the rate of six per cent per annum. One of the notes fell due on 5 April, 1951, and the other matured on 5 October, 1952. The notes are subject to a credit of $500.00 on account of a part payment made by the defendants on 3 January, 1952. The plaintiffs have made demand on the defendants for payment of the unpaid portion of the notes and the interest accrued on them, and the defendants have refused to comply with this demand.

2. The answer admits the factual allegations of the complaint. It alleges additionally that the two notes mentioned in the complaint and "two other notes in the amount of $2,500.00 each" constituted a series of four promissory notes "given by the defendants as a part of the purchase price for certain lands conveyed to the defendants by the plaintiffs by a deed of even date with said notes," and that as a part of the self-same transaction the defendants executed a deed of trust whereby they conveyed *other lands* already owned by them to Paul J. Story, as trustee, to secure the payment to the plaintiffs of the entire series of four notes. Moreover, the answer undertakes to set up "by way of further answer and defense, and as a basis for affirmative relief" two separate pleas to defeat the cause of action stated in the complaint.

3. The first plea may be epitomized in this fashion: Although it embraces *other lands,* the deed of trust is essentially a purchase money deed of trust because it secures the payment of the four notes evidencing the balance of the purchase price of the lands conveyed to the defendants by the plaintiffs. If the plaintiffs collect two of the notes by means of a personal judgment against the defendants, and the others by means of a foreclosure of the deed of trust, they will circumvent the provisions of G.S. 45-21.38 to the effect that the mortgagee or trustee or holder of the notes secured by a purchase money mortgage or a purchase money deed of trust cannot recover a deficiency judgment on account of such mortgage or deed of trust or the debt secured thereby. The court ought to forestall the evasion of the statute by appropriate injunctive relief.

4. The second plea alleges these matters in specific factual detail: After the notes mentioned in the complaint were in arrears, to wit, on 7 August, 1952, the plaintiffs and defendants made a contract by which the defendants agreed to convey to the plaintiffs the lands covered by the deed of trust in full satisfaction of the indebtedness secured by the deed of trust, and by which the plaintiffs agreed to accept such conveyance in full settlement of such indebtedness, surrender the four notes to the defendants, and cause the trustee to cancel the deed of trust. The defendants forthwith executed and delivered to Paul J. Story, the agent desig-

nated by the plaintiffs for the purpose, a deed of conveyance sufficient to vest the lands covered by the deed of trust in the plaintiffs, but the plaintiffs in violation of the contract refused to accept the deed of conveyance in satisfaction of the indebtedness, or to surrender the notes to the defendants, or to cause the trustee to cancel the deed of trust. "The defendants are still ready, willing, and able to abide by the terms of said agreement" and pray "that a judgment be entered . . . declaring all of the notes secured by the deed of trust . . . and said deed of trust itself to be fully paid and satisfied by the agreement."

5. When the cause was heard at the June Term, 1953, of the Superior Court of McDowell County, the plaintiffs moved the presiding judge for judgment on the pleadings. The judge allowed the motion and entered a personal judgment in favor of the plaintiffs and against the defendants for $4,500.00 with interest as specified in paragraph 1. The defendants excepted and appealed, assigning the allowance of the motion and the entry of the judgment as error.

Everette C. Carnes and William C. Chambers for plaintiffs, appellees.
Proctor & Dameron for defendants, appellants.

ERVIN, J. "A motion for judgment on the pleadings is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact . . . A complaint is fatally deficient in substance, and subject to a motion by the defendant for judgment on the pleadings if it fails to state a good cause of action for plaintiff and against defendant . . . An answer is fatally deficient in substance and subject to a motion by the plaintiff for judgment on the pleadings if it admits every material averment in the complaint and fails to set up any defense or new matter sufficient in law to avoid or defeat the plaintiff's claim." *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384.

The answer in the instant case admits every material allegation of the complaint. Since the deed of trust covers land other than that purchased from the plaintiffs by the defendants, it cannot qualify as a purchase money deed of trust under the statute embodied in G.S. 45-21.38. This is true because a deed of trust is a purchase money deed of trust only if it is made as a part of the same transaction in which the debtor purchases land, embraces the land so purchased, and secures all or part of its purchase price. *Miller v. Miller,* 211 Iowa 901, 232 N.W. 498; *Gray v. Kappos,* 90 Utah 300, 61 P. 2d 613; 36 Am. Jur., Mortgages, Section 15; 59 C.J.S., Mortgages, Section 168. Thus it appears that the answer is fatally deficient in substance and subject to a motion by the plaintiffs for judgment on the pleadings unless the second plea of the defendants is sufficient to avoid or defeat the plaintiff's cause of action.

According to the allegations of the second plea, which are admitted for the purpose of this appeal by the motion for judgment on the pleadings, the plaintiffs bound themselves by a bilateral contract with the defendants to accept the conveyance of the land embraced by the deed of trust in satisfaction of the pre-existing contractual obligation of the defendants to make payment of the indebtedness secured by the deed of trust. As a consequence, the decision on this appeal necessarily turns on the doctrine of accord and satisfaction.

Much confusion is avoided in this field of the law if constant heed is paid to the circumstance that agreements governed by the doctrine of accord and satisfaction fall into two categories. In the one case the parties agree that the agreement itself shall operate as the satisfaction of the old right; and in the other the parties agree that it is only the performance of the agreement that shall have that effect. *Hayes v. Railroad,* 143 N.C. 125, 55 S.E. 437, 10 Ann. Cas. 737; Restatement of the Law of Contracts, section 418; Williston on Contracts (Rev. Ed.), section 1846. What is set forth below applies to agreements of the second category because the agreement involved in this case is of that class. *Walker v. Burt,* 182 N.C. 325, 109 S.E. 43.

An accord and satisfaction is compounded of the two elements enumerated in the term. "An 'accord' is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to; and a 'satisfaction' is the execution or performance, of such agreement." 1 C.J.S., Accord and Satisfaction, section 1.

The relevant rules of accord and satisfaction may be stated in this wise:

1. If the accord is fully performed, the performance satisfies the original claim, and bars a subsequent action to enforce it. *Snyder v. Oil Company,* 235 N.C. 119, 68 S.E. 2d 805; *Hinson v. Davis,* 220 N.C. 380, 17 S.E. 2d 348; *Owens v. Manufacturing Co.,* 168 N.C. 397, 84 S.E. 389; *Griffin v. Petty,* 101 N.C. 380, 7 S.E. 729; *Cabe v. Jameson,* 32 N.C. 193, 51 Am. Dec. 386; *Smitherman v. Smith,* 20 N.C. 86.

2. If the accord is not fully performed, the original claim is not satisfied. 1 Am. Jur., Accord and Satisfaction, sections 65, 67; 1 C.J.S., Accord and Satisfaction, section 37. As a consequence, an unperformed accord does not constitute a defense to a subsequent action to enforce the original claim. *State Bank v. Littlejohn,* 18 N.C. 563; Williston on Contracts (Rev. Ed.), section 1842. This is true even though "the debtor within the time agreed or, if no time was specified, within a reasonable time tenders performance of his promise, but the creditor in violation of his agreement refuses to accept the performance in satisfaction of his

claim and brings suit on the original cause of action." Williston on Contracts (Rev. Ed.), section 1843. See paragraph 5, *post.*

3. Since an accord is as much a contract as any other agreement, an action may be maintained against the party in default for the breach or nonperformance of an accord under the ordinary principles of the law of contracts. *Union Central Life Ins. Co. v. Imsland,* 91 F. 2d 365; Williston on Contracts (Rev. Ed.), section 1840; 1 Am. Jur., Accord and Satisfaction, section 74.

4. If an accord is not performed by the debtor, the creditor has a choice of alternative remedies. He may enforce his original claim, or recover damages for the breach of the accord. *Sherman v. Sidman,* 300 Mass. 102, 14 N.E. 2d 145; *Waitzkin v. Glazer,* 283 Mass. 86, 185 N.E. 927; *Dissette v. Cutler Co.,* 29 Oh. App. 88, 163 N.E. 53; Restatement of the Law of Contracts, section 417.

5. If the creditor breaks the agreement for the accord, the debtor's original obligation to him is not discharged, for the creditor's breach prevents the performance of the accord. The debtor nevertheless acquires rights against the defaulting creditor at law and in equity. *Union Central Life Ins. Co. v. Imsland, supra.* The debtor acquires a right of action against the defaulting creditor for damages for the breach of the agreement for the accord; and if the specific enforcement of that agreement is practicable, he acquires an alternative right against the defaulting creditor to its specific enforcement. If the agreement for the accord is specifically enforced, the debtor's original obligation is discharged. *Union Central Life Ins. Co. v. Imsland, supra; Corrigan v. Payne,* 312 Mass. 589, 45 N.E. 2d 829; Restatement of the Law of Contracts, section 417; Williston on Contracts (Rev. Ed.), section 1845. See, also, in this connection these decisions relating to the specific enforcement of agreements for accords: *Very v. Levy,* 13 How. (U.S.) 345, 14 L. Ed. 173; *Boshart v. Gardner,* 190 Ark. 104, 77 S.W. 2d 642, 96 A.L.R. 1130; *French v. Commercial Credit Co.,* 99 Colo. 447, 64 P. 2d 127; *Girasulo v. Consolidated Motor Lines,* 5 Conn. Supp. 245; *Cook v. Richardson,* 178 Mass. 125, 59 N.E. 675; *Hunt v. Brown,* 146 Mass. 253, 15 N.E. 587; *Burtman v. Butman,* 94 N.H. 412, 54 A. 2d 367; *Dissette v. Cutler Co., supra; Beattie v. Traynor,* 114 Vt. 495, 49 A. 2d 200. When a defaulting creditor sues the debtor to enforce his original claim, the debtor may set up either a demand for damages for the breach of the accord or a demand for its specific enforcement as a counterclaim. Either of these demands meets the twofold requirement of the counterclaim statute embodied in the first subdivision of G.S. 1-137. *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843.

Let us read the allegations of the second plea in the light of these and other applicable rules. Since it entitles the plaintiffs to receive a distinct benefit, *i.e.,* land, which they otherwise would not obtain, the agreement

for the accord is supported by a valuable consideration. *Very v. Levy, supra;* 1 Am. Jur., Accord and Satisfaction, section 51; 1 C.J.S., Accord and Satisfaction, section 4. Although the agreement for the accord requires their direct conveyance of the encumbered property to the beneficiaries of the deed of trust in satisfaction of the debt secured by that instrument, the defendants allege by necessary implication that the stipulated transaction is fair in substance and honest in origin, and thereby estop themselves to assume any subsequent inconsistent position to the prejudice of the plaintiffs. *Rand v. Gillette,* 199 N.C. 462, 154 S.E. 746; *Harvey v. Knitting Co.,* 197 N.C. 177, 143 S.E. 45; *Bizzell v. Equipment Co.,* 182 N.C. 98, 108 S.E. 439; *Hill v. R. R.,* 178 N.C. 607, 101 S.E. 376. See, also, in this connection: *Holland v. Dulin,* 205 N.C. 202, 170 S.E. 784, rehearing denied in 206 N.C. 211, 173 S.E. 310; *Lawrence v. Beck,* 185 N.C. 196, 116 S.E. 424; *McLeod v. Bullard,* 86 N.C. 210; 59 C.J.S., Mortgages, section 438. The defendants tendered to the plaintiffs full performance of the accord within a reasonable time, and the plaintiffs breached their contractual obligation by refusing to accept the tendered performance in satisfaction of their original claim. Inasmuch as the defendants are still able, ready, and willing to perform the accord in full, and the plaintiffs still hold and own the four notes evidencing their original claim, specific enforcement of the agreement for the accord is practicable, and will extinguish the cause of action stated in the complaint.

These things being true, the second plea sets up a counterclaim for the specific enforcement of the agreement for the accord. To be sure, the defendants may not demand such relief in explicit terms. They are nevertheless entitled to relief appropriate to the facts alleged by them, and the facts alleged by them in their second plea make out a counterclaim for specific enforcement of the agreement for the accord. *Griggs v. York-Shipley, Inc.,* 229 N.C. 572, 50 S.E. 2d 914, 15 A.L.R. 2d 798.

It necessarily follows that the second plea avers facts sufficient to defeat the cause of action on the two notes mentioned in the complaint, and that the presiding judge erred in allowing the motion of the plaintiffs for judgment on the pleadings.

We deem it advisable to observe in closing that the court may be disabled to make a complete adjudication of all of the rights of the parties on the final hearing on account of the nonjoinder of the trustee as a party, and that the question of the applicability of the statute of frauds to the accord in suit was not presented or considered on this appeal.

The judgment on the pleadings is vacated, and the cause is remanded for further proceedings agreeable to law.

Error.

U DRIVE IT AUTO COMPANY v. ATLANTIC FIRE INSURANCE COMPANY.

(Filed 29 January, 1954.)

1. **Insurance § 45½—**

The terms "theft," "larceny," "robbery," and "pilferage," as used in a policy of automobile insurance, all denote loss or damage resulting from some form of larceny.

2. **Larceny § 1—**

Common law larceny is the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use.

3. **Insurance § 45½—Facts agreed held insufficient to show damage to car resulting from theft within coverage of policy.**

This action on a policy of automobile theft insurance was submitted to the court upon an agreed statement of facts to the effect that insured entrusted the automobile to an employee to drive it to a garage for repairs, that the employee, upon arrival at the garage, learned the job could not be done at that time, drove to his home for breakfast, and had an accident damaging the car while on the way back to the garage. It was also stipulated that the employee had been convicted of driving the car in violation of G.S. 20-105. There was no stipulation that the employee drove the vehicle without the consent of the owner or with intent to temporarily deprive the owner of possession of the vehicle. *Held:* Upon the facts agreed, the loss was not occasioned by larceny, and even if it be conceded that the terms "theft" or "larceny" as used in the policy should include the statutory taking of the vehicle as defined by G.S. 20-105, the facts agreed fail to show a violation of this statute, the statement to the effect that the employee had been convicted of violating this statute being a conclusion of law not binding on insured who was not a party nor privy to the criminal prosecution.

4. **Automobiles § 31½—**

To constitute a violation of G.S. 20-105, it must be made to appear that the offending driver drove the vehicle without the consent of the owner and with the intent temporarily to deprive the owner of his possession of the vehicle.

5. **Controversy Without Action § 4—**

Where the parties submit a cause to the court upon an agreed statement of facts, as distinguished from an agreement that the court should hear the evidence and find the facts, the facts agreed are in the nature of a special verdict, and in the absence of a statement providing otherwise, the court is without power to find facts not embraced in the agreement or to draw any inferences of fact except those necessarily implied as a matter of law.

6. **Same—**

While the parties may admit or agree on the facts submitted to the court for judgment, they cannot make admissions of law which will be binding on the courts.

APPEAL by plaintiff from *Grady, Emergency Judge,* at April Civil Term, 1953, of DURHAM.

Civil action to recover under a policy of automobile theft insurance, heard below upon an agreed statement of facts. These in gist are the facts agreed:

On 16 June, 1951, the plaintiff was insured under an insurance policy executed by the defendant covering the automobile involved here. The policy provides the following coverage: "Theft (Broad Form) Loss of or damage to the automobile caused by theft, larceny, robbery or pilferage."

On the date mentioned, Robert Bagley, an employee of the plaintiff, was instructed to drive one of the plaintiff's automobiles in the course of his employment to Elkin Motor Company in the city of Durham for repairs. The Motor Company was unable to make the repairs at the time Bagley delivered the automobile to it. Bagley then drove to his home on Cornwallis Road for breakfast. On his way back to Elkin Motor Company the car skidded off the road, turned over, and was damaged to the extent of $800. Following the wreck, Bagley was arrested, tried in the Recorder's Court of Durham County, and found guilty under a charge of violating G.S. 20-105, which is as follows:

"Any person who drives or otherwise takes and carries away a vehicle, not his own, without the consent of the owner thereof, and with intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in any such unauthorized taking or driving, is guilty of a misdemeanor."

Following Bagley's conviction, the plaintiff made demand upon the defendant for payment of the damage to the automobile, contending that such damage was within the coverage of the insurance policy. The defendant denied liability; whereupon this action was instituted.

Upon the facts agreed the defendant moved for judgment as of nonsuit. The motion was allowed, and from judgment entered in accordance with such ruling, the plaintiff appealed.

E. C. Brooks, Jr., Gantt, Gantt & Markham, and E. K. Powe for plaintiff, appellant.

Henry Bane for defendant, appellee.

JOHNSON, J. The single question presented by the facts agreed is whether a theft of the automobile was committed within the meaning of

the insurance policy sued on. The court below answered in the negative, and we approve.

The policy covers "Loss or damage to the automobile caused by theft, larceny, robbery or pilferage." "Theft" is the popular name for "larceny." Ordinarily the terms are synonymous. Ballentine's Law Dictionary, p. 1279; 62 C.J. 889; *Funeral Home v. Insurance Co.,* 216 N.C. 562, 5 S.E. 2d 820. And ordinarily the words "theft," "robbery," and "pilferage" all denote some form of larceny. *Ledvinka v. Home Insurance Co.,* 139 Md. 434, 115 A. 596, 19 A.L.R. 167; 32 Am. Jur., Larceny, Sec. 2, p. 885. Larceny, according to the common-law meaning of the term, may be defined as the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. *S. v. Cameron,* 223 N.C. 449, 27 S.E. 2d 81; *S. v. Holder,* 188 N.C. 561, 125 S.E. 113; *S. v. Powell,* 103 N.C. 424, 9 S.E. 627; 32 Am. Jur., Larceny, Sec. 2, p. 883.

It is manifest that the plaintiff has failed to show a felonious taking of the automobile within the meaning ordinarily connoted by the terms "theft" or "larceny." This is virtually conceded by the plaintiff. It insists, however, (1) that the policy of theft insurance sued on includes statutory taking of a vehicle as defined by G.S. 20-105, and (2) that the facts agreed show a violation of the statute. In effect, the plaintiff takes the position that the terms of this statute may be treated as being incorporated in the insurance contract on the theory that the statute was within the contemplation of the parties and that they intended the coverage of the policy to include a taking within the meaning of the statute, and that the words "theft" and "larceny" as used in the policy should be so interpreted. See *Dunn v. Swanson,* 217 N.C. 279, 281, 7 S.E. 2d 563. It may be doubted that the doctrine of aider-by-statute has any such application as is urged by the plaintiff. See 5 Am. Jur., Automobiles, Sections 567, 568, and 569; Annotations: 14 A.L.R. 215; 19 *Id.* 740; 30 *Id.* 662; 38 *Id.* 1123; 46 *Id.* 534; 89 *Id.* 465; 152 *Id.* 1100, 1102; 160 *Id.* 947, 950.

But be that as it may, and conceding, without deciding, that the insurance policy sued on does include statutory taking of an automobile as defined by G.S. 20-105, even so, we think the facts agreed upon in the instant case are insufficient to show a violation of the statute.

To constitute a violation of this statute it must be made to appear that the offending driver (1) drove the vehicle "without the consent of the owner," and (2) with "intent to temporarily deprive" the owner of his possession of the vehicle.

Plaintiff's employee Bagley was entrusted with the automobile and directed to drive it to the garage for repairs. On arrival, he learned that

the job could not be done at that time. Bagley then drove the car to his home for breakfast. He was on his way back to the garage to have the repair job performed when the wreck occurred.

It is nowhere stipulated in the agreed statement of facts that Bagley in driving the car home for breakfast did so "without the consent of the owner," or that he intended "to temporarily deprive" the plaintiff of possession of the car. With the agreed case being silent as to both these essential elements of the statutory offense, no violation of the statute was made to appear. And the trial court had no power to infer the existence of these essential factual ingredients of the statutory offense.

This case was not submitted to the trial court for judgment based on its findings of fact. Instead, the parties submitted to the court only the question of law arising upon the facts agreed. G.S. 1-185; G.S. 1-172. The court would have been traveling out of its province, as well as out of the agreement in the agreed case, if it had undertaken to infer or deduce facts from those stipulated. *Bott v. McCoy,* 20 Ala. 578, 56 Am. Dec. 223.

When a case is tried on an agreed statement of facts, such statement is in the nature of a special verdict, admitting there is no dispute as to the facts, and constituting a request by each litigant for a judgment which each contends arises as a matter of law upon the facts agreed. *Hutcherson v. Sovereign Camp W. of W.,* 112 Tex. 551, 251 S.W. 491, 28 A.L.R. 823.

The general rule is that on submission of a controversy upon an agreed statement of facts, the court is without power, in the absence of a statement providing otherwise, to draw any inferences or find any facts not embraced in the agreement, unless as a matter of law such inferences are necessarily implied. *Hutcherson v. Sovereign Camp W. of W., supra; Rand v. Hanson,* 154 Mass. 87, 28 N.E. 6, 12 L.R.A. 574; 2 Am. Jur., Agreed Case, Sections 22 and 23.

We have not overlooked the stipulation, included in the case agreed, that Bagley was convicted in the Recorder's Court of Durham County of driving the car in violation of G.S. 20-105. This stipulation, being in the nature of an erroneous admission of law, rather than an admission of fact, may be disregarded. As against the defendant here, who was neither party nor privy to the criminal prosecution, this stipulation does not overthrow the legal effect of the specific facts agreed which discloses as a matter of law no violation of the statute. Although parties "may admit or agree on facts, they cannot make admissions of law which will be binding upon the courts." *Moore v. State,* 200 N.C. 300, 301, 156 S.E. 806. See also *Rawlings v. Neal,* 122 N.C. 173, 29 S.E. 93; *Binford v. Alston,* 15 N.C. 351.

In the final analysis it would seem that the plaintiff in this action is seeking to recover "Collision or Upset" benefits under a policy that provides no such coverage and for which no premium was charged or paid.

The judgment below is

Affirmed.

THOMAS B. WOODY, DALLAS RAMSEY, RALPH RAMSEY, J. C. GALBREATH, LOUISE AND TOM OLIVER, JUNIUS DUNN, FRANK JOHNSON, AUBREY BARNETT, AND THE BOARD OF EDUCATION OF PERSON COUNTY, NORTH CAROLINA, PETITIONERS, v. HUBERT H. BARNETT AND WIFE, BESSIE BARNETT, AND JAMES GARLAND BARNETT, DEFENDANTS.

(Filed 29 January, 1954.)

1. Appeal and Error § 40d: Trial § 54—

Where the parties waive trial by jury, the findings of fact of the trial court have the force and effect of a verdict by a jury, and are conclusive on appeal if there be competent evidence to support such findings.

2. Highways § 11—

Where an action to have a portion of abandoned highway adjudged to be a neighborhood public road under G.S. 136-67 is submitted to the court under agreement of the parties, findings of fact by the court, supported by evidence, to the effect that the abandoned road was not necessary for ingress or egress to any dwelling, there having been by-roads constructed giving access to the dwelling in question and connecting the schools involved, and that the abandoned road had not remained open and in general use by the public, *held* to support the judgment dismissing the action.

3. Appeal and Error § 38—

The burden is on appellants to show error.

APPEAL by petitioners from *Hatch, Special Judge,* April Term, 1953, of PERSON. Affirmed.

This was an action by the petitioners to have a portion of an abandoned road adjudged to be a neighborhood road as provided by G.S. 136-67.

In improving State Highway #57 (now 157) the highway was straightened so as to eliminate a curve in the old road. The segment thus abandoned is 1,752 feet in length and is partly within and partly without the corporate limits of Roxboro. The petitioners allege they own property and dwelling houses fronting on the old road which afforded them a necessary means of ingress and egress, and that the defendants have declared their intention of closing the portion of this old road where it crosses their land. Petitioners pray that this old road be judicially determined to be a neighborhood public road as defined by the statute G.S. 136-67.

The defendants deny the old road is a necessary means of ingress and egress with respect to any dwelling house fronting on said road, or that it has remained open and in general use, and they deny that petitioners, either in fact or in law, are entitled to the relief prayed for.

It was agreed that jury trial be waived and that the presiding judge should find the facts from the evidence and render final judgment thereon.

After hearing the evidence offered, the court found the facts and rendered judgment as follows:

"1. That prior to 1938 there was a public highway leading from the City of Roxboro to Hurdle Mills; that during the said year of 1938, the North Carolina State Highway & Public Works Commission relocated a portion of said road beginning at a point near the Person County Negro Training School in the City of Roxboro and continuing in a southwesterly direction in a straight line, thereby abandoning that portion of the old Roxboro-Hurdle Mills' Road which begun at or near said Person County Negro Training School and continued southwesterly in a circular direction for approximately 1,752 feet where the said old abandoned road re-entered the said highway. The new highway was at that time No. 57 and later changed to No. 157.

"2. That at the time said portion of the old public dirt road from Roxboro to Hurdle Mills was abandoned by the North Carolina State Highway & Public Works Commission there was no dwelling house facing on the east side of said abandoned road and only one unoccupied log house on the west side of said abandoned road.

"3. That the new Highway No. 57 was located so near the abandoned portion of the old road that all owners of land adjoining the abandoned road continued to own land adjoining the new Highway No. 57 and had access to said Highway No. 57 across their own property without the use of the abandoned road.

"4. That all of the petitioners herein have acquired title to their property, which adjoins said abandoned road, since September, 1943,—more than four years after said road was abandoned.

"5. That prior to the beginning of this action the Superintendent of the Person County Public Schools consulted with the Engineers of the North Carolina State Highway & Public Works Commission relative to rebuilding and improving the said old abandoned road and was informed by them that said abandoned road was in such condition that it was impractical to rebuild and improve same so that it could be used as a road over which the school buses of Person County could travel.

"6. That the said abandoned road has not remained open and in general use by the public since it was abandoned in 1938 and is not a necessary means for the ingress to and egress from any dwelling house.

"It is, therefore, upon motion of Davis & Davis and Gaither M. Beam, attorneys for defendants herein, ordered, adjudged and decreed:

"1. That the petition of the petitioners be, and the same is hereby denied.

"2. That the Court declares as a fact and as a matter of law that the abandoned road as described in Paragraph 1 of the petition herein has not remained open and in general use by the public and is not a neighborhood public road serving a public use and as necessary means of ingress to and egress from the dwelling house of one or more families in accordance with General Statutes 136-67, 136-68, 136-69, and 136-70, and is not necessary for a means of ingress and egress for any of the petitioners herein.

"3. That the cost of this action to be taxed by the Clerk of Superior Court be paid by the petitioners."

Petitioners excepted and appealed.

Fuller, Reade & Fuller, R. B. Dawes, and T. B. Woody, Jr., for petitioners, appellants.

Davis & Davis for defendants, appellees.

DEVIN, C. J. This case was here at Fall Term, 1951, and is reported in 235 N.C. 73, 68 S.E. 2d 810. Only preliminary questions of pleading were considered on that appeal. We have now before us the petitioners' appeal from a judgment rendered which is determinative of the merits of the action.

It is apparent that the rights of the parties with respect to the subject of the action are controlled by the statute now codified as G.S. 136-67, the material parts of which we quote: "All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the State Highway & Public Works Commission, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families . . . are hereby declared to be neighborhood public roads. . . ."

From the evidence offered the court found the facts above set out and thereupon rendered judgment dismissing the action. Jury trial having been expressly waived by the parties, in accord with the established rule, the findings of fact made by the trial judge have the force and effect of a verdict by a jury, and are conclusive on appeal if there be competent evidence to support such findings. *St. George v. Hanson, ante,* 259; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464.

The petitioners noted exception to findings of fact numbered 2, 3, 4, 5 and 6 on the ground that they were not supported by the evidence. We

have examined the evidence brought up in the record, to which those exceptions point, and are of opinion that none of the exceptions can be sustained. There was evidence sufficient to justify the court in finding the determinative facts set out.

It was contended that the occupants of the dwelling house of Petitioner Ralph Ramsey, fronting on the east side of the old road, referred to in the second finding of fact, had no way of access to the new highway, but we think there was evidence that by roads constructed in connection with the new high school access to the highway was available to those occupying that house, and that the old road did not constitute a necessary means of access thereto.

Appellants also contended the court misunderstood the testimony of the School Superintendent as stated in the fifth finding of fact, but it is apparent, in any event, that there was evidence tending to show that the old road was not such as could be used by school buses, and that no effort was ever made to use it for this purpose outside the corporate limits of Roxboro. Other roads were constructed and used connecting the two schools west of the old road. The defendants were not interested in closing the segment of the old road which was within the town limits, but only claimed ownership of the land which reverted to them upon the abandonment by the State of its easement therein for public road purposes.

None of the exceptions noted and brought forward in petitioners' assignments of error can be upheld. The burden was on them to show error. There was no exception to any ruling of court with respect to the admission of testimony. There was no request for additional findings.

We conclude that the court's findings of fact were supported by competent evidence and that they are sufficient to sustain the judgment based thereon. *Mosteller v. R. R.*, 220 N.C. 275, 17 S.E. 2d 133; *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371; *Raynor v. Ottoway*, 231 N.C. 99, 56 S.E. 2d 28.

Judgment affirmed.

R. PAUL JAMISON v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; AND COUNTY OF MECKLENBURG; AND S. Y. McADEN, CHAIRMAN, AND E. K. BROWN, W. CRAIG LAWING, C. J. McEWEN AND S. S. McNINCH, MEMBERS OF THE BOARD OF COMMISSIONERS FOR THE COUNTY OF MECKLENBURG.

(Filed 29 January, 1954.)

1. Evidence § 2—

In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereupon take judicial notice of it. G.S. 1-157.

2. Trial § 55—

Where a jury trial is waived under the provisions of G.S. 1-184, the judge must state his findings of fact and his conclusions of law separately. G.S. 1-185.

3. Same: Appeal and Error § 50—

Where the parties waive trial by jury and agree that the judge consider the evidence, find the facts, and render judgment, but the court fails to find material facts necessary for the conclusions of law to be accurately and safely reviewed, the cause must be remanded.

APPEAL by plaintiff from *Whitmire, Special J.*, Extra Civil Term, October 1953, of MECKLENBURG.

Civil action instituted by plaintiff, a resident of, and taxpayer within, the City of Charlotte and County of Mecklenburg, to restrain by permanent injunction the City and County from issuing bonds for the purpose of erecting and equipping public library buildings for the City and County and acquiring such real and personal property as may be useful or necessary for such purposes, and levying and collecting a tax for said bonds in the City for the bonds of the City and a tax in the County, including the City, for the bonds of the County.

The plaintiff and the defendants waived a trial by jury as to any issues of facts which may arise on the pleadings, and agreed that the Judge could consider the evidence, find the facts and render judgment. The action according to the Record was heard solely on the Complaint and the Exhibits attached thereto and made a part thereof, and the Answer. There is no evidence in the Record.

The court below entered the following judgment: "This cause coming on to be heard and being heard by the undersigned Special Judge assigned to hold the October 5, 1953, Special Term of Superior Court of Mecklenburg County; both plaintiff and defendants being represented by counsel, and the pleadings having been introduced in evidence, after argument of counsel the Court finds as a fact that said Library bonds are for a public purpose, having been duly authorized by a vote of the people in accordance with Chapter 1034 of the North Carolina Session Laws of 1949, and is of the opinion and concludes as a matter of law that said bonds are for a public purpose and that said Chapter 1034 of the North Carolina Session Laws of 1949 is constitutional and does not violate the sections of the Constitution cited by the plaintiff in his complaint, or otherwise, and that the bonds to be issued pursuant to the election held thereunder will be valid obligations of the City of Charlotte and Mecklenburg County, respectively:

"WHEREFORE, upon motion of counsel for the defendants, it is hereby ordered, adjudged and decreed that the prayer for injunctive relief of the plaintiff herein be, and the same is hereby denied.

"This cause is dismissed and the plaintiff taxed with the costs."

The appellees' statement of facts is as follows:

"In addition to the facts set out in the plaintiff appellant's brief, it is proper to consider certain other facts which were before the court at the trial of this cause for a proper determination of the questions involved. The proposed bond election was not for the purpose of establishing any new system of libraries for Charlotte and Mecklenburg County. There was already in existence at the time the election was held a joint City and County system. This system consisted of the main library in the City of Charlotte and also the following branches, one located in each of the following towns: Matthews, Pineville, Huntersville, Cornelius and Davidson. Also there are two branches operated exclusively for Negroes, one on Brevard Street in the City of Charlotte and another in the community known as Fairview Homes. In addition to these branches the library operates two large bookmobiles on regular bi-weekly schedules with designated stops both within and outside the City of Charlotte. All books and other material dispensed by this library system are completely interchangeable among all of the above branches. No distinction is made between materials available for the Negro branches and that obtainable from the White branches. Any resident of Mecklenburg County is at liberty to obtain the services of the library system regardless of his place of residence. Citizens living outside the City of Charlotte regularly come to the main library in the city and have the same privilege there as do residents of the city. This library system is a corporation, duly chartered by the Legislature in 1903; because of an endowment from Andrew Carnegie it became early known as the Charlotte Carnegie Public Library. By Act of the Legislature (Chapter 253, Session Laws of 1945, Subsection K) this library is now 'Public Library of Charlotte and Mecklenburg County' and is governed by a board of eight trustees, two of whom are appointed by the Mayor of the City of Charlotte, two are appointed by the Chairman of the Board of County Commissioners of Mecklenburg County, and the other four consist of the Mayor of the City of Charlotte, the Superintendent of the Public School system of the City of Charlotte, Superintendent of the Public School system of Mecklenburg County, and the Chairman of the Board of County Commissioners of Mecklenburg County. (Chapter 366, Section 56, Public-Local and Private Laws of 1939, cited in defendant appellees' answer, R. p. 32.)

"This library system is supported by county-wide taxation, also by special appropriations made by the City Council of the City of Charlotte and by a percentage of the net profits from the operation of the Alcoholic Beverage Control Stores in Mecklenburg County, as provided in the Alcoholic Beverage Control Act. The proposed bond issue is for the purpose of extending and enlarging this library system."

These facts are neither alleged in the pleadings, nor according to the Record introduced in evidence, nor did the lower court make any findings of fact in respect thereto, except that in Paragraph 12 of the Answer of the appellees there appears this language: "That the erection and equipment of public libraries are proper city and county purposes, and so recognized and approved by the Legislature of North Carolina in statutes duly enacted, among others the Charter of the City of Charlotte, Chapter 366, Public-Local Laws of 1939, as amended by Chapter 789, Laws of 1945, and up to and including the Session of 1953, and Chapters 352 G.S. 160-200, Sec. 5, and 1270, 1949 Session Laws, G.S. 153-77, Sec. (M), and other Acts and Laws of said State"; and except that the Complaint refers to Ch. 1034 of the Session Laws of North Carolina 1949.

An examination of the statutes referred to in the pleadings show that they do not set forth most (in fact not nearly all) of the facts stated in the appellees' statement of facts in their brief.

The election was held 13 December 1952.

The plaintiff excepted to the judgment, and appealed to the Supreme Court.

Covington & Lobdell for plaintiff, appellant.

John D. Shaw for appellee City of Charlotte.

Whitlock, Dockery, Ruff & Perry for appellees County of Mecklenburg and Commissioners of County of Mecklenburg.

H. E. McDougle for Public Library of Charlotte and Mecklenburg County, Amicus Curiae.

PARKER, J. "In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereupon take judicial notice of it." G.S. 1-157.

When a jury trial is waived under the provisions of G.S. 1-184, G.S. 1-185 requires that the court's decision "shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately." The judge must state his findings of fact and his conclusions of law separately. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639; *Bradham v. Robinson,* 236 N.C. 589, 73 S.E. 2d 555.

The sole finding of fact made by the court below is "the court finds as a fact that said Library Bonds are for a public purpose, having been duly authorized by a vote of the people in accordance with Chapter 1034 of the North Carolina Session Laws of 1949."

If the facts are as stated in the appellees' brief, and if so found by the trial court, we deem them material, so that we may *more accurately and safely* pass upon the court's conclusions of law.

We are of the opinion that the court below has not sufficiently complied with the requirement of G.S. 1-185 in that the court's decision does not contain a statement of the facts found, and that the case should be remanded in order that sufficient facts may be found as required by the statute. *Shore v. Bank,* 207 N.C. 798, 178 S.E. 572; *Trust Co. v. Transit Lines,* 198 N.C. 675, 153 S.E. 158; *Knott v. Taylor,* 96 N.C. 553, 2 S.E. 680.

The parties shall be permitted to amend their pleadings, if they so desire.

It is ordered that the case be

Remanded.

BRAGG DEVELOPMENT COMPANY, INC., v. T. G. BRAXTON, TAX SUPERVISOR OF CUMBERLAND COUNTY; LECTOR E. RAY, CHAIRMAN, FRED KINLAW, F. M. BARRETT, J. M. GILLIS AND D. M. CLARK, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF CUMBERLAND COUNTY; AND CUMBERLAND COUNTY.

(Filed 29 January, 1954.)

1. Declaratory Judgment Act § 2—

The Declaratory Judgment Act does not confer upon the courts jurisdiction to render advisory opinions, and it is necessary that the facts agreed present a justiciable question upon which a judgment could be rendered in a pending civil action.

2. Same—

Where the question submitted in a controversy without action under G.S. 1-250, is whether a county has the right to tax an individual's property located on a military reservation, but it appears that no assessment or levy has been made and no attempt to collect a tax on the property involved undertaken, the action must be dismissed as presenting a purely abstract question.

3. Same: Taxation § 38c—

Ordinarily, neither the State nor its political subdivisions may be denied or delayed in the enforcement of the right to collect revenue, and if a tax is levied which the taxpayer deems unauthorized, he must pay same under protest and then sue for its recovery, G.S. 105-406. The Declaratory Judgment Act does not supersede this rule or provide an additional or concurrent remedy.

APPEAL by plaintiff and defendants from *Carr, J.,* September Term 1953, CUMBERLAND.

Controversy without action under G.S. 1-250.

The Federal Government has acquired and now owns a large area of land in Cumberland and Harnett Counties commonly known as the Fort Bragg Military Reservation. The State has ceded jurisdiction over said land to the Federal Government.

In 1950 the Federal Government, by written contract, leased to plaintiff, a domestic corporation, a certain unimproved part of said land lying entirely within Cumberland County. The lease was for a period of 75 years. Its primary purpose was to provide housing facilities for Army personnel, and in furtherance of that purpose plaintiff obligated itself to erect and maintain thereon a housing project of 500 units. The buildings were erected as provided in the contract and are now owned by plaintiff, subject to the conditions and provisions of the lease contract.

In 1952 the defendant Cumberland County notified plaintiff that said property of plaintiff would be assessed for *ad valorem* taxes. The plaintiff, protesting, asserted that said property was not subject to taxation by the County and requested that the question be submitted to the court for decision under the provisions of G.S. 1-250. The County agreed, and thereupon this proceeding was instituted.

The question presented to the court for decision was: "Does Cumberland County have the right to levy and collect *ad valorem* taxes on the aforesaid property or any part thereof?"

While the right to tax tangible personal property was submitted, the facts agreed contain no stipulation that plaintiff possesses any personal property which is located on the leased property.

The court below, upon consideration of the facts stipulated by the parties, adjudged that defendant County (1) "has the right to levy and collect *ad valorem* taxes on both the plaintiff's leasehold interest in the lands leased to it . . . and the plaintiff's improvements on the leased lands, which have become a part of the realty;" and (2) "does not have the right to list and collect *ad valorem* taxes on plaintiff's personal property on said lands, and it is enjoined and restrained from listing, levying or collecting any such tax thereon."

Both plaintiff and defendants excepted and appealed.

Poyner, Geraghty & Hartsfield, Taylor & Allen, and Hoyle & Hoyle for plaintiff.

Lester G. Carter, Jr., James MacRae, and Robert H. Dye for defendant.

BARNHILL, J. This cause must be remanded to the court below with direction that the court enter a judgment of dismissal for two reasons: (1) It presents no litigable question for decision; and (2) in any event it is not the proper method of determining plaintiff's tax liability to the defendant County.

"The subject of a civil action" as used in the statute, G.S. 1-250, is a cause of action. The stipulated facts must present a controversy which could be litigated and upon which the court could enter judgment in an action pending. In adopting the statute, the Legislature did not intend to confer jurisdiction on the courts to render advisory opinions. *Wright v. McGee,* 206 N.C. 52, 173 S.E. 31; *Burton v. Realty Co.,* 188 N.C. 473, 125 S.E. 3.

Here the facts agreed do not set forth a "question in difference which might be the subject of a civil action." The defendant County has made no assessment. Neither has it levied upon this or any other property of plaintiff in an attempt to collect a tax on the property involved. No right of plaintiff has been denied or violated. It has suffered no wrong. It has sustained no loss either real or imaginary. On the facts agreed no justiciable question on which the court, in a civil action, could render a judgment is disclosed.

Does the County have the right to tax the property of plaintiff which is located on the Fort Bragg Military Reservation? The County asserts this right. Plaintiff denies that it exists. The controversy thus created presents a purely abstract question. Any judgment putting it to rest would be wholly advisory in nature.

Ordinarily the sovereign may not be denied or delayed in the enforcement of its right to collect the revenue upon which its very existence depends. This rule applies to municipalities and other subdivisions of the State Government. If a tax is levied against a taxpayer which he deems unauthorized or unlawful, he must pay the same under protest and then sue for its recovery. G.S. 105-406; *Hunt v. Cooper,* 194 N.C. 265, 139 S.E. 446. And if the statute provides an administrative remedy, he must first exhaust that remedy before resorting to the courts for relief. *Insurance Co. v. Unemployment Compensation Com.,* 217 N.C. 495, 8 S.E. 2d 619; *Unemployment Compensation Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4; *Employment Security Com. v. Kermon,* 232 N.C. 342, 60 S.E. 2d 580. See, however, G.S. 105-406 relating to illegal property taxes.

As broad and comprehensive as it is, even the Declaratory Judgment Act does not supersede the rule or provide an additional or concurrent remedy. *Insurance Co. v. Unemployment Compensation Com., supra; Buchan v. Shaw, Comr. of Revenue,* 238 N.C. 522.

Appeal dismissed.

J. M. LITTLE AND ANNIE LITTLE v. GEORGE W. SHEETS (W. G. SHEETS, R. A. SHEETS AND EFFIE LIDDLE).

(Filed 29 January, 1954.)

1. **Appeal and Error § 10b—**

Clerks of the Superior Court have no discretionary power to enlarge the time for service of statement of case on appeal.

2. **Same—**

G.S. 1-281 does not authorize a clerk of Superior Court to enlarge the time for service of statement of case on appeal in those instances in which appeal is taken from judgment rendered by the court out of term and out of the district by agreement.

3. **Appeal and Error § 31b—**

Where statement of case on appeal is not filed within time allowed, G.S. 1-282, it is a nullity, but failure of case on appeal does not require dismissal, since the record proper may be reviewed for error appearing on its face, and the judgment affirmed on motion of appellant when no error so appears.

4. **Appeal and Error § 40d: Trial § 55—**

The findings of fact by the trial court under agreement of the parties are as conclusive as the verdict of a jury when the findings are supported by evidence.

APPEAL by plaintiffs from *Patton, Special Judge,* at July 1953 Special Term of ASHE.

Processioning proceeding to determine the true boundary line between lands of plaintiffs and lands of respondents, heard at term,—a jury trial having been waived by the parties, and it being stipulated that the court should pass upon the issues of fact, together with questions of law arising in the action, and render judgment out of term and out of the district.

This is the issue shown in the record: Where is the true location of the dividing line between the lands of the plaintiffs and those of the defendants? The court answered: "From the letter 'A' to the letter 'B' on the court map"—as contended by defendants. And in accordance therewith the "Judge Presiding" rendered judgment "in the city of Shelby, Cleveland County, North Carolina," on 1 August, 1953.

The judgment was received by the Clerk of Superior Court of Ashe County on 3 August, 1953. And after docketing it, the Clerk entered an order under date of 12 August, 1953, reciting that the judgment "having been rendered out of term and out of the district, by consent, the plaintiff excepts and gives notice of appeal to the Supreme Court of North Carolina. The plaintiff shall have ninety (90) days within which to make up and serve case on appeal and the defendants shall have thirty (30) days

thereafter within which to file exceptions and countercase. Appeal bond in the amount of One Hundred ($100.00) dollars is adjudged sufficient."

Plaintiffs, through their counsel, on the same day, 12 August, 1953, gave notice of their appeal to attorneys for defendants, who accepted service of it.

Thereafter on 21 October, 1953, "attorneys for defendant-appellees" accepted service of case on appeal and acknowledged receipt of a copy of it. And there appears in the record on appeal a stipulation signed by "attorneys for plaintiff-appellants" and by "attorneys for defendant-appellees" in which it is stipulated and agreed "that the foregoing shall constitute the case on appeal in this action in the Supreme Court of North Carolina, the defendant-appellees not waiving their objection that the statement of case on appeal was not presented in time . . ."

Bowie & Bowie and Wade E. Vannoy, Jr., for plaintiffs, appellants.
Johnston & Johnston for defendants, appellees.

WINBORNE, J. Appellees, having reserved their objection that the statement of case on appeal was not presented in time, move in this Court for affirmance of the judgment below, or for dismissal of the appeal. This basis on which the motion rests is that the statute G.S. 1-282 requires that appellant shall cause to be prepared a statement of the case on appeal, and a copy thereof served on the respondent within fifteen days from the entry of the appeal taken; and that while this statute vests the judge trying the case with power, in his discretion, to enlarge the time in which to serve case on appeal, no such power is given to clerks of Superior Court. This Court is of opinion, and now holds, that the point is well taken.

On the other hand, appellants say and contend that the preceding section of the General Statutes, that is, G.S. 1-281, is applicable in that it provides that "When appeals are taken from judgments of the judge not made in term time, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals," and, hence in such case, the clerk is vested with an over-all authority, including power to enlarge time for service of case on appeal.

This position is untenable for these reasons: This proceeding was tried in term time before the presiding judge, without a jury, and judgment was rendered as of the term. The parties only agreed that the judge might render judgment out of term, and out of the district. Moreover, the General Assembly having expressly fixed the time for serving of statement of case on appeal, and having specifically authorized the judge, in his discretion, to enlarge the time, it would seem, therefore, that this procedure is exclusive. The express mention of the one excludes the other.

Indeed, it will not be assumed that the General Assembly intended to give to clerk of Superior Court implied authority to do that for which express authority is given to the judge:

"The right of appeal is not an absolute right, but is only given upon compliance with the requirements of the statute." *Kerr v. Drake,* 182 N.C. 764, 108 S.E. 393. See also *S. v. Daniels,* 231 N.C. 17, at 24, 56 S.E. 2d 2, where it is stated that "rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive."

Therefore this Court is constrained to hold that the case on appeal, shown in the transcript on this appeal not having been served within the time fixed by statute, and there being neither waiver nor valid enlargement of time for service thereof, is a nullity. *Hicks v. Westbrook,* 121 N.C. 131, 28 S.E. 188; *Hall v. Hall,* 235 N.C. 711, 71 S.E. 2d 471, and cases cited.

However, the motion to dismiss the appeal on the ground that there is no case on appeal must be denied, for the reason that there may be error on the face of the record proper. But a motion to affirm the judgment below is appropriate procedure.

Where there is failure to have a case on appeal legally served and settled, decisions of this Court uniformly hold that that does not of itself require a dismissal of the appeal. The appellants are still entitled to present the case on the record proper. We cite a few of such decisions. See *Wallace v. Salisbury,* 147 N.C. 58, 60 S.E. 713; *Roberts v. Bus Co.,* 198 N.C. 779, 153 S.E. 398; *Pruett v. Wood,* 199 N.C. 788, 156 S.E. 126; *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66; *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496; *Hall v. Robinson,* 228 N.C. 44, 44 S.E. 2d 345; *S. v. Bryant,* 237 N.C. 437, 75 S.E. 2d 107.

In the light of this rule of practice, an examination of the record proper on this appeal fails to disclose error therein. And it is not inappropriate to say, in passing, that an examination of the case on appeal shown in the record, but not served in time, discloses substantial competent evidence to support the finding of fact made by the judge as to the true dividing line between the lands of plaintiffs, and those of defendants, in keeping with well settled and applicable principles of law. See *Lumber Co. v. Hutton,* 159 N.C. 445, 74 S.E. 1056; *Whitaker v. Cover,* 140 N.C. 280, 52 S.E. 581; *Huffman v. Pearson,* 222 N.C. 193, 22 S.E. 2d 440; *Brown v. Hodges,* 232 N.C. 537, 61 S.E. 2d 603, and cases there cited.

And, a jury trial having been waived, and the parties agreeing that the judge should pass upon the issues, the findings of the judge, supported by evidence, are as conclusive as the verdict of a jury. See of late cases: *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *St. George v. Hanson, ante,* 259; *Lovett v. Stone, ante,* 206; *Trust Co. v. Finance Co.,* 238 N.C. 478.

For reasons stated:
Motion to dismiss denied.
Motion to affirm allowed.

B. L. NEWTON AND WIFE, MARJORIE NEWTON, PETITIONERS, v. NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 29 January, 1954.)

1. Eminent Domain § 14—

A petition in a special proceeding by a landowner to recover compensation for the taking of his land for highway purposes under G.S. 136-19, must allege, among other things, facts showing that his land has been taken or damaged for highway purposes without just compensation.

2. Same—Petition held demurrable for failure to allege facts showing how land was taken or damaged for highway purposes.

In a special proceeding under G.S. 136-19, allegations in the landowners' petition to the effect that the State Highway and Public Works Commission constructed a by-passing highway through a deep cut bordering petitioners' lot, that large cracks thereafter appeared in the lot, splitting the foundations of the petitioners' residence, and that the displacement of the embankment and damage to petitioners' property was caused by the construction of the by-pass, *are held* insufficient to withstand demurrer, since they state mere legal conclusions without allegation of facts showing how the embankment was displaced or the construction of the by-passing highway effected its displacement.

3. Pleadings § 15—

A demurrer does not admit conclusions of law of the pleader.

APPEAL by respondent from *Carr, J.*, at October Term, 1953, of DURHAM.

Special proceeding by owners to recover compensation for land supposedly taken or damaged for public highway use heard upon a demurrer to the petition.

The petition alleges these things:

On 1 September, 1950, the petitioners B. L. Newton and Marjorie Newton bought a lot containing their present residence in the City of Durham, which they still own. During the period beginning on 31 August, 1949, and ending on 9 March, 1951, the respondent State Highway and Public Works Commission constructed a by-passing highway through the area just north of the lot, which lies entirely outside the highway right of way. The by-passing highway runs through a deep cut,

its right of way borders upon the northern boundary line of the lot, and the residence stands eight feet from the embankment which forms the southern side of the cut. On 1 March, 1952, large cracks appeared in the lot. These cracks have split the foundation of the residence, and threaten the total destruction of the building. The cracks "are caused by a displacement of the embankment forming the southern side" of the cut. The petitioners informed the respondent with promptitude of the appearance of the cracks, and requested it to repair the embankment. The respondent refused to comply with the request. "The displacement of the embankment is the direct and proximate result of the construction" by the respondent of the by-passing highway. The damage to the lot, which is "caused solely by the construction of the by-pass," constitutes a taking of the property of the petitioners for public highway use, and entitles them to just compensation from the respondent.

The petition prays that the court appoint commissioners "to appraise the . . . damages resulting to the . . . land by the construction" by respondent of the by-passing highway, and enter the decrees necessary to secure to petitioners just compensation "for the injury . . . of their property by the work" of the respondent.

The respondent demurred to the petition in writing on this ground: The petition does not state facts sufficient to show that the land of the petitioners has been taken or damaged for public use. Judge Carr heard the proceeding on an appeal from the clerk, and entered a judgment overruling the demurrer. The respondent excepted and appealed, assigning Judge Carr's judgment as error.

Victor S. Bryant, Jr., for the petitioners, appellees.

R. Brookes Peters, E. W. Hooper, and Hofler & Mount for the respondent, appellant.

ERVIN, J. When a landowner initiates a special proceeding to recover compensation from the State Highway and Public Works Commission under the provisions of the statute codified as G.S. 136-19, his petition must allege, among other things, facts showing that his land has been *taken* or *damaged* for public use without just compensation by the State Highway and Public Works Commission. 30 C.J.S., Eminent Domain, Section 422. The petition in the instant proceeding falls short of this requirement. To be sure, it alleges that the cracks in the lot "are caused by a displacement of the embankment forming the southern side" of the cut through which the by-passing highway runs; that "the displacement of the embankment is the direct and proximate result of the construction" of the by-passing highway by the respondent; and that the damage to the lot, which is "caused solely by the construction of the by-pass," consti-

tutes a taking of the property of the petitioners for public highway use. These allegations state mere legal conclusions. They are not admitted by the demurrer and add nothing to the petition, which does not contain any facts showing *how* the embankment has been displaced, or *how* the construction of the by-passing highway effected its displacement. *Anderson v. Atkinson,* 234 N.C. 271, 66 S.E. 2d 886; *Tea Co. v. Hood, Comr.,* 205 N.C. 313, 171 S.E. 344; *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Lane v. Graham County,* 194 N.C. 723, 140 S.E. 712; *Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800; *Whitehead v. Telephone Co.,* 190 N.C. 197, 129 S.E. 602; *Horney v. Mills,* 189 N.C. 724, 128 S.E. 324; *Manning v. R. R.,* 188 N.C. 648, 125 S.E. 555; *Bank v. Bank,* 183 N.C. 463, 112 S.E. 11, 22 A.L.R. 1124.

The judgment overruling the demurrer is

Reversed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1954

JOHN SPRUNT HILL v. ERWIN MILLS, INC.; W. H. RUFFIN, PRESIDENT; CARL HARRIS, VICE-PRESIDENT; RALPH MARSHALL, VICE-PRESIDENT AND TREASURER; E. W. DUNHAM, SECRETARY.

(Filed 24 February, 1954.)

1. Corporations § 10—Minority stockholder held entitled to maintain this action without alleging demand and refusal.

In an action by a minority stockholder and director against the corporation and its officers attacking a proposed contract of the corporation as contrary to its interests, allegation of demand upon and refusal of the corporation to bring the suit is not necessary when it is alleged that the corporation was under control of a group of stockholders who intended to have the corporation execute the contract for the benefit of another corporation in which they were interested, pursuant to a conspiracy, and that the plaintiff had opposed the contract within the structure of the corporation by all legal means within his power.

2. Corporations § 8—

While minority stockholders do not have the right to dictate the corporation's policies, they are required to submit to the will of the majority only so long as the majority act in good faith and within the limitation of the law.

3. Same—

Majority stockholders have a fiduciary relationship to the minority stockholders, and are under duty in their control of the management to exercise good faith, care and diligence, and to protect the interest of the minority stockholders.

4. Pleadings § 15—

A demurrer admits the truth of the allegations of fact contained in the pleading for the purpose of testing the sufficiency of the complaint.

5. Corporations §§ 6a, 10—Complaint held sufficient to state cause of action attacking contract proposed by majority stockholders of corporation.

In an action by a minority stockholder and director against the corporation and its officers, allegations to the effect that a majority of the stockholders of the corporation also had controlling interest in another corporation, that pursuant to a conspiracy, the majority stockholders, through their control of the management of defendant corporation, intended to have it execute a contract with such other corporation, that the contract would be detrimental to the interest of defendant corporation and its minority stockholders and would be to the benefit of such other corporation, *is held* to state a cause of action as against demurrer. Plaintiff would be entitled to attack the contract for unfairness, even though it were fully executed.

6. Same—

Where minority stockholders assert that the majority stockholders were controlling the corporation for their personal gain and to the detriment of the corporation, the burden is upon the majority stockholders to prove their good faith and show that their conduct is inherently fair from the viewpoint of the corporation and those interested therein.

7. Same: Injunctions § 8—

Upon the findings of fact made by the lower court in this case, the order dissolving the temporary order restraining defendant corporation and its officers and agents from executing the proposed contract of the corporation, is affirmed.

8. Same—

The court's ruling upon whether a temporary restraining order issued in the cause should be continued to the hearing has no bearing whatever on the rights of the parties when the action is tried on its merits.

ERVIN and BOBBITT, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Burgwyn, Emergency Judge,* August Term, 1953, of DURHAM.

This action was instituted by the plaintiff to enjoin the execution by Erwin Mills, Inc., of a five-year exclusive factoring and sales contract with Woodward, Baldwin & Company, Inc., a textile sales agency, 43-45 Worth Street, New York, N. Y., hereinafter called Woodward.

The allegations of the complaint or the substance thereof essential to a disposition of this appeal are as follows:

1. The plaintiff is a citizen and resident of the State of North Carolina, residing in the City of Durham, and is a stockholder and director of the corporate defendant; that at the present time he owns 73,000 shares of common stock in the said corporation.

2. That the corporate defendant is a corporation organized and existing under the laws of North Carolina with its principal place of business in the City of Durham, Durham County, North Carolina; that the individual defendants are officers of Erwin Mills, Inc., as designated in the caption of this action, all of whom are citizens of North Carolina and reside in the City of Durham, except Ralph Marshall, who resides in Chapel Hill, in Orange County.

3. That Erwin Mills, Inc., has issued and outstanding 1,084,290 shares of common capital stock; that the "working" or "managing" control of the corporate defendant is vested in a group of stockholders, officers, and directors, hereinafter designated as the "Abney Group."

4. That The Abney Mills is a South Carolina corporation, operating a group of mills located in South Carolina and other places; that the "working" or "managing" control of The Abney Mills is vested in Mrs. J. P. Abney, Jack Abney, F. E. Grier, and other J. P. Abney family interests; that The Abney Mills interest owns and controls 3,802 shares of the total of 7,952 shares of common stock of Woodward, has interlocking directors, and provides ninety-five per cent of all the sales of Woodward, thereby being in "working" or "managing" control of said textile sales agency.

5. "Plaintiff is advised and believes and upon such information and belief therefore alleges that unless restrained and enjoined from so doing, the corporate defendant, pursuant to a combination, plan, scheme, and conspiracy of the 'Abney Group' and in collaboration with some of the officers and directors . . . (of the defendant corporation), will, in the exercise of bad faith, and without due care and diligence, enter into a Sales Agency and Stock Purchase Agreement with Woodward, Baldwin and Co., Inc., which agreement is and will be highly prejudicial and contrary to the best interests of the Erwin Mills, Inc., and of the minority of stock of Erwin Mills, Inc., in breach of the fiduciary and trustee relationship existing between said 'Abney Group' and the officers of said Erwin Mills, Inc., on the one hand, and the minority stockholders of Erwin Mills, Inc., on the other hand; that such action will result in irreparable damage to Erwin Mills, Inc., and to plaintiff and other minority stockholders; that said agreements will unjustly oppress the minority of the stockholders and greatly impair and destroy or sacrifice profits of the corporation, resulting in reduction of dividends and of the market value of holdings of the minority of the stockholders; that the plaintiff is without adequate remedy at law to prevent such action."

6. Copy of the proposed sales agreement to be executed with Woodward is attached to the complaint and asked to be taken as a part of the complaint as if fully set out therein. Likewise, a copy of a proposed sales agreement with Joshua L. Baily & Company, Inc., hereinafter called

Baily, is also attached to the complaint and marked Exhibit B and asked to be taken as a part of the complaint as if fully set out therein.

7. It is alleged that "instead of continuing to do the business of merchandising through the sales agency of Joshua L. Baily & Company, Inc., which for 57 years has acted as sales agent for Erwin Mills, Inc., . . . plaintiff is informed and believes and therefore alleges that the 'Abney Group,' following the plan, scheme, combination, and conspiracy referred to in VI above (paragraph 5 herein), and as a move to accomplish the same, will force the execution by Erwin Mills, Inc., of the Sales Agency Agreement 'Exhibit A,' and Stock Purchase Agreement to purchase approximately 3,802 shares of the common stock of Woodward, Baldwin & Company, Inc., its controlled subsidiary, which said contracts are not in the best interest of Erwin Mills, Inc., or of the owners of the minority stock of said Erwin Mills, Inc." It is alleged that in addition to the proven ability, experience and greater financial stability of Baily over Woodward, that the contract offered by Baily, if accepted, will make available to Erwin Mills, Inc., its sales services at an annual cost of several hundred thousand dollars less than it will cost the corporate defendant to sell its products under the terms offered in the proposed contract of Woodward; and the plaintiff further alleges that if the proposed sales agency contract is executed with Woodward it will result in a diversion of profits from Erwin Mills, Inc., to Woodward for the benefit of that company and its stockholders, including some of the defendants.

8. That plaintiff, as director, at directors' meetings, has opposed the approval and execution of the proposed agreement with Woodward, and continues to do so; "that unless enjoined and restrained by the court, plaintiff is advised and believes that the 'Abney Group' will force, coerce, and require that the corporate defendant, acting through the individual defendants, or some of them, to enter into and execute the said agreements: that plaintiff has appealed to the 'Abney Group' not to take this course of action and has opposed it within the structure of the corporation to a greater extent than permitted of him as a stockholder of a minority interest in said corporation and has found no redress; that he is powerless, without court action, to prevent the 'Abney Group' from forcing Erwin Mills, Inc., into said agreements with Woodward, Baldwin & Company, Inc.; that plaintiff's remedy at law is inadequate and he will be irreparably damaged unless the defendants are restrained and enjoined from executing the proposed agreements."

The plaintiff obtained from his Honor, Leo Carr, Resident Judge of the Tenth Judicial District, a temporary restraining order on 24 July, 1953, enjoining the defendant corporation and individuals from entering into the proposed sales agreement with Woodward, and from purchasing any shares of the common stock of Woodward; and ordered the defendants

to appear before said judge (place not stated), on 3 August, 1953, at 11:00 a.m., and show cause why the order should not be continued until the final hearing.

This matter was continued from 3 August, 1953, until 9:30 a.m., Wednesday, 19 August, 1953, and was heard by his Honor, W. H. S. Burgwyn, Judge Presiding at the Special Civil Term in the Superior Court of Durham County. The oral testimony offered by the plaintiff and the defendants, together with the affidavits and exhibits offered in support of the respective contentions of the parties, cover several hundred pages of the record. It appears from the record that on 28 July, 1953, despite the objections of the plaintiff and three other directors, the Board of Directors of the Erwin Mills, Inc., by vote of six to four, adopted a resolution authorizing and directing the president and secretary of the company to execute the proposed sales contract with Woodward.

After hearing the evidence and argument of counsel, the court made the following findings of fact: "That the actions of the defendants, and of the Board of Directors of the defendant corporation, in respect to the matters complained of in the complaint were had and taken in good faith and in the exercise of the best judgment of the Directors, and the court finds the evidence fails to disclose any bad faith, fraud, oppression, duress, coercion or conspiracy on the part of the defendants or any of the Directors of the defendant corporation, or any other persons or corporations referred to in the complaint."

And the court being of the opinion it should not undertake to exercise its judgment and discretion with respect to the agreements under consideration, ordered that the temporary restraining order theretofore issued should be dissolved, and entered judgment accordingly. It was agreed by the defendants and incorporated in the judgment that pending appeal to the Supreme Court of North Carolina, the defendant corporation, its officers and directors, will not execute the proposed contract between Erwin Mills, Inc., and Woodward. From the judgment entered the plaintiff appeals, assigning error.

John T. Manning and Joyner & Howison for plaintiff, appellant.

Reade, Fuller, Newsom & Graham and Brooks, McLendon, Brim & Holderness for defendants, appellees.

DENNY, J. The defendants and each of them interposed a demurrer in this Court to the plaintiff's complaint on the ground that it does not state facts sufficient to constitute a cause of action; for that (1) the plaintiff is not entitled to maintain in his own right an action to restrain a threatened loss not peculiar to himself without allegation that he exhausted his remedies within the corporation before resorting to suit; (2) the plaintiff

is not entitled to obtain the intervention of the court to impose his own judgment in a matter reserved to the discretion and judgment of the officers and board of directors of the corporation; and (3) the plaintiff is not entitled to equitable relief where he has an adequate remedy at law. He must allege facts as to such inadequacy.

This Court, in the case of *Murphy v. Greensboro*, 190 N.C. 268, 129 S.E. 614, said: "When a person becomes a stockholder in a corporation he assents to the execution of all the powers which the law confers upon the corporation and agrees to abide by the action of the governing body as to all matters properly under its control. For this reason before bringing suit against the corporation to protect its rights or to redress its wrongs he must ordinarily seek remedial action through the directorate or the other controlling authorities of the corporation itself." See 13 Am. Jur., Corporations, section 422, page 474, *et seq.*, and cited cases. But there are exceptions to the general rule with respect to such actions. The Supreme Court of the United States in the case of *Hawes v. Oakland*, 104 U.S. 450, 26 L. Ed. 827, pointed out a number of exceptions to the rule requiring demand and refusal. The Court said: "We understand that doctrine to be that, to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit:

". . . Such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity."

The Court, in the above case, also pointed out that in addition to the grievances which warrant an action by a stockholder, the stockholder should show "to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes." Certainly, the plaintiff alleges sufficient facts in his complaint to meet this requirement.

Moreover, this Court, in discussing the identical question now before us, in *Murphy v. Greensboro, supra,* quoted with approval from Cook on Corporations, section 741, page 3250, the following statement: "So also in the state courts there are occasions when the allegation that the stock-

holder has requested the directors to bring suit and they have refused may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request; and even if they did the court would not allow them to conduct the suit against themselves." Therefore, when it appears that the control of a corporation is in the directors, or a group of stockholders, whose actions are questioned, and that a minority stockholder has exhausted all the means available to him, within the corporation itself, to obtain a redress of his grievances, a demand that the corporation bring an action for such relief is not required. In such a suit, a stockholder may prosecute the action without alleging demand and refusal. *Murphy v. Greensboro, supra; Cannon v. Wiscassett Mills,* 195 N.C. 119, 141 S.E. 344; *Hawes v. Oakland, supra; Jones v. Van Heusen Charles Co.,* 246 N.Y.S. 204; *Tarlow v. Archbell,* 47 N.Y.S. 2d 3; *Collier v. Mayflower Apartments,* 196 Ga. 419, 26 S.E. 2d 731; *Caldwell v. Eubanks,* 326 Mo. 185, 30 S.W. 2d 976, 72 A.L.R. 621; *Schmidt v. Schmidt* (Civ. App. of Texas), 52 S.W. 2d 778.

Minority stockholders do not have the right to dictate corporate policies. However, they are required to submit to the will of the majority only so long as the majority act in good faith and within the limitation of the law. 13 Am. Jur., Corporations, section 422, page 474, *et seq.*

The rights and powers vested in those holding a majority of the capital stock in a corporation imposes on them a fiduciary relationship as between them and the minority stockholders. It is the duty of the management of a corporation to exercise good faith, care, and diligence, to make the property of the corporation produce the largest possible amount, to protect the interest of the minority stockholders, and to secure and pay over to them their just proportion of the corporate income.

"It is well established that courts of equity will entertain jurisdiction, at the instance of minority stockholders of a private corporation who are unable to obtain redress within the corporation and have no adequate remedy at law, to restrain threatened *ultra vires* acts on the part of the majority or to prevent any other act on the part of the majority which may be denominated as a breach of trust or a breach of the fiduciary duties owing to the minority." 13 Am. Jur., Corporations, section 423, page 475, *et seq.*

The plaintiff alleges in sum and substance that the proposed contract with Woodward (which the directors of the defendant corporation have approved and directed its president and secretary to execute with Woodward since the institution of this action), will result in irreparable injury and damage to the corporate defendant and to the plaintiff and other minority stockholders. The plaintiff not only alleges in detail the facts

which he contends will result in the alleged irreparable injury and damage to the corporate defendant and to the plaintiff and other minority stockholders, but alleges that the execution of the contract with Woodward will be to the financial advantage of Woodward and certain majority stockholders, including some of the individual defendants. These allegations are admitted for the purpose of testing the sufficiency of the plaintiff's complaint.

It is the general rule that when the fairness of transactions between a corporation and one dominating its policies is challenged, the burden is upon those who would maintain such transactions to show their inherent fairness to all parties concerned. Fletcher Cyclopedia Corporations, Section 918, page 341, *et seq.* This question was considered in *Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp.,* 193 F. 2d 666, where the propriety of a proposed contract placing the management of the Mayflower Hotel in the hands of the Hilton chain for a period of five years was questioned. The control of the Mayflower corporation had been obtained by the Hilton Hotel chain, just as the "Abney Group" has control of the corporate defendant. Among other things, the Court said: "Nevertheless the fact is, as recognized by the trial judge, that Hilton, which was then the majority stockholder of Mayflower, sat on both sides of the table for all practical purposes. While this does not render the contract illegal *per se* it brings it under careful scrutiny. . . . The burden is upon such a stockholder, as it is upon the director, to prove not only the 'good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.' " See also, *Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corporation,* 173 F. 2d 416.

In *Pepper v. Litton,* 308 U.S. 295, 84 L. Ed. 281, the Court said: "A director is a fiduciary. . . . So is a dominant or controlling stockholder or group of stockholders. . . . Their powers are powers in trust. . . . Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the directors or stockholders not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. . . . The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside."

It is likewise said in 18 C.J.S., Corporations, section 490, page 1166, that, "There is no law which makes it impossible for a majority stockholder to enter into a contract with his company. However, such a contract will be scrutinized with much greater care than if made with a third person, and where it is unfair or unconscionable a court of equity will

interpose at the instance of the corporation or the minority stockholders to prevent it from being used oppressively and in violation of the rights of the minority; . . . Minority stockholders are not precluded from attacking the contract as fraudulent by the fact that it is completely executed . . . A corporation which, through stock ownership, controls and conducts the business of another is held to the strictest account and to the observance of the highest rectitude in a transaction with its subsidiary, and has the burden of proving its fairness. The validity of a transaction may be tested by considering whether or not the proposition submitted to the subsidiary would have commended itself to an independent corporation."

We cite the above authorities for the purpose of showing the right to maintain an action of this character and not for the purpose of prejudging or in anywise expressing an opinion on the merits of the present controversy. We hold, however, that the allegations of the complaint are sufficient to withstand the demurrer interposed by the defendants.

The sole remaining question for disposition is whether the court below committed error in dissolving the temporary restraining order theretofore issued in this cause.

This Court has discussed the law so many times and so recently in *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319, and in *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116, as to when a temporary restraining order should or should not be issued, as well as when such order should be continued to the final hearing, we deem it unnecessary to discuss the subject here. See *Tobacco Growers' Ass'n. v. Harvey & Son Co.,* 189 N.C. 494, 127 S.E. 545, 47 A.L.R. 928; *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; *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80; *Lewis v. Lumber Co.,* 99 N.C. 11, 5 S.E. 19; *Perry v. Michaux,* 79 N.C. 94; *McCorkle v. Brem,* 76 N.C. 407; *James v. Lemly,* 37 N.C. 278.

In light of the findings of the court below, we have concluded that the evidence on this record will not warrant a reversal of his Honor's ruling.

Even so, our ruling here on this question or the action of the court below in dissolving the temporary restraining order previously issued in the cause, will have no bearing whatever on the rights of the parties when the action is tried on its merits. *Lance v. Cogdill, supra; Huskins v. Hospital, supra.*

The demurrer is overruled, and the order entered in the court below dissolving the temporary restraining order is

Affirmed.

ERVIN and BOBBITT, JJ., took no part in the consideration or decision of this case.

STATE v. DORIS CROCKER.

(Filed 24 February, 1954.)

1. Constitutional Law § 36—

No person can be twice put in jeopardy of life or limb for the same offense. Constitution of North Carolina, Article I, Sec. 17; Fifth Amendment to the Federal Constitution.

2. Criminal Law § 20—

Jeopardy attaches when a defendant in a criminal prosecution is placed on trial (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been impaneled and sworn to make true deliverance in the case.

3. Criminal Law § 22—

Order of mistrial entered upon motion of defendant or with defendant's consent will not support a plea of former jeopardy.

4. Same—

An order of mistrial properly entered in a capital case for physical necessity or for necessity of doing justice will not support a plea of former jeopardy.

5. Criminal Law § 58—

The trial court may order a mistrial for physical necessity in a capital case, as when a juror or a defendant, by reason of illness or insanity or other physical reason, is wholly disabled, or for the necessity of doing justice, as when necessary to guard the administration of justice against fraudulent practices. The court must find the facts upon which his conclusion is based and set them out in the record so that his action may be reviewed.

6. Same—

The power of the trial court to order a mistrial in a capital case under the necessity of doing justice is not an unlimited discretionary power but must be based upon the occurrence of some incident of such a nature that would render impossible a fair and impartial trial under the law.

7. Criminal Law §§ 22, 58—Findings of intoxication of jurors during night held insufficient to justify order of mistrial.

The trial court found that during the progress of this trial for a capital felony several of the jurors became intoxicated in their hotel at night, during recess of the court, one of them being so unruly as to require thirty minutes to quiet him. Upon these findings, the court ordered a mistrial. There was no evidence or finding that any juror could not continue his service when court convened the next morning or within a reasonable time thereafter, or of any tampering or fraudulent practice with regard to the jury. *Held*, the findings are insufficient to support the court's order for a mistrial, and defendant's plea of former jeopardy upon the subsequent trial should have been sustained.

8. Criminal Law § 58—

The court may not order a mistrial through information obtained by an *ex parte* investigation.

APPEAL by defendant from *Burgwyn, Emergency Judge,* September Term, 1953, of WILSON.

At the September Term, 1953, before Burgwyn, Emergency Judge, and a jury, the defendant, Doris Crocker, was tried for the capital felony of murder in the first degree. She was convicted of manslaughter and sentenced to a prison term of not less than four nor more than eight years. No error is assigned to the conduct of this trial apart from rulings relating to what had occurred at May Term, 1953.

At the October Term, 1952, the grand jury returned a true bill of indictment charging the defendant with the first degree murder of her husband, John Latham Crocker, on 26 August, 1952. There were no further proceedings until the May Term, 1953, at which time the defendant was arraigned before Joseph W. Parker, J., upon the bill of indictment for the capital felony of murder in the first degree, entered her plea, "Not Guilty, and especially by reason of Transitory Insanity," and thereupon a jury of twelve, together with a thirteenth or alternate juror, were duly selected, sworn and impaneled. These events occurred on Tuesday, 12 May, 1953, on which day the trial commenced. During Tuesday, 12 May, 1953, Wednesday, 13 May, 1953, and Thursday, 14 May, 1953, the State and the defendant offered the testimony of a number of witnesses, the defendant testifying as a witness in her own behalf. The court recessed at the close of each day on Tuesday, Wednesday and Thursday afternoons. The jury, during each recess, were held together by an officer and occupied rooms in a hotel.

On convening the court on Friday morning, 15 May, 1953, the court, in the absence of the jury, made the following statement: "It has come to my attention that during the night there has been gross misconduct of the jury. I have made an investigation of it and there is no alternative other than to withdraw a juror and declare a mistrial."

Thereupon, in the absence of the jury, the court called to the stand A. W. Miller and J. C. Eversole, police officers of the Town of Wilson, and Sheriff J. W. Thompson. At the conclusion of the court's examination of these three witnesses, the following order was entered:

"IT APPEARING TO THE COURT that the defendant in the above entitled case is now on trial for the capital felony of Murder, that a jury has been previously summoned, selected, sworn and impaneled, and that this criminal action has been in process of trial since Tuesday, May 12, 1953; that during this period the said jury has been in charge of a duly sworn officer and has been quartered in the Briggs Hotel in the Town of Wilson; and

it further appearing that in the early hours of the morning of May 15, 1953, at or about the hour of 2:00 A.M., complaint having been made to the Police Department of the Town of Wilson as to disorderly conduct on the part of at least three jurors, Officer Miller and Officer Eversole of the City Police Department were called to the hotel. That at that time these officers observed three jurors in an intoxicating (*sic*) condition and moving about in their underwear along the halls of said hotel; that these officers were unable to quiet one of these jurors and requested the intervention of J. W. Thompson, Sheriff of Wilson County; that upon the arrival of Sheriff Thompson at the hotel he observed one of the jurors in an intoxicated condition, either from the use of alcoholic beverages or narcotic drugs. That it was necessary for the Sheriff to threaten arrest of this juror before he would consent to become quieted and re-enter his room at this hotel. That upon the sworn testimony of these officers, to wit, Mr. A. W. Miller and Mr. J. C. Eversole of the Police Department of the City of Wilson, and upon the sworn testimony of J. W. Thompson, Sheriff of Wilson County, the foregoing is hereby found as facts.

"The Court further finds as a fact that the proper administration of justice and the securing of a fair, just and impartial trial on behalf of the defendant and on behalf of the State of North Carolina, and the ends of justice, requires that a juror be withdrawn and a mistrial ordered.

"WHEREUPON, IT IS ORDERED, CONSIDERED AND ADJUDGED, in the exercise of sound discretion, that Rufus Hayes be, and he is hereby withdrawn as a Juror in this Criminal Action, AND IT IS FURTHER ORDERED that a mistrial be, and it is hereby ordered.

"Done in Wilson, North Carolina, this 15 day of May, 1953.

"JOSEPH W. PARKER,
Judge Presiding."

To the quoted order of mistrial the defendant objected and duly excepted.

At the September Term, 1953, before Burgwyn, Emergency Judge, the case was again called for trial, the Solicitor announcing that the State would ask for a verdict of guilty of murder in the first degree. Upon the call of the case the defendant moved that the bill of indictment be dismissed and the defendant discharged, interposing her plea of Former Jeopardy predicated upon the uncompleted former proceedings and trial at May Term, 1953. The court denied the motion, overruling the plea of former jeopardy on the ground that the order of mistrial entered by Joseph W. Parker, J., had been properly entered. To this order, the defendant objected and duly excepted. Thereupon, the trial proceeded, resulting in the verdict of guilty of manslaughter. Exceptions were taken by the defendant to the trial, verdict and judgment, by way of preserving

her rights under her prior exceptions to the order of mistrial and to the overruling of her plea of former jeopardy.

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

J. Faison Thomson & Son, N. W. Outlaw, Sharpe & Braswell, and Robert Cowen for defendant, appellant.

BOBBITT, J. Decision here depends upon whether the facts found by Parker, J., disclose necessity sufficient to justify the order of mistrial over the objection of the defendant. In sharper focus, the question is whether the facts found relating to the time, nature and duration of the misbehavior or disability of certain of the jurors are such as to warrant the order of mistrial over the objection of the defendant. If so, the defendant's plea of former jeopardy was properly overruled and the judgment must be affirmed. If not, the defendant's plea of former jeopardy must be sustained and the defendant discharged.

It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense. *S. v. Prince,* 63 N.C. 529; *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871. It was incorporated in the Bill of Rights of the Federal Constitution. (United States Constitution, Amendment V.) While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the "law of the land" within the meaning of Art. I, sec. 17. *S. v. Mansfield,* 207 N.C. 233, 176 S.E. 761.

As stated by *Stacy, C. J.:* "Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been impaneled and sworn to make true deliverance in the case." *S. v. Bell,* 205 N.C. 225, 171 S.E. 50.

Here the defendant was put in jeopardy for the capital felony of murder in the first degree at the May Term, 1953. The second trial (September Term, 1953) was a trial for murder in the first degree upon the identical bill of indictment.

It is well established that the plea of former jeopardy cannot prevail on account of an order of mistrial when such order is entered upon motion or with the consent of the defendant. *S. v. Davis,* 80 N.C. 384; *S. v. Dry,* 152 N.C. 813, 67 S.E. 1000. However, this rule has no application here.

In the earlier cases the rule as stated by *Ruffin, C. J.,* in *S. v. Ephraim,* 19 N.C. 162, was that, *in the absence of the defendant's consent,* the trial judge had no authority to discharge the jury and hold the defendant to

await a second trial "but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control; and generally speaking, such necessity must be set forth in the record." (Emphasis supplied.) See *S. v. Garrigues,* 2 N.C. 241; *In re Spier,* 12 N.C. 491.

As pointed out by *Stacy, C. J.,* in *S. v. Beal,* 199 N.C. 278, 294, 295, 154 S.E. 604, the rule has been greatly relaxed; and it has been recognized that the necessity justifying an order of mistrial may be one of two kinds, "physical necessity and the necessity of doing justice."

The two kinds of necessity, *i.e.,* "physical necessity" and the "necessity of doing justice" were so classified by *Boyden, J.,* in *S. v. Wiseman,* 68 N.C. 203. As to "physical necessity," he said: "One class may not improperly be termed physical and absolute; as where a juror by a sudden attack of illness is wholly disqualified from proceeding with the trial; or where the prisoner becomes insane during the trial, or where a female defendant is taken in labor during the trial." As to "necessity of doing justice," he said that this arises from the duty of the court to "guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution."

It will be observed that "the necessity of doing justice" is not an expression connoting a vague generality but one that relates to a limited subject, namely, the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. In *S. v. Wiseman, supra,* the basis for mistrial was "tampering with the jury." In *S. v. Bell,* 81 N.C. 591, and in *S. v. Washington,* 89 N.C. 535, 45 Am. Rep. 700, a juror had fraudulently procured himself to be put on the jury for the purpose of acquitting the defendant in a trial for murder. In *S. v. Cain,* 175 N.C. 825, 95 S.E. 930, a juror had given a false answer to the solicitor bearing upon his fitness and qualifications to serve as a juror. In *S. v. Upton,* 170 N.C. 769, 87 S.E. 328, it was discovered that a juror was disqualified because of nonresidence. As stated by *Ashe, J.,* in *S. v. Bell,* 81 N.C. 591, it is the duty of the trial judge "to see that there is a fair and impartial trial, and to interpose his authority to prevent all unfair dealing and corrupt or fraudulent practices on the part of either the prosecution or the defense."

Cases where the order of mistrial is predicated upon physical necessity, *i.e.,* the inability of a juror to continue to serve, include *S. v. Beal, supra,* where a juror became insane; *S. v. Tyson,* 138 N.C. 627, 50 S.E. 456, where a juror was intoxicated to such extent that he could not continue to serve; *S. v. Scruggs,* 115 N.C. 805, 20 S.E. 720, where a juror became too ill to continue to serve.

The rule recognized and restated in many cases is succinctly expressed by *Pearson, C. J.*, in *S. v. Jefferson,* 66 N.C. 309, as follows: "It is settled that in a trial for a capital felony for sufficient cause the Judge may discharge the jury and hold the prisoner for another trial; in which case it is his duty to find the facts and set them out in the record, *so that his conclusion as to the matter of law arising from the facts may be reviewed by this Court.*" (Emphasis supplied.) While it is stated repeatedly that the order of mistrial, even in capital cases, is a matter resting in the sound discretion of the trial judge, it is equally well settled that the findings of fact must be sufficient to warrant the exercise of this discretionary authority. *S. v. Tyson, supra.*

Now we come to the critical task. Do the facts found by Parker, J., at May Term, 1953, constitute a sufficient basis for the order of mistrial either on the ground of "the necessity of doing justice" or on the ground of "physical necessity"? We are constrained to hold that they do not.

It is not suggested in the findings of fact that the jurors or any of them were disqualified on grounds of incompetence or of fraudulent practice, or that any improper influence had been brought to bear upon them relating to the case. The incident involving certain of the jurors, upon which the order of mistrial was predicated, was an isolated incident during a long trial. It occurred in the hotel during the night while the court was in recess. Three of the jurors were intoxicated to some extent. One was in worse condition than the others. It took some thirty minutes before the unruly juror could be quieted. There is no suggestion that any juror at any time when the court was in session was under any disability on account of intoxicants or otherwise. Nor is there evidence that any of these jurors, when court convened Friday morning, were not "clothed and in their right minds" and able to proceed with their jury service. The record here shows that the testimony before the trial judge was heard in the absence of the jury. There is no indication that any of the jurors were questioned in open court or examined by a physician or other person relative to their fitness and competence to serve as jurors when court convened on Friday morning. It appears that the order of mistrial was provoked by and based on the unfortunate incident in the nighttime, causing some disturbance, when certain of the jurors drank some intoxicants in their hotel rooms. While not material to decision here, and not embraced in the findings of fact upon which the order of mistrial was based, the record indicates that the bailiff in charge of the jurors furnished the jurors the intoxicants they drank and received a sentence for contempt of court for his conduct.

In *S. v. Scruggs, supra,* during the progress of the trial one of the jurors interrupted the proceedings stating that he was sick and unable to continue to serve as a juror. "He was examined at length by the court

touching his physical condition. He declared that he had been attacked by sickness; that he could not sit on the case as a juror by reason of his illness, and it was necessary that he be excused. The court therefore found as a fact that the juror was unable by reason of his sickness to continue to serve as a juror in the case."

In *S. v. Tyson, supra,* it is stated by *Brown, J.:* "It appears that the prisoner was placed on trial under the same bill of indictment at the April term before Judge Bryan, who discharged the jury, after four and a half days, on account of the drunken condition of a juror, *which incapacitated him from further service.* From the findings of the court, we gather that after the evidence was closed and pending argument it was discovered that one of the jurors, one Covington, had without permission, authority, or knowledge of the court or its officers, gone to his home and procured a quantity of liquor and was in a grossly intoxicated condition on Friday night; *that he had been drinking secretly all during the trial;* that on Saturday morning, the last day of the term, *the juror was in a very nervous and besotted condition and unfit for duty,* and *that unavailing efforts were made to render him fit.* Whereupon the court discharged the jury and made a mistrial, after making a full and complete finding of facts, as appears of record." (Emphasis supplied.)

It is true that the rule as to former jeopardy has been greatly relaxed by decisions in cases where the facts seemed to compel a departure from the application of the rule in its original strictness. However, the fundamental rule remains and each departure from or exception to its application must be clearly and substantially marked out and grounded. *S. v. Prince, supra; S. v. Alman,* 64 N.C. 364.

Where a juror, while hearing the evidence or while hearing the argument of counsel or the charge or while deliberating as to verdict, is so incapacitated by reason of intoxicants or otherwise as to be incapable, physically or mentally, of functioning as a competent, qualified juror, the trial judge may order a mistrial. See *S. v. Jenkins,* 116 N.C. 972, 20 S.E. 1021; *S. v. Tyson, supra; S. v. Scruggs, supra.*

Where, as here, no evidence is heard and no findings of fact are made as to the crucial question, *i.e.,* the condition and fitness of the juror(s) to continue their service when court convened on Friday morning, or within a reasonable time thereafter, there is no sufficient factual basis for the trial judge in the exercise of his discretion to order a mistrial.

The power of the trial judge to order a mistrial in a capital case, over the objection of the defendant, is one which should be exercised with caution and only after a careful consideration of all available evidence and only after making the requisite findings of fact on the basis of evidence before the court at the time judicial inquiry is made. 63 Am. Jur. 685, Section 977.

Of course, information obtained by the judge through an *ex parte* investigation could not constitute a basis for the requisite findings of fact. *In re Custody of Gupton,* 238 N.C. 303. However, decision here is predicated solely upon the insufficiency of the facts as found to support the order of mistrial.

We are not unmindful of the tension and difficulty to which the presiding judge, the jurors, the defendant, counsel, and all others connected with the trial of a capital case, are subjected; and we can well understand the judge's consternation upon learning of the disturbance caused by the impropriety and regrettable behavior of certain of the jurors. We are aware, too, of the position of Judge Burgwyn at September Term, 1953, when called upon to rule on the sufficiency of the order of mistrial previously entered by another Superior Court judge.

It is not to be understood that we are modifying former decisions relating to the plea of former jeopardy in capital cases. Our holding here is that the facts and circumstances set forth in the findings of fact are not of such compelling nature as to justify a further relaxation of a rule of such importance in safeguarding the life and liberty of a citizen against repeated prosecutions for the same offense.

The preservation of the salutary principle underlying the plea of former jeopardy in capital cases is of far greater importance than the service by this defendant of the prison term imposed by the judgment at September Term, 1953, upon her conviction for manslaughter. The uncertainty, anxiety and expense of two trials for the capital felony of murder in the first degree, within themselves, constitute an ordeal that is the equivalent of substantial punishment.

In view of our holding that the order of mistrial by Parker, J., at May Term, 1953, was not justified by the findings of fact made, it follows that the defendant's plea of former jeopardy must be sustained.

Accordingly, the judgment entered at September Term, 1953, should be vacated and the defendant discharged from custody. It is so ordered.

Reversed.

STATE v. DOUGLAS GRAYSON ALIAS DOUGLAS GRISSON.

(Filed 24 February, 1954.)

1. Homicide § 17: Indictment and Warrant § 24—

Under an indictment for murder in the first degree in the usual form, G.S. 15-144, the State is entitled to introduce evidence that defendant committed the homicide in the perpetration of, or attempt to perpetrate rape, it being incumbent upon defendant if he desires more definite information to request a bill of particulars, G.S. 15-143.

2. Criminal Law § 31c: Evidence § 51—

The court's finding that a witness is a medical expert as well as an expert in the field of psychiatry is conclusive when supported by competent evidence.

3. Constitutional Law § 35—

Testimony of an expert that defendant was sane within the rule of mental responsibility for crime does not violate defendant's constitutional safeguard against self-incrimination, Article I, Section 11, Constitution of North Carolina, even though it is based upon the witness' personal interview with defendant.

4. Same—

The constitutional privilege against self-incrimination protects the accused from the extraction from his own lips against his will of an admission of guilt, and does not preclude testimony as to his bodily or mental conditions when relevant and material, even when obtained by compulsion.

5. Criminal Law § 33—

Where the court finds upon the *voir dire* upon supporting evidence that defendant's confession was voluntary, the admission of the confession in evidence will not be held for error on the ground that defendant was insane and had also denied the offense, and that therefore the confession was involuntary, there being evidence for the State tending to show that defendant was sane within the rule of criminal responsibility.

6. Homicide § 25—

Evidence of defendant's guilt of murder in the first degree *held* sufficient to be submitted to the jury in this prosecution.

7. Homicide § 4d—

When murder is committed in the perpetration of, or attempt to perpetrate rape, the State is not required to prove premeditation and deliberation, G.S. 14-17.

8. Criminal Law § 81c (2)—

The court's charge to the jury is to be construed contextually and in its entirety.

9. Criminal Law § 53d: Trial § 31b—

An erroneous statement of the law, even though made in stating the contentions of a party, must be held for reversible error.

10. Homicide § 27b—

A charge in a homicide prosecution which correctly places the burden upon the State to prove beyond a reasonable doubt defendant's guilt of an unlawful killing of a human being with malice and with premeditation and deliberation, but later places the burden upon the defendant to show that he did not have sufficient mental capacity to premeditate and deliberate, must be held for reversible error.

11. Criminal Law § 81c (2): Appeal and Error § 39h—

Conflicting instruction on the burden of proof requires a new trial.

12. Criminal Law § 5a—

The test of mental responsibility is the capacity of defendant to distinguish between right and wrong at the time and in respect of the matter under investigation.

13. Constitutional Law § 34a—

Every person charged with crime has an absolute and fundamental right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.

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

APPEAL by defendant from *Hatch, Special J.,* Special February Term 1953 of BLADEN.

Criminal prosecution upon an indictment drawn in accordance with the words prescribed by G.S. 15-144 charging the defendant with the murder of Thay Lewis White.

Upon arraignment the defendant pleaded Not Guilty.

The evidence for the State tended to show these facts: (1) On the afternoon of 13 September 1952 Thay Lewis White was found dead in a cornfield about fifty feet from her home; (2) she had been brutally beaten by some blunt instrument—there was a large laceration of her forehead with fragments of bone and brain tissue protruding, which head injury caused her death; (3) she had been raped recently; (4) there was a puddle of blood on the kitchen floor, blood on the kitchen walls, blood at the kitchen doors, blood out in the back yard and out to the field where the body was found with blood around it; (5) there was an electric smoothing iron in the house with blood and hair on it, and in the field lying parallel with the body was a piece of wood with blood and hair on one end; (6) Thay Lewis White was 19 years old, had a baby two months old and lived with her husband five miles from Elizabethtown, adjacent to the public road leading from Elizabethtown to Clarkton; (7) when her husband returned home he found their baby in a crib in the bedroom, and after search, his wife dead in the cornfield; (8) about 11:00 a.m. on 13 September 1952 the defendant was seen washing his hands near an old mill adjacent to the road going by Thay Lewis White's home and about a mile and a half from where she lived; (9) that the defendant told several people that he killed Thay Lewis White and raped her twice—once before death, and again immediately after her death; (10) that defendant had sufficient mental capacity on 13 September 1952 to know right from wrong, to know what he was doing, and the nature and consequences of his acts.

The evidence for the defendant tended to show the following. The defendant is an illiterate man from Manassas, Virginia, and on 13 September 1952 was about 24 or 25 or 26 years old. On 23 February 1944,

pursuant to the provisions of the Code of Virginia, Sections 1018 and 1019, as amended by the Acts of the Virginia Assembly 1936 and 1940, the defendant was committed to the State Hospital for the Insane, etc., at Petersburg, Virginia, to be treated and cared for as an insane person. On 31 March 1949, he was discharged from this hospital for the insane as improved. On 30 June 1949 the defendant was admitted by Park Police to the Psychiatric Department of the Gallinger Municipal Hospital, Washington, D. C., for mental observation. He was given a psychometric test, which revealed his mental age to be four years, eleven months, with intelligence quotient of 33 (imbecile). The authorities felt that he could not function outside of an institution. On 14 July 1949 he was discharged to the custody of his mother at Manassas, Virginia, who was to arrange for his placement in a hospital for care of mental defectives.

Defendant came to Elizabethtown with a carnival or circus—the record at one place calls it a carnival, at another a circus—as a dishwasher. That this carnival or show had some naked women performing. He paid fifty cents for admittance. The performance excited his lust. He was fired or released from work for this carnival or circus.

That the defendant had congenital syphilis, *i.e.,* he was born with syphilis. That on 13 September 1952 the defendant had a chronic infection of his brain and meninges due to syphilis, which is a general, permanent and fixed injury of the brain. This condition is progressive and incurable. That on 13 September 1952, and at all times since, the defendant was, and is, insane, and on 13 September 1952, and since, he did not, and does not, have sufficient mind to form a criminal intent, to distinguish between good and evil, and to realize the nature and consequences of his acts; that he was incapable mentally to premeditate and deliberate. That what mind he has comes and goes. That while the State has offered evidence tending to show that he said that he killed and raped Thay Lewis White, he also said a number of times that he had never killed anyone. That while he told Dr. I. C. Long at the State Hospital for the Insane in Goldsboro he killed Thay Lewis White and "dogged her" twice, he also denied killing her to Dr. Long. That State Bureau of Investigation Agent James Bradshaw, who was a witness for the State, testified in the absence of the jury when the court was considering the admissibility in evidence of the purported confessions of the defendant that the defendant "is wide open to suggestion." The defendant did not take the stand. His only witnesses qualified as experts, and testified as to his mental condition.

At the September Term 1952 of the Bladen County Superior Court the Grand Jury of the county returned as a true bill of indictment the indictment on which the defendant was tried. The defendant by reason of poverty was unable to employ counsel, whereupon at that term the Honor-

able Chester R. Morris, Judge Presiding, appointed as counsel for the defendant Messrs. Aaron Goldberg and William K. Rhodes, Jr., both able and experienced lawyers of the New Hanover County Bar, and both engaged actively and extensively in trial work, particularly in criminal cases. At the September Term the case was continued to a subsequent term of court.

A Special Term of Superior Court was held in Bladen County in November 1952. At that term counsel for defendant requested a continuance of the trial of the case to a subsequent term to give them further time to investigate thoroughly the question of defendant's sanity. The court allowed a continuance.

At the January Term 1953 of the Superior Court of Bladen County a jury from Cumberland County was impaneled to try the issue as to whether the defendant had sufficient mental capacity to plead to the bill of indictment. (See *S. v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458.) The jury returned for its verdict that the defendant had sufficient mental capacity to plead to the bill of indictment.

Verdict: Guilty of First Degree Murder.

To the judgment of death by asphyxiation the defendant appeals to the Supreme Court.

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

Aaron Goldberg and William K. Rhodes, Jr., for defendant, appellant.

PARKER, J. The indictment upon which the defendant was tried was drawn according to the words prescribed by G.S. 15-144. The defendant has nine assignments of error in which he contends that the court erred in permitting the State to introduce evidence tending to show that Thay Lewis White was raped, and in charging the jury that a murder committed in the perpetration or attempt to perpetrate rape shall be deemed to be murder in the first degree, because the indictment did not charge the defendant with committing murder in the perpetration or attempt to perpetrate rape. This Court in *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494, has decided this exact point against the defendant's contentions. The bill of indictment contains every necessary averment; there is no variance between *allegata* and *probata.* See also *S. v. Arnold,* 107 N.C. 861, 11 S.E. 990; *S. v. Fogleman,* 204 N.C. 401, 168 S.E. 536. If the defendant desired more definite information he had the right to request a bill of particulars. He made no such request. G.S. 15-143.

At the January Term 1953 of Bladen Superior Court an inquiry was had with a jury from Cumberland County to determine the defendant's ability to plead to the indictment. The court, upon motion of the State,

and over the objection and exception of the defendant, directed that a mental examination of the defendant be made by a witness for the State for the purpose of testifying in court as to the mental condition of the defendant. At the request of the State Dr. D. S. Owen examined the defendant in the Cumberland County jail, and testified at the inquiry in January 1953. In the instant case the State called Dr. Owen as a witness. The court held upon competent evidence that Dr. Owen is a medical expert, as well as an expert in the field of psychiatry. The defendant assigns the court's ruling that Dr. Owen is an expert witness in both fields as error. This assignment of error is without merit. *S. v. Smith,* 223 N.C. 457, 27 S.E. 2d 114; *S. v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469.

The defendant then assigns as error that the court permitted Dr. Owen in the instant case to testify over his objection that in his opinion the defendant on 13 September 1953 was sane, knew what he was doing, knew it was wrong, knew the consequences of his act, and knew the difference between right and wrong as to rape on the body of Thay Lewis White, on the ground that it would be compelling the defendant to give self-criminating evidence in violation of Art. I, sec. 11, of the North Carolina Constitution. The court in overruling the objection stated it was not going to permit Dr. Owen to testify to any conversation that Dr. Owen had with the defendant, but would permit him to state his opinion as to the mental condition of the defendant at the time of his examination. In this case the defendant interposes insanity as one of his defenses. There is no evidence in the Record that any compulsion or force was used in making the examination. The constitutional privilege against self-crimination in history and principle seems to relate to protecting the accused from the process of extracting from his own lips against his will an admission of guilt, and in the better reasoned cases it does not extend to the exclusion of his body or of his mental condition as evidence when such evidence is relevant and material, even when such evidence is obtained by compulsion. *S. v. Garrett,* 71 N.C. 85; *S. v. Graham,* 74 N.C. 646, 21 Am. Rep. 493; *S. v. Thompson,* 161 N.C. 238, 76 S.E. 249; *S. v. Riddle,* 205 N.C. 591, 172 S.E. 400; *S. v. Eccles,* 205 N.C. 825, 172 S.E. 415; *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *Blocker v. State,* 92 Fla. 878, 110 So. 547; *People v. Krauser,* 315 Ill. 485, 146 N.E. 593; *Com. v. Millen,* 289 Mass. 441, 194 N.E. 463; *State v. Nelson,* 92 P. 2d 182; *State v. Cerar,* 60 Utah 208, 207 P. 597; *State v. Coleman,* 96 W. Va. 544, 123 S.E. 580; *Hunt v. State,* 248 Ala. 217, 27 So. 2d 186; *Wymer v. People,* 114 Colo. 43, 160 P. 2d 987; *State v. Cochran,* 356 Mo. 778, 203 S.W. 2d 707; *State v. Myers,* 220 S.C. 309, 67 S.E. 2d 506; 22 C.J.S., Criminal Law, p. 998; Greenleaf on Evidence (16th Ed.), Sec. 469 (e); Wigmore on Evidence (3rd Ed.), Sec. 2265, and 164 A.L.R. Anno., p. 967, *et seq.*

The court sent the jury from the courtroom while it heard testimony on the *voir dire* as to the admissibility in evidence of a purported confession of the defendant that he raped Thay Lewis White twice and killed her. In the absence of the jury Carl C. Campbell was permitted over the objection and exception of the defendant to testify as to such a confession. The defendant assigns this as error. The defendant contends that the confession was inadmissible because the defendant was insane, had the mind of a child not more than six years old, was wide open to suggestion, and also denied killing and raping Thay Lewis White, and therefore his confession was not voluntary. The State offered evidence tending to show that the defendant was sane. The defendant does not contend in his brief that any force or compulsion was used, or that any promises or inducements were made to the defendant. The court found the confession was voluntary. When the jury returned to the courtroom Carl C. Campbell, T. P. Hofler and Sheriff John B. Allen, without objection, testified that the defendant told them separately that he raped Thay Lewis White twice and killed her. Dr. I. C. Long, Superintendent of the State Hospital for the Insane at Goldsboro, and a witness for the defendant, gave without objection similar testimony. The defendant's assignment of error is not sustained. *S. v. Rogers, supra; S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *S. v. Mays, supra.*

The defendant's assignment of error to the failure of the court to allow his motion for nonsuit is without merit.

The defendant assigns as error this part of the court's charge: "Where one of the defenses is insanity, the burden of proof is on the defendant to prove such insanity, not beyond a reasonable doubt, but to the satisfaction of the jury. Where an independent offense in a criminal action is set up as insanity the burden is on the defendant on the question involved and as in this case of the insanity of the defendant at the time, if you find that he did kill the deceased, the fact of previous insanity accompanied by the presumption of its continuance may be relied upon by defendant to sustain *prima facie* the burden which he assumes by his plea of insanity as a defense; but it cannot be held that the mere fact of insanity prior to the commission of the act alleged to be a crime, although such condition is presumed to continue, releases the defendant of the burden imposed upon him by the law of this State to offer evidence sufficient at least to satisfy the jury that he was insane at the time of the commission of the act and, therefore, not responsible for his act as a crime. The presumption is merely evidentiary and is not conclusive."

Later in its charge the court used this language, which is not excepted to: "The defendant pleads, among his other defenses, that at the time of the alleged killing of the deceased Thay Lewis White that his mind was dethroned and that he did not have mental capacity to distinguish between

right and wrong, *that he did not have the power to premeditate and deliberate upon the nature and consequences of his act* and that in the eye of the law he is excused. The burden of this plea is upon him and not upon the State, to satisfy you of its truth." (Italics added.)

The court charged the jury further: "I charge you further, Gentlemen of the Jury, if the State of North Carolina has satisfied you from the evidence beyond a reasonable doubt, the burden being upon the State, that the defendant Douglas Grayson, with malice and with premeditation and deliberation, and with a calm and deliberate mind at the time of the killing, had a formed premeditated, willful and deliberate design to take the life of the deceased, Thay Lewis White, and did kill the deceased, Thay Lewis White, he is guilty of murder in the highest degree and it would be your duty to so find. I further charge you, Gentlemen of the Jury, that if you are satisfied from the evidence in this case beyond a reasonable doubt, the burden being upon the State, that the defendant Douglas Grayson killed the deceased, Thay Lewis White, with a fixed design, with the deliberate willful intention to perpetrate or attempt to perpetrate the crime of rape or other felony, he would be guilty of murder in the highest degree and it would be your duty to so find."

The court charged on murder in the first degree in two aspects: first, an unlawful killing of a human being with malice and with premeditation and deliberation and, second, murder in the perpetration or attempt to perpetrate rape. When murder is committed in the perpetration or attempt to perpetrate rape, the State is not required to prove premeditation and deliberation. G.S. 14-17; *S. v. Mays, supra; S. v. King,* 226 N.C. 241, 37 S.E. 2d 684.

It is elementary learning that a charge is to be construed contextually and in its entirety. *S. v. Hough,* 227 N.C. 596, 42 S.E. 2d 659; *S. v. Phillips,* 228 N.C. 595, 46 S.E. 2d 720.

When a statement of the contentions presents an erroneous view of the law applicable to the case, it is material error. *S. v. Gause,* 227 N.C. 26, 40 S.E. 2d 463; *S. v. Hedgepeth,* 230 N.C. 33, 51 S.E. 2d 914; *Blanton v. Dairy,* 238 N.C. 382, 77 S.E. 2d 922.

Reading the charge in its entirety, we find that on the aspect of the unlawful killing of a human being with malice and with premeditation and deliberation the lower court placed the burden of proof to satisfy the jury on premeditation and deliberation on the State and then later on put the burden of proof on the defendant to prove that he did not have sufficient mental capacity to premeditate and deliberate upon the nature and consequences of his act. These conflicting instructions on the burden of proof require a new trial. *S. v. Floyd,* 220 N.C. 530, 17 S.E. 2d 658; *S. v. Patterson,* 212 N.C. 659, 194 S.E. 283; *S. v. Morgan,* 136 N.C. 628, 48 S.E. 670.

In this State where the defense is insanity the test of responsibility "is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation." *S. v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188. The test has been phrased also in these words that a person is legally insane where he is laboring under such a defect of reason "as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act." *S. v. Swink,* 229 N.C. 123, 47 S.E. 2d 852, where the cases are cited. In the *Swink case* it was held error for the court to charge the jury that the prisoner's plea of insanity must be "clearly established," because it imposed upon the defendant the burden of proving his insanity by a higher degree of proof than required by law. In the instant case the court charged that the burden of proof was on the defendant to prove "that he did not have the power to premeditate and deliberate upon the nature and consequences of his acts." This is going much further than anything we have said heretofore or approved.

It is not necessary for us to pass upon the exceptions to the failure of the court to grant defendant's motion for a change of venue, and when that was denied, to its refusal to summon a jury from another county, as a new trial must be granted for error in the charge. However, we wish to emphasize what we said in *S. v. Carter,* 233 N.C. 581, 65 S.E. 2d 9: "Every person charged with crime has an absolute right to a fair trial. By this is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." Such absolute right is fundamental in both criminal and civil cases in all jurisdictions in this nation.

We have carefully considered this case with a full realization of its importance to the State and to the defendant. After such consideration we are of the opinion that for prejudicial error in the charge, a new trial must be ordered.

New trial.

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

POSEY E. WRENN v. HOWARD OLIVER GRAHAM, KIKER & YOUNT, INC., AND F. A. TRIPLETT, INC.,
and
POSEY E. WRENN, ADMINISTRATOR OF THE ESTATE OF VERTIE JUNE WRENN, DECEASED, v. HOWARD OLIVER GRAHAM, KIKER & YOUNT, INC., AND F. A. TRIPLETT, INC.

(Filed 24 February, 1954.)

1. Highways § 4a—

In this action involving a collision of two automobiles at the end of a detour on a highway under construction, it *is held* that the motions of the defendant construction companies for involuntary nonsuit in plaintiffs' actions and the cross-action of defendant driver, both based on alleged negligence of the road contractors in failing to maintain proper signs, signals and warnings along the highway under construction, were properly allowed for insufficiency of the evidence to support the inference that negligence on the part of either contractor contributed as the proximate cause or as one of the proximate causes of the accident.

2. Trial § 23a—

When the evidence relating to a particular question or issue is so clear that only a single conclusion can reasonably be drawn therefrom, such conclusion should be declared by the court as a matter of law.

3. Negligence § 19b—

When evidence relating to the questions of negligence and proximate cause is so clear that only a single conclusion can reasonably be drawn therefrom, the court should draw the conclusion as a matter of law.

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

APPEAL by plaintiffs and defendant Howard Oliver Graham from *Sharp, Special Judge,* at 13 April, 1953, Civil Term of GUILFORD, Greensboro Division.

Two consolidated civil actions, one by the plaintiff administrator to recover damages for the alleged wrongful death of his intestate wife, Vertie June Wrenn, the other by the individual plaintiff to recover for personal injuries and property damage. The actions arose out of a collision between the Ford automobile of the plaintiff Wrenn and a Hudson car owned and operated by the defendant Howard Oliver Graham.

The individual plaintiff's case was here before on appeal from a procedural ruling. *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232.

The collision occurred on Saturday night, 4 August, 1951, shortly after midnight, on U. S. Highway No. 220 about seven miles north of Greensboro, on a section of the highway which was in process of being widened, resurfaced, and in some places straightened and relocated.

The general road work on the project was being done by the defendant Kiker & Yount, Inc., under contract with the State Highway and Public

Works Commission; whereas the defendant F. A. Triplett, Inc., was under contract with the Highway Commission to build the bridges and structures along the project.

The two vehicles, traveling in opposite directions, were meeting. The plaintiff Wrenn, accompanied by his wife, was traveling south; the defendant Graham, in his Hudson, was going north. Between them was a low wooded area through which the highway had been relocated and along which new bridges were to be built over two small streams. Both bridge projects were by-passed on the east side by the old road, which served as a single detour around both bridge sites. This detour was about 700 feet long. Wrenn reached the detour first and passed all the way through it. The collision occurred just as he was emerging from the south end onto the main highway. His car was hit on the left side by the front of defendant Graham's car. In the impact the plaintiff's wife received injuries which caused her death. The plaintiff Wrenn and the defendant Graham sustained personal injuries and both cars were damaged.

The plaintiffs instituted these actions, alleging that the injuries and damage complained of were proximately caused by the joint and concurring negligence of the defendant Graham and both contractors. The plaintiffs' specific allegations of negligence as they relate to the different defendants are as follows:

(1) That the defendants Kiker & Yount, Inc., and F. A. Triplett, Inc., (a) "failed to place and maintain adequate warning signals and signal lights along the highway a sufficient distance from the bridges and detour . . . to give notice to the traveling public of the dangerous condition" of the highway and detour; (b) "failed to place and maintain flagmen, adequate barriers, warning signs, lights, and other signals or safeguards near the point" where the detour connects with the improved portion of the highway; and (c) permitted the dangerous condition of the highway "to remain unguarded and unprotected by adequate signs, lights, and other warnings . . ."

(2) That the defendant Howard Oliver Graham (a) "failed and neglected to keep a proper lookout"; (b) "operated his automobile at a high and reckless rate of speed and without due caution and circumspection . . ."; (c) "failed to turn his automobile to the right to enter said detour . . ."; and (d) "drove . . . across the intersection of said detour and into the automobile operated by the plaintiff."

The defendant Graham, answering, (1) denied all allegations of negligence against him, (2) counterclaimed against the plaintiff Posey E. Wrenn for personal injuries and property damage, (3) alleged contributory negligence against both plaintiffs, and (4) set up claims for contribution against the corporate defendants based on allegations of negligence similar to those alleged by the plaintiffs against the corporate defendants.

Each corporate defendant by separate answer denied all allegations of negligence against it, and set up certain other defenses not pertinent to decision.

The plaintiffs' evidence discloses that this highway construction project extended for a distance of about a mile and a quarter south of the bridge detour, and that approaching the detour from the south these warning signs, devices, and barriers appeared along the highway: (1) At the southern end of the construction project there was a sign side of the highway, facing south, reading: "SLOW—ROAD UNDER CONSTRUCTION." This sign was about 42 x 48 inches and was located on the east shoulder a few feet from the pavement. (2) About 200 feet south of the detour there was a sign side of the highway, facing south, reading: "ROADWORK—25 MILES PER HOUR." This sign was about 42 x 48 inches and was located on the east shoulder near the pavement—one witness said four feet from the pavement, another said from six to eight feet. (3) A barricade was erected across the middle of the road just north of the turn-off leading into the detour. This barricade was about 20 feet wide, "made of horizontal boards painted—striped with black and white or yellow." One of the highway engineers said "The purpose of the . . . stripes . . . was for reflection at night . . . designed to reflect . . . headlights." There was a sign at the barricade reading "ROAD CLOSED—TURN RIGHT," with an arrow.

Resident Highway Engineer Hickerson testified that the signs used on this project were made in the paint shop of the State Highway and Public Works Commission.

M. A. Luther, Engineer in the employ of the Highway Commission, testified it was his duty to see that flare bowls were properly installed in front of the signs—"those little black pots you see on the highway . . ." He said he checked the signs on 3 August and again 6 August. "Flare bowls were in front of all signs on the morning of the 6th after the accident happened. . . . The flare bowls were there Friday, the 3rd. As to whether (at the time of the collision) they were burning or not I don't know. I didn't check them at night. I was never on the job that late."

The plaintiff Wrenn testified in part: "I lived about three miles from Greensboro on the Pleasant Garden road. . . . About 11 o'clock on the night of August 4, 1951, my wife and I went to Summerfield. . . . In returning to Greensboro I drove over the old part of the road that was used as a detour. . . . there was no one close behind me nor anyone just ahead of me on the detour. . . . as I was about to pass out of the by-pass at 15 miles an hour I was driving on the right side of the road with my headlights burning. As I came into the improved portion of the road I was going up a moderate grade or incline. I was just as close to the right as I could get. There was no stop sign in going from the detour into the

main highway. At this time Graham came along and ran into me. . . . the right front of his car hit the left front of my car. . . . I could not tell how fast the Graham car was going. Graham's car was traveling on the right side of the road coming toward me." Cross-examination: ". . . Going north the detour turns to the right and after the turn it straightens up and runs for some distance parallel with the new highway slightly downgrade toward the bridges. . . . There was nothing (along the detour) to obstruct my view and I was about 100 feet from the point where the detour enters the finished portion of the highway at the southern end of the detour when I saw the lights of an automobile approaching from the south. I think the car . . . was 200 feet south of the detour. . . . I knew there was a turn-off, and it looked like the approaching car was going to make that turn." (The evidence discloses that the by-pass was about 20 feet wide where it connected with the highway.)

Patrolman H. D. Byrd, who went to the scene shortly after the collision, testified in part: "When I arrived . . . The front of the Hudson (driven by Graham) was in the ditch on the west of Highway 220. It was headed into the ditch at an angle with the left front wheel in the ditch and the left front bumper and fender up against the embankment, . . . The front end of the Wrenn car (the Ford) was in the newly paved highway and the rear was on the by-pass. The front was knocked a little to the north." This witness said the front of the Wrenn car was 22 feet from the southernmost corner of the by-pass, and that he saw the sign located about 200 feet south of the turn-off reading "ROADWORK—25 MILES PER HOUR." He said it looked like "it had been burned," and he saw no flare bowl or smudge pot by that sign. Cross-Examination: "The paved portion of the highway was 22 feet wide and the shoulders on either side 11 feet wide. . . . The pavement was completed beyond and to the north of the by-pass 300 or 400 feet. The shoulders were not completed beyond the detour. . . . There were two flare pots at the scene of the accident when I arrived. Both were burning. One was in . . . front of the barricade slightly to the west and the other one was sitting on the right-hand side of the road, traveling north, just south of the cars. . . . When I arrived at the scene of the accident I found skid marks before the impact of 60 feet and 60-foot skid (marks) after,—looked like they had been caused by applying brakes. The point of impact was six feet west of the edge of the pavement. . . . The flare was burning in front of the sign located approximately a mile south of the point of impact. This flare was burning as I went by that night on the way to the accident. I could read the sign as I passed by it. . . . The sign about 200 feet south of the intersection . . . said 'ROADWORK—25 MILES PER HOUR.' That was clearly visible from an automobile approaching the intersection (northwardly) . . ."

Floyd Wrenn, brother of the plaintiff, said he went to the scene about 2 o'clock a.m. He testified that the sign 200 feet south of the detour was rather dirty and had a hole burned in it; that a flare pot was by it, but the pot was not burning.

At the close of the plaintiffs' evidence the defendants Kiker & Yount, Inc., and F. A. Triplett, Inc., moved for judgment as of nonsuit. The motions were allowed. Exception by plaintiffs and by the defendant Graham.

Thereupon the defendant Graham went upon the stand and testified he was en route that night from his home in Charlotte to Pittsburgh; that he saw a road sign a mile and three-tenths south of where the collision occurred. This sign, he said, was located on his right, about 5 feet from the pavement, and that it read "ROAD UNDER CONSTRUCTION." He slowed down and observed the appearance of the highway. It looked like it was completed. So, after traveling on about half a mile beyond the sign at reduced speed, he increased his speed "to about 45 or 50 miles per hour" and as he put it, "After passing this sign, I did not see any other signs. As I approached the point where this collision occurred . . ., I saw a car coming in a road that looked like a side road to me. . . . When I first saw the lights of that car I was a good ways, just going down the slope of a hill. . . . I did not see the entrance of this detour into the highway. . . . I was about 100 feet from the point where the collision occurred when I saw the car come into the highway. . . . about the time the car came in I saw the road block . . . so I just applied my brakes. My car collided with the car being operated by Mr. Wrenn. . . . The front end of the Wrenn car had gotten approximately 4 or 5 feet into the highway at the time the collision occurred. . . . My lights were burning and focused in proper order. . . . I was traveling about 45 to 50 miles per hour when I first saw the Wrenn car." Cross-Examination: "I had worked in Charlotte . . . all day. I went to work about 7:30 a.m. that morning and got off at 6:45 p.m. . . . We left Greensboro about 11:30 or 12:00 o'clock. . . . I had planned to drive all night. . . . When I was 100 feet back I applied my brakes and went right into the side of the car. . . . I saw the barricade and car all at one time. My lights did not fall on any objects there before I saw the Wrenn car come up into . . . the road. . . . I had my dim lights on. I dimmed them when I saw Mr. Wrenn's car" coming back up in the detour. (The evidence further discloses that the weather was clear, the roadway was dry, and that approaching the detour from the south the new highway was straight for more than 700 feet, with nothing to obstruct a motorist's vision between the detour and a little hillcrest about 600 feet south of the detour.) Further cross-examination of the defendant Graham: "Q. Did you see anything in the highway as you went down that highway, seven or eight

hundred feet straight stretch? A. No, I didn't. Q. You didn't see any signs, . . . flare or flare bowls? A. No, I didn't. . . . Q. You say your lights picked up the barricade when you were 100 feet south of the intersection? A. I said it picked up the barricade and the Wrenn car . . . all . . . together. Q. And at that point, you were 100 feet south of the intersection? A. About 100 feet, yes sir. Q. And you immediately applied your brakes. A. Yes, sir. Q. And you didn't stop until after you had hit the Wrenn car . . . and gone on past the barricade, . . .? A. No, I didn't stop until after it hit."

At the close of the defendant Graham's evidence, the defendants Kiker & Yount, Inc., and F. A. Triplett, Inc., each moved for judgment as of nonsuit on the defendant Graham's cross action for contribution. The motions were allowed. The defendant Graham excepted, and judgments of involuntary nonsuit were entered in accordance with the rulings. Thereupon the defendant Graham and the plaintiffs, through counsel, announced in open court that in deference to the rulings of the court as to the corporate defendants, the plaintiffs and the defendant Graham each desired to submit to judgments of voluntary nonsuit. Whereupon such judgments were entered by the court.

From the judgments of involuntary nonsuit entered in favor of the corporate defendants, the plaintiffs and the defendant Graham appealed.

H. L. Koontz and Shuping & Shuping for plaintiffs, appellants.
Adam Younce for defendant Howard Oliver Graham, appellant.
Huger S. King for defendant Kiker & Yount, Inc., appellee.
Smith, Sapp, Moore & Smith for defendant F. A. Triplett, Inc., appellee.

JOHNSON, J. The general rules governing the duties and liabilities of a highway contractor in respect to providing warning signs and barricades for the protection of the traveling public in the area of a construction project are fully delineated and established by former decisions of this Court, among which are these: *Hughes v. Lassiter,* 193 N.C. 651, 137 S.E. 806; *Evans v. Construction Co.,* 194 N.C. 31, 138 S.E. 411; *Council v. Dickerson's, Inc.,* 233 N.C. 476, 64 S.E. 2d 554; *Presley v. Allen,* 234 N.C. 181, 66 S.E. 2d 789. See also 25 Am. Jur., Highways, Sections 413 and 440. Therefore, it would serve no useful purpose to restate here the rules governing the tort liability of these corporate defendants.

It suffices to say our study of the record leaves the impression that the evidence adduced below is insufficient in any aspect to support the inference that negligence on the part of either corporate defendant contributed as the proximate cause, or as one of the proximate causes, of the injuries complained of in these actions.

When the evidence relating to a particular question or issue is so clear that only a single conclusion can reasonably be drawn therefrom, such conclusion should be declared by the court as a matter of law. *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246; *Harward v. General Motors Corp.,* 235 N.C. 88, 68 S.E. 2d 855. As in other cases, this rule applies both to the questions of negligence and proximate cause as essential elements of actionable negligence. *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111; *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849. See also *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193.

Therefore, we conclude, and so hold, that the judgments of involuntary nonsuit were properly entered as to the corporate defendants.

In this view of the case, we deem it appropriate merely to announce decision, without elaboration or further comment, so as to preserve without prejudice the rights of the plaintiffs and the defendant Graham, yet to be litigated between themselves.

The results then, are:

On plaintiffs' appeal: Affirmed.

On defendant Graham's appeal: Affirmed.

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

AVY AGNES JARMAN v. DR. V. D. OFFUTT.

(Filed 24 February, 1954.)

1. Libel and Slander § 7c—

The general rule is that a defamatory statement made in the due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice.

2. Same—

A judicial proceeding within the rule of absolute privilege is not restricted to trials in civil actions or criminal prosecutions, but includes every proceeding of a judicial nature before a competent court, administrative agency, or officer clothed with judicial or *quasi*-judicial powers, including statements made in an affidavit pertinent to a judicial proceeding or which the affiant has reasonable grounds to believe is pertinent.

3. Same—

A lunacy proceeding is a judicial proceeding within the rule of absolute privilege.

4. Same—

In a lunacy proceeding instituted by the husband of the alleged incompetent by proper affidavit sworn to before the clerk, G.S. 122-42, a state-

ment of a physician sworn to before a notary public, G.S. 122-43, is absolutely privileged and will not support an action for libel.

5. Insane Persons § 1—

While the initial affidavit-application under G.S. 122-42 must be sworn to before the clerk or a deputy clerk, the affidavits of physicians under G.S. 122-43 may be sworn to before a notary public, and the statute permits affiant in the affidavit-application to act as intermediary in carrying the papers to and from the physician for the execution of the physician's affidavit.

6. Trial § 24a—

Where plaintiff's evidence establishes as a matter of law an affirmative defense set up by defendant, nonsuit is proper.

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

APPEAL by plaintiff from *Harris, J.*, at 15 June Term, 1953, of LENOIR.

Civil action for libel.

The gravamen of the plaintiff's cause of action as alleged in the complaint is that the defendant, a practicing physician, maliciously and without justifiable cause signed and published a statement that the plaintiff was suffering from a mental disease and was a fit subject for admission into a hospital for the mentally disordered.

The defendant, by answer, admits signing the statement on 6 June, 1951, but alleges by way of defense that shortly prior thereto the plaintiff had been under his direct care, observation, and treatment in a hospital for a period of about eight days; that the plaintiff "was suffering from an unstable and nervous condition which is . . . in medical terms called . . . 'anxiety neurosis,' a mental and nervous condition which, among other symptoms, is sometimes indicated by a marked state of anxiety, by an attitude of great magnification of any physical illnesses, by unjustifiable attention given to known minor troubles, by a sense of persecution, and by general intellectual deficiency, all of which symptoms were present in the plaintiff's case . . ."; that about three weeks after the plaintiff was released from the hospital, her husband, Clyde Jarman, came to defendant's office "with a blank form of affidavits and questionnaires," and advised the defendant that his wife had attacked him with a butcher knife in their home, and requested the defendant, as her recent attending physician, to fill in and sign one of the affidavits; "That in these circumstances, and being . . . of the opinion the plaintiff needed such treatment as her . . . husband . . . expected to make available to her, this defendant did fill in and sign an affidavit constituting part of the entire Exhibit . . ."; that the defendant's act in signing the affidavit was part of the required procedure through which the plaintiff might be admitted to a hospital for mental treatment and "the affidavit was signed only as a part of, and one

step in, such program, . . . to the end that the plaintiff, his recent patient, could receive treatment which . . . defendant believed she greatly needed."

The material facts as developed by the plaintiff's evidence may be summarized as follows: For some months prior to 8 May, 1951, the plaintiff had been under the care and treatment of her family physician, Dr. Joseph S. Bower, at Pink Hill, where they both reside. On or about 8 May, 1951, Dr. Bower referred the plaintiff to the defendant, medical practitioner in the City of Kinston, and the plaintiff that day was admitted to the Lenoir County Hospital, located in Kinston. The plaintiff remained in the hospital under the defendant's direct care and observation from 8 May until 17 May, 1951. During this period the defendant saw and observed her twice each day, and sometimes more. When the plaintiff left the hospital on 17 May, 1951, she was accompanied home by her husband, Clyde Jarman.

On 6 June, 1951, the plaintiff's husband appeared before John S. Davis, Clerk of the Superior Court of Lenoir County, and made affidavit, on printed form, as follows:

AFFIDAVIT OF MENTAL DISORDER TO PROCURE ADMISSION.

DO NOT BRING OR SEND PATIENT TO HOSPITAL UNTIL TOLD TO DO SO BY SUPERINTENDENT.

STATE OF NORTH CAROLINA, LENOIR COUNTY.

The undersigned makes oath that he has carefully observed Mrs. Avy Agnes Jarman, and believes her to be mentally disordered person and to be, in the opinion of the undersigned, a fit subject for admission into a Hospital for the mentally disordered.

CLYDE D. JARMAN, Affiant.
(State relationship, if any)
Husband
Pink Hill, N. C.

Sworn and subscribed before me this 6th day of June, 1951.
JOHN S. DAVIS (C.S.C.)

Thereafter the defendant (on printed form appearing as a part of the same document as the foregoing affidavit of Clyde D. Jarman), made affidavit before notary public John W. Farabow as follows:

STATE OF NORTH CAROLINA, LENOIR COUNTY.

The undersigned makes oath that he is licensed to practice medicine by the State of North Carolina, and that on May 8 to May 17, 1951, he care-

fully examined Avy Agnes........................and believes him to be suffering from a mental disease, and to be, in the opinion of the undersigned, a fit subject for admission into a hospital for the mentally disordered.

V. D. OFFUTT, M.D., Affiant
Kinston, N. C.

Sworn and subscribed before me this 6 day of June, 1951.
(LS) JOHN W. FARABOW, N. P.
My Commission Expires: July 12, 1952.

The printed form on which both the foregoing affidavits appear also contains form affidavit to be made by a second physician, like the one made by the defendant. But the form for the second physician's affidavit was never filled in.

This printed form for admission to a State mental hospital, executed by the plaintiff's husband before the Clerk of the Superior Court with supporting affidavit made by the defendant before a notary public, was found—exactly when not appearing—folded up and sticking behind a tool cabinet in the husband's barber shop by a daughter of the plaintiff, now deceased, who had gone to the barber shop with the plaintiff. Another daughter of the plaintiff testified that her deceased sister, who found the petition, showed it to her and that she "read it . . . and knew what it was and knew the meaning and import of the words."

The plaintiff testified in substance: That she went to see the defendant the day her daughter gave her the petition; that she asked him to tell her what he had found wrong with her while she was under his care at the hospital; that he told her she had diabetes and enlarged liver; that she then confronted him with the petition and asked him why he had signed the affidavit to the effect that she was mentally diseased and a fit subject to be sent to a mental institution; that after some exchange of words, he stated that her husband told him she had assaulted him with a butcher knife, and that he signed the affidavit "just to get shed of" her husband and that "he knew . . . Dr. Bower would not sign it"; that she then asked the defendant, " '. . . did you see or hear anything by my actions from the 8th until the 17th of May that would have made you think I was insane?' and he said, 'No, ma'am, I certainly didn't. I couldn't tell whether you were crazy or not.' "

At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was allowed.

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

J. Harvey Turner and R. S. Langley for plaintiff, appellant.
John G. Dawson for defendant, appellee.

JOHNSON, J. For the purpose of decision, it may be conceded that ordinarily the publication of written words imputing insanity or impairment of mental faculties is libelous *per se.* 33 Am. Jur., Libel and Slander, Sec. 51; Annotation: 66 A.L.R. 1257. Also, for the purpose of decision it may be conceded that, nothing else appearing, a defamatory communication made to a relative of the defamed person is actionable. See Annotation: 25 A.L.R. 2d 1388.

In the case at hand the defendant places chief stress on the contention that the alleged defamatory statement was made in a judicial proceeding, and that therefore he is entitled to complete immunity under the doctrine of absolute privilege. We rest decision on the question raised by this contention.

The general rule is that a defamatory statement made in due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice. *Ramsey v. Cheek,* 109 N.C. 270, 13 S.E. 775. See also *Harshaw v. Harshaw,* 220 N.C. 145, 16 S.E. 2d 666; *Mitchell v. Bailey,* 222 N.C. 757, 23 S.E. 2d 829; 53 C.J.S., Libel and Slander, Sec. 104, p. 168; 33 Am. Jur., Libel and Slander, Sec. 146.

As to what constitutes a judicial proceeding within the rule of absolute privilege, it is generally held that privilege is not restricted to trials in civil actions or criminal prosecutions, "but includes every proceeding of a judicial nature before a competent court or before a tribunal or officer clothed with judicial or *quasi*-judicial powers." 53 C.J.S., Libel and Slander, Sec. 104 (b), p. 169. See also 33 Am. Jur., Libel and Slander, Sec. 147.

Ordinarily, statements made in an affidavit which are pertinent to matters involved in a judicial proceeding, or which the affiant has reasonable grounds to believe are pertinent, are privileged, and, although defamatory, are not actionable. *Perry v. Perry,* 153 N.C. 266, 69 S.E. 130; 33 Am. Jur., Libel and Slander, Sec. 152. See also Annotations: 12 A.L.R. 1247, 1250; 81 A.L.R. 1119.

And it is generally held that a lunacy proceeding is a judicial proceeding within the rule of absolute privilege. *Corcoran v. Jerrel,* 185 Iowa 532, 170 N.W. 776, 2 A.L.R. 1579; *Perkins v. Mitchell,* 31 Barb. (N.Y.) 461; 53 Am. Jur., Libel and Slander, Sec. 148; Annotations: 2 A.L.R. 1582; 66 A.L.R. bot. p. 1257. See also *Hodson v. Pare,* 1 Q.B. (Eng.) 455.

In *Corcoran v. Jerrel, supra,* it was held that the testimony of a physician before a lunacy commission was privileged, though no notice of the lunacy proceeding was given to the alleged lunatic, it appearing that the proceeding had been conducted according to law.

In the case at hand the lunacy proceeding in which the defendant made affidavit was instituted by the plaintiff's husband under the statutory procedure prescribed by G.S. 122-42 *et seq.*

G.S. 122-42 provides: "When it appears that a person is suffering from some mental disorder and is in need of observation or admission in a State hospital, some reliable person having knowledge of the facts shall make before the clerk of the superior court of the county in which alleged mentally disordered person is or resides, and file in writing, on a form approved by the North Carolina Hospitals Board of Control, an affidavit that the alleged mentally disordered person is in need of observation or admission in a hospital for the mentally disordered, together with a request that an examination into the condition of the alleged mentally disordered person be made.

"This affidavit may be sworn to before the clerk of the superior court, or the deputy clerk of court."

G.S. 122-43, in so far as material, is as follows: "When an affidavit and request for examination of an alleged mentally disordered person has been made, . . . the clerk of the superior court . . ., shall direct two physicians duly licensed to practice medicine by the State . . ., to examine the alleged mentally disordered person . . . in order to determine if a state of mental disorder exists and if it warrants commitment to one of the State hospitals or institutions for the mentally disordered. If the said physicians are satisfied that the alleged mentally disordered person should be committed for observation and admission into a hospital for the mentally disordered, they shall sign an affidavit to that effect on a form approved by the North Carolina Hospitals Board of Control.

"The affidavit may be sworn to before the clerk of the superior court, the assistant clerk of the superior court, or the deputy clerk of court, *or a notary public.*" (Italics added.)

G.S. 122-46 provides in part: "When the two physicians shall have certified that the alleged mentally disordered person is in need of observation and admission in a hospital for the mentally disordered, and after the clerk has heard all proper witnesses, he shall issue an order of commitment . . ., which shall authorize the hospital to receive said person and there to examine him and observe his mental condition for a period not exceeding thirty days."

It would seem that a proceeding to commit an alleged mentally disordered person to a State hospital under the foregoing procedure is a judicial proceeding within the rule of absolute privilege, and we so hold.

On the record here presented it appears that the defendant physician made the affidavit complained of in the due course of a proceeding previously instituted by the plaintiff's husband under the foregoing statutory procedure, and this is so notwithstanding the affidavit was made before

a notary public and does not appear to have been filed with the Clerk of the Superior Court before whom the proceeding was pending. As to this, it is significant to note that while G.S. 122-42 specifically directs that the initial affidavit-application by which a proceeding is commenced must be "Sworn to before the clerk . . . or the deputy clerk of court," nevertheless, the companion statute, G.S. 122-43, expressly provides that the affidavits of the physicians "may be sworn to before a notary public."

Moreover, it is noted that the statute prescribes no formal procedure to be followed by the clerk in transmitting the forms to the examining physicians and in getting them back from the physicians after execution. However, since the statute expressly provides—no doubt for the convenience of the physicians—that the affidavits may be made before notaries, rather than before the clerk, it follows by necessary implication that the statute sanctions the procedure followed in the instant case whereby the document, containing initial affidavit-application of the plaintiff's husband and the defendant's affidavit, was delivered by the defendant to the plaintiff's husband, the intermediary through whom the defendant received the document from the clerk in the first instance.

It thus appears that the facts on the issue of privilege are undisputed and support the single inference that the affidavit made by the defendant is absolutely privileged.

Here, then, the plaintiff's evidence establishes as a matter of law the truth of the defendant's affirmative defense of absolute privilege. This being so, the judgment of nonsuit entered below will be upheld under application of the rule explained and applied by *Barnhill, J.*, now *C. J.*, in *Hedgecock v. Ins. Co.,* 212 N.C. 638, 641, 194 S.E. 86: "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." See also *Thomas-Yelverton Co. v. Ins. Co.,* 238 N.C. 278, 77 S.E. 2d 692.

Affirmed.

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

MRS. AUDREY M. BLALOCK, ADMINISTRATRIX OF THE ESTATE OF BETTY JEAN BLALOCK, DECEASED, v. JULIAN D. HART, MAE B. RAGAN, ADMINISTRATRIX OF THE ESTATE OF SAM B. RAGAN, DECEASED, AND SHERRILL LEE MOORE.

(Filed 24 February, 1954.)

1. **Automobiles §§ 8i, 18h (2)—Evidence held for jury on question of negligence of driver of car on servient highway.**

Evidence tending to show that the driver of an automobile along a servient highway collided at an intersection with a car driven along the dominant highway, with physical evidence tending to show that the car approaching along the servient highway was driven at excessive speed and that skid marks from this car did not start until about six inches beyond the center of the dominant highway on the driver's right of the servient highway, *is held* sufficient to make out a *prima facie* cause of action for negligence on the part of such driver in failing to give due heed to the stop sign erected along the servient highway, in failing to exercise ordinary care in keeping a lookout, and in failing to keep proper control of his car, G.S. 20-141; G.S. 20-158.

2. **Automobiles § 8i—Duty of driver along dominant highway in approaching intersection with servient highway.**

While the driver of a car along the dominant highway, in the absence of anything which gives or should give notice to the contrary, is entitled to assume and act upon the assumption, even to the last moment, that the operator of a car along the intersecting servient highway will stop before entering the intersection, the driver along the dominant highway is nevertheless required to exercise the care of an ordinarily prudent person under similar circumstances to keep a reasonably careful lookout, not to exceed a speed which is reasonable and prudent under the circumstances, and to take such care as a reasonably prudent man would exercise to avoid collision when danger of a collision is discovered, or should have been discovered. G.S. 20-158.

3. **Same: Automobiles § 18h (2)—Evidence of negligence of driver along dominant highway held sufficient to be submitted to jury.**

Evidence tending to show that the front of a car driven along a dominant highway at night collided with the right side of a car which entered the intersection from the left along the servient highway, with physical evidence tending to show that both cars were being driven at excessive speed, and that there were no skid marks before the point of impact, *is held* sufficient to be submitted to the jury on the question of the negligence of the driver of the car along the dominant highway in traveling at excessive speed and in failing to maintain a proper lookout and in failing to keep his car under proper control. G.S. 20-141; G.S. 20-158.

4. **Automobiles § 18d, 22—**

In this action to recover for the death of a passenger killed in a collision at an intersection of highways, the evidence *is held* sufficient to be submitted to the jury on the theory of the concurrent negligence of the drivers of the cars involved.

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

APPEAL by plaintiff from *Harris, J.*, at April Civil Term, 1953, of WAKE.

Civil action by plaintiff to recover damages for the alleged wrongful death of her intestate daughter, Betty Jean Blalock, resulting from a collision of two automobiles in a highway intersection about three miles east of the Town of Angier, in Harnett County.

The collision occurred around 8 o'clock p.m. on 26 March, 1952, at the intersection of the Old Stage Road, which runs north and south, and the Angier-Benson Road, which runs east and west. An Oldsmobile sedan and a Ford coupe were involved in the collision. The plaintiff's intestate was riding as a passenger in the Oldsmobile, driven by Sam B. Ragan. Also present therein were Sherrill Lee Moore, owner of the car, and Edna Morris. The defendant Julian D. Hart was alone in the Ford coupe.

The Oldsmobile was traveling southwardly on the Old Stage Road; the Ford eastwardly on the Angier-Benson Road. A stop sign facing north on the Old Stage Road at the intersection made the Angier-Benson Road the dominant, through highway, and the Old Stage Road the servient highway. Therefore, as the two vehicles approached the intersection the Ford was on the favored highway as designated by the stop sign.

The Oldsmobile was driven into the intersection where it was struck on its right side by the front end of the Ford. The impact did not stop the forward progress of either automobile. The Ford continued on from 100 to 140 feet eastwardly in the same direction it had been going, and stopped "just off the highway down in the field" near the south side of the Angier-Benson Road.

The course of the Oldsmobile was diverted from south to southeast, in which course it continued for a distance of about 35 feet and struck a large oak tree located at the southeast corner of the intersection about 6 feet east of the Old Stage Road. The left side of the car struck the tree and "sort of wrapped around" it. All occupants of the Oldsmobile were killed instantly except Sherrill Lee Moore, who survived. Hart, the driver of the Ford coupe, also survived.

The plaintiff, administratrix of the estate of Betty Jean Blalock, brings this action, alleging that her intestate met her death as the result of the independent, though concurring, negligence of both drivers. Sherrill Lee Moore is joined as a defendant upon allegations that the Oldsmobile was being driven by Ragan with the permission and under the control or right of control of owner Moore, who was an occupant of the car, thus making Ragan's alleged negligence imputable to the defendant Moore. The record discloses that Moore did not file answer.

There were no eyewitnesses to the collision except the two survivors, the defendants Hart and Moore. Hart did not testify. Moore was called as a witness for the plaintiff, but gave only meager information concerning the occurrence. He said he was on the left side of the back seat of the Oldsmobile, with plaintiff's intestate being on his right; that "Sam Ragan was driving the car. . . . We went into the cross-roads and something hit us. It throwed me out of the car, I would say . . . thirty or forty feet. . . . When I became conscious the car was up against the oak tree. . . . I saw no lights over to my right as we entered the intersection . . ." Cross-examination: ". . . I know we had a collision and I don't know exactly how it happened or anything about it. . . . I was taken to the hospital."

The rest of the plaintiff's evidence may be summarized as follows: Tire marks led from "where the impact was" to where the Oldsmobile was "wrapped around" the tree. The marks started about 6 inches south of the center line of the Angier-Benson Road and on the right-hand side of the Old Stage Road, "on the Oldsmobile's right-hand side of the road" and "just about 6 inches" beyond the center of the east-west highway. "These marks . . . were from 8 to 10 inches wide . . ., heavy curving tire marks . . ." about 35 feet long "straight on down to the tree. . . ."

The evidence discloses there were no skid marks on the highway west of the point of impact. Nor were any such marks found on the highway east of the collision between the point of impact and the place where the Ford ran off the highway.

The body of plaintiff's intestate was "lying next to the root of the tree on the left side of the car. . . . The body of Edna Morris was . . . lying on the southwest side of the tree beside the Oldsmobile, on the opposite side from where the tree was hit." Sherrill Lee Moore was lying to the right of the oak tree about 20 feet from the car. The body of Sam Ragan was in the demolished car.

The Oldsmobile was damaged on both sides, and the "top was knocked clear off." (No damage to the front was shown.) It was mashed in on the left side where it was "wrapped partly around the oak tree." The right side was bent in. The witness Stephenson said it was "just tore up. . . . It was bent from the right toward the inside of the body. . . . I would say it was bent about 2 feet in. The frame was bent in . . . about the same as the body. It was bent from the (front) door to the back door panel. The front seat was thrown out of the car and the back seat was pushed up near the dashboard." Another witness said: ". . . the back part of the Oldsmobile was knocked . . . to within about 2 or 3 feet of the steering wheel." The front end of the Ford was damaged. "The headlights were knocked back . . ., the radiator was knocked back, the axle bent and the hood tore all to pieces."

The stop sign was located on the right-hand side of the Old Stage Road, near the intersection, "about 3 or 4 feet back from the Angier-Benson highway, north of it."

The plaintiff alleged and offered evidence tending to show that on the Angier-Benson Road there is a hill crest about 100 yards west of the intersection; that upon passing the hill crest, a motorist proceeding eastwardly toward the intersection travels downgrade to and through the intersection; that the crest of the hill is of such height as to obscure the vision of the intersection to a driver approaching from beyond the crest; that approaching the intersection from the north along the Old Stage Road, there are located upon the right or northwest corner buildings and structures surrounded by a grove of oak trees which tend to obscure the normal line of vision from one road to the other as motorists approach the intersection from the north on the Old Stage Road and from the west on the Angier-Benson Road, thus creating something of "a blind corner." The witness Broadwell said: ". . . in the northwest of the intersection there, there is a house and right smart trees. There are several buildings in there, three or four." The witness Stephenson said: "On the northwest corner of the intersection, there is a house. This house is 40 to 50 feet off the Old (Stage) Road. . . . It could be over that. It sits back a good way from the road. . . . There are some oak trees in the grove near the house." Cross-examination: "There is nothing to prevent anybody in an automobile coming down the road to the stop sign from seeing west up that road except the oak trees and the houses there; the oak trees did not have leaves on them in March when the accident happened."

The record discloses no evidence as to maximum sight distances from any fixed points along either of these roads across to the other except looking west up the Angier-Benson Road from the stop sign. And it is noted that the evidence fixes the stop sign as being located only 3 or 4 feet from the intersection. The witness Lynn Stephenson testified: "Going west from the intersection there is a little grade, couldn't say . . . how many yards . . . to where this grade crests but it is a good number of yards. An automobile coming down by this house and stopping at the stop sign on the (Old Stage) Road . . . looking west, . . . to the right on the Angier-Benson Road, . . . I would say he could see the light shining 50 or 75 yards. . . . He would know something was coming after it come over the crest of the hill. I would say it would be for some 75 or 100 yards maybe."

At the close of the plaintiff's evidence the defendants Ragan and Hart made separate motions for judgment as of nonsuit. Both motions were allowed. From judgment based on these rulings the plaintiff appeals.

Bickett & Banks for plaintiff, appellant.
Ruark, Ruark & Moore for defendant Mae B. Ragan, appellee.
Neill McK. Salmon and F. T. Dupree, Jr., for defendant Julian D. Hart, appellee.

JOHNSON, J. The defendant Ragan's intestate was driving the Oldsmobile. He was on the servient highway as designated by the stop sign. The evidence to the effect that the Oldsmobile was found immediately after the collision in a demolished condition against an oak tree beyond the intersection with the side next to the tree crushed in and the "back part of the car knocked" forward "to within 2 or 3 feet of the steering wheel," when considered with other corroborative proofs, is sufficient, we think, to make out a *prima facie* case of actionable negligence based on the plaintiff's allegations that Ragan in approaching and entering the intersection ahead of the oncoming car of the defendant Hart, who was on the favored highway, did not give due heed to the stop sign and failed to exercise ordinary care in keeping a lookout and in controlling the movement of his car. G.S. 20-158; *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Lee v. Chemical Corp.,* 229 N.C. 447, 50 S.E. 2d 181. It necessarily follows that the court below erred in nonsuiting the case as to the defendant Ragan.

This brings us to the question whether the evidence is sufficient to take the case to the jury as against the defendant Hart, who was on the dominant, through highway.

It is established by our decisions that "the operator of an automobile, traveling upon a designated main traveled or through highway and approaching an intersecting highway, is under no duty to anticipate that the operator of an automobile approaching on such intersecting highway will fail to stop as required by the statute, and, in the absence of anything which gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment, that the operator of the automobile on the intersecting highway will act in obedience to the statute, and stop before entering such designated highway." *Hawes v. Refining Co.,* 236 N.C. 643, 650, 74 S.E. 2d 17, opinion by *Winborne, J.* See also *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Johnson v. Bell,* 234 N.C. 522, 67 S.E. 2d 658.

However, the driver on a favored highway protected by a statutory stop sign (G.S. 20-158) does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and

traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered. *Hawes v. Refining Co., supra; Reeves v. Staley, supra; Cox v. Lee, supra;* 5 Am. Jur., Automobiles, Sec. 302; Annotation: 164 A.L.R. 8, p. 16.

In her complaint the plaintiff alleges in substance that the defendant Hart was actionably negligent, in that he (1) drove at an excessive rate of speed in violation of the provisions of the speed statute (G.S. 20-141), (2) failed to maintain a proper lookout, and (3) did not have his car under proper control.

As tending to support the foregoing allegations, the evidence adduced below discloses that the front part of the Hart car was practically demolished and that the right side of the Oldsmobile, including the frame, was mashed in about two feet. The testimony also discloses that the Hart car made no brake or tire marks before reaching the point of collision. The evidence of these physical facts, together with the further evidence that the Hart car traveled a distance of from 100 to 140 feet beyond the point of impact, bears directly on the question whether the defendant Hart was actionably negligent for faliure to comply with legal requirements as to speed, lookout, and control of his car. *Yost v. Hall, supra* (233 N.C. 463, 468); *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197; *Bailey v. Michael,* 231 N.C. 404, bot. p. 407, 57 S.E. 2d 372; *Cox v. Lee, supra* (230 N.C. 155).

This line of evidence, when viewed in its light most favorable to the plaintiff, as is the rule on motion to nonsuit, is sufficient to justify, though not necessarily to impel, the inference of negligence on the part of the defendant Hart as one of the proximate causes of the collision and resultant death of the plaintiff's intestate.

We conclude, therefore, that the evidence is sufficient to carry the case to the jury on the theory of concurrent negligence of both the drivers involved in the collision. See *Caulder v. Gresham,* 224 N.C. 402, 30 S.E. 2d 312; *Bumgardner v. Allison,* 238 N.C. 621, 78 S.E. 2d 752, and cases there cited.

The judgment below is
Reversed.

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

A. W. NESBITT AND WIFE, CLARA M. NESBITT, v. FAIRVIEW FARMS, INC.

(Filed 24 February, 1954.)

1. **Boundaries § 6—**

Where in a processioning proceeding petitioners allege ownership of contiguous tracts by the respective parties, and a dispute between them as to the true dividing line, and respondents do not deny petitioners' allegation of ownership except with respect to lappages and infringements on lands owned by respondent, and join in the prayer that the dividing line be properly located, title is not in dispute, G.S. 38-1.

2. **Husband and Wife § 14—**

A deed to husband and wife, unless the instrument provides otherwise, vests in the husband and wife an estate by entireties.

3. **Husband and Wife § 15a: Boundaries § 6—**

During coverture the husband is entitled to the full possession, control and use of lands owned by himself and wife by the entireties and can maintain a processioning proceeding to establish the dividing line between such lands and the contiguous lands of another, even without the joinder of his wife.

4. **Same: Compromise and Settlement § 1—Wife is not necessary party to agreement in processioning proceeding establishing boundary to lands held by entireties.**

Petitioners, husband and wife, instituted this processioning proceeding to establish the true dividing line between lands owned by them by entireties and contiguous lands of respondent. Pending trial, an agreement was executed between respondent and the husband alone, stipulating that a survey be made in accordance with the agreement and that the parties be bound by the result thereof. *Held:* The agreement is binding upon the parties to the agreement and also upon the wife, even though she did not sign it, since title was not in issue and the stipulation was made by her husband in the course of the proceeding to establish the dividing line, which the husband could have maintained without her joinder, she being a proper but not a necessary party thereto.

5. **Appeal and Error § 40d—**

The findings of fact of the trial court are binding upon appeal when they are supported by sufficient evidence.

6. **Boundaries § 13—**

Where judgment in a processioning proceeding establishing the dividing line between the tracts of the respective parties is affirmed on appeal, the lower court may retain the cause thereafter only for the purpose of putting into effect the provisions of G.S. 38-3 (3).

APPEAL by plaintiffs from *Sink, J.*, at Regular October Term, 1953, of BUNCOMBE.

Processioning proceeding for the establishment of the true dividing line between the lands of petitioners and the lands of respondent.

The record and case on appeal reveals the following:

1. Petitioners filed a petition in which they allege (1) that they are the owners of certain specifically described land in Fairview Township, in Buncombe County, North Carolina, conveyed to them by a certain deed recorded in Deed Book 536, at page 125, in the office of the Register of Deeds for Buncombe County; and (2) that defendant is the owner of certain lands adjoining said lands of petitioners, and disputes the correctness of the boundary lines of said lands of petitioner,—the particular boundary lines so disputed by defendant being the boundary lines of petitioners in their said deed as follows:

"Thence with another line of said tract N. 15 deg. west 158 feet to a white oak on Old Ashworth and McClure corner; thence South 64 deg. west 681 feet to a stake; thence South 54 deg. west 279 feet to a stake; thence S. 33 deg. 50 min. west 695 feet to a stake in Ashworth Creek at the mouth of a ditch" . . .

2. Defendant, answering the petition so filed by petitioners, avers (1) that the allegations contained in paragraph 1 of the petition are not denied "except with respect to lappages and infringements upon the lands owned by the defendant which lands come from a common source and through an older title"; (2) that defendant is advised, informed and believes there is a question as to the proper location of the line referred to in paragraph 2 of the petition, and, as this defendant is advised, informed and believes, and so alleges, the plaintiff is wrongfully claiming a portion of the lands belonging to defendant.

3. Thereupon on 31 August, 1951, the Clerk of Superior Court, with consent of attorney for petitioners and attorney for defendant, entered an order appointing Robert J. Martin surveyor in the proceeding,—and directed him to make a survey, properly and correctly locating the boundary lines in dispute between the petitioners and defendant and to make report thereof to the court.

4. Thereafter the surveyor reported to the court that pursuant to the order of the court, and accompanied by A. W. Nesbitt, one of the petitioners, and the farm manager of defendant, and by a surveyor representing defendant, he made a survey of the disputed boundary,—by certain successive calls in deed from James G. K. McClure and wife to "Andrew W. Nesbitt and wife, Clara M. Nesbitt, recorded in Deed Book 536, on page 125, in the office of the Register of Deeds for Buncombe County" (which when compared is the deed referred to in paragraph 1 of the petition, as hereinabove shown), and that in connection therewith he prepared a map, a copy of which he attached to his report, with explanation of the lines shown thereon.

5. Thereafter on 14 March, 1952, the Clerk, being of opinion that an issue of fact had been raised by the pleadings, transferred the cause to the civil issue docket.

6. Thereafter on 11 October, 1952, defendant, through its attorney, moved the court "upon facts set forth in the attached affidavit" to order a new survey.

7. Thereafter on 21 October, 1952, "A. W. Nesbitt," under his hand and seal, and "Fairview Farms, Inc., by R. B. Fuller, President," stipulated and agreed in writing: "(1) That Robert J. Martin, Surveyor, may go to the disputed line between the properties of the parties hereto, and taking the deed from S. J. Ashworth and wife to J. C. K. McClure, date November 24, 1923, recorded in Book 281, page 57, and start at one or more of the known and admitted corners and lines, and suggesting the starting point be located at a stake in the branch at the mouth of another branch which occurs at the end of a call reading: 'Up and with the branch, North 84 deg. East 4 poles to a stake in the branch; up and with the branch, North 76 deg. 15 min. East 6 poles to a stake at the mouth of another branch,' and check distance back to road at about 200 feet. Locating a starting point by taking this natural location of the junction of the branches and then running backwards on the description of the said Ashworth to McClure Deed, and thus coming to and following the line now under dispute, and in this manner the said line shall be established upon the ground. (2) The parties to this instrument agree to abide by and accept the line established upon the ground in the manner, and using the information above set forth. (3) It is further agreed that, if the majority of the line thus established is located on the Fairview Farms, Inc., side of the one wire electric fence, then Fairview Farms, Inc., will pay the expense of this survey; if the majority of the said line as thus established is located on the A. W. Nesbitt side of said fence then A. W. Nesbitt will pay expenses of this survey. (4) Upon the establishment of the line as above set forth the parties hereto agree to sign an Agreement establishing the line as located by this survey."

8. Thereafter on ...... November, 1952, Robert J. Martin, surveyor, reported to "A. W. Nesbitt and R. B. Fuller, President of Fairview Farms, Inc.," that pursuant to the stipulation of 21 October, 1952, he "went upon the lands in question in the presence of A. W. Nesbitt and R. B. Fuller, and following the direction and provisions of said stipulation, and the parties on the ground, the undersigned started the survey according to the agreement and established the line" as follows:

"Beginning at a point in a branch at the mouth of another branch, at the point marked 'A' on the plat submitted herewith, and running thence South 78 deg. West 99 feet to stake in the branch, marked 'B' on said plat; thence South 84 deg. West 66 feet to stake on the bank of the branch, marked 'C' on said plat; thence South 64 deg. West 688.4 feet to stake, marked 'D' on said plat; thence South 54 deg. West 279.2 feet to stake near a 10-inch oak, marked as corner, also near 10-inch black pine,

marked as pointer; thence South 32 Deg. 15 min. West 695 feet to stake in Ashworth Creek, marked 'F' on said plat."

9. Thereupon "Now come the plaintiffs in the above entitled action and object and except to the report of the surveyor," and for reason that Martin "did not start at any of the known and admitted corners and lines" move that the survey as reported be refused by the court, "and that a surveyor be appointed by the court who will follow the descriptions and mandates rather than ignore them as Robert J. Martin has in this cause." Signed "A. W. Nesbitt."

10. And on 29 June, 1953, defendant, through its counsel, entered a motion: For a judgment establishing the disputed line between the parties in accordance with the stipulation of 21 October, 1952, and the report of Robert J. Martin, surveyor, dated ...... November, 1952, as aforesaid,—contending "that the said stipulation, together with the said report, constitutes a settlement of the disputed line."

11. Thereafter affidavits "for Plaintiffs" and affidavits "for Defendant" in connection with the respective contentions of the parties as to the correctness of the survey, appear in the record.

12. The cause coming on to be heard upon the motion of plaintiffs described in paragraph 9 above, the court, under date of 27 October, 1953, ordered "that the said motion be, and the same is hereby overruled and the relief requested declined." To this ruling, and to the signing of the order plaintiffs object and except (Exception Nos. 1 and 2) and appeal to Supreme Court.

13. And the cause coming on to be heard upon the motion of defendant for judgment upon the record herein, and being heard and considered, the court finds: "(1) That the plaintiffs and the defendant entered into a binding Stipulation and contract, dated October 21, 1952, by which they agreed to have a survey made according to the direction set forth in said Stipulation, a copy of which Stipulation appears in the record attached to the motion in this cause. Plaintiffs' Exception No. 3.

"(2) That pursuant to the said Stipulation Robert J. Martin, Surveyor, selected and agreed to by the parties went upon the lands November .... 1952 and made the survey according to the terms of said Stipulation and established and located the disputed line between the lands belonging to the parties to this action, and made Report thereof setting forth and describing said line. The original, signed report of the surveyor being attached to the motion in this cause. Plaintiffs' Exception No. 4.

"(3) It is further found that no fraud was alleged in the pleadings and no fraud is found by the court in the proceeding.

"(4) The court further finds that the said Stipulation of the parties, and the Report filed by the surveyor in accordance therewith, establishes the disputed line between the parties, and that the defendant is entitled

to have a judgment, locating said line in accordance therewith." Plaintiffs' Exception No. 5.

"It is, Now Therefore, Ordered, Adjudged and Decreed:

"(1) That the correct line between the lands of the plaintiffs and the defendant, heretofore questioned and disputed, is as follows: Beginning at a point in a branch at the mouth of another branch (said point being marked 'A' on the Plat submitted with surveyor's Report), and running thence South 78 deg. West 99 feet to a stake in the branch (marked 'B' on said Plat); thence South 84 deg. West 66 feet to stake on the bank of the branch (marked 'C' on said Plat); thence South 64 deg. West 688.4 feet to stake (marked 'D' on said Plat); thence South 54 deg. West 279.2 feet to stake near a 10-inch oak marked as corner, also near a 10-inch Black Pine marked as pointer; thence South 32 deg. 15 min. West 695 feet to stake in Ashworth Creek (marked 'F' on said Plat).

"(2) That a copy of this judgment be recorded in the office of the Register of Deeds of Buncombe County, North Carolina.

"(3) That the unpaid costs of this proceeding be divided equally between the plaintiffs and the defendant."

14. Plaintiffs except to the judgment as signed and appeal to Supreme Court, and assign error.

George Pennell and Harry C. Martin for plaintiff, appellant.
Guy Weaver for defendant, appellee.

WINBORNE, J. At the outset, it is appropriate to say that in this State it is provided by statute, G.S. 38-1, that "the owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the Superior Court of the county in which the land or any part thereof is situated." Petitioners have proceeded under this statute.

The title to the land is not in issue unless made so by the pleadings. *Cole v. Seawell,* 152 N.C. 349, 67 S.E. 753. Here the petitioners allege in their petition that they are the owners of a certain tract of land, that defendant is the owner of certain lands adjoining the lands of petitioners, and that defendant disputes certain boundary lines of petitioners' land. On the other hand, while defendant, answering, does not deny the allegations of ownership set out in the petition "except with respect to lappages and infringments upon the lands owned by the defendant," it joins petitioners in a desire to have the lines between petitioners and defendant properly and correctly located. Thus the title is not really in dispute. See *Roberts v. Sawyer,* 229 N.C. 279, 49 S.E. 2d 468; *Clark v. Dill,* 208 N.C. 421, 181 S.E. 281; *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501.

Now, while appellants assign as error each of the matters to which the several exceptions shown relate, they state, in their brief filed here, these as the questions involved: Did the trial judge err (1) "in his findings of fact Nos. 1, 2 and 4?", and (2) "in overruling plaintiffs' motion to reject the second survey?". Careful consideration of the record, and applicable principles of law, leads to negative answers.

These questions are to be, and are considered in the light of the admitted fact that appellants, petitioners or plaintiffs, as they are interchangeably designated in the record on this appeal, acquired title to the land, to which they assert ownership, by a deed made to them as husband and wife. Such a deed, unless it be otherwise provided therein, vests in the husband and wife an estate by the entireties, or by the entirety, with right of survivorship, as at common law. And the doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. Decisions of this Court so holding are too numerous to list. But see *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566, where in opinion by *Stacy, J.*, the Court treats of the incidents and properties of an estate by the entirety. See also *Harrison v. Ray,* 108 N.C. 215, 12 S.E. 993; *West v. R. R.*, 140 N.C. 620, 53 S.E. 477; *Morton v. Lumber Co.*, 154 N.C. 278, 70 S.E. 467; *Bank v. Hall,* 201 N.C. 787, 161 S.E. 484; *Moore v. Shore,* 208 N.C. 446, 181 S.E. 275.

However, the husband is entitled during the coverture to the full possession, control and use of the estate, and to the rents and profits arising therefrom to the exclusion of the wife. See *West v. R. R., supra.*

In the *West case* it is stated: " 'But while at common law neither the husband nor the wife can deal with the estate apart from the other, or has any interest which can be subjected by creditors so as to affect the right of the survivor, yet subject to this limitation the husband has the rights in it which are incident to his own property. He is entitled during the coverture to the full control and usufruct of the land to the exclusion of the wife.' 15 Am. and Eng. Enc. (2d) 649."

And in the *West case* the Court referred to the ruling in the case of *Topping v. Sadler,* 50 N.C. 358, that the husband may maintain an action in ejectment, and held that the husband, West, could maintain an action for damages to the land which had been conveyed to husband and wife, and which they held by entireties, and that the wife was not a necessary party. Compare *Moore v. Shore, supra.* Applying these rulings of the Court to the case in hand, it is clear that the husband, the petitioner, A. W. Nesbitt, being entitled to the possession and control of the estate by the entireties had the right to have the true boundary lines thereof ascertained, and could maintain this proceeding for the establishment of such boundary lines, even without the joinder of his wife. That is, that she is not a necessary party to such proceeding. *Topping v. Sadler, supra; West v. R. R., supra.*

It follows that, having the right to maintain the proceeding for such purpose, the husband had the right to stipulate as to method by which the true boundary line could be ascertained. Hence, in so far as he, the husband, is concerned, the trial judge did not err in the findings of fact and conclusions of law in respect to the stipulation of 21 October, 1952.

The question then arises as to whether on this record the wife, the petitioner, Clara M. Nesbitt, is bound by the said stipulation. And though the record fails to show that she made any such contention in the court below, she contends in this Court that since their land is held as an estate by the entirety, she is not bound by the said stipulation because she did not sign it. This contention is without merit for these reasons: (1) Her interest in the estate by the entirety is not affected. (2) While she is not a necessary party to this proceeding, she is a proper party. And having joined her husband in the institution and prosecution of this proceeding to establish the true boundary lines between their lands and those of defendant, she will not be heard to say that she is not bound by the stipulation her husband made in the course of the proceeding toward accomplishing this end.

The findings of fact made by the trial judge appear to be supported by sufficient evidence, and are binding on this Court. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

For reasons stated, error is not made to appear in the judgment from which appeal is taken.

Hence, in accordance with this opinion, the court below should put into effect the provisions of G.S. 38-3 (3) and retain the cause only for this purpose.

The judgment below is

Affirmed.

LASSIE FREEMAN HENDERSON v. WILEY HENDERSON.

(Filed 24 February, 1954.)

1. Negligence § 1—

Negligence is the failure to exercise that degree of care which an ordinarily prudent man would exercise under like conditions in the performance of some legal duty which the defendant owes the plaintiff under the circumstances in which they are placed.

2. Negligence § 5—

Proximate cause of an injury is that cause which produces the injury in continuous sequence under circumstances from which any man of ordinary prudence could have foreseen that such result was probable under the existing facts, foreseeability being an essential element of proximate cause.

3. Automobiles § 8a—

Apart from statutory requirements, the operator of a motor vehicle is under duty to exercise that degree of care which an ordinarily prudent person would exercise under the circumstances in keeping a proper lookout, in keeping his car under proper control, and in exercising due care to avoid collision with persons or other vehicles upon the highway.

4. Automobiles § 13—

A motorist meeting a car traveling in the opposite direction may ordinarily assume that the oncoming driver will turn to his right so that the two cars may pass each other in safety, but if he sees, or in the exercise of due care should see, that the approaching driver cannot or will not do so, it is incumbent upon him then to exercise due care under the then existing conditions.

5. Same: Automobiles §§ 18h (2), 21—Failure of driver to stop immediately upon seeing car approaching out of control held not proximate cause of accident.

Plaintiff was a passenger in defendant's car which was being driven by defendant on his right side of the highway at a moderate rate of speed. The evidence tended to show that a car traveling in the opposite direction came into view when it was some 60 to 100 yards away rounding a curve, that it was traveling on its left side of the highway at a speed from fifty to sixty miles per hour, that the driver turned to his right, ran off the paved portion of the highway into the ditch on his right, and that when the car was within five to ten feet of defendant's truck, the driver pulled it out of the ditch and crashed it into defendant's truck, which at this time had been practically stopped, on defendant's right side of the highway. *Held:* As a matter of law, the failure of defendant to stop his truck immediately upon seeing the oncoming car does not constitute actionable negligence, since, whether such action would have avoided the injury rests in mere speculation, and defendant, being confronted by the sudden emergency, cannot be held under duty to have anticipated that the car would be jerked out of the ditch just when it was opposite defendant's truck.

6. Automobiles §§ 8a, 18g (6)—

Defendant's declaration that the accident would not have occurred if he had stopped his vehicle or pulled it out on the shoulder of the highway cannot be held for an admission of negligence when it amounts to nothing more than a statement that if defendant's truck, which was being operated in a lawful manner under control on its right side of the highway, had not been where it was, it would not have been struck by the other vehicle, since negligence involves more than being at a particular place at a particular time.

7. Automobiles § 8j: Negligence § 2—

When confronted with a sudden emergency created by the negligence of the adverse party, the driver of an automobile, who is in no respect at fault, is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made.

PARKER, J., dissents.

APPEAL by plaintiff from *Clarkson, Special Judge,* August "A" Civil Term, 1953, of BUNCOMBE.

The plaintiff brought this civil action to recover damages on account of personal injuries sustained in an automobile collision alleged to have been caused by the negligence of the defendant. The plaintiff is the wife of the defendant.

In support of the allegations of the complaint relating to negligence of the defendant, the plaintiff offered evidence tending to show that the collision occurred in the manner set out below.

About 5:45 p.m., on Friday, 1 August, 1952, the plaintiff was riding as a guest passenger in the defendant's Ford pickup truck. The defendant was proceeding in a northerly direction. One Bobby Eugene Hyatt, operating a Ford sedan, was proceeding in a southerly direction. A collision between these two vehicles occurred on paved Highway #63. The plaintiff suffered serious personal injuries in consequence of the collision.

The Hyatt car was first observed by plaintiff on the east side of the paved highway, coming around a curve, traveling at a speed of 50-60 or 55-60 miles per hour. At that time, in plaintiff's opinion, the Hyatt car and the defendant's truck were approximately 100 yards apart. "It swerved around here out of control, looked like it was wobbling, and it came right on this way on our side of the road until it got down here so far, and then into the ditch about there. After it drove into the ditch on the west side, it came up the ditch just a little way and was wobbling." "He (Hyatt) went over on his side of the road on the west side. After he got on his side of the road he ran into the ditch and when he got into the ditch he ran a little ways down the ditch, just a little ways, and when he pulled out of the ditch he pulled his car across the road, but not straight across." "When he jerked his car out of the ditch he was five to ten feet from where my husband's car was running." "When the Hyatt boy jerked his car out of the ditch he was still running at a high rate of speed."

The Hyatt car, when jerked out of the ditch, crossed the paved highway and crashed into the defendant's truck. The defendant slammed on his brakes just as the Hyatt car hit the truck. At the moment of collision the defendant's truck was almost stopped, barely moving. The collision occurred on the east side of the paved portion of the highway, that is, on the defendant's right while traveling north, midway between the center line and the east margin of the pavement.

From the time the Hyatt car first came into view the occupants of the defendant's truck could observe its movements up to the time of the collision. "He (the defendant) didn't do anything except kept on going down the road here until he got within about 5 or 10 feet of this (Hyatt's)

car and he slammed on his brakes and just as he slammed on his brakes the other car ran into us." No other vehicle was involved or in sight.

The defendant was driving on his side of the road, from 20 to 25 miles per hour, "going at a moderate rate of speed down the road and had his car under control." The plaintiff couldn't say as to the width of the paved highway, but there was plenty of room for the two cars to pass. East of the pavement, *i.e.*, on the defendant's right while traveling north, there was a shoulder, even with the paved highway, from 6 to 10 feet wide and extending north-south a distance of at least 50 yards. Traveling north, this was the condition of the shoulder east of the pavement at and immediately before reaching the place of collision.

After the collision the plaintiff saw the defendant, her husband, every day; and he made statements to and in the presence of the plaintiff and others to the effect that he could have stopped and avoided the collision, or he could have pulled out. On one occasion his statement was, "Oh, if I had only stopped when I saw this car coming, it wouldn't have happened."

The allegation of the complaint, and the theory of the trial, was that the defendant was negligent in failing either to stop his truck on the highway immediately when he saw or should have seen the Hyatt car some 100 yards away or in failing to pull to his right onto the shoulder and there stop.

At the close of the plaintiff's evidence the trial judge, upon the defendant's motion, entered judgment of involuntary nonsuit and dismissed the action. Plaintiff excepted and appealed.

E. L. Loftin for plaintiff, appellant.
Harkins, Van Winkle, Walton & Buck for defendant, appellee.

BOBBITT, J. In testing the sufficiency of the plaintiff's evidence to require submission of the issue of negligence to the jury, certain well-established propositions must be kept in mind.

The general law as to what constitutes actionable negligence is thus stated by *Justice* (later *Chief Justice*) *Hoke:* "To establish actionable negligence, the question of contributory negligence being out of the case, the plaintiff is required to show by the greater weight of the testimony, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiffs under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with like duty; and, second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen

that such a result was probable under all the facts as they existed. Shearman and Red. on Neg., secs. 25-28; *Brewster v. Elizabeth City,* 137 N.C. 392; *Raiford v. R. R.,* 130 N.C. 597; *Pittsburg v. Taylor,* 104 Pa. 306; *McGowan v. R. R.,* 91 Wis. 147." *Ramsbottom v. R. R.,* 138 N.C. 39, 41, 50 S.E. 448.

With further reference to proximate cause, we note that "foreseeability" is one of its requisite elements. *Whitley v. Jones,* 238 N.C. 332, 78 S.E. 2d 147; *Davis v. Light Co.,* 238 N.C. 106, 76 S.E. 2d 378.

Apart from safety statutes prescribing specific rules governing the operation of motor vehicles, a person operating a motor vehicle must exercise proper care in the way and manner of its operation, proper care being that degree of care that an ordinarily prudent person would exercise under the same or similar circumstances and when charged with like duty. Thus, he must exercise due care as to keeping a proper lookout, as to keeping his car under proper control, and generally so as to avoid collision with persons or other vehicles on the highway. *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111.

In meeting a car, proceeding in the opposite direction, where the oncoming car is not on its right side of the highway as the vehicles approach each other, ordinarily a motorist may assume that before the cars meet the driver of the approaching car will turn to his right so that the two cars may pass each other in safety; but from the time the motorist sees, or by the exercise of due care should see, that the approaching driver cannot or will not do so it is incumbent upon him then to exercise due care under the then existent conditions. *Morgan v. Saunders,* 236 N.C. 162, 72 S.E. 2d 411, and cases therein cited.

Too, as stated by *Chief Justice Devin* in *Morgan v. Saunders, supra,* "Furthermore, when confronted by the sudden emergency of the approach of another automobile negligently operated, the driver of an automobile who is in no respect at fault, is not usually held to the same degree of deliberation and circumspection as under ordinary conditions. *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562."

Tested in relation to these well established propositions, we agree with the trial judge in his ruling that the plaintiff's evidence fails to show actionable negligence on the part of the defendant.

The defendant's truck was always on its proper side of the highway, the collision occurring midway between the center line and the east edge of the paved highway. The defendant's truck was traveling at a moderate speed, estimated to be from 20 to 25 miles per hour, and at all times the defendant had the truck under control.

When the Hyatt car came into view, some 60, 75 or 100 yards ahead, rounding the curve, it was on its left side of the paved highway, swerving and wobbling, traveling at a speed of from 50 to 60 miles per hour. Hyatt

turned to his right, out of the defendant's lane of travel. Thereafter, he got off the paved portion of the highway into a ditch on his right side, traveled "just a little ways" in the ditch, and then within 5 to 10 feet of the defendant's truck Hyatt jerked his car out of the ditch and caused it to cut across the paved highway and crash into the defendant's truck. At that time the defendant's truck was almost stopped, barely moving.

Viewing the circumstances in the light most favorable to the plaintiff, as required in passing upon a motion for judgment of involuntary nonsuit, the defendant was confronted suddenly by an emergency caused solely by the gross negligence of Hyatt. If the vehicles were 100 yards apart, as the plaintiff testified, when the Hyatt car came into view, at a speed of 60 miles per hour the Hyatt car would travel 100 yards in slightly more than 3.4 seconds; and at a speed of 50 miles per hour it would travel 100 yards in slightly more than 4 seconds. Automobile Trials, Applied Law, Clevenger, Chart on page 102. This calculation leaves out of consideration the distance traveled by the defendant's truck, this distance reducing to that extent the 100 yards used in the calculation and the time period involved. The calculation is significant only as it emphasizes the fact that the emergency arose suddenly and less than four seconds elapsed from the time the Hyatt car came into view until the collision occurred.

The evidence is silent as to certain of the facts relating to Hyatt's movements within this distance of less than 100 yards. Did he get on his right side of the highway immediately? How far did he travel on his right side of the highway before going into the ditch? How far did he travel in the ditch? What were the physical facts as to the nature of this ditch?

To hold the defendant accountable for his failure to anticipate that Hyatt would jerk his car out of the ditch just when he was opposite the defendant's truck would require omniscience rather than reasonable foreseeability. The law does not so require. *Lee v. Upholstery Co.,* 227 N.C. 88, 90, 40 S.E. 2d 688.

Moreover, the evidence as to the defendant's declarations of remorse, to the effect that if he had only stopped or pulled out on the shoulder the collision would not have occurred, throws no light on what actually occurred at and preceding the time of the collision. The presence of his truck, operated in a lawful manner, under control, on its right and proper side of the highway must be regarded as "a circumstance of the accident and not its proximate cause." *Lee v. Upholstery Co., supra; Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88. In retrospect the defendant rightly concluded that had his truck not been where it was when Hyatt cut across the road the collision would not have occurred. But negligence, as stated frankly in plaintiff's brief, involves more than being at a particular place

at a particular time. Even by the use of hindsight, ("Hindsight is usually better than foresight.") it is altogether a matter of surmise or conjecture as to what would have happened had the defendant stopped in the highway when the Hyatt car first came into sight or had pulled off on the shoulder and stopped. *Pack v. Auman,* 220 N.C. 704, 707, 18 S.E. 2d 247; *Tysinger v. Dairy Products,* 225 N.C. 717, 722, 36 S.E. 2d 246. Hindsight does indicate, as events developed, that had he speeded up his truck while Hyatt was on his right side of the highway or in the ditch the defendant would have passed in safety. Indeed, if he had traveled only a few feet farther he would have passed in safety. But at the time the questions as to whether, when or where Hyatt would get into the ditch or undertake to pull out of it could not be answered; and his failure to anticipate the unforeseeable when confronted by a sudden emergency caused by no fault of his own cannot be deemed a basis of actionable negligence. *Patterson v. Ritchie,* 202 N.C. 725, 164 S.E. 117; *Ingle v. Cassady, supra; Morgan v. Saunders, supra.* For in such case, as stated by *Stacy, C. J.,* in *Ingle v. Cassady, supra,* "One who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, *similarly situated,* would have made." (Emphasis supplied.) The plaintiff's evidence does not show a failure of the defendant to pass this test.

The collision, with its regrettable and serious consequences to the plaintiff, must be deemed upon the evidence before us to have been *caused* solely by the gross negligence of Hyatt. Accordingly, the judgment of involuntary nonsuit is

Affirmed.

PARKER, J., dissents.

W. E. WILLIAMSON v. M. Q. SNOW, S. M. SMITH AND M. C. FOWLER, CONSTITUTING THE BOARD OF COMMISSIONERS FOR THE COUNTY OF SURRY, NORTH CAROLINA, AND EX OFFICIO TO THE GOVERNING BODY OF THE NORTHERN HOSPITAL DISTRICT.

(Filed 24 February, 1954.)

1. Constitutional Law § 8c—

While the General Assembly may not delegate its power to make laws, it may delegate power to a subordinate agency of the State, under proper guiding standards, to determine the facts or state of things upon which a law enacted by it shall become effective.

2. Same: Hospitals § 6½—Statute delegating power to Medical Care Commission to create hospital district held to provide proper guiding standards and is constitutional.

G.S. Article 13C, Chapter 131, as amended, providing that after the filing of petition signed by at least five hundred qualified voters of a proposed hospital district in conformity with G.S. 131-126.31, and after a public hearing pursuant to notice, with the approval of the county commissioners, the Medical Care Commission may create a hospital district by resolution upon its finding that it is advisable to create the proposed district (G.S. 131-126.32), *is held* a lawful delegation of legislative power to the Commission. The provision that the resolution find that all the residents of the proposed territory will be benefited by the creation of the district requires only a determination by the Commission that the hospital is needed in the area. The bond election pursuant to G.S. 131-126.33 must be called by the county commissioners and the county commissioners constitute the governing body of the hospital district, G.S. 131-126.40 (a).

3. Hospitals § 6½: Taxation §§ ½, 5—

A tax levied pursuant to the approval of the voters in a hospital district for the purpose of establishing and maintaining a public hospital in the district is a general tax levied for a special purpose as distinguished from a special assessment, and therefore a hearing on the benefits to be conferred upon the property within the district and the exclusion from the tax of property not benefited, is not required, Constitution of North Carolina, Article I, Sec. 17; G.S., Article 13C, Chapter 131.

APPEAL by plaintiff from *Gwyn, J.,* in Chambers at Wentworth, North Carolina, 8 December, 1953. From SURRY.

This is a civil action instituted against the defendants on 20 November, 1953, for the purpose of restraining and enjoining them from issuing bonds for the construction of a hospital and nurses' home on the alleged ground that Article 13C, Chapter 131, General Statutes of North Carolina, as amended, is unconstitutional.

It was agreed by the parties to waive a jury trial and to let his Honor hear the matter in Chambers.

The facts pertinent to the appeal are set out in the pleadings and may be stated as follows:

1. On 6 June, 1953, there was filed with the North Carolina Medical Care Commission (hereinafter called Commission), an administrative agency of the State of North Carolina, created by the provisions of Article 13, Chapter 131, General Statutes of North Carolina, a petition signed by 1,026 qualified voters residing within the territory described therein, praying for the creation of the Northern Hospital District of Surry County (to include several designated townships in said County), pursuant to Article 13C, Chapter 131, as amended.

2. The Board of Commissioners of Surry County in an adjourned regular session on 5 June, 1953, approved the creation of the proposed

hospital district as provided in G.S. 131-126.31, as amended by Chapter 1045, section 1, 1953 Session Laws of North Carolina.

3. On 9 June, 1953, at a special meeting of the Executive Committee of the Commission, said Committee adopted a resolution calling for a public hearing at 10:00 o'clock a.m., 2 July, 1953, on the question of creating a hospital district comprising the territory described in the petition as provided in G.S. 131-126.31, as amended. Notice of the public hearing, giving the time and place thereof, was posted and published as required by Article 13C, Chapter 131, as amended.

4. Thereafter, on 29 July, 1953, the Commission, not having received any protest to the creation of the hospital district at the public hearing, adopted a resolution creating the district, defining the territory comprising said district, and determining that the residents of all the territory included therein will be benefited by the creation thereof. The Commission also designated the district so created as the "Northern Hospital District of Surry County," hereinafter called hospital district.

5. The defendants meeting in an adjourned session on 10 August, 1953, called an election to be held in the hospital district on Saturday, 3 October, 1953, for the purpose of determining whether or not the qualified voters thereof would approve the issuance of bonds in the name of the hospital district in an amount not to exceed $500,000.00 for the construction of a hospital and a nurses' home, including the levying of a sufficient tax therein for the payment of principal and interest on said bonds; and likewise to determine whether the qualified voters in the hospital district would approve the levy and collection annually of a special tax not to exceed ten cents on each $100.00 assessed valuation of real and personal property in the hospital district for the purpose of financing the cost of operation, equipment, and maintenance of the hospital, including a nurses' home, training school, and other relating facilities, in the event the bond issue was approved.

6. The election was duly held and a majority of the votes cast therein was in favor of issuing the bonds and levying the annual maintenance tax.

7. The result of the election was duly published on 6 October, 1953, as required by G.S. 131-126.34.

This cause was heard upon the pleadings and the court held that Article 13C, Chapter 131, as amended, General Statutes of North Carolina, is a valid law of the State of North Carolina and that neither said Article nor any of its provisions violate any of the provisions of the Constitution of North Carolina; that the hospital district was duly and legally created; that the election held on 3 October, 1953, was and is valid, and that the defendants are duly authorized to issue the aforesaid bonds for the purpose of constructing a hospital, including a nurses' home, and to levy annually the necessary taxes authorized in said election for the designated purposes.

The court thereupon declined to restrain and enjoin the defendants from issuing said bonds or from levying the taxes required for the payment of principal and interest on said bonds and for maintenance purposes as authorized by the election held on 3 October, 1953. Judgment was entered in accord with his Honor's ruling. The plaintiff appeals, assigning error.

W. W. Norman for plaintiff, appellant.

A. B. Carter and Folger & Folger for defendants, appellees.

DENNY, J. The regularity with respect to procedural compliance with the provisions contained in Article 13C, Chapter 131, as amended, is not challenged. In fact, the action was not instituted within the prescribed statutory time in which such an attack was permissible. G.S. 131-126.32 and G.S. 131-126.33, as amended by Chapter 1045, sections 2 and 3, 1953 Session Laws of North Carolina.

Therefore, only two questions are raised on this appeal: (1) Is Article 13C, Chapter 131, as amended, General Statutes of North Carolina, constitutional? (2) Is the hospital district created in fact a special improvement district in which property not benefited should be excluded or relieved from payment of the taxes to be levied?

In our opinion the first question posed must be answered in the affirmative, and the second one in the negative.

Article 13C, Chapter 131, was amended substantially by Chapter 1045 of the 1953 Session Laws of North Carolina. Under the present law, before the Commission will be permitted or authorized to create a hospital district, a petition signed by at least five hundred of the qualified voters of the territory described in such petition, praying that such territory be created into a hospital district, must be filed with it, with the approval of the County Board of Commissioners in which such proposed district is located. The petition must set forth (1) a description of the territory to be embraced within the proposed district, (2) the names of all municipalities or parts thereof located within the area, (3) the names of all publicly owned hospitals located within the area, (4) the purpose or purposes sought to be accomplished by the creation of the proposed district, and (5) the name of the proposed district. G.S. 131-126.31.

Upon the filing of a petition with the Commission as required by statute, the Commission must hold a public hearing pursuant to notice duly posted and published as required by G.S. 131-126.32. If, after such hearing, the Commission shall deem it advisable to create such hospital district, it is required by law to adopt a resolution creating the district, determining that the residents of all the territory to be included in the

district will be benefited by the creation of such district, and describing the territory included therein.

The appellant contends that the Legislature does not have the authority to delegate its power to the Commission to create a hospital district in the manner prescribed in Article 13C, Chapter 131, as amended.

We concede that the Legislature may not delegate its power to make laws, *S. v. Curtis*, 230 N.C. 169, 52 S.E. 2d 364; however, it may make a law and delegate the power to a subordinate agency of the State, under proper guiding standards, to determine the facts or state of things upon which the law shall become effective. *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310; *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 22 S.E. 2d 896; *Efird v. Comrs. of Forsyth*, 219 N.C. 96, 12 S.E. 2d 889; *Cox v. Kinston*, 217 N.C. 391, 8 S.E. 2d 252; *Meador v. Thomas*, 205 N.C. 142, 170 S.E. 110; *Sanitary District v. Prudden*, 195 N.C. 722, 143 S.E. 530; *Provision Co. v. Daves*, 190 N.C. 7, 128 S.E. 593; *Field v. Clark*, 143 U.S. 649, 36 L. Ed. 294; 11 Am. Jur., Constitutional Law, section 235, page 949, *et seq.;* 16 C.J.S., Constitutional Law, section 138 (a), at page 353.

In our opinion, to clothe the Commission with the power to hear and determine whether a hospital is needed in a particular area and whether it is advisable to create a hospital district in the manner prescribed and authorized by Article 13C, Chapter 131, as amended, in order to meet such need, is not an unlawful delegation of legislative power, and we so hold. Moreover, the provision in the statute requiring the adoption of a resolution "determining that the residents of all the territory to be included in such district will be benefited by the creation of such district," is nothing more than a requirement that the Commission, before creating a hospital district, shall determine that a hospital is needed in the area included within the boundaries of such proposed hospital district. G.S. 131-126.32.

It is well to note that after the Commission created the hospital district under consideration, it had nothing to do with calling or conducting the election referred to herein. The Board of County Commissioners of Surry County called the election, but not until after five hundred or more qualified voters residing in the hospital district filed with it a petition requesting the election. The election was held pursuant to the provisions of G.S. 131-126.33.

Furthermore, it is provided in G.S. 131-126.40 (a) that the board of county commissioners of the county in which a hospital district is created, under the provisions of Article 13C, Chapter 131, General Statutes of North Carolina, shall be the governing body of such district, and all of the provisions of the Municipal Hospital Facilities Act shall apply to

such hospital district and the said board of county commissioners as the governing body thereof.

We now come to consider the second question presented. The appellant contends that Article 13C, Chapter 131, as amended, is unconstitutional and void in that it purports to provide for the creation, in violation of the provisions of Section 17, Article I, of the Constitution of North Carolina, of a taxing district without providing for a hearing on the benefits to be conferred upon the property therein. In other words, he contends the tax is in the nature of an assessment for improvements and not a duly authorized general or special tax in a constitutional sense. We do not concur in this view.

A similar question was before this Court in the case of *Sanitary District v. Prudden, supra,* in which we held the levying of a tax authorized pursuant to the provisions of Chapter 100, Public Laws of 1927 (now codified in Article 6, Chapter 130, Public Health-Administration, beginning with G.S. 130-33 and subsequent sections), in sanitary districts created by The State Board of Health, was a general tax as distinguished from a special assessment and was, therefore, not limited by the amount of benefits conferred by the proposed improvements. We can see no factual or legal distinction between the above case and the present one that would justify a different conclusion. Hence, we hold that the taxes to be levied in the hospital district involved herein, authorized by Article 13C, Chapter 131, as amended, and approved by a majority of the qualified voters in the district, voting in the election held on 3 October, 1953, are duly authorized general taxes levied for special purposes as distinguished from special assessments. *St. Louis & Southwestern Railway Co. v. Nattin,* 277 U.S. 157, 72 L. Ed. 830; 51 Am. Jur., Taxation, section 27, page 54, *et seq.,* and cited cases.

The judgment of the court below is

Affirmed.

R. P. MILLS v. W. L. BONIN.

(Filed 24 February, 1954.)

1. **Evidence § 39: Bills and Notes §§ 3, 29—**

In an action on notes between the original parties thereto, the payee is entitled to set up the defense of total failure of consideration, and evidence in support of such defense does not violate the parol evidence rule.

2. **Bills and Notes § 3—**

The presumption of consideration arising from the fact that notes are under seal is rebuttable.

3. Same—

A total failure of consideration for a note under seal renders it unenforceable in the hands of any person other than a holder in due course, G.S. 25-33, and in an action on notes given for the purchase price of property defendant maker may set up this defense.

4. Contracts § 5—

As a general rule, the term "consideration," as affecting the enforceability of contracts, consists of some benefit or advantage to the promissor, or some loss or detriment to the promissee.

5. Bills and Notes § 29: Partnership § 9b—Evidence of total failure of consideration for notes given for net worth of partner's interest held for jury.

Plaintiff payee instituted this action on notes executed by defendant. Defendant's evidence tended to show that he executed the notes under an agreement to buy plaintiff's interest in the partnership of the parties, the notes to equal the net worth of the plaintiff's interest therein, that plaintiff managed the business entirely, that defendant had no knowledge and relied completely upon plaintiff's representation of the condition of the partnership, that through error an audit showed the value of plaintiff's interest in a certain sum which was reduced by negotiation to a stipulated amount, which plaintiff paid partly in cash and partly in promissory notes, one of which notes he had paid prior to the institution of plaintiff's action on the balance, and that shortly after the execution of the notes and bill of sale another audit was made disclosing that plaintiff had no net worth in the business, so that the consideration for the payment of the cash and the execution of the notes did not in fact exist. *Held:* Defendant's defense of total failure of consideration should have been submitted to the jury, and peremptory instruction for plaintiff for the amount of the notes was error.

6. Money Received § 1—

Where a party pays in good faith, in ignorance of the facts, a sum of money to another for certain property, rights or interest, which in fact is worthless, so that there is a total failure of consideration, the money may be recovered under principles of justice, and where the purchaser sets up the defense of total failure of consideration in the seller's action for the balance of the purchase price represented by notes, it is error to nonsuit the purchaser's counterclaim to recover the cash paid.

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

APPEAL by defendant from *Armstrong, J.,* April Term 1953 of FORSYTH.

Civil action by plaintiff to recover $5,000.00 with interest, represented by five one thousand dollar promissory notes under seal.

The plaintiff's evidence tended to show these material facts. For some time prior to 1 May 1952 the plaintiff and the defendant operated as partners a business known as Bonin-Mills, dealing in building materials. The defendant started the business, and sold 49% of it to the plaintiff, who gave his promissory notes in payment of the purchase price—the

purchase price was $7,000.00—which has been paid. When the partnership was formed the defendant was building houses, and it was agreed that the defendant was to take no part in the business, and to draw no salary. That about 1 May 1952 the plaintiff and the defendant agreed to dissolve the partnership. On 3 May 1952 the plaintiff and the defendant executed and delivered a Bill of Sale, which is summarized: The plaintiff has this 3rd day of May 1952, in consideration of $6,800.00 paid to him—$800.00 in cash and 6 notes of $1,000.00 each under seal bearing interest, and due and payable on dates specified in the Bill of Sale—bargained, sold and delivered to the defendant all his right, title and interest in and to the assets of the partnership known as Bonin-Mills: it is understood and agreed that as part of the consideration the defendant assumes all liabilities of the partnership. The defendant paid the $800.00 in cash and the first one thousand dollar note due 1 July 1952. The defendant admitted in his answer the execution and delivery of the notes sued upon. That the notes sued upon are all past due, and the defendant refuses to pay them.

A summary of what the defendant's evidence tends to show, which evidence is supported by the allegations of the answer, is as follows: After the plaintiff became a partner, the plaintiff managed and operated the partnership business entirely. The defendant was not familiar with the condition of the business, but relied completely upon the reports of the business the plaintiff gave him. That he believes the plaintiff reported the net income to him for 1951 to be $26,000.00; that this was after a correction was made, the net income originally reported was $53,000.00. On cross-examination the plaintiff testified he reported to defendant that the partnership had earned $41,000.00 in 1951—that October and November 1951 showed $11,934.62 profits. The defendant's evidence further tended to show that the agreement was that the defendant would buy the plaintiff's interest in the business, and would pay therefor a sum equal to the value of the net worth of the plaintiff's interest in the partnership. That it was mutually agreed that an auditor should be employed to show what this net worth was. That in February 1952 the defendant learned the business had not made the big profits the plaintiff had reported to him. Among the assets of the partnership was a construction contract in Salisbury, which the plaintiff and defendant agreed had a net worth of $21,000.00. In preparing the audit prior to the purported sale, the auditor carried the net worth of the Salisbury contract into accounts receivable twice, once in the amount of $19,000.00 and again in the agreed amount of $21,000.00, thus showing the assets of the partnership to be some $19,000.00, or more, than they were. About 15 days after the purported sale was made the defendant's attention was called to this mistake. He had made another audit, which tended to show this mistake,

but he had paid $800.00 in cash and the first one thousand dollar note, before he received the last audit. That the last audit tended to show that the plaintiff had no interest in the business, and had withdrawn from the business some $645.00 or more in excess of his interest therein. That the partnership business owed more than $95,000.00 of debts, which defendant has to pay. That plaintiff had nothing to sell; he had a liability instead of an asset. The item of good will was not used as an asset in the audit. The first audit tended to show that plaintiff's interest in the partnership was $7,000.00 or $9,000.00. That in negotiations between plaintiff and defendant, plaintiff's interest was reduced to $6,800.00—this was before the last audit. That defendant was willing to pay $6,800.00 for plaintiff's interest until he found out there was nothing for plaintiff to convey. The last audit tended to show that plaintiff withdrew $21,000.00 from the business, and that plaintiff had overdrawn his capital account in the business, and owed it $645.00: that on 29 February 1952 the liabilities of the partnership exceeded the assets $1,005.28. The defendant contends there was a total failure of consideration, and that the plaintiff should recover nothing; and that he should recover from the plaintiff the $1,800.00 he has paid him.

At the close of all the evidence upon motion of the plaintiff the court dismissed the counter-claim of the defendant for $1,800.00, and the defendant excepted.

The court submitted one issue to the jury: "In what amount, if anything, is the defendant W. L. Bonin indebted to the plaintiff R. P. Mills on the five notes sued on?"; and directed the jury to answer it $5,000.00 with interest from 1 May 1952, which the jury did.

The court entered judgment upon the verdict, and the defendant excepted and appealed.

Eugene H. Phillips for plaintiff, appellee.
Dallace McLennan and John R. Surratt for defendant, appellant.

PARKER, J. This is an action between the payee and the maker of the five notes. No rights of third parties are involved. The defendant has pleaded total failure of consideration as a defense. The rule prohibiting the introduction of parol evidence to vary, modify or contradict the terms of a written instrument was not violated by the introduction of evidence by the defendant tending to show a total failure of consideration. *Swift & Co. v. Aydlett,* 192 N.C. 330, 135 S.E. 141; *Chemical Co. v. Griffin,* 202 N.C. 812, 164 S.E. 577; *Galloway v. Thrash,* 207 N.C. 165, 176 S.E. 303; *Royster v. Hancock,* 235 N.C. 110, 69 S.E. 2d 29.

The notes sued upon are under seal, which purports a consideration, but such presumption is rebuttable. *Patterson v. Fuller,* 203 N.C. 788,

167 S.E. 74; *Lentz v. Johnson & Sons, Inc.*, 207 N.C. 614, 178 S.E. 226; *Royster v. Hancock, supra.*

G.S. 25-33 provides that absence or failure of consideration is matter of defense to a negotiable instrument as "against any person not a holder in due course . . ."

It is the general rule in this jurisdiction, and elsewhere, that a total failure of the consideration for a note under seal renders it unenforceable in the hands of any person other than a holder in due course. *Jewelry Co. v. Stanfield,* 183 N.C. 10, 110 S.E. 585; *Swift v. Etheridge,* 190 N.C. 162, 129 S.E. 453; *Patterson v. Fuller, supra; Perry v. Trust Co.,* 226 N.C. 667, 40 S.E. 2d 116; *Royster v. Hancock, supra;* 10 C.J.S., Bills and Notes, p. 626.

As a general rule the term *consideration,* as affecting the enforceability of contracts, consists of some benefit or advantage to the promissor, or of some loss or detriment to the promisee. *Cherokee County v. Meroney,* 173 N.C. 653, 92 S.E. 616; *Exum v. Lynch,* 188 N.C. 392, 125 S.E. 15; *Stonestreet v. Oil Co.,* 226 N.C. 261, 37 S.E. 2d 676.

The defense of absence or failure of consideration may be made to an action on notes given for the purchase price of property. 7 Am. Jur., Bills and Notes, p. 950, where numerous cases are cited.

We said in *Fair v. Shelton,* 128 N.C. 105, 38 S.E. 290: "To render a promise void upon an entire failure of consideration, it must appear that the consideration upon which it was supposed to be based, *did not in fact exist,* and its nonexistence was unknown to the parties. For instance, where the grantor sells and conveys land to which he has no title (both parties assuming that he has) the grantee gets nothing—there is a failure of consideration, but otherwise should the grantee purchase such right, title and interest as grantor might have, for here the maxim of *caveat emptor* applies. *Foy v. Haughton,* 85 N.C. 168." (This is a case of quitclaim deed—parenthesis ours.) "Likewise if a vendee gets that which he buys, though worthless (in the absence of deceit), for he buys upon his own judgment and at his own risk, in not requiring a warranty. So also in the absence of fraud, the buyer is liable for the price agreed to be paid for worthless stock in a corporation, where he receives that for which he contracted, though it was known by the seller to be worthless." See also *Johnston v. Smith,* 86 N.C. 498.

"While some decisions appear to have reached a contrary conclusion, it is often held that a sale or transfer of property does not constitute consideration for an undertaking on a bill or note if the seller or transferor completely lacks title to the thing sold or transferred, except where the sale is intended to be merely of such title as the seller has, if any." (For instance a quitclaim deed, 8 C.J., p. 227—parenthesis ours.) 10 C.J.S.,

Bills and Notes, p. 614. See also Williston on Contracts Rev. Ed. Secs. 1570 *et seq.;* Anno. 1 A.L.R. 2d, p. 37, Sec. 16, p. 52, Sec. 19.

In the case under consideration the defendant's evidence tended to show that the defendant agreed to buy the plaintiff's interest in the partnership for a sum equal to the value of the *net worth* of the plaintiff's interest; that the plaintiff managed the business entirely; that the defendant was not familiar with the condition of the business, relying completely upon what the plaintiff told him of its condition; that it was mutually agreed between the parties that an auditor should be employed to show what the *net worth* of the plaintiff's interest was; that this audit by mistake showed the *net worth* of plaintiff's interest was $7,000.00 or $9,000.00 and that the parties by negotiation reduced the amount to $6,800.00. That the defendant then paid to plaintiff $800.00 in cash, and executed and delivered to him $6,000.00 in promissory notes, and the plaintiff executed to the defendant a bill of sale for his interest in the business. The defendant's evidence further tended to show that about 15 days after the execution of the notes and bill of sale the defendant's attention was called to the mistake in the first audit, and that he had another audit made which disclosed that the liabilities of the business exceeded its assets, and that the plaintiff had no *net worth* in the business, that he had nothing to convey; that the supposed consideration for the $800.00 in cash and the six promissory notes *did not in fact exist.* That before the defendant learned this he had paid the plaintiff one promissory note for $1,000.00.

The plaintiff contends that the evidence tends to show there was no total failure of consideration.

We are of the opinion that the defendant's defense of a total failure of consideration should have been submitted to the jury upon proper instructions, and that the peremptory charge of the court was error. *Jewelry Co. v. Stanfield, supra; Perry v. Trust Co., supra; Finance Co. v. O'Daniel,* 237 N.C. 286, 74 S.E. 2d 717.

If, upon a new trial, the jury should find there was a total failure of consideration, the defendant will be entitled to recover from the plaintiff the $1,800.00 he paid him upon the plain principle of justice that the defendant through ignorance of the facts paid the plaintiff $1,800.00 for nothing. *Anderson v. Hawkins,* 10 N.C. 568; *Page v. Einstein,* 52 N.C. 147; 48 C.J., Payment, p. 768 (where numerous cases are cited); 70 C.J.S., Payment, Sec. 158; 40 Am. Jur., Payment, Sec. 214. In stating this conclusion we must not be understood as expressing any opinion as to the weight or conclusiveness of the evidence for that is the province of the jury. G.S. 1-180.

The defendant's assignment of error to the lower court's dismissing his claim for the recovery of the $1,800.00 he paid the plaintiff is sustained.

The defendant is entitled to a New Trial, and it is so ordered.
New Trial.

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

ALBERT B. STYERS v. WINSTON COCA-COLA BOTTLING COMPANY.

(Filed 24 February, 1954.)

1. **Food § 6c—**

Proof of injury caused by the explosion of a bottle containing a carbonated beverage, standing alone, is not sufficient to carry the case to the jury on the issue of negligence, the principle of *res ipsa loquitur* not being applicable.

2. **Same—**

The installation by the bottler of modern machinery and appliances, such as are in general and approved use, does not *ipso facto* exculpate the bottler of liability.

3. **Same: Negligence § 19b (4)—**

Direct evidence of actionable negligence on defendant's part is not requisite; such negligence may be inferred from relevant facts and circumstances.

4. **Food § 6c—**

In an action against a bottling company by an employee of a grill to recover for injuries sustained from the explosion of a bottle of Coca-Cola, evidence that the crate containing the bottle was delivered by defendant and left in the sun outside the building, that the employee moved the crate into the building, and that shortly thereafter the bottle exploded, together with evidence that on six different occasions during the same summer bottles prepared and sold by the defendant had exploded under similar conditions, *is held* sufficient to carry the case to the jury on the issue of defendant's negligence.

5. **Food § 6b: Evidence § 26—**

In plaintiff's action to recover for injuries resulting from the explosion of a bottle containing a carbonated beverage prepared by defendant, evidence of the explosion of other bottles prepared by the same bottler is competent when, and only when, there is proof of substantially similar circumstances and reasonable proximity in time.

6. **Food § 6d—**

Evidence tending to show only that the employee of a grill took a crate of Coca-Cola that had been delivered by defendant, and left standing in the sun, into the grill and set it down on a stack of other crates, when one of the bottles exploded, causing the injury in suit, *is held* insufficient evidence of contributory negligence on the part of the employee as a proxi-

mate cause of the injury so as to require the submission of the issue of contributory negligence to the jury.

7. Trial § 31g—

The charge of the court as to the credibility of the witnesses *held* without error on authority of *Herndon v. R. R.*, 162 N.C. 317.

8. Trial § 49—

Held: The trial court did not abuse its discretion in refusing to set aside the verdict as being against the greater weight of the evidence.

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

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

Civil action for damages wherein the plaintiff alleges the defendant, because of its actionable negligence, caused one of its bottles containing a carbonated beverage to explode injuring his right eye to the extent it had to be taken out.

Plaintiff was employed by the Winston-Salem Drive-In Theatre as operator of the grill and maintenance man in the daytime. He sold Coca-Colas there delivered by a truck driver of the defendant. He went to work about 12:30 p.m., and had told the defendant's driver his work hours. He was not always present when the Coca-Colas were delivered; lots of times he found them stacked outside at the south door.

11 August 1950 was a hot "smothery day." About 9:00 a.m. on this day a driver of the defendant delivered to the Drive-In Theatre three crates of Coca-Colas bottled by the defendant, leaving them outside the building at the south door where they were exposed to the sun. About 12:30 p.m. the plaintiff arrived at the Drive-In Theatre, and found the crates of Coca-Colas sitting at the south door exposed to the direct sunlight. The crates were stacked one on top of the other. The plaintiff picked a crate up, and opened the door. He carried it three steps, and set it down on a stack of four other crates. The plaintiff "was just fixing to turn away" from the crate when one of the bottles exploded, cutting his right eyeball with glass and injuring it to such an extent it had to be removed.

The following witnesses for the plaintiff testified as to explosions of bottles of Coca-Colas in Winston-Salem in the Summer of 1950: (1) J. T. Peak picked up a bottle of Coca-Cola from a wet box; it exploded cutting him in the forehead; the bottle was delivered at his store some time during the week; his store is in Winston-Salem: (2) The Forsyth Kennel Club put on a dog show at the National Guard Armory in Winston-Salem in June 1950; Coca-Cola was delivered to the Armory by the defendant in crates; on 25 June 1950 Phil Hedrick picked up a crate of

Coca-Colas, set it on the floor, and a bottle exploded cutting his hand: (3) W. F. Henderson ran a grocery store in Winston-Salem and purchased crates of Coca-Colas from the defendant; that he picked up a crate of Coca-Colas and set it in the box; that one of the bottles burst; that he did not subject it to any jar, nor strike it against anything, nor drop it; that the weather was hot: (4) R. R. Whisnant in July 1950 was working for Paul Myers in Winston-Salem; that he picked up four Coca-Cola bottles—two in each hand—from a crate to put in a dry box, and one bottle of Coca-Cola exploded cutting his finger so that it required thirteen stitches to sew it up; that he did not strike the bottle against anything nor drop it; that he did not know when the bottles he took from the crate were delivered, but there were three deliveries a week and that they sell about thirty cases of Coca-Colas a week: (5) Jack Brooks, in June or July 1950, was working at a filling station in Winston-Salem which sold Coca-Colas; they had a wet box and one day during this time he saw a bottle of Coca-Cola explode in the wet box under water; that this was one of the bottles of Coca-Cola delivered by the defendant; that they got deliveries every day: (6) P. G. McGee testified that off and on all the time bottles of Coca-Colas exploded at his grill in his Drive-In Theatre.

At a pretrial conference the parties stipulated as follows: (1) the defendant bottled and delivered to plaintiff's employer the bottle of Coca-Cola that is alleged to have burst and injured plaintiff; (2) all bottles of Coca-Colas referred to in the bill of particulars were bottled and distributed by defendant, if purchased in Forsyth County; (3) since 1 January 1949 the machinery and process of bottling at the Winston-Salem bottling plant have been the same.

The plaintiff further offered evidence tending to show that slivers of glass were scattered around the room after the bottle injuring the plaintiff burst and that the bottom part of this bottle was still in the crate.

Defendant's evidence tended to show the care taken in the inspection of bottles both before they went through the bottling works, while being bottled, and after the bottling process, and that these inspections were made by the human eye as well as by mechanical devices. That the bottling operation was carried on by defendant in a careful manner and with approved modern machinery and in accord with the best methods for inspecting bottles for defects; that this machinery would break a defective bottle while it was going through the process of being cleaned, sterilized, filled, capped and crated. That the carbonated water was infused by machinery, and the machine prevents the overloading of a bottle of Coca-Cola with gas; the regulated pressure in the bottle is from 35 to 38 pounds to the square inch; that it would require at least 400 pounds pressure to cause an internal explosion in a Coca-Cola bottle; one bottle has been found to withstand internal pressure of 1,500 pounds. That an examina-

tion of the remnants of the broken bottle that the plaintiff testified caused his injury would indicate the bottle was broken from external impact, and the explosion was not caused by a defective bottle or overcharge.

On direct or cross-examination of defendant's witnesses the following evidence favorable to plaintiff was elicited: (1) defendant had no means of detecting stresses and strains and small cracks in bottles before or after filling them with carbonated beverages under pressure; (2) the electric eye machine is designed primarily to detect foreign particles in bottles—it will detect also a bad crack; (3) unless a bottle has been examined under polarized light, one cannot tell whether there is any strain or stress; the electronic eye at defendant's plant is not a polarizing device; (4) a bottle having a crack which did not go all the way through would hold internal pressure, but when subjected to excessive internal pressure would tend to break at the line of crack; (5) one of the ideal conditions to cause thermal shock is to remove a Coca-Cola bottle from a hot atmosphere into a cool one; the bottles are built to withstand a sudden 76-deg. F. change; to some extent whether or not bottles withstand such a thermal shock would depend on whether or not the bottle had latent stresses and strains or cracks; (6) the bottles of Coca-Colas are roughly handled at defendant's plant; (7) the manufacturers of bottles actually test under 1% of total output, which establishes a norm as to the quality of the bottles.

The jury answered the issues in favor of the plaintiff and awarded damages in the sum of $15,000.00.

From judgment on the verdict, defendant appealed.

Deal, Hutchins & Minor and Womble, Carlyle, Martin & Sandridge for plaintiff, appellee.

Craige & Craige and Roger B. Hendrix for defendant, appellant.

PARKER, J. The defendant's first assignment of error is to the denial of its motion for judgment of nonsuit. The plaintiff's action is based on allegations of negligence, and this assignment of error presents the question whether sufficient evidence of actionable negligence on the part of the defendant was offered to carry the case to the jury.

It is well settled law in North Carolina that proof of injury caused by the explosion of a bottle containing a carbonated beverage, standing alone, is not sufficient to carry the case to the jury on the ground of actionable negligence. The principle of *res ipsa loquitur* is not applicable. *Davis v. Bottling Co.*, 228 N.C. 32, 44 S.E. 2d 337; *Enloe v. Bottling Co.*, 208 N.C. 305, 180 S.E. 582; *Cashwell v. Bottling Works*, 174 N.C. 324, 93 S.E. 901.

The installation by the bottler of modern machinery and appliances, such as is in general and approved use, does not *ipso facto* exculpate the

defendant from liability. *Enloe v. Bottling Co., supra; Grant v. Bottling Co.,* 176 N.C. 256, 97 S.E. 27.

Direct evidence of actionable negligence on defendant's part is not requisite; such negligence may be inferred from relevant facts and circumstances. *Enloe v. Bottling Co., supra; Broadway v. Grimes,* 204 N.C. 623, 169 S.E. 194; *Dail v. Taylor,* 151 N.C. 284, 66 S.E. 135.

In cases where damages are sought for injuries caused by such explosion, when the plaintiff has offered evidence tending to show that like products filled by the same bottler under substantially similar conditions, and sold by the bottler at about the same time have exploded, there is sufficient evidence to carry the case to the jury, as such facts and circumstances permit the inference that the bottler had not exercised that degree of care required of him under the circumstances. Such similar instances are allowed to be shown as evidence of a probable like occurrence at the time of plaintiff's injury when, and only when, accompanied by proof of substantially similar circumstances and reasonable proximity in time. *Davis v. Bottling Co., supra; Ashkenazi v. Bottling Co.,* 217 N.C. 552, 8 S.E. 2d 818; *Enloe v. Bottling Co., supra; Broadway v. Grimes, supra; Perry v. Bottling Co.,* 196 N.C. 175, 145 S.E. 14; *Grant v. Bottling Co., supra.*

A study of the evidence and the stipulations shows that the plaintiff has offered sufficient evidence to require submission of his case to the jury under the law laid down in many decisions of this Court, and the defendant's motion for judgment of nonsuit was correctly denied.

The defendant assigns as error the refusal of the court to submit an issue of contributory negligence.

In *Davis v. Bottling Co., supra,* the defendant's evidence tended to show that the bursting of the Coca-Cola bottles was due to some other or outside cause and not to defective bottles or overcharge. An examination of the Record in that case discloses that no issue of contributory negligence was submitted.

This assignment of error poses this question: Is there sufficient evidence in the Record tending to show that the plaintiff failed to exercise reasonable care for his own safety, and such failure concurring with actionable negligence of the defendant contributed to the injury complained of as a proximate cause, so as to require the submission of such an issue to the jury? Sir A. P. Herbert has wittily and happily said (Uncommon Law p. 1) "The Common Law of England has been laboriously built about a mythical figure—the figure of 'The Reasonable Man.'" This Court has answered this question No in *Cashwell v. Bottling Works, supra,* in which case the plaintiff's evidence tended to show that while the plaintiff was placing some bottles of Pepsi-Cola taken from a crate on the shelves of his store, one of the bottles exploded, and so

injured his eye that he lost the sight of it. The Court said: "There was no sufficient evidence, in law, to show any contributory negligence of the plaintiff. No obvious danger was presented to him, in the presence of which he continued to handle the bottles, when a man of ordinary prudence and discretion would have refrained from doing so. He had the right to rely on the assurance that the defendant had performed its duty and so inspected and filled the bottle as to prevent any such catastrophe as has resulted in the loss of his eye, or at least reduced the danger to such a minimum as could be attained by the exercise of proper care and caution."

The defendant assigns as error the charge of the court as to the credibility of witnesses. The language of the trial court is in substantially the same words as the charge in *Herndon v. R. R.*, 162 N.C. 317, 78 S.E. 287, in which the Court said: "This is but an admonition to the jury, and not pointed to any particular witness or party. It applies with equal force to the defendant as to plaintiff, and to all witnesses alike." See also *Ferebee v. R. R.*, 167 N.C. 290, 83 S.E. 360, and its comment on the *Herndon case*. The plaintiff was the only witness who had a direct pecuniary interest in the result, and if anyone was prejudiced, which we do not admit, it would seem that it would be him. This assignment of error is not sustained.

The appellant has noted other exceptions to the court's instructions to the jury. We have carefully read the court's charge in its entirety with particular attention to the defendant's exceptions and its argument and authorities set forth in its brief, and are unable to perceive any prejudicial error therein which would justify the award of a new trial.

The trial court did not abuse its discretion in not setting aside the verdict as being against the greater weight of the evidence.

The jury's verdict and the judgment thereon will not be disturbed.

No error.

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

MRS. DICIE EDWARDS (PARKER) ANDERSON AND HUSBAND, TOM M. ANDERSON (BY A. J. PARKER, JR., SUBSTITUTED PETITIONER), v. RACHEL EDWARDS, UNMARRIED; MRS. WILLIE EDWARDS, A WIDOW; M. P. EDWARDS, JR., AND WIFE, CLAUDIA EDWARDS.

(Filed 24 February, 1954.)

Wills § 35: Partition § 1a—

The will devised farm lands to testator's three children with provision that his widow take a dower right therein. By further provision testator stipulated that it was his will that the farms be operated jointly by the beneficiaries for a period of ten years after his death. *Held:* Testator's intent will be given effect, and none of the beneficiaries is entitled to partition of the lands during the ten-year period, the limitation not being an unlawful restraint on alienation nor limitation repugnant to the fee.

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

ERVIN, J., dissents.

APPEAL by defendants Rachel Edwards and M. P. Edwards, Jr., and wife Claudia Edwards from *Bone, J.,* at November Term, 1953, of EDGECOMBE.

Special proceeding for actual partition of certain lands in Edgecombe County, North Carolina, among tenants in common, devisees under will of M. P. Edwards, deceased.

These facts appear to be uncontroverted:

(1) M. P. Edwards, late of the county of Edgecombe, died on 18 December, 1950, seized and possessed of the lands, the subject of this proceeding, leaving a last will and testament which has been duly probated and recorded, the pertinent portions of which are these:

"Item One. I give, devise and bequeath all my property both real and personal of whatever kind or character and wheresoever situated to my wife Willie J. Edwards and my three children, Rachel Edwards, Dicie Edwards Parker and M. P. Edwards, Jr., in the manner provided by, and in accordance with the laws of the State of North Carolina; that is to say that my wife shall take a child's part of my personal property and shall dower in my real estate and that my children shall share and share alike in both my real and personal property, this devise and bequest being made subject to and in accordance with the stipulations and conditions as set out in the further items of this my last will and testament.

"Item Two: It is my will that out of the monies that my Estate may have at my death shall first be paid my funeral expenses and then all of my other debts save and except the liens on my Real Estate which are held by various Land Banks under what is known as the Amortization Plan and in connection with said liens, if there remains sufficient monies in the hands of my Executors, hereinafter named, belonging to my Estate

after the payment of the debts hereinbefore mentioned, to retire and pay off any or all of said liens, it is my will that said monies be used to that end, otherwise my said children, devisees hereunder shall assume the payment of said liens before and without the sale of any of the personal property which constitutes the equipment used in the operation and cultivation of my farms.

"Item Three: In connection with and as a condition to the devise and bequest as set out in Item One of this Will, it is my desire and will that my wife and children shall jointly operate, for mutual profit, as executors and devisees, all of the farms of which I die seized and possessed of for a period of ten years from and after my death, and for said period my said wife and children shall keep my said farms and equipment thereon intact and undivided.

"Item Four: I hereby nominate, constitute and appoint Willie J. Edwards, Rachel Edwards, Dicie Edwards Parker and M. P. Edwards, Jr., co-executors, without bond, of this my last will and testament."

(2) Mrs. Dicie Edwards (Parker) Anderson, one of the daughters of M. P. Edwards, deceased, and her husband instituted this special proceeding and filed petition on 10 May, 1952, against Mrs. Willie Edwards, the widow, and Rachel Edwards, unmarried daughter, and M. P. Edwards, Jr., a son of M. P. Edwards, together with Claudia Edwards, the wife of M. P. Edwards, Jr., for an actual partition of the lands of which M. P. Edwards died seized,—alleging in substance that the widow owned a dower right in said lands and that she, the petitioner, and the defendants, her sister and brother, each owned an undivided one-third interest in said lands, subject to the dower right of their mother—and praying that the dower be assigned as provided by law, and that actual partition of the lands among the tenants in common in the proportions of their several interests therein be ordered as by law provided.

(3) The defendant, Rachel Edwards, answered, and the defendants M. P. Edwards and his wife, by permission of the court, came in and adopted her answer. In this answer the defendants admit the tenancy in common, subject to the dower, but they aver that the parties hold the land subject to the express terms and conditions of the will of the late M. P. Edwards, and, for a further answer and defense to the petition, they plead that by the terms of the will "he left the property described in the petition on the condition that his wife and children should jointly operate, for mutual profit, as executors and devisees, all of the farms of which he died seized and possessed for a period of ten years from and after his death, and that for said period his said wife and children should keep his said farms and equipment thereon intact and undivided; and that because of said condition the petitioners are not at the present time entitled to partition, in law or in fact."

(4) Pending hearing the petition, Mrs. Dicie Edwards (Parker) Anderson died leaving as her only child A. J. Parker, Jr., who, having succeeded to all of the rights of the petitioner, was, by order of the court, substituted as petitioner in the place and stead of his mother, and allowed to adopt the petition.

(5) When the cause came on for hearing before the judge presiding, and being heard upon the petition and answer filed, and the last will and testament of M. P. Edwards, the court being of opinion that A. J. Parker, Jr., substituted petitioner, as a tenant in common therein, is entitled to a partition of the lands described in the petition, so ordered, and for that purpose, in the manner provided by law, remands the proceeding to the Clerk of Superior Court.

The defendants Rachel Edwards and M. P. Edwards, Jr., and his wife Claudia object and except, and appeal to the Supreme Court, and assign error.

Leggett & Taylor for petitioner, appellee.
Weeks & Muse for defendants, appellants.

WINBORNE, J. This is the determinative question: The testator having in Item One of his will devised and bequeathed his real and personal property to his wife and children "subject to and in accordance with the stipulations and conditions as set out in the further items of this my last will and testament," is the provision of Item Three postponing partition for ten years void as a restraint on alienation, and against public policy? Manifestly the trial court was of opinion that it is. However, this Court is constrained to hold that the provision is valid.

The annotators of decided cases in this and in other jurisdictions state that: "It seems to be well settled that a provision in a will which prohibits and postpones a partition of the estate is valid, and that, since a will is to be executed in accordance with the intent of the testator, no partition will be granted where the will expressly or by necessary implication directs that the property shall be kept intact." Anno. 14 A.L.R. 1238. Citations follow from eighteen States, England and Canada, including the case of *Blake v. Blake,* 118 N.C. 575, 24 S.E. 424.

And in later annotation reported in 85 A.L.R. 1321, the author, after digesting cases from Illinois, Iowa, Kentucky, Nebraska and New York, and our own case of *Greene v. Stadiem,* 198 N.C. 445, 152 S.E. 398, in respect to the general rule that "testamentary provisions prohibiting or postponing partition for a reasonable time or until the happening of a designated event are upheld as not involving a restraint on alienation or limitation repugnant to the fee," comes to say: "Therefore the general rule is that effect will be given to the intention of the testator as expressed

in the will, and that no partition suit will lie before the date so fixed or the happening of the event named."

In the light of this general rule applied to case in hand, it seems clear that the testator having amassed a large farm-land estate, which he had financed on amortization plan, was concerned about the preservation of it. And it is clear that he was of opinion that by pulling together for ten years his wife and children could liquidate the indebtedness or, at least, so reduce it as to be in position to carry on singly.

In *Holden v. Rush* (1907), 119 App. Div. 716, 104 N. Y. Supp. 175, the Court, in holding that partition could not be granted during the minority of the youngest child, said: "I find no authority which holds that a testator may not, in one and same sentence in his will, use words which apparently make an absolute devise of real estate, and restrict the devisees, his children, from disposing of the real estate until the youngest child reaches his majority. I know of no principle of law which forbids that the plain intent of the testator, as expressed in this will, should be given effect."

This case is distinguishable in factual situation from cases relied upon by appellee. They are not controlling here.

For reasons stated, the judgment below is

Reversed.

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

ERVIN, J., dissents.

HELEN G. UNDERWOOD v. A. T. WARD, ADMINISTRATOR OF DAVID F. UNDERWOOD, JR., DECEASED.

(Filed 24 February, 1954.)

1. **Executors and Administrators § 15c: Husband and Wife § 14½—**

Where husband and wife execute notes jointly and severally promising to pay moneys used by them in the improvement or purchase of property held by them by entireties, each is primarily liable, jointly and severally, and upon the death of the husband, his estate is liable only for one-half the balance remaining due at his death, without credit for any sums realized from the property after his death.

2. **Husband and Wife § 15d—**

Upon the death of the husband, the wife becomes the sole owner of lands held by them by entireties, and no right, title or interest of any kind passes to the estate of the husband.

3. Executors and Administrators § 16—

The provision of G.S. 28-105 that debts constituting a specific lien on property to the amount not exceeding the value of the property shall be paid in the first class of priority is solely for the purpose of preserving the equity in property for the benefit of the creditors and beneficiaries of the estate, and the statute can have no application when the property subject to the lien is not a part of the assets of the estate, even though the estate be liable for the payment of the debt secured, or any part of it.

4. Same: Husband and Wife § 15d—

Husband and wife were jointly and severally liable on notes secured by liens on lands held by them by entireties. *Held:* Upon the death of the husband, the liability of his estate for one-half the balance due on the notes at the time of his death is not a debt coming within the first class of priority, since even though the debt is secured by specific lien on the property, the property is not an asset of the estate.

APPEAL by plaintiff from *Moore, J.*, Resident Judge of the Twentieth Judicial District, heard 8 January, 1954, in Chambers in Sylva, N. C., by agreement, from HAYWOOD.

Controversy without action duly submitted in accordance with the provisions of G.S. 1-250, heard upon an agreed statement of facts. The facts on which decision of the question presented on appeal must be made are stated in the opinion.

S. G. Bernard for plaintiff, appellant.
Morgan & Ward for defendant, appellee.

BOBBITT, J. David F. Underwood, Jr., died intestate 30 August, 1953, and the defendant is the administrator of his estate. The decedent and Helen G. Underwood, the plaintiff, were husband and wife.

The husband purchased a lot in Waynesville adjoining the right of way of the Southern Railway Company, referred to as the "Southern Railway lot," and erected thereon a large business building having a value of $50,000.00 or more and constructed a railroad sidetrack. He also purchased a 200 acre tract of land in Haywood County, referred to as the "Gwyn Tract." He had these properties conveyed to himself and his wife as tenants by entirety.

They executed two deeds of trust on the "Southern Railway lot" securing their promissory notes for $20,000.00 and $10,000.00; and the principal balances owing when the husband died were $11,000.00 and $4,911.12, respectively. These notes provided, "For value received, the undersigned, jointly and severally, promise to pay," etc. The $30,000.00 thus borrowed was used exclusively in the erection of the building and the construction of the sidetrack on the "Southern Railway lot."

They executed a deed of trust on the "Gwyn Tract" securing their promissory note for $13,000.00. The principal balance owing when the husband died was $12,886.22. This note provided, "For value received, the undersigned, jointly and severally, promise to pay," etc. The $13,000.00 thus borrowed was used exclusively as part purchase price for the "Gwyn Tract."

In each instance, the property subject to lien has a value in excess of the debt; and the ability of the plaintiff to discharge in full her liability for these debts is not disputed.

The assets of the decedent's estate available for the payment of debts equal or exceed the estate's liability for one-half of these debts if such liability is treated as a debt of the First Class under G.S. 28-105. However, such assets are insufficient for the payment of the estate's liability for one-half of these debts if such liability is on the basis of an unsecured general claim and entitled to participation in the distribution on equal terms with other unsecured general claims.

The plaintiff's assignments of error are addressed solely to Judge Moore's ruling that these debts are not First Class debts within the meaning of G.S. 28-105 but are liabilities of the decedent's estate on the basis of unsecured general claims. In our view, Judge Moore's ruling was clearly correct.

Upon the execution of the notes the makers became primarily liable, jointly and severally, for the payment thereof; and as between the plaintiff and her husband's estate the liability of each is for the payment of one-half of the amounts owing when the husband died. This is the explicit holding in *Trust Co. v. Black,* 198 N.C. 219, 151 S.E. 269. The plaintiff concedes that this is correct but insists that the claim of each of these secured creditors for the debts outstanding when the husband died (or her claim for one-half of that amount should she pay the debts in full in order to avoid foreclosure or for other reasons) is entitled to preferential payment from the general assets of the decedent's estate. She relies upon G.S. 28-105, which prescribes the order in which debts of a decedent must be paid, and particularly she urges that such debts are within the First Class, namely, "Debts which by law have a specific lien on property to an amount not exceeding the value of the property."

Upon the death of her husband, the plaintiff, as survivor in the tenancies by entirety, became the sole owner of the real property. No right, title or interest of any kind passed to the defendant-administrator, for the benefit of the creditors of the intestate, or to the heirs of the intestate. *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566.

It is true that the deeds of trust constitute specific liens on real property of which the plaintiff became and is now sole owner. The question presented is whether these specific liens on *her* real property require that

the liabilities of the decedent's estate for these debts be paid as debts of the First Class.

The evident purpose of the statute relating to debts of the First Class is to benefit the estate, particularly the creditors thereof next in line for payment. Administration of Estates in North Carolina, Douglas, Section 218. In this connection, it should be noted that debts of the First Class take precedence over funeral expenses, taxes, and other items entitled to payment before general claims. The priority of the First Class is limited to a situation where the value of the property equals or exceeds the amount of the specific lien thereon. Thus, the personal representative may preserve any equity for the benefit of other creditors and of beneficiaries. But where the estate and its creditors and beneficiaries have no right, title or interest in the real property on which the creditor has a specific lien, no equity can be preserved.

"The statute being in derogation of the equity of a *pro rata* distribution, should be strictly construed so as not to confer a priority over other creditors unless clearly called for." *Baker v. Dawson,* 131 N.C. 227, 42 S.E. 588; *Hospital Asso. v. Trust Co.,* 211 N.C. 244, 189 S.E. 766.

The exact wording relating to debts of the First Class now appearing in G.S. 28-105 goes back to Section 24, Chapter 113, Laws of North Carolina 1868-69. We are unable to find any decision or intimation that the statute applies other than in situations where the property subject to the lien was a part of the decedent's estate. If the contention of the plaintiff were accepted, two persons could execute and deliver their promissory note for money borrowed; as security therefor, one of them could execute a deed of trust on his separate property, the other giving no security; and upon the death of the person who gave no security it could be asserted that the liability of his estate for the amount due on the note is a First Class debt under G.S. 28-105 payable in full ahead of all other debts for the reason that such debt was secured by a specific lien on property. No such intention can be discerned when the context and purpose of G.S. 28-105 are kept in mind. The fact that the plaintiff is the widow of the decedent and is now the sole owner as the surviving tenant in an estate by entirety rather than sole owner when the notes and deeds of trust were executed affords no basis for distinction in relation to the applicability of the portion of G.S. 28-105 dealing with First Class debts.

It is plain that "a specific lien on property to an amount not exceeding the value of such property" as used in G.S. 28-105 refers only to property which passes to and becomes a part of the decedent's estate and which, upon payment of a debt of the First Class, is preserved free of lien for the creditors and beneficiaries of the decedent's estate. The statute has no reference to specific liens on properties owned by others and in which the decedent's estate has no interest.

If the creditors had a specific lien on property belonging to the decedent's estate, they would be required to exhaust their security and then would be permitted to file claim only for the balance of the debt due after allowing credit for the proceeds of sale. *Rierson v. Hanson,* 211 N.C. 203, 189 S.E. 502. Since they have no specific lien on property belonging to the decedent's estate, the estate's liability is for the debts and, as between the plaintiff and the defendant, for one-half of the amount thereof, without allowance of credit for what is or may be realized from property now owned solely by the plaintiff.

The judgment below is predicated upon a correct ruling on the single question presented by this appeal and is therefore

Affirmed.

J. D. HODGES v. W. B. CARTER (INDIVIDUALLY) AND ADMINISTRATOR OF THE ESTATE OF H. C. CARTER (DECEASED), AND D. D. TOPPING.

(Filed 24 February, 1954.)

1. Attorney and Client § 7—

An attorney who contracts to prosecute an action in behalf of his client impliedly represents 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 he will assert his best judgment in the prosecution of the litigation, and that he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

2. Same—

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.

3. Same—Evidence held to show mere error of judgment on part of attorneys on unsettled point of law, and nonsuit was properly entered in client's action against them.

Defendant attorneys, employed to prosecute actions against nonresident insurance companies, mailed to the Commissioner of Insurance, the statutory process agent of foreign insurance companies doing business in this State, G.S. 58-153, process for the Commissioner's acceptance of service in accordance with prevailing custom. The right of the Commissioner to accept service on behalf of foreign insurance companies had not theretofore been tested in the courts, and judgment was entered in Superior Court that his acceptance of service was valid. The attorneys failed to sue out *alias* and *pluries* summons, and on appeal it was held that the acceptance

of service by the Commissioner was invalid. The causes were then barred by the statute of limitations. *Held:* The evidence fails to show any breach of duty the law imposed upon defendants in their professional capacity, and nonsuit was properly entered.

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

APPEAL by plaintiff from *Morris, J.*, October Term, 1953, BEAUFORT. Affirmed.

Civil action to recover compensation for losses resulting from the alleged negligence of defendant D. D. Topping and H. C. Carter, now deceased, in prosecuting, on behalf of plaintiff, certain actions on fire insurance policies.

On 4 June 1948 plaintiff's drugstore building located in Belhaven, N. C., together with his lunch counter, fixtures, stock of drugs and sundries therein contained, was destroyed by fire. At the time plaintiff was insured under four policies of fire insurance against loss of, or damage to, said mercantile building and its contents. He filed proof of loss with each of the four insurance companies which issued said policies. The insurance companies severally rejected the proofs of loss, denied liability, and declined to pay any part of the plaintiff's losses resulting from said fire.

H. C. Carter and D. D. Topping were at the time attorneys practicing in Beaufort and adjoining counties. As they were the ones from whom plaintiff seeks to recover, they will hereafter be referred to as the defendants.

On 7 April 1949 plaintiff entered into a written contract of employment with defendants to prosecute an action against each of the insurers on the policy issued by it. The compensation to be paid was fixed on a contingent basis and defendants bound themselves "to do whatever may be necessary in order to bring the matters to a successful conclusion, to the best of their knowledge and ability."

On 3 May 1949 defendants, in behalf of plaintiff, instituted in the Superior Court of Beaufort County four separate actions—one against each of the four insurers. Complaints were filed and summonses were issued, directed to the sheriff of Beaufort County. In each case the summons and complaint, together with copies thereof, were mailed to the Commissioner of Insurance of the State of North Carolina. The Commissioner accepted service of summons and complaint in each case and forwarded a copy thereof by registered mail to the insurance company named defendant therein.

Thereafter each defendant made a special appearance and moved to dismiss the action against it for want of proper service of process for that the Insurance Commissioner was without authority, statutory or other-

wise, to accept service of process issued against a foreign insurance company doing business in this State. When the special appearance and motion to dismiss came on for hearing at the February Term 1950, the judge presiding concluded that the acceptance of service of process by the Insurance Commissioner was valid and served to subject the movants to the jurisdiction of the court. Judgment was entered in each case denying the motion therein made. Each defendant excepted and appealed. This Court reversed. *Hodges v. Insurance Co.*, 232 N.C. 475, 61 S.E. 2d 372. See also *Hodges v. Insurance Co.*, 233 N.C. 289, 63 S.E. 2d 819.

On 4 March 1952 plaintiff instituted this action in which he alleges that the defendants were negligent in prosecuting his said actions in that they failed to (1) have process properly served, and (2) sue out *alias* summonses at the time the insurers filed their motions to dismiss the actions for want of proper service of summons, although they then had approximately sixty days within which to procure the issuance thereof.

Defendants, answering, deny negligence and plead good faith and the exercise of their best judgment.

At the hearing in the court below the judge, at the conclusion of plaintiff's evidence in chief, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Allen, Allen & Langley for plaintiff appellant.

Grimes & Grimes, Rodman & Rodman, and L. H. Ross for defendant appellees.

BARNHILL, C. J. This seems to be a case of first impression in this jurisdiction. At least counsel have not directed our attention to any other decision of this Court on the question here presented, and we have found none.

Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. *McCullough v. Sullivan,* 132 A. 102, 43 A.L.R. 928; *Re Woods,* 13 S.W. 2d 800, 62 A.L.R. 904; *Indemnity Co. v. Dabney,* 128 S.W. 2d 496; *Davis v. Indemnity Corp.,* 56 F. Supp. 541; *Gimbel v. Waldman,* 84 N.Y.S. 2d 888; Anno. 52 L.R.A. 883; 5 A.J. 287, 47; Prosser Torts, p. 236, sec. 36; Shearman & Redfield Negligence, sec. 569.

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers. 5 A.J. 335, sec. 126; 7 C.J.S. 979, sec. 142; *McCullough v. Sullivan, supra; Hill v. Mynatt,* 59 S.W. 163, 52 L.R.A. 883.

Conversely, he is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care. 5 A.J. 333, sec. 124; *Re Woods, supra; McCullough v. Sullivan, supra;* Anno. 52 L.R.A. 883.

When the facts appearing in this record are considered in the light of these controlling principles of law, it immediately becomes manifest that plaintiff has failed to produce a scintilla of evidence tending to show that defendants breached any duty the law imposed upon them when they accepted employment to prosecute plaintiff's actions against his insurers or that they did not possess the requisite learning and skill required of an attorney or that they acted otherwise than in the utmost good faith.

The Commissioner of Insurance is the statutory process agent of foreign insurance companies doing business in this State, G.S. 58-153. *Hodges v. Insurance Co.,* 232 N.C. 475, 61 S.E. 2d 372, and when defendants mailed the process to the Commissioner of Insurance for his acceptance of service thereof, they were following a custom which had prevailed in this State for two decades or more. Foreign insurance companies had theretofore uniformly ratified such service, appeared in response thereto, filed their answers, and made their defense. The right of the Commissioner to accept service of process in behalf of foreign insurance companies doing business in this State had not been tested in the courts. Attorneys generally, throughout the State, took it for granted that under the terms of G.S. 58-153 such acceptance of service was adequate. And, in addition, the defendants had obtained the judicial declaration of a judge of our Superior Courts that the acceptance of service by the Commissioner subjected the defendants to the jurisdiction of the court. Why then stop in the midst of the stream and pursue some other course?

Doubtless this litigation was inspired by a comment which appears in our opinion on the second appeal, *Hodges v. Insurance Co.,* 233 N.C. 289, 63 S.E. 2d 819. However, what was there said was pure *dictum,* injected —perhaps ill advisedly—in explanation of the reason we could afford plaintiff no relief on that appeal. We did not hold, or intend to intimate,

that defendants had been in any wise neglectful of their duties as counsel for plaintiff.

The judgment entered in the court below is

Affirmed.

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

STATE v. FRANK CEPHUS.

(Filed 24 February, 1954.)

1. Criminal Law § 38—

In criminal prosecutions a defendant's plea of not guilty clothes him with a presumption of innocence which continues to the moment the State offers evidence sufficient to rebut the presumption and to show beyond a reasonable doubt that the defendant in fact committed the crime charged, or some lesser degree thereof.

2. Same—

The general rule, which is subject to certain exceptions, is that the burden of proof in a criminal prosecution never shifts to defendant but remains on the State throughout the trial, and defendant does not have the burden of proving matters in justification or excuse.

3. Assault §§ 11, 14b—

In a prosecution for assault with a deadly weapon in which defendant's evidence tends to show that he acted only in his own necessary self-defense, the burden of proof rests on the State throughout the trial to prove that defendant willingly engaged in an affray or unlawfully assaulted the prosecuting witness and that in so doing he used a deadly weapon, and thus rebut any suggestion of self-defense, and an instruction that the burden was on defendant of proving his plea of self-defense to the satisfaction of the jury constitutes prejudicial error.

APPEAL by defendant from *Bone, J.*, October Term, 1953, EDGECOMBE. New trial.

Criminal prosecution in which it is charged that defendant assaulted one Harvey Everett with a deadly weapon.

The defendant entered a general plea of not guilty.

On 28 February 1953 defendant, Harvey Everett (the prosecuting witness), Richard Pippen, and four others were together in Tarboro, N. C. All had been drinking, and Pippen was drunk. Defendant had an automobile and agreed to carry Pippen to his home in Princeville, just across the Tar River, if he would furnish the gas. They stopped at a filling station in Princeville and purchased five gallons of gas. Defendant de-

manded that Pippen purchase ten gallons. Everett protested that that was too much for such a short trip.

From that point on the evidence is in sharp conflict. The State's testimony tends to show that as Everett went out of the filling station defendant grabbed him, jerked him around and cut him in the face. The testimony favorable to defendant tends to show that Everett made an unprovoked and persistent assault on defendant, and defendant did nothing more than try to ward off the assault and get away without suffering any injury.

There was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Weeks & Muse for defendant appellant.

BARNHILL, C. J. The court below in its charge instructed the jury in part as follows:

"The burden of proof as to the plea of self-defense is on the defendant to satisfy the jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy the jury that he was fighting in his own self-defense and used no more force than was reasonably necessary for his protection."

This instruction must be held for error which entitles the defendant to a new trial.

It is true that in homicide cases when it is made to appear that defendant intentionally assaults another with a deadly weapon, inflicting a wound which proximately causes the death of the person assaulted, the law raises certain presumptions of fact which, nothing else appearing, require a verdict of murder in the second degree. And upon the admission or proof of such facts, the law casts upon the defendant the burden of proving facts and circumstances which will rebut the presumption of malice or which will excuse the homicide altogether on the grounds of self-defense, accident, or misadventure. But we need not now enter into a discussion of the philosophy underlying that rule for it has no application here.

In criminal prosecutions a defendant's plea of not guilty clothes him with a presumption of innocence which continues to the moment the State offers evidence sufficient to rebut the presumption and to show beyond a reasonable doubt that the defendant in fact committed the crime charged, or some lesser degree therof. *S. v. Carver*. 213 N.C. 150, 195 S.E. 349. Consequently the burden of proof rests on the State throughout the trial, even when defendant's evidence tends to show that he acted only in his

own necessary self-defense. *S. v. Carver, supra; S. v. Gibson,* 196 N.C. 393, 145 S.E. 772; *S. v. Reddit,* 189 N.C. 176, 126 S.E. 506; *S. v. Revels,* 227 N.C. 34, 40 S.E. 2d 474; 6 C.J.S. 975, sec. 114.

Defendant's evidence tending to show that he did not commit an assault upon, or willingly engage in an affray with, the prosecuting witness, but only did what reasonably appeared to him to be necessary to ward off or repel an assault being made on him is offered to rebut, impeach, or discredit the evidence offered by the State or to "muddy the waters" so as to create a reasonable doubt as to his guilt.

"If the defendant's evidence raised a reasonable doubt as to his guilt, or if such evidence caused to linger in the minds of the jury from the original presumption of innocence a reasonable doubt as to his guilt, or if upon all the evidence the jury entertained a reasonable doubt as to his guilt the defendant was entitled to a verdict of not guilty, although the defendant's evidence may not have satisfied the jury of matters in justification or excuse." *S. v. Carver, supra; S. v. Murphrey,* 186 N.C. 113, 118 S.E. 894.

The rule is the same as in cases where the defendant undertakes to prove an alibi. *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844; *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867.

There are, of course, certain exceptions to the rule that the burden in a criminal prosecution never shifts to the defendant as when a defendant seeks to bring himself within an exceptive provision of a criminal statute. But the general rule and not the exceptions must be applied here.

To follow any other rule would deprive the defendant of the presumption of innocence and tend to confuse. Just when does the burden shift? Does defendant's reliance on evidence tending to show he fought only in his own necessary self-defense altogether relieve the State of any burden? Must the jury decline to consider the evidence of self-defense on the primary issue of guilt? A charge which attempted to answer these questions would be, of necessity, inconsistent and conflicting.

Here the State must prove that the defendant willingly engaged in an affray with, or unlawfully assaulted, the prosecuting witness and that in so doing he used a deadly weapon. Proof of these facts rebuts any suggestion of self-defense. To say that the burden then shifts to the defendant to prove that he fought only in his own necessary self-defense is too illogical to find favor with this Court. The State must first prove his guilt, and then he must prove his innocence. Such is not the law in this jurisdiction.

New trial.

GEORGE L. WADE, JR., BY HIS NEXT FRIEND, GEORGE L. WADE, v. JONES SAUSAGE COMPANY AND M. R. HICKS.

(Filed 24 February, 1954.)

1. Automobiles § 18e: Negligence § 10—

Plaintiff pedestrian, in invoking the doctrine of last clear chance, must show that he negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care, that defendant motorist discovered, or by the exercise of reasonable care should have discovered, plaintiff's position of peril and his incapacity to escape from it before injury, and in time to have avoided the injury to plaintiff with the means at hand, and that defendant negligently failed to use the available time and means to avoid the injury, and injured him.

2. Automobiles § 18j—Evidence held to raise issue of last clear chance for determination of jury.

Plaintiff's evidence tended to show that he was subject to dizzy spells of a disabling character, that notwithstanding he undertook to walk upon the main traveled portion of a highway at nighttime, became dizzy, lost consciousness and fell on the hard surface, that the truck driven by defendant employee had headlights burning, rendering plaintiff's prostrate body visible when the vehicle was some 225 feet away, and that the truck, driven at a speed of some forty-five miles per hour, continued at unabated speed and ran over plaintiff's ankles and feet, inflicting injury, notwithstanding that the driver, throughout the intervening 225 feet, could have avoided striking plaintiff by stopping the truck or by driving it onto the shoulder of the highway. *Held:* The evidence was sufficient to require the submission of the issue of the last clear chance to the jury.

APPEAL by defendants from *Bone, J.*, and a jury, at November Term, 1953, of EDGECOMBE.

Civil action in which a pedestrian seeks to hold the owner and the operator of a motor vehicle liable for his personal injuries under the last clear chance or discovered peril doctrine.

This action arose out of an accident which occurred about 4 a.m. on 24 July, 1952, upon United States Highway 64, in Edgecombe County, when a motor truck owned by the defendant Jones Sausage Company and operated by its employee, the defendant M. R. Hicks, ran over the plaintiff George L. Wade, Jr., who was lying on the traveled part of the roadway. Hicks was admittedly performing a business mission for his employer. Both sides offered evidence at the trial.

These issues arose on the pleadings, and were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint?

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?

3. Notwithstanding plaintiff's own contributory negligence, could the defendants, through the exercise of due care, have avoided the injury to the plaintiff, as alleged in the complaint?

4. What damages, if any, is plaintiff entitled to recover?

The jury answered the first issue "yes," the second issue "yes," the third issue "yes," and the fourth issue "$4,054.50." The trial judge entered judgment for the plaintiff in accordance with the verdict, and the defendants excepted and appealed, assigning as error the disallowance of their motion for a compulsory nonsuit, the submission of the third issue to the jury, and the refusal of their request for a peremptory instruction in their favor on the third issue.

Fountain, Fountain & Bridges for plaintiff, appellee.
Spruill & Spruill for defendants, appellants.

ERVIN, J. The defendants assert that the evidence does not bring the plaintiff's claim within the purview of the last clear chance or discovered peril doctrine, and that their assignments of error ought to be sustained on that ground.

Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him. *Dowdy v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639; *Lee v. R. R.*, 237 N.C. 357, 75 S.E. 2d 143; *Matheny v. Motor Lines*, 233 N.C. 673, 65 S.E. 2d 361; *Manufacturing Co. v. R. R.*, 233 N.C. 661, 65 S.E. 2d 379; *Osborne v. R. R.*, 233 N.C. 215, 63 S.E. 2d 147; *Aydlett v. Keim*, 232 N.C. 367, 61 S.E. 2d 109; *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337; *Mercer v. Powell*, 218 N.C. 642, 12 S.E. 2d 227; *Van Dyke v. Atlantic Greyhound Corp.*, 218 N.C. 283, 10 S.E. 2d 727; *Cummings v. R. R.*, 217 N.C. 127, 6 S.E. 2d 837; *Hunter v. Bruton*, 216 N.C. 540, 5 S.E. 2d 719; *Newbern v. Leary*, 215 N.C. 134, 1 S.E. 2d 384; *Taylor v. Rierson*, 210 N.C. 185, 185 S.E. 627; *Morris v. Transpor-*

tation Co., 208 N.C. 807, 182 S.E. 487; *Miller v. R. R.*, 205 N.C. 17, 169 S.E. 811; *Caudle v. R. R.*, 202 N.C. 404, 163 S.E. 122; *Jenkins v. R. R.*, 197 N.C. 786, 148 S.E. 926; *S. c.*, 196 N.C. 466, 146 S.E. 83; *Redmond v. R. R.*, 196 N.C. 768, 147 S.E. 287; *Redmon v. R. R.*, 195 N.C. 764, 143 S.E. 829; *Construction Co. v. R. R.*, 185 N.C. 43, 116 S.E. 3; *Fry v. Utilities Co.*, 183 N.C. 281, 111 S.E. 354; *McManus v. R.R.*, 174 N.C. 735, 94 S.E. 455; *Cullifer v. R. R.*, 168 N.C. 309, 84 S.E. 400; *Edge v. Railway Company*, 153 N.C. 212, 69 S.E. 74; *Styles v. Railroad*, 118 N.C. 1084, 24 S.E. 740; *Gunter v. Wicker*, 85 N.C. 310.

When the evidence is interpreted in the light most favorable to the plaintiff, it reveals this factual situation:

United States Highway No. 64, which runs east and west through Edgecombe County, is paved to a width of twenty feet. It has a dirt shoulder ten feet wide on each side. The plaintiff is subject to dizzy spells of a disabling character. Despite this infirmity, he undertook to walk eastward upon the main-traveled portion of the highway sometime before four o'clock on the morning of 24 July, 1952. While so doing, he became dizzy, lost consciousness, fell, and came to rest athwart the center of the pavement with his feet and legs projecting into the southern traffic lane. Shortly thereafter the defendant Hicks came upon the scene from the west, driving his employer's eastbound motor truck along the southern traffic lane at a speed of about forty-five miles an hour. The truck was equipped with burning headlights which fell upon the plaintiff's helpless and prostrate body and rendered it plainly visible to Hicks when the vehicle in his charge was 225 feet away. Although he could have seen the plaintiff throughout the intervening 225 feet and could have avoided striking him by stopping the truck or by driving it onto the southern shoulder of the highway, Hicks drove the vehicle straight ahead at unabated speed along the southern traffic lane and ran over the plaintiff's ankles and feet, inflicting painful and permanent injuries upon him.

These facts bring the plaintiff's claim within the protection of the last clear chance or discovered peril doctrine. As a consequence, the judgment of the Superior Court will be sustained.

No error.

ROBERT O. ALEXANDER v. LAWRENCE E. BROWN.

(Filed 24 February, 1954.)

Appeal and Error § 51a—

Where it is determined on appeal that the evidence upon a particular cause of action is sufficient to be submitted to the jury and overrule defendant's motion to nonsuit, the question of the sufficiency of the evidence is precluded upon the subsequent trial upon substantially the same evidence, and judgment of involuntary nonsuit entered on such cause of action will be reversed.

APPEAL by plaintiff from *Sink, J.*, and a jury, at the October Term, 1953, of BUNCOMBE.

Civil action upon a complaint stating a first cause of action for false arrest and imprisonment, and a second cause of action for malicious prosecution.

These are the controlling facts:

1. The events culminating in this litigation happened in May, 1947.

2. Shortly after their occurrence, the plaintiff Robert O. Alexander brought this action against G. H. Lindsey, a private citizen, Lawrence E. Brown, the Sheriff of Buncombe County, and Carl W. Smith, the Chief of Police of the Town of Black Mountain.

3. The original complaint alleged a first cause of action against Lindsey, Brown, and Smith for false arrest and imprisonment, and a second cause of action against them for malicious prosecution.

4. The cause was originally called for trial on its merits before Judge George A. Shuford and a jury at the March Term, 1949, of the Superior Court of Buncombe County. After the plaintiff had introduced his evidence and rested his case, Judge Shuford entered a judgment involuntarily nonsuiting the plaintiff as to Lindsey, Brown, and Smith on the first cause of action for false arrest and imprisonment, and as to Brown and Smith on the second cause of action for malicious prosecution. The plaintiff excepted to the judgment and appealed, assigning errors. The record now before us does not disclose the disposition of the second cause of action in respect to Lindsey.

5. The case came before this Court on the plaintiff's appeal from the judgment of Judge Shuford at the Fall Term, 1949, and is reported in *Alexander v. Lindsey*, 230 N.C. 663, 55 S.E. 2d 470, where the evidence introduced by the plaintiff at the original trial is summarized in an able and thorough opinion which *Justice Denny* wrote for the Court. This Court held that the plaintiff's testimony made the liability of Brown to the plaintiff for false arrest and imprisonment and for malicious prosecution questions of fact for the jury, and reversed the involuntary nonsuit

as to Brown upon both of the causes of action. Moreover, this court affirmed the involuntary nonsuit as to Lindsey upon the first cause of action, reversed the involuntary nonsuit as to Smith upon the first cause of action, and affirmed the involuntary nonsuit as to Smith upon the second cause of action.

6. After the decision of this Court on the plaintiff's appeal from the judgment of Judge Shuford, to wit, on 7 June, 1951, the plaintiff amended his complaint so as to allege a first cause of action against Brown and Smith for false arrest and imprisonment, and a second cause of action against Brown alone for malicious prosecution. The case came before this Court a second time at the Fall Term, 1952, on the appeal of Brown and Smith from an order of Judge William H. Bobbitt refusing to strike an amendment to plaintiff's amended complaint, and is reported in *Alexander v. Brown,* 236 N.C. 212, 72 S.E. 2d 522.

7. After the decision of this Court on the second appeal, Smith died, and the plaintiff reformed his complaint so as to state a first cause of action against Brown alone for false arrest and imprisonment, and a second cause of action against Brown alone for malicious prosecution.

8. Subsequent to the death of Smith and the reformation of the complaint, to wit, at the October Term, 1953, of the Superior Court of Buncombe County, the case was tried on the merits a second time as to Brown before Judge H. Hoyle Sink and a jury. The plaintiff offered substantially the same evidence at that time as that presented by him at the original trial. After the plaintiff had introduced his evidence and rested his case, Brown moved for an involuntary nonsuit upon both causes of action. Judge Sink denied the motion in respect to the first cause of action, *i.e.*, the cause of action for false arrest and imprisonment, and granted it in respect to the second cause of action, *i.e.*, the cause of action for malicious prosecution. Brown then offered testimony bearing on the first cause of action. Judge Sink submitted these issues to the jury: (1) Did the defendant, Lawrence E. Brown, cause the arrest and imprisonment of the plaintiff by a police officer in Black Mountain without legal process, as alleged in the complaint? (2) What compensatory damages, if any, is the plaintiff entitled to recover against the defendant? The jury answered the first issue "No," and left the second issue unanswered. Judge Sink entered judgment effectuating the verdict of the jury upon the cause of action for false arrest and imprisonment, and his involuntary nonsuit upon the cause of action for malicious prosecution. The plaintiff excepted to the judgment and appealed to this Court, assigning errors.

Guy Weaver for plaintiff, appellant.

J. W. Haynes and Roy A. Taylor for defendant Lawrence E. Brown, appellee.

ERVIN, J. We have examined the exceptions bearing on the first cause of action, and found that none of them point out any error of law entitling the plaintiff to a new trial of the cause of action for false arrest and imprisonment. It is otherwise, however, with respect to the exception which challenges the dismissal of the second cause of action upon the involuntary nonsuit.

The plaintiff offered substantially the same evidence at the second trial on the merits before Judge Sink and the jury as that presented by him at the original trial on the merits before Judge Shuford and the jury. This being so, the question of the sufficiency of the plaintiff's evidence to withstand a motion for an involuntary nonsuit on the second cause of action was foreclosed against the defendant Brown by the decision on the first appeal adjudging the plaintiff's evidence ample to carry the case to the jury and support a verdict against the defendant Brown upon the cause of action for malicious prosecution. *Mintz v. R. R.*, 236 N.C. 109, 72 S.E. 2d 38. This conclusion necessitates a reversal of the involuntary nonsuit upon the second cause of action.

No error upon cause of action for false arrest and imprisonment.

Reversed upon cause of action for malicious prosecution.

CHARLES S. STRIBBLING AND CATHERINE R. STRIBBLING: H. L. HAMILTON AND HELEN HAMILTON, MRS. R. C. MOORE v. J. C. LAMM AND BLANCHE LAMM.

(Filed 24 February, 1954.)

1. Pleadings § 15—

A demurrer admits the truth of the allegations of fact contained in the pleading and ordinarily relevant inferences of fact necessarily deducible therefrom, but it does not admit conclusions or inferences of law.

2. Negligence § 4b: Injunctions § 4d—

Allegations to the effect that defendants constructed a dam creating an artificial pond on defendants' land, without allegation of any unusual condition or artificial feature other than the mere existence of the pond, *is held* insufficient to state a cause of action to enjoin the maintenance of the pond or to abate it as an attractive nuisance, allegations that it constituted a nuisance and dangerous condition being disregarded as mere conclusions of law, and the maintenance of an unenclosed pond not being negligence *per se*.

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

APPEAL by defendants from *Carr, J.*, at September Term, 1953, of ALAMANCE, to Fall Term, 1953, of Supreme Court,—carried over to Spring Term, 1954.

Civil action to enjoin the maintenance of a pond on the lands of defendants, and to abate same as an attractive nuisance,—heard upon demurrer to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action.

The complaint alleges, briefly stated:

1. That plaintiffs are citizens and residents of Alamance County, North Carolina, residing in or near the northwestern edge of the limits of the city of Burlington.

2. That defendants, also citizens and residents of Alamance County, North Carolina, own a considerable acreage of real property near the northwestern edge of the city of Burlington, including the pond referred to in the complaint, near the homes of the plaintiffs, through which real property a small stream runs, across which in or about the year 1950 defendants built a high dam, thereby causing the water of the stream north of the dam to back up, and to form a pond several hundred yards long, and several hundred feet wide and "in places" more than ten feet deep.

3. That this pond is located in a thickly populated residential district near the city of Burlington, in close proximity to the homes of plaintiffs, and to apartment buildings in which some of them, and others reside, and within a few hundred feet of many other citizens and residents of that section, and near streets where not only the plaintiffs, but a large number of other people live and travel, and defendants have failed to build a fence or to erect protective devices around the pond to prevent children or others from going to the pond for amusement and other purposes.

4. That many of the plaintiffs and others in the neighborhood, within a few hundred feet of the pond, are parents of children, small, and of various ages, to all of whom, and to all persons in said thickly settled community, said pond is a constant danger.

5. That the construction and maintenance of the pond, without any protection whatever for purposes aforesaid, are in violation of the rights of plaintiffs and of others, and if permitted to be continued without a fence or other protecting device will work irreparable and permanent injury and loss to plaintiffs and to others,—and constitutes a nuisance, and plaintiffs and the public will be endangered thereby, and the children, small and larger, of plaintiffs and of others will be constantly exposed to death and great bodily harm.

6. That there is likelihood that children and others will be, and have been attracted to said pond, by its attractive nature, and are inclined to go there and do go there; that the condition is uncommon and artificially produced by defendants and is inherently dangerous and amounts to an invitation to visit and inspect the place, extended to children and others;

"that a small child, who lived in one of the homes near and in the vicinity . . . has recently been attracted to said pond and was drowned therein because of the dangerous condition thereof and the lack of protection; and that there is serious and continuing danger that other children and other persons in and near the said community and near the said pond . . . and plaintiffs will suffer irreparable damage unless the defendants are restrained from maintaining and keeping the said nuisance in the way in which they are maintaining and keeping it."

Wherefore, the plaintiffs pray (1) for an injunction against the continuance and maintenance of the pond "without protection and protective devices for the protection of children and of all persons"; (2) for judgment abating "the said nuisance and dangerous condition herein complained of and be required to furnish adequate protection to the plaintiffs and to the families of the plaintiffs and to others residing in said vicinity"; etc.

The defendants demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action against defendants in that: "(1) As a matter of law, an ordinary lake or pond, natural or artificial, even within a few hundred feet of neighboring dwellings, is not a nuisance *per se,* and the plaintiffs do not allege the existence of any concealed or unusual hazard or of any special allurement, such as a sand beach, raft, boat, floating objects, pier or springboard, in support of their characterization of the defendants' lake as an attractive nuisance; (2) In that the complaint does not allege nor is it made to appear that the defendants owed the plaintiffs or the public the duty to take any action or precaution with regard to such body of water, or that defendants owed the plaintiffs any special duty whatsoever; (3) In that the complaint does not allege nor is it made to appear that the plaintiffs or the public had any right to go upon the premises of the defendants or to use the same for any purpose whatsoever; (4) In that the complaint does not allege nor is it made to appear that the pond upon the defendants' premises was used by the plaintiffs or the public, or that the defendants knew that the plaintiffs were in the habit of going on said premises, or had ever invited them there; and (5) That the complaint does not state any cause of action."

When the cause came on for hearing upon the demurrer, the court being of opinion that it should be overruled, so adjudged, and defendants objected and excepted thereto, and appeal to the Supreme Court and assign error.

Allen & Allen and Young, Young & Gordon for plaintiffs, appellees.
Cooper, Long, Latham & Cooper for defendants, appellants.

WINBORNE, J. The sole assignment of error presented on this appeal is directed to the ruling of the trial court in overruling the demurrer entered by defendants.

"The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted, but the principle does not extend to the admissions of conclusions or inferences of law," *Stacy, C. J.*, in *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761. See also *McCampbell v. B. & L. Assn.,* 231 N.C. 647, 58 S.E. 2d 617; also *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452.

Now in respect to the matters alleged in the complaint: In *Fitch v. Selwyn Village,* 234 N.C. 632, 68 S.E. 2d 255, in opinion by *Denny, J.*, this Court said: "The overwhelming weight of authority in this country is to the effect that ponds, pools, lakes, streams, reservoirs, and other bodies of water, do not *per se* constitute attractive nuisances. 56 Am. Jur., Water, Section 436, p. 850. 'The attractive nuisance doctrine generally is not applicable to bodies of water, artificial as well as natural, in the absence of some unusual condition or artificial feature other than the mere water and its location,' 65 C.J.S., Negligence, Sec. 29 (12) j, p. 475. It is, therefore, not negligence *per se* to maintain an unenclosed pond, pool, lake, or reservoir on one's premises," citing *Barlow v. Gurney,* 224 N.C. 223, 29 S.E. 2d 681, and *Hedgepath v. Durham,* 223 N.C. 822, 28 S.E. 2d 503.

Testing the sufficiency of the allegation of fact by the rule stated above, in the light of the principles set forth in the *Fitch case,* this Court is of opinion that the demurrer is well taken, and should have been sustained. True there are allegations of conclusions of law, but these may not aid the pleader. Indeed, they are in conflict with the *Fitch case.*

For reasons stated the judgment overruling the demurrer is

Reversed.

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

IREDELL TAYLOR DAVIS v. N. B. JENKINS AND WIFE, SARAH F. JENKINS, BERTRAM W. JENKINS AND WIFE, LOUISE T. JENKINS, SADIE JENKINS HARMON AND HUSBAND, J. OBIE HARMON.

(Filed 24 February, 1954.)

Courts § 5: Trial § 51—

Where plaintiff fails to prosecute her appeal from judgment against her, and her application for writ of *certiorari* has been denied, litigation involved in the action is at an end, and her motion thereafter made in the Superior Court to set aside the judgment and grant a new trial is properly denied, since one Superior Court judge may not modify, reverse or set aside judgment of another Superior Court judge.

APPEAL by plaintiff from *Bone, J.*, October Term, 1953, of NASH.

This is a civil action instituted on 12 January, 1950, by the plaintiff, a daughter of Elias T. Taylor, deceased, to set aside a deed made to the defendants pursuant to a sale of the real estate described in plaintiff's complaint. The land described belonged to the estate of the decedent and was sold on 20 March, 1933, pursuant to a petition filed by his administrator to create assets to pay debts.

The case was called for trial at the April Term, 1952, of the Superior Court of Nash County. At the conclusion of plaintiff's evidence, defendants' motion for judgment as of nonsuit was allowed, and from judgment dismissing the action the plaintiff appealed to the Supreme Court. This Court reversed the ruling below and remanded the cause for further hearing in an opinion reported in 236 N.C. 283, 72 S.E. 2d 673. A petition to rehear filed by the defendants was "allowed only for the purpose of amplification of the order remanding the cause for further proceeding." The amplification appears in 236 N.C. 767, 73 S.E. 2d 780.

The case was again tried at the April Term, 1953, of the Superior Court of Nash County before his Honor, Joseph W. Parker, Judge Presiding, and a jury. The jury in answering the issues submitted found that the fair market value of the entire tract of land described in the complaint, at the time of the sale in 1933, was only $450.00, and that the value of the provable debts against the estate of Elias T. Taylor was $1,800.00. From the judgment entered on the verdict the plaintiff gave notice of appeal. The case on appeal was never perfected and docketed in the Supreme Court.

The defendants, through their counsel filed a motion in the office of the Clerk of the Supreme Court on 19 August, 1953, to docket and dismiss the appeal under Rule 17 for failure on the part of the plaintiff to comply with Rule 5 of the Rules of Practice in the Supreme Court, 221 N.C. 546.

On 1 September, 1953, the plaintiff filed with the Clerk of this Court an application for a writ of *certiorari* and motion to dismiss the defendants' motion to docket and dismiss the appeal.

The application for writ of *certiorari* was denied and the motion to docket and dismiss the appeal allowed on 8 September, 1953.

Thereafter, the plaintiff filed a motion in the Superior Court of Nash County to set aside the judgment entered at the April Term, 1953, of the Superior Court of Nash County, and to grant the plaintiff a new trial.

The above motion was heard and denied at the October Term, 1953, of the Superior Court of Nash County. The plaintiff appeals, assigning error.

P. H. Bell and F. T. Hall for appellant.

Thorp & Thorp and Valentine & Valentine for appellees.

DENNY, J. The ruling of the court below was correct. The plaintiff's exclusive remedy with respect to the judgment entered at the April Term, 1953, of the Superior Court of Nash County, was by appeal. Having failed to perfect her appeal in the manner required by the rules of this Court, and her application for writ of *certiorari* having been denied, the litigation involved in the action was at an end. In such cases, a judgment entered by one judge of the Superior Court may not be modified, reversed or set aside by another Superior Court judge. *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153; *Davis v. Land Bank,* 217 N.C. 145, 7 S.E. 2d 373; *Newton v. Mfg. Co.,* 206 N.C. 533, 174 S.E. 449; *Price v. Insurance Co.,* 201 N.C. 376, 160 S.E. 367.

The judgment entered below is

Affirmed.

EDWIN RHOADS, JR., AND WIFE, ELIZABETH E. RHOADS, v. LLOYD O. HUGHES AND WIFE, JEANETTE E. HUGHES.

(Filed 24 February, 1954.)

Wills § 31—

The courts may construe the language of a will only when the language is so uncertain, vague, ambiguous, or conflicting that it creates a doubt as to the true intent of testator. If the language used is clear and has a recognized legal meaning, there is no room for construction, and the recognized legal meaning of the language must be given effect.

APPEAL by defendants from *Parker (J. W.), J.,* November Term, 1953, BERTIE. Affirmed.

Civil action to compel specific performance of a contract to purchase real property.

The contract is admitted. Defendants decline to take title for the reason plaintiff Elizabeth Rhoads does not possess and cannot convey a marketable fee simple title to the property they contracted to purchase.

Pritchett & Cooke for plaintiff appellees.
Stuart A. Curtis for defendant appellants.

PER CURIAM. The jurisdiction of the courts may be invoked to construe a will when, and only when, the language used in the will is so uncertain, vague, ambiguous, or conflicting that it creates a doubt as to the true intent of the testator. If the devise is couched in language which is clear and has a recognized legal meaning, there is no room for construction. The applicable rule of law must control. Such is the case here. The *feme* plaintiff survived the testator. Manifestly, upon his death she became the owner of the *locus* in fee, subject to the preceding life estate devised to her mother.

The judgment entered in the court below is

Affirmed.

STATE v. GORDON DAWES.

(Filed 24 February, 1954.)

APPEAL by defendant from *Bone, J.*, and a jury, at August Term, 1953, of NASH.

Criminal prosecution tried on appeal from the County Recorder's Court upon a warrant charging the defendant with possession of nontax-paid whiskey for the purpose of sale.

From a verdict of guilty and judgment imposing penal servitude of six months, the defendant appeals, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State.

Davenport & Davenport, C. C. Abernathy, and T. A. Burgess for defendant, appellant.

PER CURIAM. This case involves no new question requiring extended discussion. A careful examination of the record leaves us with the im-

pression it is free of reversible or prejudicial error. The verdict and judgment will be upheld.

No error.

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

W. T. REVIS v. BRUCE A. DUCKETT AND BLUE BIRD TAXI CO., INC.

(Filed 24 February, 1954.)

APPEAL by plaintiff from *Sink, J.*, at November Term, 1953, of BUNCOMBE.

An automobile operated by Bruce A. Duckett struck and injured the plaintiff while he was walking across a street in Asheville. The plaintiff sued both Duckett and the Blue Bird Taxi Co., Inc., for damages in this action on the theory that concurrent negligence on their parts proximately caused the accident and his resultant injury. When the plaintiff had produced his evidence and rested his case, the trial judge sustained the separate motion of the Blue Bird Taxi Company for an involuntary nonsuit, and entered judgment accordingly. The plaintiff thereupon submitted to a voluntary nonsuit as to Duckett, and appealed, assigning the involuntary nonsuiting of his case against the Blue Bird Taxi Company as error.

Don C. Young for plaintiff, appellant.

John C. Cheesborough for the defendant Blue Bird Taxi Co., Inc., appellee.

PER CURIAM. When the evidence is appraised at its true probative value, it is insufficient to show actionable negligence on the part of the Blue Bird Taxi Company. In consequence, the involuntary judgment of nonsuit is

Affirmed.

WILSON RADIO COMPANY, INC., v. JOSEPH G. OVERMAN, JR., AND WATSON INDUSTRIES, INC.

(Filed 24 February, 1954.)

APPEAL by defendant Watson Industries, Inc., from *Bone, Resident Judge* of Second Judicial District at Chambers in Nashville, North Carolina, 16 January, 1954, upon notice duly given.

Civil action for injunctive relief, and to recover damages of defendants for alleged breach by defendant Joseph G. Overman, Jr., of contract of employment, dated 26 June, 1953, in respect to preparing, broadcasting, and disseminating weather information exclusively for plaintiff, and not for any other corporation, firm or person, either by radio, television or any other means except by and with the consent of plaintiff,—in which breach of contract defendant, Watson Industries, Inc., participated, by unlawfully conspiring with defendant to bring about the breach.

Defendant Watson Industries, Inc., demurred to the complaint for that it appears on the face thereof that there is a misjoinder of parties defendant, and of causes of action.

The demurrer was overruled, and defendant Watson Industries, Inc., appeals to Supreme Court, and assigns error.

Carr & Gibbons for plaintiff, appellee.
Lucas, Rand & Rose for defendant, appellant.

PER CURIAM. The judgment below is accordant with the principles stated and applied in the cases of *Sineath v. Katzis,* 218 N.C. 740, 12 S.E. 2d 671, and of *Winston v. Lumber Co.,* 227 N.C. 339, 42 S.E. 2d 218. Hence the judgment is hereby

Affirmed.

EFIRD L. HINE AND WIFE, MARIA F. HINE, LOUISE HINE WESTBROOK AND HUSBAND, GEORGE A. WESTBROOK, AND WACHOVIA BANK AND TRUST COMPANY, TRUSTEE FOR FRANCES J. HINE, MARGARET HINE HURLEY, AND GILBERT C. HINE UNDER THE WILL OF CECIL C. HINE, DECEASED, v. ELLIS BLUMENTHAL AND WIFE, MRS. ELLIS BLUMENTHAL.

(Filed 3 March, 1954.)

1. Declaratory Judgment Act § 2a—

An alleyway ending in a *cul-de-sac* was referred to in the respective deeds to contiguous lots. *Held:* The right to close a part of the alley at

the *cul-de-sac* end may be determined under the Declaratory Judgment Act, G.S. 1-253, G.S. 1-254, G.S. 1-256.

2. Declaratory Judgment Act § 3—

In an action under the Declaratory Judgment Act, all persons who have or claim any interest which would be affected by the declaration must be made parties, and the judgment cannot prejudice the rights of persons not made parties to the proceeding, G.S. 1-260.

3. Same: Parties § 1—

The owners of the fee in an alleyway in which owners of contiguous lots have an easement are necessary parties in an action under the Declaratory Judgment Act to determine whether a part of the alleyway at the *cul-de-sac* end may be closed, as against the contention of one lot owner that he had the right to have the entire alleyway kept open, G.S. 1-260.

4. Same—

In an action under the Declaratory Judgment Act to determine the right to close at the *cul-de-sac* end an alleyway in which contiguous lot owners have an easement, as against the claim of one lot owner that he has the right to have the entire alleyway kept open, lot owner who has leased her entire interest, as well as a party agreeing to lease the alleyway only in the event a part of it could be closed, *held* not necessary parties to the proceeding.

5. Dedication § 3—

Where land is subdivided and sold into lots with reference to a map showing streets and alleyways, the owner dedicates the streets and alleyways to the use of those who purchase the lots, regardless of whether the streets and alleyways be in fact opened or whether the dedication be accepted by the municipality in which the property lies.

6. Dedication § 6—

Where revocation of a dedication is made in the manner provided in G.S. 136-96, streets and alleys theretofore dedicated become private property and are not subject to any easement by reason of the dedication except in so far as their use may be necessary to afford convenient ingress to and egress from any lot previously sold and conveyed by the dedicator.

7. Easements §§ 1, 2—Grantees of lots held entitled to easement in alley at rear only so far as its use was necessary to enjoyment of premises conveyed.

The owners of the lands upon which a private alleyway was maintained, sold tracts of land on one side of the alleyway by deeds granting the respective purchasers and their assigns the privilege of using the alleyway "leading to" another alley running from street to street. One end of the alley in suit terminated in the alleyway running from street to street, and the other end terminated in a *cul-de-sac*. *Held:* The owners of the lot at the intersection of the alleys were granted an easement to use the alleyway in suit only from the rear of his lot to the other alley, or, if the grant of the easement in the deed was not so limited, such owners would have only such easement in the alley in suit as may be necessary to a reasonable and proper enjoyment of their premises, and therefore have no right to prevent

the closing at the *cul-de-sac* end of a part of the alley in suit not necessary to the reasonable ingress to and egress from their lot.

8. Easements § 2—

The express grant of an easement will convey by implication only such rights as are reasonably necessary to the fair enjoyment of the easement conveyed.

9. Easements § 1—

The conveyance of an easement will be construed to effectuate the intent of the parties as expressed in the instrument, and if the language is ambiguous the court will give it an interpretation which will effect a rational purpose and not one which will produce an unusual and unjust result.

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

APPEAL by defendants from *McSwain, Special Judge,* October Term, 1953, of FORSYTH.

This is an action instituted pursuant to the provisions of Article 26, Chapter 1, General Statutes of North Carolina, known as the Declaratory Judgment Act and codified as G.S. 1-253, *et seq.,* to determine whether or not a portion of the alley hereinafter described may be closed for a term of years.

The plaintiffs offered in evidence a map showing the alley and all other properties involved, marked "Plaintiffs' Exhibit 10," which will be referred to hereinafter as "Exhibit 10." The following facts, unless otherwise indicated, are not controverted:

1. The alley in controversy as shown on Exhibit 10 is 15 feet wide and 93.19 feet in length. At its southern terminus it intersects a 10-foot alley running between Liberty and Main Streets. At its northern terminus it ends in a *cul-de-sac.*

2. Prior to 20 September, 1909, lots Nos. 5, 6, 7, and 8, as shown on Exhibit 10 and fronting on Liberty Street, had a depth of only 70 feet. On the above date an area 18.5 feet in depth and 23 feet in width, lying adjacent to the rear of each of said lots, was purchased from George Roediger and wife, Laura Roediger, by the respective owners of the Liberty Street lots. Each deed was in fee simple and contained identical provisions with respect to the alley now in controversy. These provisions in the deed from George Roediger and wife to Rangie Davis, a predecessor in title to the lot now owned by the defendants, are as follows: ". . . and we hereby grant unto the said Rangie Davis, her heirs, administrator, and assigns the privilege of using the 15-foot alley situate on the east side of the above described property and leading to the alley in the rear of P. A. Thompson and others forever; the grantors herein agreeing to perpetually maintain said 15-foot alley." The alley referred to in the above deed as being "in the rear of P. A. Thompson and others" is the

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alley shown on Exhibit 10, running between Liberty and Main Streets. All the above deeds were duly and promptly recorded in the office of the Register of Deeds of Forsyth County.

3. The heirs of George Roediger own all of the land lying on the east side of the 15-foot alley as well as the fee simple title to the alley itself, subject to the easements granted in the deeds referred to above.

4. In January, 1950, the heirs of George Roediger leased all their property as shown on Exhibit 10, as belonging to them, including the 15-foot alley, to S. H. Kress and Company (hereinafter referred to as Kress) for a term to end 31 December, 1989. Thereafter, in 1952, the present owner of Lot No. 8 as shown on Exhibit 10 leased it together with the easement appurtenant thereto in the 15-foot alley to Kress for a term ending 31 December, 1989. Both of these leases have been duly filed and recorded in the office of the Register of Deeds of Forsyth County. The plaintiffs have likewise contracted to lease Lot No. 7 as shown on Exhibit 10, including the easement in the 15-foot alley, to Kress for a similar period of time and Kress has agreed to accept the lease provided it is permitted to close that portion of the 15-foot alley adjacent to the rear of said lot.

5. Kress proposes to construct a building on Lots Nos. 7 and 8 as shown on Exhibit 10, and extending across the 15-foot alley and the northern end of the property leased from the Roediger heirs and connecting with the present store building of Kress, which will necessitate closing that portion of the 10-foot alley which lies east of Lots Nos. 7 and 8 and north of the northeastern corner of Lot No. 6, as shown on Exhibit 10. The heirs of George Roediger, U. K. Rice, Trustee for Lillian C. Moses, owner of Lot No. 8; Efird L. Hine, Maria F. Hine, Louise Hine Westbrook, Wachovia Bank and Trust Company as Trustee under the will of Cecil C. Hine, owner of Lot No. 7, and James W. Glenn and L. E. Glenn, owners of Lot No. 6, have executed a release and quitclaimed to Kress during the term of the aforesaid leases or any renewals or extensions thereof, all of the right, title and interest, if any they have, in and to that part of the alley which lies adjacent to the east of Lots Nos. 7 and 8 as shown on Exhibit 10. However, this release has not been recorded and will become null and void unless Kress can obtain a valid lease on Lot No. 7. The offer of Kress to lease Lot No. 7 from these plaintiffs is conditioned not only upon the execution of a valid lease to Lot No. 7 by them, but is further conditioned upon the right of the lessee to close the 15-foot alley in the rear of said lot.

6. It is alleged in plaintiffs' complaint that "it has already been finally adjudicated in a case similar to this, instituted in the Superior Court of Forsyth County by Lillian C. Moses by U. K. Rice, Trustee, *v.* Ellis Blumenthal, one of the defendants in this case, that said Ellis Blumenthal

has no right, title or interest in the 15-foot alley in the rear of the Moses lot, which lies adjacent to plaintiffs' property on the north." These allegations are denied in the defendants' answer.

7. The defendants herein refused to sign the release described in paragraph 5 above. The plaintiffs thereupon instituted this action praying an adjudication of the rights of defendants, if any they have, in that portion of the 15-foot alley which lies to the rear of plaintiffs' property, which adjudication is necessary before the plaintiffs can consummate their lease agreement with Kress.

When this cause came on for hearing, the parties waived a trial by jury and agreed that his Honor might hear the evidence, find the facts and enter final judgment. The court found, among other things, that the deed from George Roediger and wife to Rangie Davis to the plot of land at the east end of Lot No. 5, and the respective deeds to the plots of land at the east end of Lots 6, 7, and 8, made no reference to any plat or map, there being no plat or map in existence at the time; that the "language contained in the deed from George Roediger to Rangie Davis, after considering the physical conditions of the premises, that it was not the intent of the parties to that deed that any easement or other interest should be conveyed to Rangie Davis in that part of the alley involved in this action. The court, therefore, concludes as a matter of law that the defendants have no easement or any right, title or interest in or to that part of the alley involved in this action, and that the plaintiffs are entitled to the relief prayed for." Judgment was entered accordingly. The defendants appeal, assigning error.

Womble, Carlyle, Martin & Sandridge for appellees.

Hastings & Booe and Ratcliff, Vaughn, Hudson, Ferrell & Carter for appellants.

DENNY, J. The two primary questions which must be answered on this appeal may be stated as follows: (1) May the status of the parties with respect to their rights in the 15-foot alley involved herein be determined under the provisions of the Declaratory Judgment Act, G.S. 1-253, *et seq.?* (2) Does the easement granted in the deed from George Roediger and wife to Rangie Davis, which easement is now held by the defendants, give them an easement in that portion of the 15-foot alley which lies to the rear of Lot No. 7, as shown on Exhibit 10?

The Declaratory Judgment Act authorizes courts of record within their respective jurisdictions to declare rights, status, and other legal relations whether or not further relief is or could be claimed. G.S. 1-253. The Act also provides, among other things, that any person interested in a deed, will, or written contract, may bring an action to determine any

question of construction or validity arising in such deed, will, or contract, and "obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof." G.S. 1-254. Moreover, G.S. 1-256 contains the following provisions: "The enumeration in sections 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in section 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." *Brandis v. Trustees of Davidson College,* 227 N.C. 329, 41 S.E. 2d 833; *Tryon v. Duke Power Co.,* 222 N.C. 200, 22 S.E. 2d 450.

In our opinion the present controversy is one that may be adjudicated pursuant to the provisions of the Declaratory Judgment Act. In fact, we have heretofore held that the rights of parties with respect to an easement appurtenant, or by way of necessity may be determined in such an action. *Carver v. Leatherwood,* 230 N.C. 96, 52 S.E. 2d 1.

It will be noted, however, that when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. G.S. 1-260.

The plaintiffs, as owners of a dominant easement, certainly have the power to release their rights in such easement, and such release, when properly executed, probated and recorded, would be binding on a subsequent purchaser of the dominant estate. 28 C.J.S., Easements, section 61 (a), page 727, *et seq.* However, a release by the plaintiffs of their easement rights in the 15-foot alley involved herein, would in nowise affect the obligation of the owners of the servient estate with respect to their responsibility to the defendants, if they have any, in connection with that portion of the alley now sought to be closed. Hence, since the defendants allege and contend that they do have easement rights in that portion of the alley which lies to the rear of Lot No. 7 as shown on Exhibit 10, we hold the heirs of George Roediger, the present owners of the fee in the entire alley, subject to the easement referred to herein, are necessary parties to this action. G.S. 1-260. Therefore, they should be made parties plaintiff, but if they will not come in voluntarily and be made parties plaintiff, they should be brought in as parties defendant and required to show cause, if any they have, why the judgment in this action should not be binding on them. G.S. 1-73; *Bullard v. Johnson,* 65 N.C. 436; *Walker v. Miller,* 139 N.C. 448, 52 S.E. 125, 1 L.R.A. (N.S.) 157, 111 Am. St. Rep. 805, 4 Ann. Cas. 601; *Rental Co. v. Justice,* 212 N.C. 523, 193 S.E. 817; *Jones v. Griggs,* 219 N.C. 700, 14 S.E. 2d 836; *Dwiggins v. Bus Co.,* 230 N.C. 234, 52 S.E. 2d 892; *Garrett v. Rose,* 236 N.C. 299, 72 S.E. 2d 843.

The owner of Lot No. 8, having already leased it to Kress for the entire period that Kress seeks to close the alley, and since she has no title interest in the alley, we hold she is not a necessary party to this action. Moreover, since the owners of Lot No. 6 have released all their right, title and interest in and to that portion of the alley now sought to be closed by Kress, if they have any interest therein, during the term of its lease, or any renewals or extensions thereof, in our opinion they are not necessary parties to the action. It is further held that since Kress has agreed to lease the plaintiffs' property only in the event it is determined that the alley in the rear of said property may be closed, it is likewise not a necessary party to the proceeding.

We must now decide whether the defendants, who are the present owners of the easement rights contained in the deed dated 20 September, 1909, from George Roediger and wife to Rangie Davis, have such rights in that portion of the 15-foot alley which lies to the rear of Lot No. 7 as shown on Exhibit 10, as to require it to be kept open for their use and benefit.

In this jurisdiction it is well settled that when land is subdivided into lots and a map is made thereof, showing streets and alleys, and lots are sold with reference to such map, the owner of the subdivision thereby dedicates the streets and alleys to the use of those who purchase the lots; and it makes no difference whether the streets and alleys be in fact opened or accepted by the governing board of the town or city in which the property lies. *Lee v. Walker*, 234 N.C. 687, 68 S.E. 2d 664; *Russell v. Coggin*, 232 N.C. 674, 62 S.E. 2d 70; *Evans v. Horne*, 226 N.C. 581, 39 S.E. 2d 612; *Foster v. Atwater*, 226 N.C. 472, 38 S.E. 2d 316; *Broocks v. Muirhead*, 223 N.C. 227, 25 S.E. 2d 889; *Insurance Co. v. Carolina Beach*, 216 N.C. 778, 7 S.E. 2d 13. However, when land has been so dedicated and the streets or alleys have not been opened for a period of fifteen years from and after dedication, they are conclusively presumed to have been abandoned by the public, provided the dedicator, or those claiming under him, shall file a certificate in the registrar's office in the county where the land lies, withdrawing the dedication in the manner provided by G.S. 136-96, as amended by Chapter 1091, 1953 Session Laws of North Carolina. *Russell v. Coggin, supra; Sheets v. Walsh*, 217 N.C. 32, 6 S.E. 2d 817; *Irwin v. Charlotte*, 193 N.C. 109, 136 S.E. 368.

Where a withdrawal of property from dedication has been made as authorized by statute, all the streets and alleys as shown on the map of such subdivision may be disregarded, except such streets and alleys as shall be necessary to afford convenient ingress and egress to any lot or parcel of land sold and conveyed by the dedicator of such street or alley. *Russell v. Coggin, supra; Evans v. Horne, supra; Insurance Co. v. Carolina Beach, supra; Irwin v. Charlotte, supra.*

We cite the above statute and decisions of this Court for the purpose of showing that when streets and alleys are withdrawn from dedication in the manner authorized by statute, they become private property and may not be subjected to any easement by reason of the previous dedication, except where it is necessary to use such street or alley to afford convenient ingress and egress to any lot or parcel of land previously sold and conveyed by the dedicator of such street or alley.

The alley under consideration is a private one; the lots adjacent to it were not sold with reference to any plat or map and the court so found. The court further found that the 10-foot alley, shown on Exhibit 10, was, on 20 September, 1909, and is now, a private alley extending from Liberty Street along the rear of the property of P. A. Thompson and others to Main Street; that the 15-foot alley, shown on the above exhibit, extends from the 10-foot alley to the Rominger Furniture Company building which extends from Liberty Street to Main Street, and that it occupied the same location on 20 September, 1909. Moreover, it is not contended that the defendants have ever had or ever will have any way of ingress and egress to the rear of their property over this 15-foot alley, except from and to the 10-foot alley leading from Liberty Street to Main Street. Their property fronts on Liberty Street; it is bound on the south by the 10-foot alley referred to above and on the east by the 15-foot alley which is the subject of this controversy.

The trial judge made a personal inspection of the premises by agreement of the parties and in company with the attorneys representing the plaintiffs and the defendants; and we do not think his findings in respect thereto had any prejudicial effect on the rights of the defendants, and their exceptions directed thereto are overruled.

In our opinion, the language used by George Roediger and wife, in granting the easement under consideration, indicates an intent on their part to limit the easement to one of ingress and egress to the respective properties conveyed. It will be noted that the grantee in each deed was given the right to use the 15-foot alley *situate on the east side of the described property and leading to the 10-foot alley in the rear of P. A. Thompson and others.*

We think the original grantors of the respective easements in the 15-foot alley realized that that part of the alley which lies to the north of Lots Nos. 5, 6, and 7 respectively, and which ended then and now in a *cul-de-sac,* was of no useful purpose to the respective grantees. Hence, they gave them an easement in that part of the alley situate on the east side of the property described in the respective deeds and to that portion of the alley leading from the respective properties to the 10-foot alley herein described. On the other hand, if it be conceded that reference to the 15-foot alley in the deeds was descriptive of the alley, rather than a

limitation on the grant, the defendants, as owners of the easement applicable to Lot No. 5 as shown on Exhibit 10, are entitled to exercise only such rights thereunder as may be necessary to a reasonable and proper enjoyment of their premises. 17 Am. Jur., Easements, section 96, page 993, *et seq.; Lidgerwood Estates, Inc., v. Public Service Electric & Gas Co.,* 113 N. J. Eq. 403, 167 A. 197; *Diamond State Telephone Co. v. Maclary,* 18 Del. Ch. 142, 156 A. 223; *Crosier v. Shack,* 213 Mass. 253, 100 N.E. 607, L.R.A. 1918A 260; *Horton v. Shacklett,* 20 Tenn. App. 72, 95 S.W. 2d 936. *Cf. Miller v. Weingart,* 317 Ill. 179, 147 N.E. 804, and *Wood v. Woodley,* 160 N.C. 17, 75 S.E. 719, 41 L.R.A. (N.S.) 1107.

In 28 C.J.S., Easements, section 78, page 753, in discussing easements by express grant, it is said: "While the grant of an easement carries with it whatever is essential to its enjoyment, nothing passes by implication as incident to the grant except what is reasonably necessary to its fair enjoyment." Likewise, "the creation of a private way does not take from the owner of the land over which it passes any portion of the fee of the soil. Regardless of how acquired, a private way carries with it by implication only such incidents as are necessary to its reasonable enjoyment." 17 Am. Jur., Easements, section 101, page 998, *et seq.,* and cited cases.

In *Stevens v. Headley,* 69 N. J. Eq. 533, 62 A. 887, the Headley Road led from an established street known as South Street and ended in a *cul-de-sac.* The Court held Headley Road was a private way. One Lidgerwood had purchased two lots on Headley Road located about 625 feet from where it entered South Street. The owners of all the lots at or near the dead end of Headley Road sold them together with other adjacent but undeveloped lands, consisting altogether of five acres, to Frederick W. Stevens, the plaintiff. Stevens undertook to close the road from its dead end to his northeast line, which line was a distance of approximately 250 feet southwest of Lidgerwood's lots and more than 1,000 feet from South Street. Lidgerwood, one of the defendants in the case, opposed the closing of any part of the road. Therefore, the identical question now before us was presented to the Court of Chancery of New Jersey. *Pitney, V. C.,* speaking for the Court, said: "I am unable to see how Lidgerwood will be injured in the least by the closing of this road, as proposed by the complainant. The case is not only bare of any proof that he bought with a view of making any use of or deriving any benefit from the existence of the road at the point in question or that he can possibly derive any benefit therefrom, but, on the contrary, it abundantly appears that the sole use that he expected to make of the road was to have access over it to South street. I have said that the object of an estoppel is to promote justice. To set it up and enforce it in this instance would, in my judgment, work a gross injustice on the Headleys and the complainant, since it would

simply give to Mr. Lidgerwood a right to injure them without benefiting himself or his land, except in so far as it gave him power to compel the parties to buy him off."

In the case of *Patrick v. Insurance Co.,* 176 N.C. 660, 97 S.E. 657, it is pointed out that when reading a deed or deeds and considering the attendant circumstances, it is not difficult to reach a satisfactory conclusion as to what the parties meant; we are required by the settled canon of construction to so interpret such deed or deeds as to ascertain and effectuate the intention of the parties. *Walker, J.,* speaking for the Court, said: "Their meaning, it is true, must be expressed in the instruments, but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe them consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results."

The defendants cite in support of their contentions the cases of *Aspinwall v. Enterprise Development Co.,* 165 Ga. 83, 140 S.E. 67, and *Frawley v. Forrest,* 310 Mass. 446, 38 N.E. 2d 631, 138 A.L.R. 999, and similar cases. The facts in these cases are clearly distinguishable from those on the present record.

After a careful consideration of the questions presented on this appeal, we are of the opinion that the court below reached the correct conclusion.

The judgment will be affirmed in so far as the present parties are concerned, but remanded for further proceedings with respect to additional parties as pointed out herein.

Remanded.

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

PAUL R. WORSLEY (EMPLOYEE) v. S. & W. RENDERING COMPANY, INC., (EMPLOYER)—BITUMINOUS CASUALTY CORPORATION (INSURER),

and

J. S. SUGG (EMPLOYEE) v. S. & W. RENDERING COMPANY, INC., (EMPLOYEE)—BITUMINOUS CASUALTY CORPORATION (INSURER).

(Filed 3 March, 1954.)

1. Master and Servant § 55c—

The procedure in appeals from the Industrial Commission to the Superior Court should conform substantially to that in appeals from subordinate courts when such appeals are restricted to questions of law by statute, and

appellant should file a bill of exceptions setting out specifically each error of law he asserts was committed by the Commission in making the award.

2. Master and Servant § 55d—

An exception to a finding of fact by the Industrial Commission on the ground that there was not sufficient competent evidence to support the same presents a question of law for the court.

3. Same—

On appeal from the Industrial Commission, the Superior Court is an appellate court without power to find facts, but is limited to review of alleged errors of law made by the Commission and presented for decision by exceptions duly entered, and each such exception should be ruled upon separately so as to preserve the right to further review.

4. Appeal and Error § 1—

On appeal from judgment of the Superior Court affirming or reversing an award of the Industrial Commission, the Supreme Court is limited to questions of law presented by assignments of error based on exceptions to specific rulings of the Superior Court.

5. Appeal and Error § 6c (1)—

Questions of law which appellant desires the Supreme Court to review, including questions of whether specific findings of fact are supported by the evidence, must be presented by exceptions duly taken and assignments of error duly made which point out specifically and distinctly the alleged error, and the Supreme Court, upon a broadside exception, will not make a voyage of discovery through the record to ascertain if error was committed at some time in some way during the progress of the trial.

6. Appeal and Error § 23—

An assignment of error must be bottomed on an exception duly entered in the record.

7. Same—

A single assignment of error to several rulings of the trial court must fail if any one of the rulings is correct.

8. Master and Servant § 55c—

Where appellants on appeal from the full Commission to the Superior Court give written notice of appeal for errors of law in the review of an award made by the Industrial Commission, but file no exception to any finding of fact or conclusion of law made by the full Commission, the appeal constitutes a broadside exception to the award, which does not challenge the sufficiency of the evidence to support the findings of fact of the Commission or any one of them, and the award must be affirmed if the Commission's conclusions of law are supported by facts found.

9. Appeal and Error § 6c (7)—

On appeal from judgment affirming the award of the Industrial Commission, the Supreme Court does not review the rulings and decisions of the Industrial Commission, but only the judgment of the Superior Court for errors of law properly presented, and it will not consider assignments of

error relating to alleged errors of law made by the Commission upon which the Superior Court has made no ruling.

APPEAL by defendants from *Bone, J.,* October Term, 1953, NASH.

Two workmen's compensation claims, consolidated for hearing.

The defendant S & W Rendering Company, Inc., hereinafter referred to as the employer, is a close corporation. Claimant Worsley owns fifty shares, claimant Sugg, forty-nine shares, and Sugg's wife, one share. Sugg is president, Worsley is secretary, and Mrs. Sugg is vice-president of the corporation. Worsley had been assigned duties other than those incident to his duties as secretary, and the employer furnished him an automobile to be used in the discharge of his duties.

On 13 September 1951 the claimants left Rocky Mount on the company automobile, primarily to go to Littleton to interview one Skinner, a supplier who had been irregular in his deliveries. They intended to and did make contact with other potential suppliers of raw material, leave advertising matter in various places to build good will for the corporation, and scout for doves.

On the return trip the claimants were involved in an automobile collision and both received serious injuries which incapacitated them, temporarily, from rendering any services whatever and by reason of which each incurred heavy hospital, nursing, and medical expenses. Each was paid his full salary during the time here involved and neither has suffered any loss of income during the period of his incapacity to earn wages or salary.

When the proceeding came on for hearing before the full Commission, on appeal from the hearing commissioner, the full Commission found the facts in detail and concluded as to each claimant that (1) he had suffered an injury by accident which arose out of and in the course of his employment, (2) he was at the time of the accident acting in the capacity of an employee and not as an executive, and (3) he is entitled to compensation for loss of wages notwithstanding he has been paid his full salary during the period of his incapacity. It thereupon made an award as to each claimant for compensation as well as for hospital and other expenses incurred.

In each case the defendant gave notice of appeal to the Superior Court "for errors in law in the review of an award made by the Full North Carolina Industrial Commission."

When the appeals came on for hearing in the court below, Bone, J., "being of the opinion that the conclusions of law based upon the findings of fact . . . are correct and lawful," affirmed the awards made by separate judgments—one on each claim.

The claimants entered no exception other than the exception to the judgments. Each claimant, having excepted to the judgment entered

on his claim, appealed, and the proceedings were consolidated for hearing in this Court. The two proceedings will be discussed as one case.

Battle, Winslow & Merrell for plaintiff appellees.
Ruark, Young & Moore for defendant appellants.

BARNHILL, C. J. While defendants in their application for a review by the full Commission of the award made by the hearing Commissioner assigned certain errors on the part of the hearing Commissioner, they entered no exception either to the findings of fact or conclusions of law made by the full Commission. Neither did they except to the award entered. They were content to give notice of their appeal to the Superior Court. *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129.

In appeals from the Industrial Commission to the Superior Court, the procedure should conform substantially to that in appeals from subordinate courts where, by statute, appeals are restricted to questions of law, or to the consideration of exceptions to the report of a referee. *Fox v. Mills, Inc.,* 225 N.C. 580, 35 S.E. 2d 869; *Anderson v. McRae,* 211 N.C. 197, 189 S.E. 639; *Gurganus v. McLawhorn,* 212 N.C. 397, 193 S.E. 844. The appellant should file a bill of exceptions setting out specifically each error of law he alleges was committed by the Commission in making the award. And of course an exception to a finding of fact by the Commission on the ground that there was no sufficient competent evidence to support the same presents a question of law for the court to decide. *Vause v. Equipment Co.,* 233 N.C. 88, 63 S.E. 2d 173.

When an appeal from the Industrial Commission comes on for hearing in the Superior Court the Judge before whom the appeal is heard sits as an appellate court. He can find no facts. Instead, his function is to review alleged errors of law made by the Commission and presented to him for review by the exceptions entered. He should overrule or sustain each and every exception addressed to alleged errors of law thus designated, so that the party aggrieved by his rulings may except thereto and present the question to this Court for review. *Fox v. Mills, Inc., supra.*

On an appeal to this Court from the judgment of the Superior Court affirming or reversing an award of the Industrial Commission, this Court is limited to a consideration of the contention of the appellant that there was error in matters of law at the hearing in the Superior Court. This contention must be presented to this Court by assignments of error based on exceptions to specific rulings of the Superior Court. *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609; *Smith v. Texas Co.,* 200 N.C. 39, 156 S.E. 160; *S. v. Parnell,* 214 N.C. 467, 199 S.E. 601; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *S. v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85; *Powell v. Daniel,* 236 N.C. 489, 73 S.E. 2d 143; *Thompson v. Thompson,*

235 N.C. 416, 70 S.E. 2d 495; *Weaver v. Morgan,* 232 N.C. 642, 61 S.E. 2d 916; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

The Supreme Court can review only such questions as are presented by exceptions duly taken and assignments of error duly made. *Wilson v. Charlotte,* 206 N.C. 856, 175 S.E. 306; *Bakery v. Insurance Co.,* 201 N.C. 816, 161 S.E. 554; *Clark v. Henderson,* 200 N.C. 86, 156 S.E. 144. And so, "it is elementary with us that if a litigant would invoke the right of review, he must point out specifically and distinctly the alleged error." *Thompson v. Thompson, supra; S. v. Dilliard, supra.* "Under the rules of practice in this Court, the questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the Superior Court." *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179.

A broadside assignment of error never serves to invite this Court to engage in a voyage of discovery by reviewing the record for the purpose of ascertaining whether the judge committed error at some time and in some way during the progress of the trial. *Rader v. Coach Co., supra; Arnold v. Trust Co.,* 218 N.C. 433, 11 S.E. 2d 307; *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921; *Vestal v. Vending Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427; *S. v. Jones,* 227 N.C. 402, 42 S.E. 2d 465. It is the duty of the appellant, not this Court, to choose those rulings of the court below which he desires to assail as erroneous.

It follows that when it is claimed that findings of fact made by the Industrial Commission and approved by the judge are not supported by competent evidence, the exceptions and assignments of error in relation thereto must specifically and distinctly point out the alleged error. *Rader v. Coach Co., supra; Clodfelter v. Gas Corp.,* 231 N.C. 343, 56 S.E. 2d 600; *Burnsville v. Boone, supra.*

"An assignment of error alone will not suffice. Only an assignment of error bottomed on an exception duly entered in the record will serve to present a question of law for this Court to decide." *S. v. Williams,* 235 N.C. 429, 70 S.E. 2d 1.

"Where there is a single assignment of error to several rulings of the trial court and one of them is correct, the assignment must fail." *Rader v. Coach Co., supra,* and cases cited.

When this record is reviewed in the light of these rules of appellate procedure, established by numerous decisions of this Court, it becomes manifest that neither the appeal from the Industrial Commission to the Superior Court nor the appeal from the Superior Court to this Court presents any substantial questions of law for review.

On their appeal from the hearing commissioner to the full Commission the defendants duly entered exceptions which presented to the full Commission the questions they now seek to have us decide. But on their appeal from the full Commission to the Superior Court they filed no

exception to any finding of fact or conclusion of law made by the full Commission. Neither did they except to the award entered. They were content to give written notice of their appeal to the Superior Court "for errors in law in the review of an award made by the Full North Carolina Industrial Commission . . ."

The appeal, being unsupported by any exceptions, amounted to nothing more than a general broadside exception to the decision and award of the Commission. It did not serve to challenge the sufficiency of the evidence to support the findings of fact of the Commission or any one of them. At most it carried up for review in the Superior Court the single question whether the facts found by the Commission support the award. *Greene v. Board of Education, supra,* and cases cited; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488; *In re Sams,* 236 N.C. 228, 72 S.E. 2d 421; *Parsons v. Swift & Co.,* 234 N.C. 580, 68 S.E. 2d 296; *Brown v. Truck Lines,* 227 N.C. 65, 40 S.E. 2d 476.

The full Commission found that (1) the claimants suffered injuries by accident which resulted in temporary total disability, (2) the relationship of employer-employee existed between them and the employer at the time of the accident, (3) the accident arose out of and in the course of their employment, and (4) the money paid the claimants during their disability was paid to them as executives and not as employees of the employer.

On this record the judge was bound by the facts thus found. He was not required to and did not review the testimony to determine whether there was any competent evidence to support them. That question was not presented to him for consideration and he properly refrained from making any ruling in respect thereto. He merely concluded that the conclusions of law were supported by the facts found and affirmed the award.

The only exception defendants entered at the hearing in the court below is an exception to the judgment. Their first four assignments of error are directed to alleged errors of law committed by the full Commission. But we do not review the rulings and decisions of the Industrial Commission. That is the prerogative of the Superior Courts. We review decisions of the Superior Court and then only when the alleged error is specifically presented by an assignment of error supported by an exception duly entered or, when the admissibility of evidence is involved, at least by an objection. Ch. 150, S.L. 1949; *Cathey v. Shope,* 238 N.C. 345.

The only assignment of error directed to the judgment entered in the court below is as follows:

"For that his Honor Walter J. Bone erred in concluding as a matter of law, or as a mixed question of law and fact, that either of the plaintiffs was entitled to recover compensation of the defendants or medical expenses from the defendants and in signing a judgment in conformity with

and confirming the award of compensation and medical expense theretofore issued by the North Carolina Industrial Commission and in signing the judgment appealed from."

Under this assignment the defendants discuss in their brief and seek to have us decide these two questions:

(1) "That claimants were executives and not employees, and, the insurance carrier not having been paid a premium on the salary of Worsley, it is not estopped to contend that he was an executive and thus outside the Act."

(2) "That even if it is held that Worsley was not excluded from the Act, he is not entitled to compensation payments since his employer continued to pay his full salary and he had no wage loss."

But the court below made no conclusions of law other than the conclusion that the facts found by the full Commission support its conclusions of law and sustain the award. Whether the claimants were acting as executives or employees at the time of their injuries and whether they have been paid full compensation as employees during the period of their disabilities are questions which were settled by the findings of fact made by the full Commission to which no exceptions were entered.

In the light of these facts we are compelled to affirm. However, it must be understood that our affirmance is exclusively on procedural grounds. Specifically, we do not hold or conclude that there is any competent evidence in the record sufficient to support any one of the three decisive findings of fact made by the Commission. If that question was presented to us, the result might be quite different. Since it is not presented, we withhold decision thereon. Hence this opinion is not to be deemed a precedent on any question other than the rules of appellate procedure upon which we base our decision.

In this connection we call attention to the fact that we do not in this opinion establish any new rule. We simply restate, at the risk of needless repetition, rules which have heretofore been established by numerous decisions of this Court, for the guidance of those who prosecute appeals to this Court, especially appeals in compensation cases originating before the Industrial Commission.

The judgment entered in the court below is

Affirmed.

J. W. ALEXANDER, JR., ADMINISTRATOR D. B. N. OF THE ESTATE OF MORRIS A. GALLOWAY, DECEASED, PETITIONER, v. ANNIE GALLOWAY, UNMARRIED, A. J. GALLOWAY AND WIFE, DORA GALLOWAY, J. HENRY GALLOWAY AND WIFE, LUNDY K. GALLOWAY, MARY GALLOWAY CALDWELL AND HUSBAND, SAM B. CALDWELL, NELLE GALLOWAY SMIDT AND HUSBAND, RUDOLPH SMIDT, O. F. GALLOWAY, UNMARRIED, ROGER A. GALLOWAY AND WIFE, ZULA S. GALLOWAY, T. I. GALLOWAY AND WIFE, ELIZABETH GALLOWAY, W. LAWSON GALLOWAY AND WIFE, BERTHA C. GALLOWAY, W. O. McGIBONY, TRUSTEE, THE FEDERAL LAND BANK OF COLUMBIA, AND FEDERAL FARM MORTGAGE CORPORATION, RESPONDENTS.

(Filed 3 March, 1954.)

1. **Descent and Distribution § 1: Executors and Administrators § 5—**

Upon the death of a person intestate, his real property descends directly to his heirs, and the sole right of the administrator therein is the right to sell the land to make assets to pay debts of the estate and the cost of administration provided the personalty is insufficient for that purpose.

2. **Executors and Administrators § 17—**

A secured creditor need not present his claim for allowance to an executor or administrator in order to preserve his right to enforce his security.

3. **Same—**

A secured creditor must present his claim to the executor or administrator if he seeks to obtain payment either in full or in part out of the general assets of the estate.

4. **Executors and Administrators § 13—**

Where petition by an administrator to sell lands to make assets to pay debts does not allege that certain secured creditors had filed claim to have the debts paid out of the general assets of the estate, the petition fails to make out a right to sell the lands to make assets for the purpose of paying such secured creditors.

5. **Same—**

The pendency of contested actions against the estate to recover upon an implied contract for services rendered decedent will not support a petition of the administrator to be allowed to sell lands of the estate to make assets to pay debts.

6. **Same: Pleadings § 28—**

In proceedings by the administrator to sell lands to make assets to pay debts of the estate, allegations of respondents denying the existence of any debt of the estate which would warrant the relief, *is held* to raise issues of fact precluding judgment on the pleadings in favor of petitioner.

7. **Appeal and Error § 20c—**

An order entered after the entry of the judgment appealed from and after case on appeal has been agreed to, is no part of the case on appeal and will not be considered.

8. Descent and Distribution § 12: Executors and Administrators § 13a—
Heirs at law have the right to pay off indebtednesses against the estate, including costs of administration, in order to prevent the sale of realty to make assets.

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

APPEAL by respondents T. I. Galloway and wife Elizabeth Galloway from *Sharp, Special J.*, Extra Civil Term March 1953 of MECKLENBURG.

This is a special proceeding brought by J. W. Alexander, Jr., Administrator *d. b. n.* of the Estate of Morris A. Galloway, deceased, to sell realty to make assets to pay debts of his intestate under G.S. N.C., 28-81 *et seq.*

The parts of the petition material for decision are summarized as follows: (1) Petitioner's intestate died 22 October 1939, survived by his widow, who died 5 March 1942, and by nine children, who were at the time of intestate's death, and now are, his sole heirs at law, and giving their names, addresses, and stating that all children and all the spouses of the children who are married are over 21 years of age: (2) The amount of debts now outstanding against the estate is approximately $8,537.94, exclusive of the charges of administration, and the said debts consist of (A) Judgment in favor of E. B. Solomon, rendered 2 June 1947 and docketed in Judgment Docket 12, p. 18, in the Clerk of the Superior Court's office for Mecklenburg County, which judgment with costs and interest is about $1,696.48; (B) Two promissory notes amounting to $9.300.00, face value, executed and delivered by the intestate and his wife, in 1934 to the Land Bank Commissioner, and each note secured by a separate deed of trust properly recorded conveying a 93 acre tract of land owned by petitioner's intestate and described in the petition as the First Tract, to the Federal Land Bank of Columbia, South Carolina, and on said two notes there is now due $6,841.46, with interest on $5,415.00 from 1 May 1952, these two notes and two deeds of trust have been transferred by operation of law to the Federal Farm Mortgage Corporation, which is now the owner and holder of said indebtedness; (C) An action pending in the Superior Court of Mecklenburg County brought by Annie Galloway, a daughter of petitioner's intestate, against the estate, in which she alleges the estate is indebted to her in the sum of $4,625.00 under an implied contract with petitioner's intestate for services rendered to him and his wife; (D) A similar action pending in the same court brought by Nelle Galloway, a daughter of petitioner's intestate, on the same ground to recover $8,375.00 from the estate; (E) Whatever North Carolina inheritance tax may be due has not been determined: (3) The personal property of petitioner's intestate since his death has never been more than a few hundred dollars in value, and at present the estate has no personal property, and therefore it is necessary to sell realty to create assets to pay

debts of the estate and costs of administration, which have not been determined: (4) That petitioner's intestate at his death owned two tracts of land—the first tract consisting of 93 acres and worth about $26,390.00, which tract is encumbered by the two deeds of trust set forth above; and a second tract worth about $1,170.00, which is unencumbered. Wherefore, the petitioner prayed that judgment be entered authorizing him to sell the first tract of land, or so much thereof as may be necessary, free of encumbrances, to make assets to pay debts of the estate.

None of the respondents filed answers, except T. I. Galloway and wife and W. O. McGibony, Trustee, The Federal Land Bank of Columbia and Federal Farm Mortgage Corporation. On 4 September 1952 and on 15 September 1952 the Clerk of the Superior Court of Mecklenburg County entered judgments by default against the respondents who did not answer adjudging "the petitioner is entitled to the relief prayed in the petition."

T. I. Galloway and his wife demurred to the petition. The demurrer on 25 September 1952 was adjudged sham and frivolous by the Clerk of the Superior Court, who further adjudged that all respondents have been properly served with process and are subject to the jurisdiction of the court; that the answer of McGibony, Trustee, The Federal Land Bank of Columbia and Federal Farm Mortgage Corporation does not raise any issue of fact or deny any allegations of the petition, but prays that if the relief sought in the petition be granted, that the deeds of trust held by them be declared first liens on the purchase price; that the petitioner is entitled to the relief prayed and directed him to sell the tract of land described as the First Tract. The respondents T. I. Galloway and wife excepted, and appealed to the judge.

The Superior Court Judge presiding over the 29 September 1952 Extra Civil Term of Court entered judgment affirming the Clerk's judgment overruling the demurrer, but reversing the Clerk's judgment adjudging that the demurrer was sham and frivolous and reversing the Clerk's judgment upon the pleadings, and allowed T. I. Galloway and wife to file answer.

The relevant parts of their answer follow: (1) The amount of the judgment in favor of Solomon is less than $1,600.00. (In this Court T. I. Galloway and wife on 10 November 1953 filed a motion that they be permitted to amend their answer so as to allege that the judgment in favor of Solomon has been paid in full, and attached to their motion a letter from the Clerk of the Superior Court of Mecklenburg County to their counsel of record stating that the judgment in favor of Solomon recorded in Book 12, p. 18, has been canceled in full on 5 November 1953; which motion was allowed by us): (2) That the petitioner has denied the claims of Annie Galloway and Nelle Galloway, that neither of said

claims has been reduced to judgment and that said claims are not at this time a debt of the estate: (3) There is no final inheritance tax liability by the heirs of M. A. Galloway to the State of North Carolina: (4) Immediately after the funeral of M. A. Galloway his nine children and their husbands and wives met and entered into an agreement whereby the respondent T. I. Galloway, his brother O. F. Galloway, and his sisters Annie and Nelle Galloway would live at the home, would assume the support of their mother and would pay the entire indebtedness of the estate in return for which they were to be deeded the entire property of the estate: (5) At the time of the agreement the estate was indebted on the aforesaid two deeds of trust in the amount of $10,300.00, which indebtedness was long overdue, the funeral expenses were unpaid, there were no funds of the estate to pay these debts and the two tracts of land described in the petition were worth less than the secured debts: (6) That M. A. Galloway's widow at his death was paralyzed and unable to care for herself and T. I. Galloway, O. F. Galloway and Annie and Nelle Galloway lived at the home and cared for her needs until her death 5 March 1942—all working and contributing to the expenses: (7) These four paid the funeral expenses: (8) Shortly after M. A. Galloway's death the Federal Land Bank instituted foreclosure proceedings: (9) T. I. Galloway, his brother O. F. Galloway and his sisters Annie and Nelle Galloway caused the Land Bank to withdraw its foreclosure proceedings by agreeing to pay on its indebtedness $100.00 a month until they had paid $2,000.00, and then paying $900.00 a year until the two deeds of trust had been paid in full; that these payments have been made by them as agreed and there is now due on the notes secured by the deeds of trust less than $7,000.00, and these four heirs now stand ready, willing and able to pay all the costs of administration and any other debts of the estate which may be determined: (9) The second tract of land described in the petition is worth $1,200.00, and is sufficient to pay the debts of the estate, and if not, these respondents are able and willing to pay any deficiency, and that it is not to the best interests of the estate to sell the first tract of land.

On 26 February 1953 the Clerk of the Superior Court of Mecklenburg County, on motion of the petitioner, entered judgment upon the pleadings authorizing and directing the petitioner to sell the first tract of land described in the petition, or so much thereof as may be necessary, to pay the debts of the estate—said land to be sold free and clear of encumbrances. The respondents T. I. Galloway and wife excepted and appealed to the Superior Court Judge.

The Judge of the Superior Court entered judgment affirming the Clerk's judgment in all respects.

Whereupon the respondents T. I. Galloway and wife excepted and appealed to the Supreme Court.

Covington & Lobdell for plaintiff, appellee.
Mullen, Holland & Cooke for defendants, appellants.

PARKER, J. At the regular Civil May Term 1948 of Mecklenburg County the presiding judge rendered an order affirming the Clerk's order removing T. I. Galloway and O. F. Galloway as administrators of the estate of M. A. Galloway. Upon appeal to this Court error was found and the case was remanded to the lower court. *In re Estate of Galloway*, 229 N.C. 547, 50 S.E. 2d 563.

When a person dies intestate his real property descends direct to his heirs at law. The sole right the administrator can have in his intestate's realty is the right to subject it to the payment of the debts of his intestate and the costs of administration, when the personalty is insufficient for that purpose. *James v. Withers*, 126 N.C. 715, 36 S.E. 178; *Parker v. Porter*, 208 N.C. 31, 179 S.E. 28; *In re Estate of Galloway, supra.*

In this jurisdiction, and according to the weight of authority elsewhere, it is held that a secured creditor need not present his claim for allowance to an executor or administrator in order to preserve his right to enforce his security. *Dennis v. Redmond*, 210 N.C. 780, 188 S.E. 807; 34 C.J.S., Executors and Administrators, Sec. 403; 21 Am. Jur., Executors and Administrators, Sec. 360.

Where a secured creditor seeks to obtain payment either in full or of a deficiency out of the general assets of the estate and thus to enforce his claim against property not covered by his lien or held by him as security, presentation of his claim is necessary to preserve the right to payment out of the general assets of the estate. *Dennis v. Redmond, supra;* 34 C.J.S., *ibid.*, Sec. 403; 21 Am. Jur., *ibid.*, Sec. 360 and Sec. 367.

Petitioner's intestate died 22 October 1939. The petition alleges the appointment of T. I. Galloway and O. F. Galloway as administrators of the estate of M. A. Galloway by the Clerk of the Superior Court of Mecklenburg County on 6 March 1940, their removal on 24 April, 1952, and the appointment of the petitioner as administrator *d. b. n.* on 6 May 1952.

The petition does not allege the presentation of a claim by the past or present owner and holder of the notes secured by the deeds of trust for allowance to the administrators, or any of them. Apparently the lien-holder was satisfied with its security, or considered the estate in such shape after M. A. Galloway's death that the presentation of his claim would be useless. Therefore, it would seem under the allegations of the petition the petitioner is under no obligation to pay these secured liens.

The petition alleges pendency of a civil action in the Superior Court of Mecklenburg County brought by Annie Galloway against the estate in which she alleges the estate is indebted to her in a certain amount under an implied contract with petitioner's intestate for services rendered to him and his wife, and a similar action brought by Nelle Galloway pending in the same court on the same grounds to recover a certain amount from the estate. The respondents in their answer allege that the petitioner has denied both claims. Neither of said actions has been reduced to judgment. To sell land to pay debts, the existence of valid and enforceable debts of the estate must be shown. These two actions are contested. This is not sufficient to sell land to create assets to pay debts. 34 C.J.S., Executors and Administrators, Sec. 539; see also *Robinson v. McDowell,* 133 N.C. 182, 45 S.E. 545. In the oral argument counsel for appellee stated that judgments of nonsuit had been entered in both actions.

The petition alleges whatever North Carolina inheritance tax may be due has not been determined. The respondents deny this, and allege there is no inheritance tax liability.

The petition alleges these debts against the estate: (1) A judgment in favor of E. B. Solomon, which the respondents allege has been paid in full; (2) two actions pending against the estate, which the counsel for the petitioner admitted in the oral argument had been nonsuited; (3) a possible inheritance tax liability to the estate which the respondents deny; (4) and the secured claims.

Issues of fact are raised by the pleadings as to whether there is a valid and enforceable debt against the estate, and the court was without power to enter judgment upon the pleadings. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384; *Crew v. Crew,* 236 N.C. 528, 73 S.E. 2d 309.

After the argument in this special proceeding, attorneys for the appellee filed in the office of the Clerk of the Supreme Court what purports to be an allowance of counsel fees against the estate. This purported order is no part of the case on appeal and is not considered. Further, it appears that the case on appeal was agreed to by counsel of record on 20 April 1953, and the purported order allowing counsel fees was entered 1 May 1953.

The heirs at law of an estate have a right to pay off the indebtedness, if any, of the estate so as to take the realty of the estate free from any claims of the administrator. *James v. Withers, supra; Parker v. Porter, supra; Chambers v. Byers,* 214 N.C. 373, 199 S.E. 398; 34 C.J.S., Executors and Administrators, p. 502. The petitioner alleges the costs of administration have not been determined. When determined the heirs shall be allowed a reasonable time to pay the costs of administration before the realty is ordered to be sold. *James v. Withers, supra.*

The judgment below is set aside, and this proceeding is remanded to the end that the issues of fact raised by the pleadings may be submitted to a jury for decision. *Erickson v. Starling, supra.*

Error.

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

EDGEWOOD KNOLL APARTMENTS, INC., v. M. P. BRASWELL, SR., AND M. P. BRASWELL, JR., DOING BUSINESS AS M. P. BRASWELL AND SON, AND UNITED STATES CASUALTY COMPANY, A CORPORATION.

(Filed 17 March, 1954.)

1. **Appeal and Error § 29—**

Assignments of error not brought forward in the brief and in support of which no reason or argument is stated or authority cited, are deemed abandoned. Rules of Practice in the Supreme Court No. 28.

2. **Appeal and Error § 39e—**

The refusal to admit in evidence portions of a complaint filed by the same plaintiff in another action against a different defendant relating to damages sustained by plaintiff will not be held for prejudicial error when it appears that defendants had the benefit of evidence showing that such other suit was pending and what was alleged in the paragraph in dispute, and that the trial court explicitly limited plaintiff's recovery to such damages as were caused by defendants' breach of the contract in suit and excluded any damages relating to the breach of another contract by the defendant in the other suit.

3. **Principal and Agent § 7a—**

In order for defendant to show that the contract in suit had been modified by plaintiff's agent, he must show that such person was in fact the agent of plaintiff, and also that the agent was clothed with actual authority to vary the terms of the contract, or apparent authority to do so, as being within the scope of his duties.

4. **Same: Corporations § 20—**

The vice-president of a corporation owning lands was also the president of a company contracting to erect a building thereon. Evidence that he authorized a subcontractor to substitute material in the performance of the subcontract *held* properly excluded as against the owner, when the other evidence discloses that the scope of his duties in respect to the project was that of principal contractor and was not that of representative of the owner.

5. **Trial § 31e—**

The mere fact that the court takes longer in stating the contentions of plaintiff than those of defendants is not ground for a new trial, the test

being whether the court gives equal stress to the contentions of the respective parties.

6. Appeal and Error § 6c (5)—

An exception to the charge which fails to point out in what particular the alleged error was committed is ineffectual as a broadside exception.

7. Appeal and Error § 6c (6)—

Objection to the statement of contentions must be brought to the court's attention in apt time in order for an exception thereto to be considered on appeal.

8. Principal and Surety § 8—

A contractor's performance bond must be read in the light of the contract it is given to secure, and the extent of the engagement entered into by the surety is to be measured by the terms of the principal's agreement.

9. Same—

A provision in a subcontractor's performance bond that suit thereon should not be maintained unless brought within 12 months from the completion of the contract relates to the full performance of the contract by both parties and not to the date of the completion of the work, and the contract being bilateral, it is not completed until the project has been completed and approved, and final payment made thereunder, and action brought within 12 months thereafter is not barred.

10. Same—

Where, in an action on a subcontractor's performance bond, the surety's answer admits that plaintiff owner forwarded to the surety a copy of a letter to the subcontractor alleging certain defaults by the subcontractor in the performance of the work, the surety's motion to nonsuit on the ground that the owner did not give it written notice of default is properly denied.

11. Appeal and Error § 7—

Motion of appellant in the Supreme Court to be allowed to amend its pleading will not be allowed when upon the facts of the record the ends of justice will not be promoted by the granting of the motion.

12. Principal and Surety § 8: Assignments § 2—

Where the performance bond of a subcontractor provides that it should not be assignable without the written consent of the surety, the introduction in evidence of the bond with a written assignment by the owner of all its right, title and interest in the bond to the bank as security, together with testimony of an officer of the bank that the bank handled the construction loan but that it had no interest in the bond, and that the surety had not consented to the assignment, *is held* to disclose that the assignment was not completed, and the surety's motion to nonsuit the owner's action on the ground that it was not the real party in interest is properly denied.

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

APPEAL by defendants separately from *Phillips, J.*, at May Civil Term, 1953, of BUNCOMBE, to Fall Term, 1953, of Supreme Court,—carried over to Spring Term, 1954.

Civil action instituted 29 November, 1951, to recover for breach of contract for the faithful performance of which defendants executed bond.

These facts appear from the pleadings to be uncontroverted:

1. On 19 October, 1949, the plaintiff herein, a corporation organized and existing under and by virtue of the laws of the State of North Carolina, with its principal office and place of business at Asheville, North Carolina, as party of the first part, and the defendants herein, M. P. Braswell, Sr., and M. P. Braswell, Jr., doing business as M. P. Braswell and Son, of Charlotte, North Carolina, hereinafter referred to as Braswell, as party of the second part, "in consideration of the promises and . . . of the sum of $10.00 each to the other paid," entered into a written contract by the terms of which Braswell agreed to furnish all labor, materials and equipment to do the lathing and plastering in all buildings in a 166-unit apartment project then being erected by plaintiff on the western margin of Merrimon Avenue in Asheville.

2. The material parts of the contract so entered into between plaintiff and Braswell are as follows: (1) Braswell agreed to install and complete the lathing and plastering "in the manner provided in the plans and specifications of said project prepared by William G. Lyles, *et al.*, Architects of Columbia, South Carolina, for FHA Project No. 153-42029, dated September 28, 1949." (2) Braswell to furnish to plaintiff "a satisfactory surety performance bond . . ."; (4) The contract price for the entire lathing and plastering was $79,200.00, payable as specified, the balance to be paid "when apartment project has been completed and approved and final disbursements made under the FHA loan"; . . . (7) Braswell "to secure written permission to substitute or to make variations from the plans and specifications from William G. Lyles, Bissett, Carlisle and Wolfe, Architects,—copies of such . . . to be sent" to plaintiff; . . . (10) Braswell guarantees in the signing of the contract, "that the lathing and plastering shall be installed in a thorough manner by experienced labor and shall be approved by the FHA project inspector; and shall be responsible for defects which develop due to faulty workmanship and shall replace any such defects due to faulty workmanship during the period of one year from date of final acceptance of the work at no charge of the party of the first part. Final acceptance and payment in full for such work will not waive any of this guarantee."

3. On 26 October, 1949, defendants Braswell, as principal, and defendant United States Casualty Company, a corporation of the State of New York, called the surety, as surety, executed to plaintiff as obligee, a bond in the sum of $79,426.00, as the maximum liability thereunder, for the payment of which "the principal and the surety bound themselves, their—and each of their—heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents." And the bond recites

that: "Whereas the principal has entered into a written contract dated October 19th, 1949, with the obligee for furnishing *all* labor, materials, and equipment necessary to do the lathing and plastering in the buildings of a 166-unit apartment project on the western margin of Merrimon Avenue, Asheville, North Carolina, in accordance with certain plans and specifications prepared by William G. Lyles, *et al.*, Architect; which contract, plans and specifications are hereby made a part hereof." And the bond provides: That "the condition of this obligation is such, that if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal faithfully to perform said contract, then this obligation shall be void; otherwise to remain in full force and effect: *Provided,* however, that this Bond is executed and accepted upon the following express conditions, each of which shall be a condition precedent to any right of recovery hereon, anything in the contract to the contrary notwithstanding": (Pertinent portions are as follows):

"First: That in the event of any default on the part of the Principal, a written statement of the particular facts showing such default and the date thereof shall be delivered to the surety by registered mail, at its office in the city of New York, New York, promptly and in any event within ten (10) days after the Obligee or his representatives, or the Architect, if any, shall learn of such default . . ."

"Second: That no suit, action or proceeding for recovery hereunder by reason of any default whatever shall be had or maintained on this Bond unless the same shall be brought within twelve (12) months from the date fixed in such contract for its completion, or if no date is fixed in said contract for its completion, then within twelve (12) months from the date of actual completion of said contract or within twelve (12) months from the date of default, whichever shall have first occurred." . . .

"Sixth. That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of anyone other than the Obligee herein named; and that the obligation of the surety is, and shall be construed strictly as one of suretyship only; that this Bond shall be executed by the Principal before delivery, and that it shall not, nor shall any interest therein or right of action thereon, be assigned without the prior written consent of the surety, duly executed by its president or one of its Vice-Presidents and the corporate seal affixed thereto, duly attested by its secretary or one of its assistant secretaries."

4. After the execution of the contract and the bond, as aforesaid, Braswell undertook to carry out the terms of the contract, and pursuant thereto, furnished certain labor, materials and equipment, and performed said work in connection with the construction of said apartment units as in said contract more particularly referred to.

And plaintiff in its complaint makes these allegations: In paragraph "7": That Braswell "breached the terms of said contract in that they failed and neglected to do the work in accordance with the plans and specifications as in said contract provided, and used certain materials contrary to the terms and provisions of said contract and plans and specifications, and failed to properly perform the work in the manner as therein provided for, as a result of which the work was defective and faulty."

In paragraph "8": That by reason of Braswell "failing to use the proper materials as specified in the plans in the bathrooms, which they plastered in said apartment units, the said walls, tile and plaster thereon were left in such condition that the tile has fallen off said walls and away from said plaster in practically all of said bathrooms, and plaster cracks have developed throughout the entire units and to such an extent that said bathrooms, in many instances, cannot be used, and the buildings have been greatly damaged by the use of said improper and faulty workmanship."

In paragraph "9": "That the work performed by" Braswell, "under the terms of said contract, is of such condition and character, due to the use of improper materials and faulty workmanship, that the project inspector of the Federal Housing Administration has refused to approve the same, in express violation of paragraph 10 of the contract above referred to."

In paragraph "10": "That as a result of the breach of said contract and the failure to perform the same on the part of said" Braswell, "this plaintiff has been damaged in the sum of $25,000.00." (Amended to read $75,000.00.)

In paragraph "11": "That written notice has been given to defendants" Braswell, "and to the defendant United States Casualty Company of the default by the said" Braswell, "in the performance of said contract, and demand has been made upon said defendants for the performance and completion of said contract, but that said defendants, and both of them, have failed, neglected and refused to take any steps whatever in making said contract good or paying the loss resulting therefrom."

And in paragraph "12": "That by reason of the matters and things hereinbefore set forth, the defendants are indebted to the plaintiff, under the terms of said surety bond, as above referred to in the sum of $25,000.00." (Amended to read $75,000.00.)

Upon these allegations, in connection with the uncontroverted facts, hereinabove set forth, plaintiff prays judgment.

The defendants Braswell answering deny the allegations of the complaint above set forth, except they aver "that pursuant to certain circumstances as hereinafter more fully set forth, certain materials were substi-

tuted for materials specified by the referred to contract, plans and specifications"; and they admit in paragraph 11 of their answer "that the plaintiff wrote a letter to these defendants alleging certain defaults by them in the performance of the contract in question . . ."

And for a further answer and defense defendants Braswell say: "1. . . . That the general contractor on such work was Robinson Brothers, Inc., the president of which was Z. B. Robinson, who likewise was an officer of the plaintiff herein, to wit, its Vice-President; that all the construction work in connection with the erection of the apartments of the plaintiff was done under the express direction and control of Robinson Brothers, Inc., and particularly its duly authorized officer and agent, said Z. B. Robinson; that in lathing and plastering the bathrooms of the 166-apartment units in question, these defendants, by and with the consent and approval of the general contractor and of the plaintiff herein, and . . . of the project inspector of the Federal Housing Administration, supplied vermiculite as aggregate in lieu of sand for the base coat of plaster; that the material so installed was installed by careful and prudent workmanship rendering it completely adaptable for covering over by tile or other final wall-surfacing material; that in the event any tile or other final wall-surfacing material has proved faulty, such defects are solely attributable to the workmanship of the contractor or contractors installing such tile or other final wall-surfacing material and in no part due to any default on the part of these defendants.

"2. That the project . . . was finally completed on or about August 15, 1950, was on or about such date approved by the project inspector of the Federal Housing Administration, and at or about such time the work of these defendants was accepted by the plaintiff.

"3. That pursuant to the terms of paragraph 10 of the . . . contract, these defendants by reason of the lapse of more than one year from the date of completion, approval and acceptance of the work performed by them under such contract are relieved of all further and additional responsibility to the plaintiff on such account, and that by reason of the knowledge and approval of the plaintiff and its general contractor of the substitution of plastering materials, waived any provisions contained in the said contract, plans and specifications prohibiting the substitution of materials, and accordingly are now estopped from making any claims or demands against these defendants on account of such substitution."

And the defendant, United States Casualty Company, answering, denies in material aspect the allegations of the complaint above set forth, but it admits in paragraph 11 of its answer that the plaintiff forwarded to it a copy of a letter addressed to defendants Braswell, alleging certain defaults by them in the performance of the contract in question.

And, for a further answer and defense, the defendant United States Casualty Company invokes the provisions of paragraph 2 of the contract bond entered into 26 October, 1949, and avers that by the terms thereof the bond had expired, by reason of the lapse of time specified as constituting its effective term, prior to the institution of this action by plaintiff; and, further avers, that although the contract between plaintiff and Braswell specified no date for the completion of such contract, the contract was in fact completed on or about August 15, 1950, and the work thereunder approved by the Federal Housing Administration and accepted by the plaintiff on or about said date; "that summons having issued in this action on November 29, 1951, more than twelve months had elapsed from the date of the alleged default by the defendants" Braswell, and, "accordingly, any action against this defendant is barred."

Upon trial in Superior Court, plaintiff offered in evidence (1) the original summons issued 29 November, 1951, and served 30 November, 1951; (2) portions of the pleadings covering the uncontroverted facts above set forth; (3) the admissions shown in the answers; (4) a copy of the contract of 19 October, 1949, and (5) a copy of the bond of 26 October, 1949. Portions of both the contract and the bond are hereinabove set out.

Plaintiff also offered in evidence plans and specifications bearing date 28 September, 1949, identified as Exhibit P-6 and as those referred to in the contract of 19 October, 1949, between plaintiff and Braswell. Pertinent portions of specifications shown in this Exhibit P-6 are these:

"12.07 *Plastering:* a. Materials: (1) Materials shall conform to the following specifications of the American Society of Testing Material: Sand—C35-39: Finished hydrated lime—C206-46T; Gypsum plaster—C28-40; Keene's Cement—C61-40; Sandplaster—C28-40; i. Application of Finish . . . (4) Keene's Cement Finish shall be applied over a thoroughly set base coat which is nearly, but not quite dry, scratched in thoroughly, laid on well, doubled back and filled out to a true even surface. The thickness shall be from 1/16″ to 1/8″. The finish shall be allowed to dry a few minutes, and then it shall be well troweled with water to a smooth finish, free from cat faces and other blemishes. . . .

"12.09. Alternate. If desired, vermiculite may be used as aggregate in lieu of sand for the base coat of plaster in all spaces except baths . . ."

And plaintiff further offered evidence tending to support the allegations of its complaint as hereinabove set forth. Sufficient and appropriate portions of the evidence will be quoted hereinafter in treating of assignments of error.

Defendants, reserving exceptions to the denials of their respective motions for judgment as of nonsuit made when plaintiff first rested its case, offered evidence tending in part to support their denial of allegations of

the complaint, and of averments otherwise made in their respective answers are hereinabove shown. And while defendants Braswell admit the use by them of vermiculite base in the bathrooms, they do not offer any evidence that they "secured written permission to substitute or to make variations from the plans and specifications" from the architects as agreed in the contract.

Motions of defendants respectively made at the close of all the evidence for judgment as of nonsuit were overruled, and each of them excepted.

Defendants in apt time tendered thirteen issues. And each of them excepts "to the refusal of the court to submit each and every of the issues as tendered . . . and not submitted by the court." Exceptions Nos. 56 and 57.

These issues, as settled by the court, were submitted to, and answered by the jury as shown:

"1. Did the plaintiff and the defendants Braswell, trading and doing business as M. P. Braswell and Son, enter into the contract for construction work at Edgewood Knoll Apartments, Inc., as alleged in the complaint? Answer: Yes.

"2. Did the defendants M. P. Braswell, Sr., and M. P. Braswell, Jr., trading and doing business as M. P. Braswell and Son, breach the contract entered into with the plaintiff, as alleged in the complaint? Answer: Yes.

"3. Did the defendants M. P. Braswell and Son and United States Casualty Company execute and deliver the bond dated the 26th day of October, 1949, to the plaintiff, as alleged in the complaint? Answer: Yes.

"4. Did the plaintiff notify the defendant United States Casualty Company in writing of the alleged default of the said M. P. Braswell, Sr., and M. P. Braswell, Jr., trading and doing business as M. P. Braswell and Son, as required by the bond? Answer: Yes.

"5. Did the plaintiff commence this action within twelve months from the date of the last payment by the plaintiff to M. P. Braswell and Son, as alleged in the complaint? Answer: Yes.

"6. What amount of damages, if any, is the plaintiff entitled to recover of the defendants? Answer: $30,000.00."

Defendant United States Casualty Company objected, and excepts to the issues as settled and submitted by the court. Exception No. 58.

Defendant Casualty Company moved the court that defendant be allowed a credit of $7,960.00 on the verdict as rendered by the jury on the sixth issue "for that from all the evidence, and as a matter of law, it appears that said amount of $7,960.00 represented that proportion of the value of all work performed or materials furnished in the prosecution by the defendants Braswell and Son of their construction contract with the plaintiff, and represents the amount which the plaintiff, as obligee in the

bond, should have retained, but did not, until the complete performance by the defendants Braswell and Son of all the terms, covenants and conditions of said building contract on their part, to be performed, the plaintiff, as obligee under the bond, having paid said amount to the defendants Braswell and Son as principals under the bond, in violation of Condition Fourth, appearing in said bond." The motion was denied. Exception No. 116.

And Porter B. Byrum as Trustee in Bankruptcy of M. P. Braswell, Sr., and M. P. Braswell, Jr., doing business as M. P. Braswell and Son, having been made a party defendant and appellant and authorized to prosecute this appeal to the Supreme Court of North Carolina, by order of the *Chief Justice* of the Supreme Court, adopted as his own the case on appeal as tendered by defendants Braswell, and joined in stipulation that the case on appeal shown in the record is the case on appeal as settled by the judge.

Judgment was signed and entered in favor of plaintiff against the defendants in accordance with the verdict of the jury.

To the signing and entry of the judgment the defendants respectively object and except, and appeal to the Supreme Court and assign error.

Harkins, Van Winkle, Walton & Buck for plaintiff, appellee.

Chas. G. Lee, Jr., and Cochran, McCleneghan & Miller for defendants Braswell and Byrum, appellants.

Meekins, Packer & Roberts for defendant Casualty Company, appellant.

WINBORNE, J. The record and cases on appeal of the defendants, now before the Court, comprise three hundred sixty-one pages, of which eighty-one are devoted to a grouping of assignments of error. The appellants Braswell set forth sixty-eight assignments of error based upon exceptions taken during the course of the trial, and to the charge as given to the jury, to denial of request for instruction and to failure to charge as required by G.S. 1-180 as amended, and in brief filed preserve twenty-eight of them. The remaining forty are not mentioned in the brief, nor is any reason or argument stated, or authority cited in support of them and, hence, are deemed to be abandoned. See Rule 28 of the Rules of Practice in the Supreme Court of North Carolina, 221 N.C. 544 at 562, which is uniformly applied on appeals to this Court. And appellant United States Casualty Company sets forth one hundred seven assignments of error based upon exceptions taken during the course of the trial, and to the charge as given to the jury, to denial of request for instruction, and to failure to charge as required by G.S. 1-180, as amended, and in brief filed preserves fifty of them. The other fifty-seven are not men-

tioned in the brief, nor is any reason or argument stated, or authority cited in support of them, and, hence, under the above rule, are deemed to be abandoned.

APPEAL OF DEFENDANTS BRASWELL:

At the outset it may be noted that though the defendants Braswell entered exceptions to the denial of their motions aptly made for judgment as of nonsuit, their assignments of error based thereon are among those abandoned as above recited. Indeed, a reading of the evidence offered by plaintiff, including admissions by Braswell in their answer, and orally upon the trial, all as shown in the record and case on appeal, discloses sufficient evidence to take the case to the jury upon the issues raised by the pleadings, and to support a verdict against them for breach of contract as alleged in the complaint.

However, Braswell does present for consideration assignments of error which merit express consideration.

I. Assignments of error Numbers 3, 4, 25, 26 and 27, based upon exceptions Numbers 5, 6, 40, 41 and 42, relate to the refusal of the court to permit Braswell "to introduce in evidence the complaint and portions thereof in an action pending in Superior Court of Buncombe County" brought by plaintiff here against Robinson Brothers Contractors, Inc., and St. Paul Mercury Indemnity Company of St. Paul, defendants. In respect thereto, the case on appeal discloses that Richard L. Coleman, President of plaintiff corporation, under cross-examination by counsel for Braswell, testified that such a suit was pending, and he identified the complaint, verified by him, and filed in court in such action. Then he was asked about the language of paragraph 9 of that complaint. Objection thereto was sustained.

But, after argument in the absence of the jury, and the jury having returned, the witness answered: "Yes, I alleged in the complaint and swore to it in paragraph 9": Then follows what purports to be the wording of paragraph 9. The witness, explaining, said: "When I say buildings, I mean the buildings constructed and erected by Robinson Brothers . . . the same apartment project that I am referring to in this suit against Braswell."

And when Braswell was introducing evidence the complaint so identified by the President of plaintiff corporation was offered, and, upon objection, excluded. Likewise the caption of the complaint and paragraph 9 were offered, and upon objection, were excluded.

The point is made that the complaint, and paragraph 9 so offered, would disclose that plaintiff is there charging that Robinson Brothers, the general contractors, failed to construct the buildings in accordance with the plans, resulting in the roofs of the buildings leaking, and thereby

damaging the plaster and other parts of the inside of the buildings. But defendant has the benefit of the fact that a suit against Robinson Brothers was pending, and of what is alleged in paragraph 9 of the complaint therein.

True, it is a rule of evidence that if a party in one action admits a fact in his pleading, such admission is usable against him as an evidential admission in another action between the same or different parties. See Stansbury's North Carolina Evidence, Sec. 177; also *Grant v. Gooch,* 105 N.C. 278, 11 S.E. 571; *Middleton v. Hunter,* 195 N.C. 418, 142 S.E. 325; *Hotel Corp. v. Dixon,* 196 N.C. 265, 145 S.E. 244; *Odom v. Palmer,* 209 N.C. 93, 182 S.E. 741. However, it does not appear here that the matters to which these assignments relate are violative of this rule.

Indeed, it is not deemed that defendant has been prejudiced by the rulings made by the trial court. For a reading of the charge discloses that the trial court expressly instructed the jury "that the plaintiff can recover only such damages as it has proven by the greater weight of the evidence was caused by the breach of the contract on the part of the defendants Braswell, and for none other."

II. Assignments of error Numbers 29, 30, 31, 32, 33 and 34, based upon exceptions Numbers 44, 45, 46, 47, 48 and 49 respectively, are directed to the refusal of the court to permit defendants Braswell to introduce evidence tending to show that Zeb V. Robinson, Vice-President of the plaintiff, agreed that vermiculite might be used in lieu of sand-plaster in the bathrooms.

While the evidence discloses that Robinson was President of Robinson Brothers Contractors, who had the general contract with plaintiff for the construction of the project here involved, and that he was Vice-President of the plaintiff corporation, appellee contends, and we hold properly so, that there is no evidence that Robinson was an agent of plaintiff for the purpose of varying, and clothed with authority to vary the terms of the written contract between plaintiff and Braswell.

In order for such evidence to be competent, defendants were required to show two things, first, that Robinson was an agent of plaintiff corporation for this purpose, and, second, that he was clothed with authority to vary the terms of the contract. See *Biggs v. Ins. Co.,* 88 N.C. 141; *Ferguson v. Mfg. Co.,* 118 N.C. 946, 24 S.E. 710; *Land Co. v. Crawford,* 120 N.C. 347, 27 S.E. 31; *Willis v. R. R.,* 120 N.C. 508, 26 S.E. 784; *Bank v. Hay,* 143 N.C. 326, 55 S.E. 811; *Floars v. Ins. Co.,* 144 N.C. 232, 56 S.E. 915; *Thompson v. Power Co.,* 154 N.C. 13, 69 S.E. 756; *Hall v. Presnell,* 157 N.C. 290, 72 S.E. 985; *Bank v. McEwen,* 160 N.C. 414, 76 S.E. 222; *Wynn v. Grant,* 166 N.C. 39, 81 S.E. 949; *Jones v. Ins. Co.,* 216 N.C. 300, 4 S.E. 2d 848.

The thread of decision in these cases is aptly expressed by *Ruffin, J.*, in the *Biggs case, supra*, in this fashion: "When one deals with an agent it behooves him to ascertain correctly the extent of his authority and power to contract. Under any other rule, every principal would be at the mercy of his agent, however carefully he might limit his authority." To this the writer added: "It is true the power and authority of an agent may always be safely judged by the nature of his business and will be deemed to be at least equal to the scope of his duties." Testing the power and authority of Robinson by the nature of his business, the evidence discloses that even though he was Vice-President of plaintiff corporation, the nature of his business in respect to the project at Edgewood Knoll was that of principal contractor under contract with plaintiff corporation for the construction of the 166-building units. The scope of his duties in this respect is not that of representative of the principal. Rather the evidence tends to show that the President of plaintiff was its representative.

III. Assignments of error Nos. 65 and 66, based on Exceptions Nos. 113 and 114, are directed to alleged failure of the trial court "to state in a plain and clear manner the evidence in the case and declare and explain the law arising thereon as required by G.S. 1-180."

This statute G.S. 1-180 was rewritten by Chapter 107, Session Laws 1949, and as so rewritten declares in pertinent part that the judge, in giving a charge to the petit jury, "shall declare and explain the law arising on the evidence given in the case." But "he shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action . . ."

In the case in hand the exceptions taken are, No. 113, that "the court failed to sum up for the jury an array of the facts arising on the evidence the circumstances under which the jury should have, as a matter of law, answered the second issue No"; and No. 114, that "the court failed to state the contentions of the defendants Braswell with the impartiality as required by law, and emphasized the contentions of the plaintiff throughout the charge with a heavy over-balance in the plaintiff's favor, and to the prejudice and injury of the defendants Braswell."

The chief argument advanced is that the case on appeal discloses that the trial judge devoted more words, as shown by the number of printed lines, in stating contentions of plaintiff than in stating those of defendants. This is not the test. It is a question whether the judge gives "equal stress" to the contentions of the plaintiff and of the defendant. Otherwise than as above stated appellants Braswell fail to point out wherein the judge failed to give "equal stress." The exceptions are broadside, and, too, objection was not made at the time, and will not now be entertained.

See *Poniros v. Teer Co.*, 236 N.C. 145, 72 S.E. 2d 9. Indeed, the record fails to disclose that unequal stress, or emphasis was displayed by the trial judge in stating the contentions of the respective parties.

Defendants Braswell also assign as error portions of the charge as given, refusal to charge as requested, the exclusion of evidence offered, denial of motion to strike answer of witness, and denial of formal motions. These have been considered, and express treatment of each is deemed unnecessary since no prejudicial error is made to appear.

Therefore, on the Braswell appeal, we find

No error.

APPEAL OF UNITED STATES CASUALTY COMPANY:

The appellant Casualty Company brings forward among others its assignments of error Numbers 39 and 54, based upon exceptions Numbers 39 and 55 taken to denial of its motions aptly made for judgment as of nonsuit.

While it does not debate or question the sufficiency of the evidence to support a finding that defendants Braswell breached their contract in the respects alleged in the complaint, U. S. Casualty Company advances three grounds upon which it contends that it is entitled to judgment as of nonsuit.

It is contended (1) that plaintiff's action was not commenced within the time limited in the second condition of the bond, as pleaded in its further answer and defense; (2) that plaintiff did not give notice as required in the first condition of the bond; and (3) that plaintiff is not the real party in interest, as disclosed by its own evidence. These are considered *seriatim.*

In this connection it is appropriate to bear in mind: (1) That in the premises of the bond, after referring to the contract between plaintiff and Braswell and its terms, all as quoted hereinbefore in statement of uncontroverted facts, it is recited that "the contract, plans and specifications are hereby made a part hereof," that is, of the bond; and (2) that the only affirmative defense pleaded by the United States Casualty Company, in its further answer and defense, is that, under the provisions of paragraph two of the conditions of the bond, this action is barred for that it was not instituted within the time limited.

I. And this leads to consideration of the first ground above stated upon which appellant, defendant surety, relies for judgment as of nonsuit.

In *Builders Corp. v. Casualty Co.*, 236 N.C. 513, 73 S.E. 2d 155, this Court restated the well established principle in respect of a contractor's performance bond in this manner: "The obligation of the bond is to be read in the light of the contract it is given to secure. The extent of the

engagement entered into by the surety is to be measured by the terms of the principal's agreement."

Bearing this principle in mind, it is true that in the second condition of the bond it is provided that "no suit, action or proceeding for recovery hereunder by reason of any default whatever shall be had and maintained on this bond unless the same shall be brought within twelve (12) months from the date fixed in said contract for its completion . . ." And the appellee contends, and we hold rightly so, the contract between plaintiff and defendants Braswell, made a part of the bond, fixed the date for the completion of the contract, rather than the date of the completion of the work,—that the contract is bilateral, and is not completed until fully performed by both parties. It is pointed out that paragraph 4 of the contract provides that "the balance of the contract price shall be paid when apartment project has been completed and approved and final disbursements made under the FHA loan," and that the date when this occurred is made certain by the evidence offered upon the trial.

The evidence offered by plaintiff, and admissions made by Braswell upon the witness stand tend to show that this date was 19 December, 1950. As to this, the witness Charles L. Hayes, inspector for FHA, testified: "The date of the final report was on December 4, as I recall, 1950. On the basis of that report, the funds were disbursed in connection with the loan." And all the evidence tends to show, and appellant Casualty Company, in brief filed on this appeal, states that on 19 December, 1950, final payment was made by the plaintiff to the defendants Braswell in the amount of $7,960. And this action was instituted within one year thereafter, to wit, 29 November, 1951.

Authorities cited by appellant, Casualty Company, have been considered, but in the light of the interpretation of the record and case on appeal, error in this respect is not made to appear.

II. As to the second ground advanced by the appellant, defendant Casualty Company, that is, that plaintiff did not give notice as required in the first condition of the bond: It is appropriate to direct attention (a) to paragraph eleven of plaintiff's complaint, wherein it is alleged that written notice had been given to defendants Braswell "and to the defendant United States Casualty Company" of the default by Braswell in the performance of the contract, and (b) to the answer thereto by defendant United States Casualty Company, wherein it admits that plaintiff forwarded to it a copy of a letter addressed to defendants Braswell alleging certain defaults by them in the performance of the contract in question. And in brief filed in this Court the appellant, United States Casualty Company, concedes (1) that in its answer it did not plead as a defense failure to give notice, and (2) that the requirement of notice is a condi-

tion attached to the remedy, and ordinarily the breach of such condition is one to be pleaded by the defendant as a matter of defense.

Be that as it may, it appears that in the trial below the burden of proof as to the fourth issue, relating to the plaintiff giving notice, was put upon plaintiff—and the jury answered the issue in the affirmative—and there is sufficient evidence to support the finding.

In this connection it is significant that appellant, the defendant United States Casualty Company, moves in this Court to be permitted to amend paragraph 11 of its answer to the complaint by pleading as a defense failure of plaintiff to give timely and proper notice. However, this Court, in the light of the factual situation in hand, being of opinion that the ends of justice did not require it, nor would the ends of justice be promoted by the granting of the motion, denies the motion.

III. And as to the third ground for nonsuit as contended for by the appellant, defendant Casualty Company, that plaintiff is not the real party in interest as disclosed by its own evidence:

In this connection, plaintiff alleges in paragraph 5 of the complaint in respect to the bond executed by defendants Braswell as principal, and United States Casualty Company, as surety, "that a copy of said bond is hereto attached and marked 'Plaintiff's Exhibit A' and made a part hereof the same as if expressly copied herein." The U. S. Casualty Company, answering, avers that "The allegations contained in paragraph 5 are admitted." And the bond provides "that it shall not, nor shall any interest therein or right of action thereon be assigned without the prior written consent of the surety, duly executed . . ." as indicated. The copy of the bond so attached bears no endorsement or assignment.

Then in the course of the cross-examination of the President of plaintiff corporation, recalled to the witness stand, counsel for defendant, surety, inquired as to the whereabouts of the original bond, and sought to show that the bond had been assigned. The President testified that he had tried to get the surety to agree to an assignment, but it would not agree to do so; and that then he took the bond to Greensboro, N. C., and delivered it to the bank along with other papers in connection with a loan for the FHA project in question.

Following this a subpoena *duces tecum* was issued for a named vice-president, or a named assistant cashier, of Security National Bank, Greensboro, N. C., to be and appear at court at certain time to testify in behalf of defendant United States Casualty Company, and to have with him then and there before said court Standard Contract Bond, in question, "in connection with FHA 608 Project," etc. Pursuant thereto A. T. Preyer, Jr., assistant cashier of Security National Bank of Greensboro, N. C., appeared, and produced the bond that was in the bank in Greensboro. The endorsement on the back of it reads: "For valuable considera-

tion, we hereby assign all our right, title and interest in and to the within bond to Security National Bank of Greensboro and Federal Housing Commissioner. This 7th day of November, 1949. Edgewood Knoll Apartments, Inc. by Richard L. Coleman, President. Attest: F. B. Short, Secretary," with the corporate seal affixed.

And on cross-examination the witness testified: "This bond was brought down here to our bank at the time the Edgewood Knoll Apartments borrowed a sum of money through the bank for construction loan. We handled the construction loan. We have no interest whatever in this bond. We never received any assignment of the United States Casualty Company to this assignment to my knowledge, any consent to an assignment."

Manifestly, the assignment of the bond was not completed. Plaintiff had no right to assign it, without the consent of defendant surety,—and the consent was not given. Hence the point made is without merit.

The appellant, Casualty Company, brings forward in its brief assignments of error based upon exceptions relating to admission, and to exclusion of evidence, in many aspects, to the settlement and submission of the issues, to the refusal to submit issues tendered, to portions of the charge as given, to the failure of the court to charge as required by G.S. 1-180, to the failure of the court to charge as requested, to denial of motion to allow this appellant credit for last payment of $7,960.00 made by plaintiff to defendant 19 December, 1950, and to denial of formal motions. All these have been duly considered, and express treatment of each would serve only to unduly extend this opinion, since no prejudicial error in them is made to appear.

Therefore, on the Casualty Company's appeal we find no error.

On appeal of Braswell—No error.

On appeal of U. S. Casualty Company—No error.

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

STATE OF NORTH CAROLINA v. W. E. FELTON.

(Filed 17 March, 1954.)

1. Constitutional Law § 10b—

While every presumption is to be indulged in favor of the constitutionality of a statute, it is the duty of the Court to declare an act unconstitutional when it clearly transgresses the authority vested in the General Assembly by the Constitution.

2. **Constitutional Law § 11 (1)—**

The General Assembly has the authority, in the exercise of the police power, to enact legislation making gambling a criminal offense.

3. **Gambling § 1—**

The General Assembly, by the enactment of general statutes has made gambling in its variety of guises and disguises illegal in this State.

4. **Same—**

The betting on races of any sort is illegal under the general laws of North Carolina. G.S. 16-1, 16-2, and 14-292.

5. **Same—**

Pari-mutuel machines or appliances, or systems, of the kind employed and used at recognized racing courses, provide a system for betting on the outcome of races.

6. **Constitutional Law § 17—**

Municipalities and counties may be granted exclusive emoluments or privileges in consideration of public service. Constitution of North Carolina, Article I, Sec. 7.

7. **Constitutional Law §§ 17, 18: Gambling § 1—Chapter 541, Session Laws of 1949, held unconstitutional.**

Chapter 541, Session Laws of 1949, which provides for the establishment of a racing commission for a single county of the State, with self-perpetuating membership, and which provides that such commission may grant to a single person, firm or corporation a franchise, irrevocable for 25 years, to operate a race track and a system of pari-mutuel betting on dog races, and seeks to legalize pari-mutuel betting on dog races in the county only within the racing course operated by the holder of the franchise, in consideration of the payment of a percentage of the gross receipts, *is held* unconstitutional as being in violation of the Constitution of North Carolina. Article I, Sec. 7, proscribing exclusive or separate emoluments or privileges except in consideration of public services, and Article I, Sec. 31, proscribing monopolies and perpetuities.

8. **Same—**

The exclusive privilege granted to the holder of a franchise to operate a dog race track under the provisions of Chapter 541, Session Laws of 1949, is not in consideration of public service within the meaning of Article I, Sec. 7, of the Constitution of North Carolina.

9. **Same—**

The operator of a dog race track under a franchise granted under the provisions of Chapter 541. Session Laws of 1949, is not in effect an employee of the county so as to constitute its operation of the track operation by the county for the county's benefit, since the county's control is limited and its right to participate in the gross revenues is fixed by the statute.

10. **Gambling § 7—**

The bill of information in this case is held to charge the offense of placing wagers and bets on dog races under the pari-mutuel system by defend-

ant, and defendant's motion to quash on the ground that the bill does not express the charge in a plain, intelligible and explicit manner was properly denied. G.S. 15-153.

APPEAL by State of North Carolina from *Hubbard, Special Judge*, 7 September, 1953, Term of CURRITUCK.

Criminal action wherein the defendant was arrested on a warrant issued from the Recorder's Court of Currituck County under date of 31 August, 1953, upon an affidavit charging in substance the matters alleged in the bill of information referred to below. Upon the call of the case in the Recorder's Court, the defendant demanded a jury trial; and thereupon, in accordance with the applicable statutes, the case was transferred to the Currituck County Superior Court for trial. In the Superior Court, at 7 September, 1953, Term, the defendant and his counsel, in accordance with G.S. 15-140, waived in writing the finding and return into court of a bill of indictment and agreed that the defendant be tried on a bill of information worded as follows:

"BILL OF INFORMATION

"STATE OF NORTH CAROLINA—In the SUPERIOR COURT CURRITUCK COUNTY—September 1953 Term

"Walter W. Cohoon, Solicitor of the First Judicial District, upon information and belief, alleges, that W. E. Felton in Currituck County, State aforesaid, on August 29, 1953, with force and arms, did unlawfully and wilfully place wagers and bets on a game of chance, to-wit: dog races conducted by the Carolina-Virginia Racing Association, Inc., said Association operating under franchise or privilege from the Currituck County Racing Commission pursuant to the provisions of Chapter 541 of the 1949 Session Laws of North Carolina, in which money was bet and wagered, in that the said W. E. Felton did, on the night of the 29th day of August 1953, bet and wager upon the chance and outcome of dog races conducted by the said Association by the purchase of numbered pari-mutuel tickets sold to various and sundry persons and issued by the said Association upon the grounds of said Association, which said Association paid off to the holders of winning tickets in amounts dependent upon the form of the wager on the race and on the position of the dogs at the finish of the race against the form of the Statute in such cases made and provided and against the peace and dignity of the State.

"WALTER W. COHOON,
"Solicitor."

(Counsel representing Currituck County, and other counsel representing the Currituck County Racing Commission, were permitted to appear

as *amici curiae* in the proceedings before Judge Hubbard and also by brief and oral argument in this Court.)

Before pleading, the defendant moved "to quash said Bill of Information for that by reason of Chapter 541, Session Laws of 1949, the bill failed to charge the commission of any crime or misdemeanor." Judge Hubbard allowed the motion to quash, announcing at the time that he was "holding said Act of 1949 to be constitutional." The State of North Carolina duly excepted to this ruling and appealed from the judgment predicated thereon as permitted by G.S. 15-179 (3).

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

E. R. Woodard for defendant, appellee.

Lucas, Rand & Rose, John B. McMullan, Wilton F. Walker, Jr., and John G. Dawson as amici curiae.

BOBBITT, J. As stated in the brief filed here by counsel appearing as *amici curiae:* "Thus it is seen that the case has come to this Court in such form as to test the constitutionality of the aforesaid Chapter 541 of the Session Laws of 1949. That is the single question involved."

In undertaking our task of decision, we are mindful that "in considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity." *Stacy, C. J.,* in *S. v. Lueders,* 214 N.C. 558 (561), 200 S.E. 22. We are mindful also that "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." *Parker, J.,* in *Wilson v. High Point,* 238 N.C. 14 (23), 76 S.E. 2d 546.

A better perspective as to the applicable principles of law may be obtained by an analysis of the statute here under consideration, to wit, Ch. 541, 1949 Session Laws of North Carolina, entitled, "AN ACT CREATING THE CURRITUCK COUNTY RACING COMMISSION FOR THE COUNTY OF CURRITUCK IN THE STATE OF NORTH CAROLINA AND PROVIDING FOR AN ELECTION THEREON," hereinafter referred to as the 1949 Currituck Act.

Section 1 creates the Currituck County Racing Commission, consisting of three members. The original members are to be appointed by the Member of the House of Representatives from Currituck County, for one, two and three years, respectively; and at the expiration of the first term of each member his successor is to be appointed for a term of four years by the Member of the House of Representatives from Currituck County *and* the two members whose terms have not expired, and so consecutively thereafter. Any vacancy shall be filled by the Member of the House of Representatives from Currituck County *and* the remaining members of the Commission. The salary of each commissioner is to be fixed by a

committee of three, consisting of the Chairman of the Commission, the Chairman of the Board of County Commissioners and the Chairman of the Board of Education. A vote of any two of the three shall control. The Commission is directed to organize, elect a chairman, a vice-chairman and a secretary-treasurer. The secretary-treasurer is required to give a $5,000.00 bond and to receive . . . disburse . . . the money of the Commission "by authority of the commission" and "under the provisions of this Act."

Section 2 vests in the Commission full authority "to grant to any person, firm, association, or corporation a franchise or privilege, franchises or privileges, for a term of years not exceeding twenty-five years, to construct, lease, maintain, operate, and own, or to exercise either of said privileges, a race course or driving park or appropriate facilities for pacing, running, and trotting races for horses or dogs, or for both horses and dogs, in the manner herein set forth." Section 2 (a) provides that no franchise or privilege shall be granted unless and until the Commission is satisfied as to the financial ability and responsibility of "such person, firm, association, or corporation to comply with all the reasonable rules and regulations of the commission and to otherwise operate in accordance with such reasonable rules and regulations as the commission may from time to time prescribe." Section 2 (b) provides that the holder of such franchise or privilege shall pay to the Commission "for each day or part of day during which races or racing is conducted a sum equivalent to ten per cent (10%) of the gross receipts derived from *all* sources or operations connected with or incident to the operation of such races or racing conducted during such day or part of day." The maximum payment to be required is $5,000.00 per day, "in addition to any tax as may be now or hereafter fixed by law on such gross receipts."

Section 3 provides that the net proceeds of the Commission's operations shall be disbursed by it as follows: 50% to the Currituck County School Fund; 25% to the Currituck County Welfare Fund; and 25% to the Currituck County General Fund.

Section 4 provides that under a franchise or privilege so granted, the holder thereof is fully authorized to acquire property, construct facilities, etc., for "pacing, running, and trotting races for horses or dogs, or for both horses and dogs, on property owned or leased" by it. Then follows the provision which provoked the controversy, to wit: "Such person, firm, association, or corporation is hereby expressly granted full authority and power to own or lease, maintain, and operate on the premises aforesaid what are generally known as 'Pari Mutuel Machines or Appliances' or 'Pari Mutuel Systems' of the kind employed and in use at recognized racing courses in America: *Provided, however,* that said Pari Mutuel Machines and Appliances, or Pari Mutuel Systems, shall be operated only

within the enclosure of said race course or driving park or appropriate facilities for the aforesaid operations and only on days or parts of days when races or racing is being therein conducted. And it shall be legal for any and all persons twenty-one (21) years of age legally within the enclosure aforesaid to participate in the operation of or become a patron of said Pari Mutuel Machines and Appliances, or Pari Mutuel Systems."

Section 4 (a) provides that so long as the holder of the franchise, etc., complies with "the reasonable terms and provisions" thereof and "with such other reasonable rules and regulations as the said commission may promulgate from time to time and as may be set forth in its contracts," the franchise is irrevocable; "*Provided, however,* that no franchise granted to any person, firm, association, or corporation by said commission shall be assigned or transferred to any other person, firm, association, or corporation without the written consent of the commission; *nor shall the commission grant a franchise or privilege to more than one person, firm, association, or corporation, it being the intention and purpose that the operations shall be under a single management.*" (Emphasis added.)

Section 5 provides that the Commission is authorized to adopt reasonable rules and regulations from time to time which it may "deem necessary to properly carry out the intentions of this Act." The violation thereof by the holder of the franchise or by any of its officers, agents or employees is declared to be a misdemeanor.

Section 6 provides that the Board of Commissioners of Currituck County shall order a special election, at which the qualified voters of Currituck County shall vote "For" or "Against" creating the Currituck County Racing Commission. The Act shall be in full force and effect if the majority of the qualified voters who vote at such election shall vote in favor of creating the Currituck County Racing Commission; otherwise, the Act shall not be in effect. However, should the voters fail to vote in favor of the creation of the Commission, other elections may be called by the Board of County Commissioners, successively, but not until six (6) months from the preceding election have expired; and if at any subsequent election so called and held, "a majority of the qualified voters who vote at said election shall vote in favor of establishing the Currituck County Racing Commission, then and in such event this Act shall be in full force and effect."

Section 7 provides that "All laws and clauses of laws in conflict with this Act are hereby repealed."

Section 8 provides that "This Act shall be in full force and effect from and after its ratification." It was ratified 25 March, 1949.

The Bill of Information alleges explicitly that the betting on dog races in which the defendant participated was the pari-mutuel system conducted

by the Carolina-Virginia Racing Association, Inc., under franchise from the Currituck County Racing Commission, pursuant to the provisions of the 1949 Currituck Act. The defendant's position is that the franchise granted to the Carolina-Virginia Racing Association, Inc., pursuant to the statute under consideration, authorizes it to operate a pari-mutuel system of betting on dog races at its dog race track; therefore, one who gambles at such dog race track by participating in such legalized pari-mutuel system is not guilty of a criminal offense under the general laws of North Carolina relating to gambling.

While gambling *per se* is not a crime at common law, the General Assembly, in the exercise of the police power, can enact legislation making gambling a criminal offense. A general statement bearing upon this subject is set forth in 24 Am. Jur. 399 (Gaming and Prize Contests, Sec. 3), viz.:

"3. Generally.—It is well settled that the police power of the state may be exerted to preserve and protect the public morals. It may regulate or prohibit any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it or to encourage idleness instead of habits of industry. Whether gambling, in the various modes in which it is practiced, is demoralizing in its tendencies and, therefore, an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure is no longer an open question. Gambling is injurious to the morals and welfare of the people, *and it is not only within the scope of the state's police power to suppress gambling in all its forms, but its duty to do so.* In enacting legislation for this purpose, there is no invasion of constitutional rights, unless the restraints imposed are unreasonable. The courts are not concerned with the necessity for, or the wisdom of, a legislative enactment forbidding gaming transactions and wagers, provided it is a valid exercise of the police power." (Emphasis added.)

If this be a duty, the General Assembly, which largely controls the public policy of the State, has performed such duty well by the enactment of general statutes on the subject of gambling in its variety of guises and disguises, *e.g.*, lotteries, punch boards, slot machines, betting on games of chance; and the violation of such a statute is a misdemeanor. Art. 37, Ch. 14, of the General Statutes. Construing the statutes presently designated G.S. 16-1, G.S. 16-2, and G.S. 14-292, it was directly held in *S. v. Brown*, 221 N.C. 301, 20 S.E. 2d 286, that "betting on horse racing, or, in fact, on any other sort of race," is an offense against the criminal law; and there the defendants were found guilty of maintaining a nuisance by using premises for the purposes of handling bets and wagers on the out-

come of horse races run outside of North Carolina. What is said by *Seawell, J.*, in *S. v. Brown, supra,* is equally applicable to dog races.

The statute under consideration purports to authorize the grant of a franchise for the maintenance and operation on the dog race track premises what are generally known as "Pari Mutuel Machines or Appliances" or "Pari Mutuel Systems" of the kind employed and in use at recognized racing courses in America; *provided, however,* that said Pari Mutuel Machines and Appliances, or Pari Mutuel Systems, shall be operated only within the enclosure of said race course and only on days or parts of days when races are being conducted. It will be observed that the statute does not speak of "betting" or "wagering" or "gambling." Therefore, unless "Pari Mutuel Machines or Appliances" or "Pari Mutuel Systems" of the kind employed and in use at recognized racing courses in America *ex vi termini* constitute a scheme or system whereby the participants place bets on the outcome of the races in a manner such as to constitute gambling under the general laws the 1949 Currituck Act affords no color of protection whatever to the Carolina-Virginia Racing Association, Inc., or to the defendant. We accept the view, upon which the defendant must rely, that a pari-mutuel system is well recognized as a system having no other purpose than that of providing the facilities by means of tickets, machines, etc., for placing bets, calculating odds, determining winnings, if any, whereby participants bet on the outcome of the races. *S. v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851, 226 N.W. 705; *Pompano Horse Club v. State,* 93 Fla. 415, 111 So. 801, 52 A.L.R. 51; *Donovan v. Eastern Racing Asso.*, 324 Mass. 393, 86 N.E. 2d 903 (906); *City of Portland v. Duntley,* 185 Or. 365, 203 P. 2d 640 (644); *Feeney v. Eastern Racing Asso., Inc.*, 303 Mass. 602, 22 N.E. 2d 259; *Wise v. Delaware Steeple-chase & Race Asso.*, 18 A. 2d 419 (Del.); *Utah State Fair Asso. v. Green*, 68 Utah 251, 249 P. 1016 (1028).

In *City of Portland v. Duntley, supra,* we find this succinct, but comprehensive, descriptive statement of a pari-mutuel system: "The wagering system termed in the statute 'mutual' or 'mutuel' is what is commonly known as the 'pari mutuel' system, under which 'odds' are determined by the *quantum* of the bets placed on the several entries and those whose wagers are placed on the winning horse share the total stake, less a fixed percentage to the track management, in proportion to their respective contributions or wagers."

In our view the constitutionality of the 1949 Currituck Act must be considered in relation to these provisions of our fundamental law, set out under the caption "Declaration of Rights," of the Constitution of North Carolina, viz.:

Article I, Section 7, which provides: "Exclusive emoluments, etc.—No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

Article I, Section 31, which provides: "Perpetuities, etc.—Perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed."

In *S. v. Fowler,* 193 N.C. 290, 136 S.E. 709, the defendant was indicted and convicted in Polk County under the general criminal statutes of the State relating to the possession of intoxicating liquor and was sentenced to imprisonment under such statutes. He appealed on the ground that, while the sentence was authorized by the general criminal statutes on the subject, a public-local act, applicable only to Polk and four other named counties, provided that upon conviction for the first offense the maximum punishment was a fine of $100.00. In holding that the public-local act was in violation of Art. I, sec. 7, and in sustaining the sentence under the general criminal statutes, the Court, speaking through *Justice Adams,* said: "There are constitutions which provide in express terms that general laws shall have a uniform operation; ours embodies the principle in the following language: 'No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.' Const., Art. I, sec. 7. This provision, we think, is a guaranty that every valid enactment of a general law applicable to the whole State shall operate uniformly upon persons and property, giving to all under like circumstances equal protection and security and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions. 6 R.C.L. 369, sec. 364; 36 Cyc. 992; 12 C.J. 1187, sec. 955; 16 C.J. 1352, sec. 3189; *S. v. Bargus,* 53 A.S.R. (Ohio) 628; *Jones v. R. R.,* 121 A.S.R. (Ill.) 313; Cooley's Const. Lim., 554 *et seq.*"

By way of answer to the contention that this was a valid exercise of the police power of the State, *Justice Adams* said: "But the statute under consideration cannot be sustained on the ground that it was enacted in the exercise of the police power. The question is whether it shall supersede 'the law of the land,'—the general public law which was designed to operate without exception or partiality throughout the State. It is needful to remember that the indictment was drafted under the general law, and that the decisive question is whether offenders in the five counties referred to may lawfully be exempted from the punishment prescribed by the general law; whether they shall be subject only to a fine when the offenders in ninety-five other counties may be punished by imprisonment. In our judgment this part of Section 2 is neither equal protection of the laws nor the protection of equal laws (*Connolly v. Pipe Co., supra*); it is the grant of a special exemption from punishment or an exclusive or separate privilege which is forbidden by the cited provision. This conclusion is upheld in principle in our own decisions and in those of other jurisdictions."

In *Plott v. Ferguson,* 202 N.C. 446, 163 S.E. 688, an act relating only to Buncombe County and providing that certain provisions should be deemed written into private construction contract bonds executed in that county by corporate sureties different from those required by the general laws relating to the subject, was held unconstitutional on the ground that it conferred special privileges on residents of Buncombe County and imposed on corporate sureties in respect of such bonds executed there obligations not imposed in other counties or on individuals. In *Plott v. Ferguson, supra,* the Court expressly followed the reasoning in *S. v. Fowler, supra,* particularly in relation to Art. I, Sec. 7. In the opinion of *Clarkson, J.,* in *Plott v. Ferguson, supra,* we note the following: "In 6 R.C.L., part sec. 437, at p. 441-2, the law is thus stated: 'Due process of law and the equivalent phrase, law of the land, have frequently been defined to mean a general and public law operating equally on all persons in like circumstances, and not a partial or private law affecting the rights of a particular individual or class of individuals, in a way in which the same rights of other persons are not affected.'

"Cooley's Const. Lim., Vol. 1, note, under Powers Legislative Department May Exercise, p. 261: 'Gambling cannot be made a crime everywhere except "within the limits or enclosure of a regular race course." *S. v. Walsh,* 136 Mo. 400, 37 S.W. 1112, 35 L.R.A. 231; see, also, *S. v. Elizabeth,* 56 N.J.L., 28 Atl. 51, 23 L.R.A. 525.'"

These cases, *S. v. Fowler, supra,* and *Plott v. Ferguson, supra,* are cited with approval in later cases, including *Hendrix v. R. R.,* 202 N.C. 579, 163 S.E. 752; *Edgerton v. Hood,* 205 N.C. 816, 172 S.E. 481; *S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854; *S. v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860; *Duncan v. Charlotte,* 234 N.C. 86, 66 S.E. 2d 22.

The defendant cites as in conflict with *S. v. Fowler, supra,* and decisions based thereon, certain earlier decisions, including *S. v. Muse,* 20 N.C. 463; *S. v. Joyner,* 81 N.C. 534; *S. v. Stovall,* 103 N.C. 416, 8 S.E. 900; *S. v. Moore,* 104 N.C. 714, 10 S.E. 143; *S. v. Barringer,* 110 N.C. 525, 14 S.E. 781; *S. v. Barrett,* 138 N.C. 630, 50 S.E. 506; *Brunswick-Balke-Collender Co. v. Mecklenburg County,* 181 N.C. 386, 107 S.E. 317.

We have not overlooked the decision of the Supreme Court of the United States, decided 11 January, 1954, in *Salsbury v. Maryland,* 346 U.S. 545, 98 L. Ed. (Advance p. 207), 74 S. Ct. 280, involving a Maryland statute authorizing the admission in prosecutions for gambling misdemeanors in certain named counties of evidence illegally obtained, *i.e.,* without a search warrant, when such evidence was inadmissible under general state law in the other counties of the state. The Court rejected the defendant's claim that distinction based on county areas are necessarily so unreasonable as to deprive him of the equal protection of the laws guaranteed by the Federal Constitution. It was stated by *Mr. Jus-*

tice Burton: "The Equal Protection Clause relates to equality between persons as such rather than between areas." Hence, *so far as the Equal Protection Clause of the Federal Constitution* was concerned, it was held permissible for the General Assembly of Maryland, being authorized to do so under the Maryand Constitution, to enact such local legislation.

It would seem that *S. v. Fowler, supra,* and *Plott v. Ferguson, supra,* would constitute ample authority for a decision that the 1949 Currituck Act is unconstitutional. However, in view of the earlier decisions cited by defendant as being in conflict and noted above, it is urged that the decisions in *S. v. Fowler, supra,* and *Plott v. Ferguson, supra,* should be reconsidered. There appears to be no necessity for doing so in relation to the statute now under consideration.

It should be noted that grants of well-defined monopolistic rights to regulated *quasi*-public utilities, including the power of eminent domain, under the public law, are upheld as being "in consideration of public service" within the terms of Art. I, sec. 7, of the Constitution of North Carolina. Indeed, such corporations have become known as "public service corporations." *Utilities Com. v. State* and *Utilities Com. v. Telegraph Co., ante,* 333, 343, 80 S.E. 2d 133; *Power Co. v. Power Co.,* 175 N.C. 668, 96 S.E. 99; *Reid v. R. R.,* 162 N.C. 355, 78 S.E. 306; *In re Spease Ferry,* 138 N.C. 219, 50 S.E. 625. Within the exception, *a fortiori,* is a municipal corporation, an agency of the State, created for the benefit of the public. *Kornegay v. Goldsboro,* 180 N.C. 441, 451, 105 S.E. 187.

It should be noted that it has been held consistently that acts of the General Assembly giving special privileges to private corporations by way of charter provisions or otherwise violate the provisions of Art. I, sec. 7. *Motley v. Finishing Co.,* 124 N.C. 232, 32 S.E. 555; *Motley v. Warehouse Co.,* 122 N.C. 347, 30 S.E. 3; *Meroney v. Building & Loan Asso.,* 116 N.C. 882, 21 S.E. 924; *Rowland v. Building & Loan Asso.,* 116 N.C. 877, 22 S.E. 8; *Staton v. R. R.,* 111 N.C. 278, 16 S.E. 181; *Simonton v. Lanier,* 71 N.C. 498. See also, *Edgerton v. Hood, supra,* and *Cowan v. Trust Co.,* 211 N.C. 18, 188 S.E. 812.

Counsel appearing *amici curiae,* with prodigious research and great learning, have brought to our attention the historical background and origin of the language of Art. I, sec. 7, and contend persuasively that a county is a subdivision of the State and is not "a man or set of men" within the meaning of Art. I, sec. 7. However, the 1949 Currituck Act, as pointed out below, confers special privileges upon a private corporation, not upon Currituck County as a political subdivision of the State. Upon close scrutiny of the 1949 Currituck Act, we find:

1. Under Section 1, after the original three members of the Commission are appointed by the Member of the House of Representatives from Currituck County, all later appointments are to be made by the Member

of the House of Representatives from Currituck County *and* the two members of the Commission whose terms have not expired, making apparent the possibility of self-perpetuating membership on the Commission.

2. Under Section 6, provision is made for an original and, if necessary, successive elections, at intervals of six months, for the purpose of voting the Act "in" without any provision whatever, once it becomes effective, for an election for the purpose of voting the Act "out."

3. The franchise granted by the Commission to Carolina-Virginia Racing Association, Inc., is irrevocable, for a period of twenty-five years, except for failure to pay 10% of its gross receipts from *all* its operations and for failure to comply with "the reasonable rules and regulations of the Commission." To what subjects do such rules and regulations relate? Do they concern the percentage the Carolina-Virginia Racing Commission, Inc., is to be allowed to deduct from the money bet on the races as its charge, commission or fee for operating the pari-mutuel gambling establishment? Do they relate to the price of admission to the race track grounds? Do they relate to the conduct of patrons? Do they relate to the manner in which the races are run? It is interesting to notice that Section 5 provides that the violation of the rules and regulations *by the holder of the franchise or by any of its officers, agents or employees* is declared to be a misdemeanor. What kind of misdemeanor could they and they alone commit? Are there any standards whatever for the so-called reasonable rules and regulations? It may be doubted that such rules and regulations, in the absence of statutory standards, would have any validity whatever. *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310, and cases cited.

4. The language of the statute has the plain meaning, confirmed by the prompt award of the franchise, that such franchise is to be granted only to one private "person, firm, association or corporation"; and the proviso in Section 4 states, in express terms: *"nor shall the commission grant a franchise or privilege to more than one person, firm, association, or corporation, it being the intention and purpose that the operations shall be under a single management."*

5. The separate, exclusive privileges are not granted to Currituck County as a political subdivision of the State but under a twenty-five year irrevocable franchise to one private corporation, which has bought this separate, exclusive privilege, not available to any other person, firm, association or corporation of Currituck County or elsewhere in North Carolina.

6. The general statute law as to gambling continues to apply in Currituck County. The 1949 Currituck Act does not purport to legalize a particular type of gambling, *i.e.,* betting on dog or horse races in Curri-

tuck County. Only the Carolina-Virginia Racing Association, Inc., and its patrons, may violate the general criminal laws of the State relating to gambling. Furthermore, betting on the Currituck dog races may not be done legally by Currituck County residents or other residents of North Carolina except on the race track premises in Currituck County.

We have examined the decisions from other jurisdictions brought to our attention. Suffice it to say that none involves the constitutionality of a statute containing provisions analogous to the 1949 Currituck Act.

Solely to clarify the question before us, and without intimating decision on questions *not* before us, we observe:

1. The question is not whether the General Assembly can enact a statute legalizing gambling in a single county, applicable alike to all persons within the county.

2. The question is not whether the General Assembly can enact a statute legalizing a particular type of gambling in a single county, applicable alike to all persons within the county.

3. The question is not whether the General Assembly can enact a statute authorizing the governing board of a county or other governmental unit or agency to operate either on a State-wide basis, or within a county or other restricted portion of the State, a system of pari-mutuel betting on dog races, lotteries, or other types of gambling.

The one question before us is whether a statute that authorizes a commission, with provisions making possible a self-perpetuating membership, to grant, in consideration of a percentage of the gross receipts, an exclusive franchise irrevocable for a period of twenty-five years to a private corporation to operate in Currituck County a system of pari-mutuel betting on dog races, exceeds the constitutional power of the General Assembly.

We must conclude that the 1949 Currituck Act violates Art. I, sec. 7, and Art. I, sec. 31, of the Constitution of North Carolina. It is in conflict with that fundamental democratic principle: "Equal rights and opportunities to all, special privileges to none."

The 1949 Currituck Act presents the same situation as would exist if the General Assembly were to attempt, directly or indirectly, to grant to a private person, firm, association or corporation in one of the more populous counties, *e.g.,* Mecklenburg, Guilford, Forsyth or Wake, the exclusive right to operate a lottery where persons could legally participate on the licensee's premises, in consideration of the payment by such licensee of a percentage of its gross receipts to the county for use for county purposes.

We state without elaboration that the special, exclusive privileges granted to this private corporation under the 1949 Currituck Act are not "in consideration of public services" within the meaning of Art. I, sec. 7.

We assume that the taxpayers of Currituck County have reaped *financial* benefits from the operation of the pari-mutuel gambling establishment, operated as a feature if not *the* feature, of the race track. No doubt more money has been available for county purposes and less taxes have been required. It is not unusual that a monopoly should yield large returns. The franchise holder pays 10% of gross receipts for his privileges with a maximum of $5,000.00 for any one day. This goes to the County, after deduction has been made for the salaries and other expenses of the Commission. It would seem that this rather unimpressive fraction of gross revenue is little enough to pay for such special privileges. The lure of "easy money" makes a strong appeal. But the lure of "easy money" is not calculated to build the moral fiber of the citizenship of Currituck County. The incentive to achievement by working rather than by possibility of winning without working is the basis for stability, self-reliance and character.

Counsel appearing as *amici curiae* suggest that the Carolina-Virginia Racing Association, Inc., is virtually an employee of the county, operating the establishment primarily for the county's benefit. We cannot accept this view. The county's right to participate in the gross revenues is fixed and limited by statute. Beyond this statutory percentage, the private franchise holder is on its own. We forego a discussion in detail of the interesting suggestion as to the employer-employee, master-servant, relationship. Suffice it to say that one of the evil and demoralizing influences of organized gambling, legalized or unlawful, is its insidious tendency to infiltrate and to control those agencies of government charged with the duty either of controlling or of suppressing its operations. When revenues from gambling operations become a substantial part of the public revenues of a county, the task of cutting loose requires a major and difficult operation. No idea of controlling gambling is apparent from a reading of the 1949 Currituck Act. The reverse is true. The more extensive the gambling operations become, the greater the revenues to Currituck County and the greater the revenues to the holder of the franchise. Neither an individual nor a community can gamble his or its way to an enduring prosperity.

Counsel appearing as *amici curiae*, while devoting their argument principally to the constitutional question, make the point that the bill of information was properly quashed because it did not express the charge against the defendant in a plain, intelligible and explicit manner as required by G.S. 15-153. We think the bill of information charges in plain and unmistakable terms that the defendant and others on the date alleged unlawfully and willfully bet and wagered on dog races under the pari-mutuel system of betting and wagering operated by the Carolina-Virginia

Racing Association, Inc., under its franchise granted pursuant to the 1949 Currituck Act.

For the reasons stated the defendant's motion to quash should have been overruled. Accordingly, the judgment of the lower court is

Reversed.

STATE OF NORTH CAROLINA v. G. D. STEWART.

(Filed 17 March, 1954.)

APPEAL by State of North Carolina from *Hubbard, Special Judge,* 7 September, 1953, Term, of CURRITUCK.

Criminal action wherein the defendant, after preliminary proceedings in accordance with applicable statutes, demurred to the bill of information charging in substance that he willfully violated the general gambling statutes of North Carolina by participating with others in betting on dog races under the pari-mutuel system of betting operated in connection therewith by the Carolina-Virginia Racing Association, Inc.

(Counsel representing Currituck County, and other counsel representing the Currituck County Racing Commission, were permitted to appear as *amici curiae* in the proceedings before Judge Hubbard and also by brief and oral argument in this Court.)

Before pleading, the defendant demurred to the bill of information for that "by reason of Ch. 541, Session Laws of 1949, the bill failed to charge the commission of any crime or misdemeanor." Judge Hubbard sustained the demurrer, announcing at the time that he was "holding said Act of 1949 to be constitutional." The State of North Carolina duly excepted to this ruling and appealed from the judgment predicated thereon as permitted by G.S. 15-179 (2).

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

E. R. Woodard for defendant, appellee.

Lucas, Rand & Rose, John B. McMullan, Wilton F. Walker, Jr., and John G. Dawson as amici curiae.

BOBBITT, J. Is Ch. 541, Session Laws of 1949, void as being in violation of limitations upon legislative power imposed by the Constitution of North Carolina? This is the question presented for decision. Upon the authority of the decision in *S. v. Felton, ante,* 575, the defendant's

demurrer should have been overruled. Accordingly, the judgment of the lower court is

Reversed.

STATE OF NORTH CAROLINA v. S. M. TRUITT.

(Filed 17 March, 1954.)

APPEAL by State of North Carolina from *Hubbard, Special Judge,* 7 September, 1953, Term, of CURRITUCK.

Criminal action wherein the defendant, after preliminary proceedings in accordance with applicable statutes, demurred to the bill of information charging in substance that he willfully violated the general gambling statutes of North Carolina by participating with others in betting on dog races under the pari-mutuel system of betting operated in connection therewith by the Carolina-Virginia Racing Association, Inc.

(Counsel representing Currituck County, and other counsel representing the Currituck County Racing Commission, were permitted to appear as *amici curiae* in the proceedings before Judge Hubbard and also by brief and oral argument in this Court.)

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Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

E. R. Woodard for defendant, appellee.

Lucas, Rand & Rose, John B. McMullan, Wilton F. Walker, Jr., and John G. Dawson as amici curiae.

BOBBITT, J. Is Ch. 541, Session Laws of 1949, void as being in violation of limitations upon legislative power imposed by the Constitution of North Carolina? This is the question presented for decision. Upon the authority of the decision in *S. v. Felton, ante,* 575, the defendant's demurrer should have been overruled. Accordingly, the judgment of the lower court is

Reversed.

STATE OF NORTH CAROLINA ON THE RELATION OF J. A. SUMMRELL v. CAROLINA-VIRGINIA RACING ASSOCIATION, INC., AND THE CURRITUCK COUNTY RACING COMMISSION.

(Filed 17 March, 1954.)

1. Injunctions §§ 4d, 4j—

Ordinarily a resident and citizen may not enjoin public officials from putting into effect the provisions of a legislative enactment on the ground that the act is unconstitutional unless he alleges and proves that he will suffer direct injury, such as the deprivation of a constitutional right.

2. Same—

A resident and citizen may not enjoin a public officer or agency acting under color of legislative authority on the ground of the alleged unconstitutionality of the statute. *Quere:* Does this rule apply where such injunctive relief is sought against a private individual, firm or corporation?

3. Nuisance § 6b: Injunctions § 4j—

An establishment used for the purpose of gambling constitutes a nuisance, G.S. 19-1, and may be enjoined in an action brought in the name of the State on relation of a citizen.

4. Injunctions §§ 4d, 4j: Statutes § 4—

Where the statute under which defendant maintains and operates a race track for pari-mutuel betting is unconstitutional, a private citizen may maintain an action in the name of the State to enjoin the operation of such track as a public nuisance, G.S. 19-1.

APPEAL by plaintiff's relator from *Morris, Resident Judge,* heard in Chambers at Elizabeth City, on 3 August, 1953, from CURRITUCK.

This is a civil action brought in the name of the State of North Carolina, on relation of J. A. Summrell, a citizen and resident of Currituck County, against the defendant Carolina-Virginia Racing Association, Inc., a private corporation, under the provisions of Ch. 19 of the General Statutes of North Carolina, entitled "Offenses against Public Morals," to perpetually enjoin, as a nuisance as defined by G.S. 19-1, the defendant's maintenance and use of certain premises, buildings, fixtures and machines, for the purpose of gambling.

No temporary writ of injunction was issued, but the defendant was ordered to show cause why such writ should not be issued. The hearing was before Judge Morris, Resident Judge of the First Judicial District. Currituck County Racing Commission was permitted to intervene as a proper party. Currituck County's application for leave to intervene was denied.

Upon the pleadings and affidavits before Judge Morris at the hearing, these facts appear:

Pursuant to an Act of the General Assembly of North Carolina entitled, "An Act Creating the Currituck County Racing Commission for the County of Currituck in the State of North Carolina and providing for an Election Thereon," Ch. 541, 1949 Session Laws, an election was held at which a majority of the qualified voters who participated therein voted in favor of the creation of the Commission.

The three members of the Commission were appointed as provided in the Act. On 11 May, 1949, the Commission met and adopted a resolution granting to the defendant (Section 1) "a franchise, right, and privilege for a term of twenty-five (25) years from this May 11, 1949, to construct, lease, maintain, operate, and own, or to exercise either of said privileges, a race course or driving park or appropriate facilities for pacing, running, and trotting races for horses or dogs, or for both horses and dogs, anywhere within the County of Currituck except within the corporate limits of any town located within said County, and to operate and maintain in connection with the said racing operations what are generally known as 'Pari-Mutuel machines or appliances' or 'Pari-Mutuel systems' of the kind employed and in use at recognized racing courses in America; provided, however, that said 'Pari-Mutuel machines or appliances' or 'Pari-Mutuel systems' shall be maintained and operated only within the enclosure of said park or driving grounds or race courses, and only on days or parts of days when races or racing is being therein conducted."

The franchise so granted is irrevocable so long as the defendant complies with the terms thereof and the reasonable rules and regulations of the Commission. It is granted upon terms such that (Section 2) the defendant is required to pay the Commission "for each day or part of day during which races or racing is conducted, a sum equivalent to ten (10) per cent of the gross receipts derived from all sources or operations connected with or incident to the operation of such races or racing conducted during such day or part of day." It is further provided that without limiting the generality of the foregoing, the term "sum equivalent to ten (10) per cent of the gross receipts derived from all sources or operations referred to above" shall include, in addition to other sources of gross receipts, "(a) ten (10) per cent of the first monies received by the holder of this franchise, derived from the operations of the 'Pari-Mutuel machines or appliances' or 'Pari-Mutuel systems' operated after the direct return to the bettors shall have been made." Should the defendant fail to operate the track, etc., during any calendar year subsequent to 31 December, 1949, it must pay a penalty of $10,000.00 by reason of such "non operation."

The franchise (Section 8) contains this provision: "It is the intention and purpose by this franchise that the Carolina-Virginia Racing Associa-

tion, Inc., shall have and hold all advantages, benefits, privileges, and rights authorized and available under and by virtue of the Act of the General Assembly hereinabove mentioned and by authority of which this franchise is granted."

The defendant, at a cost of approximately $500,000.00, purchased land and constructed thereon a race course intended for, and suitable for, the racing of dogs, "and installed for operation, and has since operated, beginning with the year 1949, what is generally known as a 'pari-mutuel system,' with the apparati used in connection therewith, which is of the kind employed and in use at recognized racing courses in America; and that beginning with, and since, the year 1949, at stated intervals, each year, the defendant has operated and carried on upon said premises seasonably dog-racing meets, at which it has maintained and operated, and persons who chose to do so patronized, the pari-mutuel system."

The defendant's operations have been highly profitable. During each of the years 1949-1952, both inclusive, out of revenues received from the operation of the dog-racing track and the "pari-mutuel" system of betting on the races, the defendant has paid to the Currituck County Racing Commission an average of more than $100,000.00 per year, the net amount of which has been paid to Currituck County, making possible an expansion of the county services, *e.g.,* the enlargement and remodeling of the courthouse, the building of a health center, the construction of new school buildings and the remodeling of old school buildings and the supplement of the salaries of teachers, while at the same time making possible a substantial reduction in the tax rate. In addition, a large number of Currituck County residents as well as others have obtained employment by reason of the defendant's operation.

While "impressed with the seeming merits of plaintiff's contentions as to the invalidity of the Act," Judge Morris held "as a matter of law, that the constitutionality of this Act cannot be raised in or by the present action, and, must be approached by a different procedural method than the one adopted here" . . . and "the Court considers itself in this action to be without legal authority to pass upon the question of the unconstitutionality of the 1949 Act, Ch. 541, Session Laws. *Amick v. Lancaster,* 228 N.C. 157; *Newman v. Watkins, et al.,* 208 N.C. 675; *Wood v. Braswell,* 192 N.C. 588; *Person v. Doughton,* 186 N.C. 723; and other cases of like import in North Carolina."

Accordingly, on the procedural grounds stated and without passing upon the constitutionality of the 1949 Act, judgment was entered denying the plaintiff's application for injunctive relief, dismissing the action and taxing the plaintiff with the costs. The plaintiff duly excepted and appealed.

Frank B. Aycock, Jr., for plaintiff, appellant.

Wilton F. Walker, Jr., John G. Dawson, Lucas, Rand & Rose, and John B. McMullan for defendants, appellees.

BOBBITT, J. Where a resident and citizen seeks to enjoin public officials from putting into effect the provisions of a statute enacted by the General Assembly on the ground that the statute is unconstitutional and therefore void, it is held that he is not entitled to injunctive relief in the absence of allegation and proof that he will suffer direct injury, such as a deprivation of a constitutionally guaranteed personal right or an invasion of his property rights. In the absence of such allegation and proof the Court will not pass on the constitutionality of the statute. *Wood v. Braswell,* 192 N.C. 588, 135 S.E. 529; *Newman v. Comrs. of Vance,* 208 N.C. 675, 182 S.E. 453.

G.S. 19-1 declares that an establishment used for the purpose of gambling constitutes a nuisance. Its constitutionality as a valid exercise of police power has been tested and upheld. *Carpenter v. Boyles,* 213 N.C. 432, 196 S.E. 850; *Barker v. Palmer,* 217 N.C. 519, 8 S.E. 2d 610. And it is specifically provided by G.S. 19-2 that "any citizen of the county may maintain civil action in the name of the State of North Carolina upon the relation of such . . . citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists." *S. v. Alverson,* 225 N.C. 29, 33 S.E. 2d 135; *Dare County v. Mater,* 235 N.C. 179, 69 S.E. 2d 244.

Thus, the plaintiff's action is not grounded on general equitable principles but on the express authority of G.S. 19-1, *et seq.*, and he is entitled to injunctive relief if he can prove his allegations that the defendant is conducting and maintaining a gambling establishment. The undisputed facts constitute such proof unless, as alleged by the defendant and intervener, these general statutes are inapplicable to the defendant's operations in Currituck County because the defendant's operations are lawful under Ch. 541, 1949 Session Laws, and the franchise granted to defendant by the Commission in pursuance thereof. In short, the defendant's operations are lawful if the 1949 Act is a constitutional exercise of legislative power; otherwise, the defendant's operations are unlawful and subject to abatement as a nuisance under G.S. 19-1, *et seq.* The ultimate status of the defendant's operations will be determined when the constitutional question is decided. Is this action appropriate for the decision of the constitutional question? Judge Morris ruled that it was not and dismissed the action on that ground, relying upon *Amick v. Lancaster,* 228 N.C. 157, 44 S.E. 2d 733.

In *Amick v. Lancaster, supra,* the action was brought under G.S. 19-1, *et seq.* The plaintiff sought to enjoin as a nuisance the operation of a liquor store by "The Town of Louisburg Board of Alcoholic Control" pursuant to Ch. 862, 1947 Session Laws. The Court held that since the alcoholic control board was acting "under color of legislative authority" the remedy by action under G.S. 19-1, *et seq.,* "seems inappropriate." It is to be noted that the plaintiff in *Amick v. Lancaster, supra,* sought to enjoin the operations of a governmental board acting "under color of legislative authority." Whether the rationale of the decision would apply equally to a private person, firm, association or corporation is open to serious question. Be that as it may, the 1949 Currituck Act (Ch. 541, 1949 Session Laws) being unconstitutional and therefore void as declared in *S. v. Felton, ante,* 575, there is error in the judgment below dismissing the action; and the cause is remanded for further proceedings.

Error and remanded.

O. L. BROWN AND WIFE, ANNA MAE BROWN, v. GUARANTY ESTATES CORPORATION, TRUSTEE FOR LOUIS MITCHELL, INCOMPETENT; NATIONAL SURETY CORPORATION; AND GUS G. MITCHELL, ADMINISTRATOR OF LOUIS MITCHELL, DECEASED.

(Filed 17 March, 1954.)

1. Attachment § 23—

Where an order of attachment is improperly obtained or tortiously employed, the attachment defendant may (1) proceed on the attachment bond if either of the two conditions specified in G.S. 1-440.10 exists, (2) sue for malicious and wrongful attachment if the essential elements of that tort are present, (3) sue for abuse of process if the order of attachment is used to accomplish a result not lawfully or properly obtainable under it.

2. Same—

If an order of attachment is dissolved, dismissed, or set aside by the court, or if the attachment plaintiff fails to obtain judgment against the attachment defendant, G.S. 1-440.10, the attachment defendant may, without the necessity of showing malice or want of probable cause, proceed against the attachment plaintiff and his surety jointly or severally by independent action or motion in the cause, G.S. 1-440.45 (c), on the contractual obligations of the attachment plaintiff and his surety embodied in the bond and the statute under which it is given.

3. Same—

The right of the attachment defendant to sue the attachment plaintiff for wrongfully and maliciously suing out the order of attachment without probable cause and in procuring its levy on the property of the attachment defendant, is for an independent tort committed by the attachment plain-

tiff, and the surety's liability on the attachment bond may not be asserted in a suit against the attachment plaintiff for such tort.

4. Same—

Damages recoverable by the attachment defendant in a statutory proceeding against the attachment plaintiff and the surety on his bond is limited as to the attachment plaintiff to the actual damages sustained by attachment defendant by reason of the levy of the order of attachment, and is limited as to the surety to the amount of the attachment bond.

5. Same—

In an action by attachment defendant against attachment plaintiff for malicious and wrongful attachment, the attachment defendant must show that attachment plaintiff maliciously sued out his order of attachment without probable cause for believing that the alleged ground for attachment existed, that the order of attachment was actually levied upon property of attachment defendant, thereby depriving him of his right to use his property for any legitimate purpose to his damage, and that the attachment proceeding legally terminated in favor of attachment defendant.

6. Same—

Malice necessary to support an action for wrongful and malicious attachment may be either legal malice, which consists of the doing of a wrongful act intentionally without just and lawful cause or excuse, or actual malice, in which instance exemplary or punitive damages may be awarded.

7. Executors and Administrators § 12½—

Ordinarily, an action will not lie against an administrator or executor in his representative capacity for torts of the administrator or executor committed in administering the estate, except where the estate actually receives assets acquired by the tortious act of the administrator or executor, the estate may be held responsible to the extent of the value of such assets.

8. Executors and Administrators § 30e—

An administrator or executor is personally liable for his own torts even though they are committed in the administration of the estate.

9. Insane Persons § 3—

Under G.S. 35-2 the clerk of Superior Court may appoint either a guardian or trustee to manage the estate of a person who is found by an inquisition of lunacy to be mentally incompetent to manage his own affairs, and a trustee appointed under this statute is subject to the laws enacted for the control and handling of estates by guardians.

10. Insane Persons § 9d—

Ordinarily, an action will not lie against a guardian or trustee of an insane person in his representative capacity for torts which the guardian or trustee commits in managing the estate.

11. Insane Persons § 10—

A guardian or trustee of an insane person is personally liable for his own torts, even though they are committed in the management of the estate of his ward.

12. Attachment § 23: Executors and Administrators § 12½: Insane Persons § 9d—Complaint held not to state cause for wrongful attachment as against surety and personal representatives of creditor.

In an action by the attachment defendant the complaint alleged that the creditor was declared incompetent and that the trustee of his estate brought a civil action on the debt and, as trustee, sued out an attachment with malice and without probable cause for believing in the existence of the ground of attachment, and procured the levy of the order of attachment on attachment defendant's property, that upon the death of the incompetent his administrator joined the trustee in prosecuting the action and ancillary attachment proceedings, acting maliciously and without probable cause, and that the orders of attachment were thereafter dissolved. *Held:* The complaint states a common law action for malicious and wrongful attachment and not a statutory proceeding on the attachment bond, and therefore the complaint fails to state a cause of action against the trustee or the administrator in their representative capacities, or against the surety on the attachment bond, and their oral demurrers were properly sustained.

13. Pleadings § 22b—

The trial court has authority to permit an amendment to the pleadings which does not change substantially the claim or defense, G.S. 1-163. The use of "and/or" in the order disapproved.

APPEALS by plaintiffs and defendants from *Hall, Special Judge,* at the November Term, 1953, of SURRY.

Civil action for malicious and wrongful attachment.

The facts necessary to an understanding of the legal questions arising on these appeals are stated in the numbered paragraphs which immediately follow.

1. The pleadings consist of the complaint of the plaintiffs O. L. Brown and Anna Mae Brown, who are husband and wife; the answer of the defendant Guaranty Estates Corporation, which is sued in its representative capacity as trustee of its insane ward, Louis Mitchell; the answer of the defendant National Surety Corporation; the answer of Gus G. Mitchell, who is sued in his representative capacity as administrator of his intestate, Louis Mitchell; and the replies of the plaintiffs to the answers of the several defendants.

2. When the pleadings of the plaintiffs are recast in chronological order and ultimate terms, they make these allegations: On 26 May, 1949, Louis Mitchell accommodated the plaintiffs by endorsing their note for $10,000.00 at the Bank of Elkin, and took from them a deed of trust on certain land to secure himself against loss upon his endorsement. On 17 May, 1950, Louis Mitchell was found by an inquisition of lunacy to be mentally incompetent to manage his own affairs, and Guaranty Estates Corporation was appointed trustee of his estate under the provisions of G.S. 35-2. On 20 June, 1950, Guaranty Estates Corporation, acting in

its representative capacity as trustee, brought a civil action against the plaintiffs in the Superior Court of Yadkin County for the ostensible purpose of saving the estate of its ward harmless by reason of his endorsement of the note at the Bank of Elkin. At the time of the issuance of the summons in such action, Guaranty Estates Corporation, as trustee, acting with malice and without probable cause for believing any ground for attachment existed, presented an affidavit to the Clerk of the Superior Court of Yadkin County falsely stating that it was entitled to ancillary attachments against the property of the plaintiffs because they were "about to assign, dispose of, or secrete" such property with intent to defraud their creditors, furnished an attachment bond in the amount of $10,000.00 executed by itself as principal and by National Surety Corporation as surety, caused the Clerk of the Superior Court of Yadkin County to issue ancillary orders of attachment against the property of the plaintiffs, and procured the Sheriffs of Lee and Yadkin Counties to levy the ancillary orders of attachment upon the lands, chattels, and bank deposits of the plaintiffs. The plaintiffs moved without delay to dissolve the ancillary orders of attachment, but before their motion could be heard the insane ward Louis Mitchell died. Three days after that event, to wit, on 12 July, 1950, the Clerk of the Superior Court of Yadkin County granted the motion of the plaintiffs, and entered an order dissolving the ancillary orders of attachment. The Clerk's order of dissolution never took effect because Gus G. Mitchell forthwith qualified as administrator of Louis Mitchell, had himself made a party plaintiff in the pending action in his representative capacity as administrator, joined the trustee in appealing the Clerk's order of dissolution to the Judge at term, and continued the prosecution of the action and the ancillary attachment proceedings. In so doing, Gus G. Mitchell, the administrator, acted with malice and without probable cause for believing in the existence of the ground on which the ancillary orders of attachment had issued. During January, 1951, the deed of trust from the plaintiffs to Louis Mitchell was foreclosed, and the proceeds of the foreclosure were used to exonerate the estate of Louis Mitchell from liability on account of his endorsement of the note at the Bank of Elkin. Shortly thereafter, to wit, on 5 February, 1951, the trustee and the administrator submitted to a voluntary nonsuit in the Yadkin County case, and the ancillary orders of attachment issued in that suit were thereupon dissolved. As the result of the malicious and wrongful acts of the trustee and the administrator, the plaintiffs were deprived of their right to use their property from about 20 June, 1950, until 5 February, 1951, and incurred expenses and suffered injuries to their business, credit, and feelings in sums totaling $20,000.00. "The plaintiffs pray judgment against the defendants, Guaranty Estates Corporation, Trustee for Louis Mitchell, incompetent, and Gus G. Mitchell,

Administrator of Louis Mitchell, deceased, for the sum of $20,000.00, and against the defendant, National Surety Corporation, to the extent of $10,000.00, as covered by the bond of said defendant; for the cost of this action; and for such other and further relief as the plaintiffs may be entitled to in the premises."

3. The action came on for trial before Judge Hall and a jury at the November Term, 1953, of the Superior Court of Surry County. Pending the introduction of testimony, the defendants demurred *ore tenus* to the pleadings of the plaintiffs on the ground that such pleadings did not state a cause of action against any of them. Judge Hall entered an order sustaining the oral demurrers, and allowing the plaintiffs "thirty days to amend and/or make new parties." The plaintiffs excepted to the portion of the order sustaining the oral demurrers, and appealed; and the defendants excepted to the portion of the order allowing plaintiffs to amend, and appealed.

J. T. Reece and Allen, Henderson & Williams for plaintiffs.

Earl C. James for defendant Guaranty Estates Corporation, Trustee.

Brooks, McLendon, Brim & Holderness for defendant National Surety Corporation.

James J. Randleman for defendant Gus G. Mitchell, Administrator.

ERVIN, J. The appeal of the plaintiffs presents the question whether their pleadings state a cause of action against the defendants or any of them. The rules of law bearing on this question are set forth in the seven ensuing paragraphs.

1. Where an order of attachment is improperly obtained or tortiously employed, the attachment defendant may have several modes of obtaining redress for injuries caused by its levy on his property. He may proceed on the attachment bond if either of the two conditions specified in the statute now codified as G.S. 1-440.10 exists. *Whitaker v. Wade,* 229 N.C. 327, 49 S.E. 2d 627; *Smith v. Bonding Co.,* 160 N.C. 574, 76 S.E. 481; *Wright v. Harris,* 160 N.C. 542, 76 S.E. 489. He may sue for malicious and wrongful attachment if the essential elements of that tort are present. *Tyler v. Mahoney,* 168 N.C. 237, 84 S.E. 362; *Id.,* 166 N.C. 509, 82 S.E. 870; *Wright v. Harris, supra; Railroad Co. v. Hardware Co.,* 143 N.C. 54, 55 S.E. 422; *Id.,* 138 N.C. 174, 50 S.E. 571, 3 Ann. Cas. 720; *Id.,* 135 N.C. 73, 47 S.E. 234. He may even maintain an action for abuse of process if the attachment plaintiff maliciously perverts and employs a regularly issued order of attachment to accomplish a result not lawfully or properly obtainable under it. *Wright v. Harris, supra; Railroad Co. v. Hardware Co.,* 143 N.C. 54, 55 S.E. 422; *Id.,* 138 N.C. 174, 50 S.E. 571, 3 Ann. Cas. 720.

2. A proceeding on an attachment bond differs greatly from an action for malicious and wrongful attachment. The former is a statutory proceeding based on the contractual obligations of the attachment plaintiff and his surety embodied in the attachment bond and the statute under which it is given; whereas, the latter is an independent common law action founded on the tort of the attachment plaintiff in maliciously suing out an order of attachment without probable cause and procuring its levy on the property of the attachment defendant. *Martin v. Rexford,* 170 N.C. 540, 87 S.E. 352; *Railroad Co. v. Hardware Co.,* 138 N.C. 174, 50 S.E. 571, 3 Ann. Cas. 720; *Id.,* 135 N.C. 73, 47 S.E. 234; 7 C.J.S., Attachment, section 163. The statutory proceeding on the attachment bond may be prosecuted by either a motion in the original cause or by an independent action. G.S. 1-440.45 (c); *Whitaker v. Wade, supra.* In enforcing liability on the attachment bond, the attachment defendant may proceed against the attachment plaintiff and his surety jointly or separately. *Smith v. Bonding Co., supra;* McIntosh: North Carolina Practice and Procedure in Civil Cases, section 235; 5 Am. Jur., Attachment and Garnishment, section 1029. It is otherwise with respect to an action for malicious and wrongful attachment. Since his liability arises out of the contract embodied in the attachment bond and the statute under which it is given, the surety is not liable to the attachment defendant for the tort of the attachment plaintiff in maliciously suing out the order of attachment without probable cause and procuring its levy on the property of the attachment defendant. As a consequence, the attachment defendant cannot properly unite in one suit an action against the attachment plaintiff for malicious and wrongful attachment, and a proceeding against the surety for enforcement of liability on the attachment bond. *Martin v. Rexford, supra; Railroad Co. v. Hardware Co.,* 135 N.C. 73, 47 S.E. 234.

3. The right of the attachment defendant to proceed on the attachment bond does not depend on a showing of malice and want of probable cause. 7 C.J.S., Attachment, section 163. See in this connection the observations of *Justice Platt D. Walker* in *Mahoney v. Tyler,* 136 N.C. 40, 48 S.E. 549. Since the attachment bond is conditioned that if the order of attachment is dissolved, dismissed or set aside by the court, or if the attachment plaintiff fails to obtain judgment against the attachment defendant, the attachment plaintiff will pay all costs that may be awarded to the attachment defendant and all damages that the attachment defendant may sustain by reason of the attachment, the attachment defendant may bring the statutory proceeding to enforce liability on the bond under two conditions, namely, where the order of attachment is dissolved, dismissed or set aside by the court, or where the attachment plaintiff fails to obtain judgment against him. G.S. 1-440.10; *Frick Co. v. Deiter,* 168 S.C. 289, 167 S.E. 499; 7 C.J.S., Attachment, section 163. When he

proceeds on the bond under either of these conditions, the attachment defendant is entitled to recover the actual damages sustained by him by reason of the levy of the order of attachment on his property. *Martin v. Rexford, supra; Tyler v. Mahoney,* 168 N.C. 237, 84 S.E. 362; *Railroad Co. v. Hardware Co.,* 135 N.C. 73, 47 S.E. 234. The liability of the surety, however, is limited to the amount of the attachment bond. G.S. 1-440.10; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 827.

4. Where the attachment defendant sues the attachment plaintiff for malicious and wrongful attachment, it is incumbent upon him to establish these essential elements of the tort: (1) That the attachment plaintiff sued out an order of attachment against the property of the attachment defendant without probable cause for believing that the alleged ground for attachment existed (*Tyler v. Mahoney,* 166 N.C. 509, 82 S.E. 870; *Railroad Co. v. Hardware Co.,* 143 N.C. 54, 55 S.E. 422; *Id.,* 138 N.C. 174, 50 S.E. 571, 3 Ann. Cas. 720; *Mahoney v. Tyler, supra; Abrams v. Pender,* 44 N.C. 260; *Davis v. Gully,* 19 N.C. 360; *Williams v. Hunter,* 10 N.C. 545, 14 Am. D. 597); (2) that the attachment plaintiff sued out such order of attachment maliciously (*Wright v. Harris, supra; Railroad Co. v. Hardware Co.,* 143 N.C. 54, 55 S.E. 422; *Id.,* 138 N.C. 174, 50 S.E. 571, 3 Ann. Cas. 720; *Id.,* 135 N.C. 73, 47 S.E. 234; *Davis v. Gully, supra; Williams v. Hunter, supra*); (3) that the order of attachment was actually levied on the property of the attachment defendant, who was thereby deprived of his right to use his property for any legitimate purpose (*Railroad Co. v. Hardware Co.,* 138 N.C. 174, 50 S.E. 571, 3 Ann. Cas. 720; *Terry v. Davis,* 114 N.C. 31, 18 S.E. 943; *Ely v. Davis,* 111 N.C. 24, 15 S.E. 878; American Law Institute's Restatement of the Law of Torts, section 677); (4) that the attachment proceeding has legally terminated in favor of the attachment defendant (*Whitaker v. Wade, supra; Wright v. Harris, supra; Railroad Co. v. Hardware Co.,* 143 N.C. 54, 55 S.E. 422; *Id.,* 138 N.C. 174, 50 S.E. 571, 3 Ann. Cas. 720; *Kramer v. Electric Light Co.,* 95 N.C. 277); and (5) that the attachment defendant suffered damage as the result of the levy of the order of attachment upon his property. 7 C.J.S., Attachment, section 520. The malice essential to support an action for malicious and wrongful attachment may be either actual malice or legal malice. *Wright v. Harris, supra;* 5 Am. Jur., Attachment and Garnishment, section 986. Legal malice "consists in a wrongful act intentionally done . . . without just and lawful cause or excuse." *Wright v. Harris, supra.* It is well to note at this juncture that the statement of *Judge Pearson* in *Kirkham v. Coe,* 46 N.C. 423, and the statement of *Judge Clark* in *Tyler v. Mahoney,* 168 N.C. 237, 84 S.E. 362, to the effect that it is not necessary to prove malice in an action for malicious and wrongful attachment are not good law. Although

Judge Pearson's erroneous statement is apparently accepted as valid in some parts of the somewhat inconsistent opinion in *Railroad Co. v. Hardware Co.,* 138 N.C. 174, 50 N.C. 571, 3 Ann. Cas. 720, it is rejected in express terms by a unanimous Court in *Wright v. Harris, supra. Judge Clark's* erroneous statement is avowedly based on *Tyler v. Mahoney,* 166 N.C. 509, 82 S.E. 870, which merely holds, in essence, that legal malice, as distinguished from actual malice, is sufficient to sustain an award of actual damages in an action for malicious and wrongful attachment. Moreover, *Judge Clark's* erroneous statement is contradicted by his own positive assertion in *Railroad Co. v. Hardware Co.,* 143 N.C. 54, 55 S.E. 422, that an action for this tort "cannot be maintained . . . if . . . there was no malice." Where the attachment defendant successfully prosecutes an action for malicious and wrongful attachment against the attachment plaintiff, he is entitled to recover the actual damages suffered by him by reason of the attachment plaintiff's tortious act. *Tyler v. Mahoney,* 168 N.C. 237, 84 S.E. 362. The actual damages may include compensation "for every injury to his credit, business, or feelings." *Railroad Co. v. Hardware Co.,* 135 N.C. 73, 47 S.E. 234. He may even be awarded exemplary or punitive damages by the jury if he alleges and proves that the attachment plaintiff was actuated by actual malice, as distinguished from legal malice, in suing out the order of attachment. *Martin v. Rexford. supra; Tyler v. Mahoney,* 168 N.C. 237, 84 S.E. 362; *Id.,* 166 N.C. 509, 82 S.E. 870; *Wright v. Harris, supra; Railroad Co. v. Hardware Co.,* 138 N.C. 174, 50 S.E. 541, 3 Ann. Cas. 720.

5. As a general rule, the estate of a decedent cannot be held liable for torts which an administrator or an executor commits in administering the estate. In consequence, an action will not ordinarily lie against an administrator or an executor in his representative capacity for such torts. *Hood, Comr. of Banks, v. Stewart,* 209 N.C. 424, 184 S.E. 36; *Hall v. Trust Co.,* 200 N.C. 734, 158 S.E. 388; *Allen v. Armfield,* 190 N.C. 870, 129 S.E. 801; *Whisnant v. Price,* 175 N.C. 611, 96 S.E. 27; *Mobley v. Runnels,* 14 N.C. 303; *Owens v. Lackey,* 234 Ala. 144, 174 So. 231; *Digby v. Cook,* 200 Ark. 1004, 142 S.W. 2d 228; *Rapaport v. Forer,* 20 Cal. App. 2d 271, 66 P. 2d 1242; *Evans v. Dickey,* 50 Ga. App. 127, 177 S.E. 87; *Christensen v. Frankland,* 324 Ill. App. 391, 58 N.E. 2d 289; *Ostheimer v. McNutt,* 116 Ind. App. 649, 66 N.E. 2d 142; *Kirchner v. Muller,* 280 N.Y. 23, 19 N.E. 2d 665, 127 A.L.R. 681; *Boyle v. Nolan,* 123 N.J.L. 365, 8 A. 2d 358; 21 Am. Jur., Executors and Administrators, section 303; 33 C.J.S., Executors and Administrators, section 250. "The rule has . . . been applied to actions based on the institution of wrongful legal proceedings by a personal representative." 21 Am. Jur., Executors and Administrators, section 303. See in this connection *Gilmer v. Wier,* 8 Ala. 72, and the other cases collected in the annotation in 44

A.L.R. 674. The rule is subject to this exception: Where the estate of a decedent actually receives assets acquired by an administrator or an executor by a tortious act, the party wronged thereby and entitled to such assets may hold the estate responsible to the extent of the value of such assets. *McKinnie's Executors v. Oliphant's Executors,* 2 N.C. 3; 21 Am. Jur., Executors and Administrators, section 306; 33 C.J.S., Administrators, section 250. An administrator or an executor is personally liable for his own torts even though they are committed in the administration of the estate. *Pettijohn v. Williams,* 46 N.C. 145; 21 Am. Jur., Executors and Administrators, section 303; 33 C.J.S., Executors and Administrators, section 250.

6. Under G.S. 35-2, the clerk of the Superior Court may appoint either a guardian or a trustee to manage the estate of a person who is found by an inquisition of lunacy to be mentally incompetent to manage his own affairs. A trustee appointed under this statute "is subject to the laws . . . enacted for the control and handling of estates by guardians."

7. As a general rule, the estate of an insane person cannot be held liable for torts which a guardian or a trustee commits in managing the estate. For this reason, an action will not ordinarily lie against a guardian or a trustee of an insane person in his representative capacity for such torts. But a guardian or a trustee of an insane person is personally liable for his own torts, even though they are committed in the management of the estate of his ward. *Gillet v. Shaw,* 117 Md. 508, 83 A. 394, 42 L.R.A. (N.S.) 87; *Rooney v. People's Trust Co.,* 61 Misc. 159, 114 N.Y.S. 612; *Ward v. Rogers,* 51 Misc. 299, 100 N.Y.S. 1058, 19 N. Y. Ann. Cas. 56; *Reams v. Taylor,* 31 Utah 288, 87 P. 1089, 8 L.R.A. (N.S.) 436, 120 Am. S. R. 930, 11 Ann. Cas. 51; 44 C.J.S., Insane Persons, section 87.

When the pleadings of the plaintiffs are analyzed in the light of these rules of law, these things are manifest:

This is a common law action for malicious and wrongful attachment, and not a statutory proceeding on an attachment bond. The plaintiffs seek to recover damages of the defendant Guaranty Estates Corporation in its representative capacity as trustee of its insane ward Louis Mitchell upon pleadings alleging that in its management of the estate of its ward it maliciously sued out an order of attachment without probable cause, and procured the levy of the order of attachment upon the property of the plaintiffs. These pleadings state no cause of action against the defendant Guaranty Estates Corporation as trustee because their allegations bring the case within the general rule that the estate of an insane person cannot be subjected to liability for the tort of his guardian or his trustee, even though his guardian or his trustee commits the tort in the management of his estate. The plaintiffs seek to recover damages of the defendant Gus G. Mitchell in his representative capacity as administrator of

the decedent Louis Mitchell upon pleadings alleging that in his administration of the estate of the decedent he maliciously continued an attachment proceeding against the property of the plaintiffs without probable cause, and in that way tortiously deprived the plaintiffs of their right to use their property for any legitimate purpose. These pleadings state no cause of action against the defendant Gus G. Mitchell as administrator because their allegations bring the case within the general rule that the estate of a decedent cannot be subjected to liability for the tort of an administrator or an executor, even though the administrator or the executor commits the tort in the administration of the estate. Moreover, the pleadings of the plaintiffs state no cause of action against the defendant National Surety Corporation for the very simple reason that a surety on an attachment bond is not liable for the tortious act of the attachment plaintiff in maliciously and wrongfully attaching the property of the attachment defendant.

What has been said shows that the presiding judge rightly ruled on the oral demurrers.

This brings us to the appeal of the defendants, which challenges the validity of the portion of the order allowing the plaintiff's "thirty days to amend and/or make new parties."

The presiding judge murdered the King's, the Queen's, and everybody's English by using the monstrous linguistic abomination "and/or" in this portion of the order. We are constrained to adjudge, however, that the judge's law is better than his grammar, and that this portion of the order finds sanction in G.S. 1-163, which vests in the judge of the Superior Court discretionary authority to permit an amendment "when the amendment does not change substantially the claim or defense." McIntosh: North Carolina Practice and Procedure in Civil Cases, section 487. This portion of the order contemplates that any amendment made by the plaintiffs will not offend the restrictive provision of G.S. 1-163. Whether such an amendment can be made is something for their able counsel to ponder.

Affirmed on the plaintiffs' appeal.

Affirmed on the defendants' appeal.

STATE v. BOBBY SPENCER.

(Filed 17 March, 1954.)

1. Criminal Law § 47—

Indictment was returned against one defendant charging him with murder in the first degree of a named person and another indictment was returned against two other defendants charging them with murder in the

first degree of the same person and on the same date. The State was relying upon the same set of facts at the same place and time as against each of the defendants. *Held:* The trial court had authority to consolidate the indictments for trial. G.S. 15-152.

2. Criminal Law § 50g—

Upon motion of defendants the court ordered the segregation of witnesses for the State. Upon motion of the solicitor, the court then ordered the segregation of defendants' witnesses over defendants' objection that they might rely on the weakness of the State's case and call no witnesses, or would not know who their witnesses would be until the State rested. *Held:* The order for the segregation of defendants' witnesses rested in the sound discretion of the trial judge, and no abuse of discretion being made to appear in this case, exception is not sustained.

3. Criminal Law §§ 50e (1), 57a: Statement of prospective witness in hearing of jury held insufficient to justify order of mistrial.

During the course of the trial, a person who had been sworn as a witness for defendant upon the court's order for the segregation of witnesses, came into the courtroom in the absence of the judge while the jury was still in the box and said in a loud voice to one of the attorneys for defendant that she didn't know anything about the case and that he would be sorry if he put her on the stand. Upon the court's later inquiry as to whether any of the jurors had heard the remark, only two of them stated that they had, and upon interrogation by the court the one juror who stated that the occurrence might have some bearing on his consideration of the case, nevertheless stated that he could hear the evidence and the charge of the court and return a verdict uninfluenced by the witness' statement. *Held:* The competency of the jurors is a question of law for the court, G.S. 9-14, and the occurrence was insufficient to justify the withdrawal of a juror and order of mistrial, and therefore defendants' exception to the refusal of the court to do so is not sustained.

4. Homicide § 25—

The State's evidence tended to show that appealing defendant had an altercation with deceased, that he and his two codefendants left the cafe where the altercation had occurred and returned thereto in about 30 minutes, that one of defendants was armed with a pistol, that the three defendants entered the cafe together and gathered round the deceased, and that one defendant shot deceased while the appealing defendant and the other defendant were physically and violently aiding and abetting the assault. *Held:* The evidence was sufficient to overrule appealing defendant's motion to nonsuit.

5. Criminal Law § 8b—

When two or more persons aid and abet each other in the commission of a felony, all being present, all are principals and equally guilty without regard to any previous confederation or design.

6. Homicide § 27d—

The court's definition of malice in this homicide prosecution *is held* without error on authority of *S. v. Benson*, 183 N.C. 795.

7. Homicide § 27g: Conspiracy § 3—

In this prosecution for homicide there was evidence that the three defendants aided and abetted each other in the commission of the crime, all being present, and also some evidence that the crime was committed pursuant to a conspiracy. The court correctly charged on the question of conspiracy and also on the principle of the guilt of defendants as principals. *Held:* On the aspect of defendants' guilt as principals, the court correctly charged that the jury could convict any one or all of them.

APPEAL by defendant Bobby Spencer from *Williams, J.*, November Term 1953. HARNETT. No error.

This is a criminal action. The grand jury of Harnett County Superior Court properly returned in open court a bill of indictment charging John Spencer on 9 January 1953 with murder in the first degree of Thurman McNeill. The said grand jurors duly returned in open court another bill of indictment charging Lacy Murchison and Bobby Spencer on the same date with murder in the first degree of the same person. Upon motion of the Solicitor for the State, and over the objection and exception of the defendant Bobby Spencer, the court ordered a consolidation of the two bills of indictment for trial. Each defendant pleaded Not Guilty.

The State's evidence tended to show the following facts. About 9:30 or 10:00 p.m. on 9 January 1953 Thurman McNeill, the deceased, entered a cafe in the Town of Lillington operated by his brother. The cafe consisted of two rooms. There is no door between the rooms—only an open space. In one room there was a piccolo and a heater; in the other a refrigerator, a sink, two tables, chairs and a shelf with candy and other things for sale. When Thurman McNeill came in the cafe, his sister Dorothy, who worked there, Willard Pearson, Lacy Murchison, one of the defendants, Bobby Spencer, one of the defendants, Rufus Stokes and Snooks Ferrell were there. The defendant John Spencer was either present when Thurman McNeill arrived, or came in shortly thereafter. Several other persons came in soon after Thurman McNeill.

In the cafe Snooks Ferrell and Rufus Stokes were wrestling, or trying to wrestle. Thurman McNeill pulled one back. The defendant Bobby Spencer asked Thurman McNeill what he had to do with it, and they cursed each other about five minutes. Then Bobby Spencer told Thurman McNeill if he wanted to fight, to come outside. They went out. There was no fight outside. In a few minutes Thurman McNeill and the others came in. Then the defendants John Spencer, Lacy Murchison, Bobby Spencer and Snooks Ferrell left the cafe. In about 30 minutes the three defendants and Snooks Ferrell returned. Thurman McNeill was standing near the piccolo. John Spencer entered first. He had a pistol in his right front pocket with his hand on the handle. Lacy Murchison, Bobby

Spencer and Snooks Ferrell followed him in. The three defendants gathered around Thurman McNeill at the piccolo.

Dorothy McNeill, a witness for the State, testified when the three defendants gathered around the deceased she saw a knife go up, and come down on the deceased's head. She did not know which defendant had the knife. She saw John Spencer have a pistol in his hand pointed at the deceased. She started for help. When she had gone three feet from the door, she heard a pistol fire. She went back to the door, and saw the deceased down on his knees, and John Spencer standing over him holding a pistol. She asked John Spencer did he shoot Thurman McNeill, and he replied Yes.

Clyde Sanford, a witness for the State, testified he saw John Spencer walk up to deceased at the piccolo, and slap him. John Spencer then put his hand on the deceased's shoulder, snatched him around, and hit him in the face: he had the deceased in the collar, and put the pistol in his face. While John Spencer had the deceased in the collar and his pistol in the deceased's face, the defendants Lacy Murchison and Bobby Spencer caught the deceased by his shoulder, and hit him three or four times on the side of his head. The deceased was doing nothing but begging them to leave him alone. Clyde Sanford at this time left the room. When Sanford had gone two steps in the other room, he heard a pistol shot. He turned around, and saw the deceased down on his knees holding his stomach, and John Spencer standing over him holding a pistol pointing towards him. Lacy Murchison and Bobby Spencer were standing behind John Spencer.

A pistol bullet penetrated Thurman McNeill's body going through the abdomen. He also had a scalp wound on his head, which was sewed up. Four days later Thurman McNeill died. The bullet wound produced peritonitis, which caused his death.

The defendants offered no evidence.

The jury returned a verdict of guilty as to all three defendants of murder in the second degree.

Judgment of the court: imprisonment in the State's prison as to each defendant.

Each of the defendants entered appeal entries in open court when judgment was pronounced. The defendant Bobby Spencer alone perfected his appeal, assigning error.

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

Doffermyre & Stewart for defendant, appellant.

PARKER, J. The defendant assigns as error the consolidation for trial of the two bills of indictment. This Court said in *S. v. Combs,* 200 N.C.

671, 158 S.E. 252: "The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others." G.S.N.C. 15-152.

The three defendants were charged with participating in the same crime as principals. The State relied upon the same set of facts at the same place and time as against each defendant. The consolidation was proper. It prevented two trials involving the same facts. *S. v. Davis,* 214 N.C. 787, 1 S.E. 2d 104 (consolidation for trial of three warrants—each warrant issued against one defendant—charging each defendant as a principal with the unlawful possession and transportation of intoxicating liquor); *S. v. Jackson; S. v. Blackwell,* 226 N.C. 760, 40 S.E. 2d 417 (consolidation for trial of three separate indictments against three defendants relating to one felonious assault).

The appellant in his brief in respect to the above assignment of error cites only an excerpt from *S. v. Norton,* 222 N.C. 418, 23 S.E. 2d 301, which deals with the lower court's charge to the jury. In that case this Court held the consolidation for trial of the two indictments had statutory authority. G.S.N.C. 15-152.

The defendant's second assignment of error, based on his exception No. 2, is to the trial court's segregation of his witnesses. Each defendant moved that the State's witnesses be segregated during the trial. The court allowed the motion. The solicitor for the State then moved that the defendants' witnesses be segregated. The defendants objected. Their counsel stated to the court, we do not know at this time whether we will have any witnesses or not; we might rely upon the weakness of the State's case; at this time, we do not know who our witnesses will be; we have only two under subpoena; we feel that it would be prejudicial to be forced to have any prospective witnesses called and sworn in the presence of the jury, until the State has rested. The court said it would not permit any witnesses to testify in the case who were present in court after the evidence began, and directed the defendants to call their witnesses and have them sworn. Whereupon several were sworn—one of whom was Annie Lee Hodges. Each defendant objected and excepted.

The defendant in his brief combined his second assignment of error with his ninth assignment of error, based on his exception No. 17. His exception No. 17 is based on these facts. One afternoon during the trial immediately after the judge had left the courtroom, and while the jury was in the jury box, Annie Lee Hodges came into the bar, and in a loud tone of voice said to Mr. Doffermyre, one of the defendant's counsel, "I told Mr. Hooks (solicitor for the State) I don't know anything about this

case. If you put me on the stand, you will be sorry." The next day when court convened counsel for defendant, in the absence of the jury, brought this to the attention of the judge by the testimony of the Clerk of the Court. Then Mr. Doffermyre stated to the judge that he had never seen Annie Lee Hodges before. Whereupon the defendants, and each of them, moved that a juror be withdrawn and a mistrial ordered.

The judge then ordered the jury to be brought into the courtroom. The judge inquired if any of the jury heard what Annie Lee Hodges said to Mr. Doffermyre. One juror replied he heard a girl he did not know, inquire of Mr. Doffermyre why she was sworn as a witness, and say "you had better not put me on the stand," and that was all he heard.

Another juror by the name of Tudor replied he heard the same thing, and heard her say she told Mr. Hooks she knew nothing about the trial, and didn't know why she was called. The judge then asked Tudor did he consider that would affect his consideration of the case. Tudor replied it might have some bearing on it; of course, I haven't heard all the evidence. The judge said that is not evidence. Tudor replied, I realize that. The judge: do you consider that would prejudice you in any way against either of the defendants? Tudor: well, I can't help from feeling it would have some bearing; if there was some doubt in my mind, that would add to it. The juror Tudor then stated in response to questions by the judge that he could sit in the jury box, and hear the evidence in the case and the charge of the court, and return a verdict uninfluenced by anything he had heard, except the evidence and the charge. The judge then stated: "Gentlemen, the Court holds the juror is impartial." The court denied the motion to withdraw a juror, and order a new trial. The defendants, and each of them, excepted.

The defendant contends that the manner in which his witnesses were segregated, the words of Annie Lee Hodges before the jury, and the judge's interrogations of the jurors as to the language of Annie Lee Hodges were highly prejudicial. And further that the other ten members of the jury were not given an opportunity to say whether they heard the remarks of Annie Lee Hodges, and if so, were they influenced thereby.

This jurisdiction, and the great majority of jurisdictions, follow the early English rule that the segregation, separation, exclusion of witnesses, or "putting witnesses under the rule," as the procedure is variously termed, is a matter not of right, but of discretion on the part of the trial judge. The exercise of such discretion is not reviewable, except in cases of abuse of his discretion. *S. v. J. H. Hodge,* 142 N.C. 676, 55 S.E. 791; *S. v. Lowry,* 170 N.C. 730, 87 S.E. 62; *Lee v. Thornton,* 174 N.C. 288, 93 S.E. 788; 53 Am. Jur., Trial, Sec. 31. The State moved "to put the defendants' witnesses under the rule" only after the court had granted a

similar motion of the defendants to exclude the State's witnesses. No abuse of the trial judge's discretion appears.

The evidence in the Record does not bear out the defendant's contention that the other ten members of the jury were not given an opportunity by the court to say whether they heard the remarks of Annie Lee Hodges, and if so, were they influenced by them. The judge asked the jury twice, if any of them had heard the words of Annie Lee Hodges. Only two said they had. The other ten could have spoken up in response to the two questions, if they had heard her remarks.

The juror Tudor stated to the court that he could hear the evidence and the charge of the court, and return a verdict uninfluenced by anything he had heard except the evidence and the charge. That suffices to support the court's finding that Tudor was impartial or indifferent. *S. v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523; *S. v. Foster,* 172 N.C. 960, 90 S.E. 785; *S. v. English,* 164 N.C. 497, 80 S.E. 72; *S. v. Banner,* 149 N.C. 519, 63 S.E. 84.

G.S.N.C. 9-14 provides that the judge "shall decide all questions as to the competency of jurors," and his rulings thereon are not subject to review on appeal, unless accompanied by some imputed error of law. The ruling in respect of the impartiality of the juror Tudor presents no reviewable question of law. *S. v. DeGraffenreid, supra; S. v. Bailey,* 179 N.C. 724, 102 S.E. 406; *S. v. Bohanon,* 142 N.C. 695, 55 S.E. 797.

According to the Record only one other juror spoke up. He stated he heard a girl he didn't know inquire of Mr. Doffermyre why she was sworn as a witness, and say he had better not put her on the stand. It would seem that the hearing of such remark was not prejudicial. Upon the evidence in the Record sufficient facts were not shown to withdraw a juror, and order a mistrial in this capital case. *S. v. Crocker, ante,* p. 446, 80 S.E. 2d 243; *S. v. Suddreth,* 230 N.C. 239, 52 S.E. 2d 924; *S. v. Hart,* 226 N.C. 200, 37 S.E. 2d 487; *S. v. Hawkins,* 214 N.C. 326, 199 S.E. 284; *S. v. Plyler,* 153 N.C. 630, 69 S.E. 269; *S. v. Boggan,* 133 N.C. 761, 46 S.E. 111; *S. v. Kinsauls,* 126 N.C. 1095, 36 S.E. 31; *S. v. Brittain,* 89 N.C. 481. See also *S. v. Burton,* 172 N.C. 939, 90 S.E. 561 (trial for second degree murder; remark to jury by officer having them in charge that the judge would keep them until Sunday, though authorized by judge, held not reversible error); *S. v. Jackson,* 112 N.C. 851, 17 S.E. 149 (indictment for larceny; before jury impaneled, but in their presence, a bystander remarked in open court that the defendant's wife said she would not come because she would only help get her husband in jail. This Court said "this can be no ground for exception.").

The defendant's assignments of errors Nos. Two and Nine are overruled.

The defendant's tenth assignment of error is to the refusal of the court to grant his motion for judgment of nonsuit made at the close of the evidence. The State offered evidence tending to show that the defendant Bobby Spencer had had an altercation with the deceased; that he and his two codefendants left the cafe, and returned together in about 30 minutes; that the defendant John Spencer was armed with a pistol; that the three defendants entered the cafe together and gathered around Thurman McNeill at the piccolo; and that the defendants Bobby Spencer and Lacy Murchison were physically and violently aiding and abetting the defendant John Spencer in the murder of Thurman McNeill. It is thoroughly established law in North Carolina that without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127; *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *S. v. Donnell,* 202 N.C. 782, 164 S.E. 352; *S. v. Gosnell,* 208 N.C. 401, 181 S.E. 323; *S. v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482; *S. v. Church,* 231 N.C. 39, 55 S.E. 2d 792. The court was correct in overruling the motion for judgment of nonsuit.

The defendant assigns as error the court's definition of malice in its charge. In defining malice the court used the same words that *Stacy, C. J.,* did in defining malice in *S. v. Benson,* 183 N.C. 795, 111 S.E. 869—words that have been cited by us many times since with approval. This assignment of error is without merit.

The defendant assigns as error that the court charged the jury "you may convict all, or you may acquit all, or you may convict one or more and acquit the others, or you may acquit one or more, and convict one or more, etc." The contention being that the court charged the jury that the State contended that the three defendants entered into a conspiracy to murder Thurman McNeill, and that in the execution of the conspiracy all three defendants gathered around the deceased and Lacy Murchison and Bobby Spencer aided and abetted John Spencer in murdering Thurman McNeill, and that "any instruction other than all defendants must either be found guilty or all not guilty was error." The defendant cites one authority in his brief in support of his argument: *S. v. Brown,* 204 N.C. 392, 168 S.E. 532, which case does not support his contention.

The court in addition to charging in respect to a conspiracy, also charged the jury correctly and at length as to the principle of law that when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. The defendants were not on trial for conspiracy: they were on trial for murder. The court's charge in respect to a conspiracy in this case is free from reversible error. *S. v. Donnell, supra.* Without regard to any

previous confederation or design when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. To illustrate: if the jury had found beyond a reasonable doubt that John Spencer was guilty of the murder of Thurman McNeill, and if the jury had had a reasonable doubt that Lacy Murchison and Bobby Spencer were guilty of aiding and abetting John Spencer in the murder of Thurman McNeill, it would have been their duty under those circumstances to convict John Spencer and acquit Lacy Murchison and Bobby Spencer. This assignment of error is overruled. See *S. v. Ford,* 175 N.C. 797, p. 804, 95 S.E. 154.

We have examined the defendant's other assignments of error, and find them without merit.

The case was fairly and ably tried by the experienced judge below, and we find it free from error. The last words spoken by the judge to the jury in his charge were that the jurors were to banish from their minds as completely as if it had never taken place what Annie Lee Hodges said to Mr. Doffermyre, and that their verdict was to be based solely upon the evidence they had heard and the charge of the court. The defendant must abide by the verdict and judgment imposed thereon. From the evidence in the Record it would seem that the jury could have returned a verdict for the capital charge.

No error.

WACHOVIA BANK & TRUST COMPANY AND MARION GREEN JOHNSTON, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF GAY GREEN, DECEASED, AND MARION GREEN JOHNSTON, INDIVIDUALLY, v. 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 17 March, 1954.)

1. Appeal and Error § 1—

Ordinarily, the Supreme Court will not pass upon questions which are not ruled upon in the court below.

2. Wills § 34c—

The general rule is that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of

the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child if he so desired, such adopted child will be included in the word "children" when used to designate a class which is to take under the will.

3. Wills § 31—

While the dispositive provisions of a will speak as of the death of the testator, G.S. 31-41, in ascertaining testator's intent the will must be considered in the light of the conditions and circumstances existing at the time it was made.

4. Wills § 34c—Under facts of this case, adopted child held not entitled to take part of corpus under devise to children of life tenant.

Under the provisions of the will in suit, testator's niece and nephew and children "born" to them were made beneficiaries of the income from the trust estate therein created, with further provision that upon the death of the survivor of the niece and nephew the trust should terminate and the *corpus* paid share and share alike to the children of the niece and nephew then surviving. *Held:* Adopted children of the nephew were not entitled to share in the *corpus* of the estate, the word "children" as used in the provisions for the disposition of the *corpus* being given the same meaning as in the provision for the distribution of the income, which was limited to children "born" to either the nephew or niece.

5. Wills § 31—

Where it is apparent from one portion of the will that testator gave a particular significance to a certain word or phrase, the same meaning will be presumed to have been intended in all other instances in which the same word or phrase is used in the will.

6. Same—

If the intent of testator may be ascertained from the consideration of the will from its four corners, extrinsic evidence is not admissible for the purpose of overruling the intent therein expressed.

APPEAL by defendant Virginia F. Green, guardian *ad litem* of Laura Adelaide Green, Mary Virginia Green and Michael Joseph Green, minors, from *Clarkson, Special Judge,* November Term, 1953, of BUNCOMBE.

This action was instituted in the Superior Court of Buncombe County by the duly appointed and acting executors and trustees under the last will and testament of Gay Green, and Marion Green Johnston, individually, to obtain the advice 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."

At the April Term, 1953, of the Superior Court of Buncombe County the court ruled on questions (a) and (b) but declined to rule on question (c). Upon appeal to this Court we affirmed the rulings of the court below on questions (a) and (b) to the effect that none of the adopted children of Ottis Green, Jr., and wife may take as beneficiaries under the Trusts created by the will of Gay Green, deceased, and remanded for a ruling on question (c). See *Trust Co. v. Green,* 238 N.C. 339, 78 S.E. 2d 174, where the facts are fully set out.

The present appeal is from the ruling in the Superior Court of Buncombe County on question (c).

Gay Green died on 8 June, 1951, and his last will and testament was duly probated in the office of the Clerk of the Superior Court in the aforesaid county.

The will of Gay Green was executed on 10 December, 1947. Laura Adelaide Green and Mary Virginia Green were placed in the home of Ottis Green, Jr., by the Superintendent of Public Welfare of Cleveland County, North Carolina, on 10 May, 1951. The proceedings for the adoption of these children were instituted by Ottis Green, Jr., and his wife, Virginia F. Green, on 22 May, 1951. The interlocutory decrees in these proceedings were entered on 20 June, 1951, and the final decrees on 23 June, 1952. The proceeding for the adoption of Michael Joseph Green by Ottis Green, Jr., and wife was instituted on 25 June, 1952. The interlocutory decree was entered on 8 August, 1952, and the final decree was not entered until or after 8 August, 1953.

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."

The court below held that none of the defendants, Laura Adelaide Green, Mary Virginia Green or Michael Joseph Green, will be entitled to share in the distribution of the assets of the Trusts created by the will of Gay Green, deceased, upon the termination of the Trusts, and entered judgment to that effect. Virginia F. Green, guardian *ad litem* of Laura Adelaide Green, Mary Virginia Green and Michael Joseph Green, appeals, assigning error.

Williams & Williams for appellant Virginia F. Green, guardian ad litem of Laura Adelaide Green, Mary Virginia Green and Michael Joseph Green, minors.

Hudgins & Adams and Ward & Bennett for appellees Aileen Morel Johnston and John Devereaux Johnston, Jr.

John C. Cheesborough, guardian ad litem for all persons not now in esse.

DENNY, J. The appellant seriously contends that in order to ascertain whether the testator intended to include the adopted children of Ottis

Green, Jr., and his wife, Virginia F. Green, as ultimate beneficiaries under paragraph 4, Item X of his will the trial court should have permitted her to introduce evidence bearing upon such intention.

The record discloses that the court below, upon a consideration of the allegations in the complaint and the answers thereto, including the will of Gay Green, and after hearing and considering the arguments of counsel for the respective parties, held that "no issue or incidental questions of fact arise therefrom necessary to the determination of the controversy before us."

The appellant contends, however, that it was not necessary for this Court to remand the case when it was heard on the former appeal, unless we intended to give her an opportunity to introduce evidence and to have the court find the facts and enter its conclusions of law thereon, citing G.S. 7-11; *Mining Co. v. Mills Co.,* 181 N.C. 361, 107 S.E. 216; *Knight v. Little,* 217 N.C. 681, 9 S.E. 2d 377; *Suddreth v. Charlotte,* 223 N.C. 630, 27 S.E. 2d 650.

Ordinarily, upon appeal to this Court we do not pass upon questions raised but not ruled upon in the court below. See *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888, in which *Barnhill, J.,* now *Chief Justice,* discussed the reason for remanding such cases. Furthermore, the mere fact that occasionally this Court, in its discretion, considers the merits involved in a case although not properly presented, as it did in *Suddreth v. Charlotte, supra,* does not bind us to follow that course in all such cases.

The appellant is relying principally upon our decisions in *Bradford v. Johnson,* 237 N.C. 572, 75 S.E. 2d 632, and *Smyth v. McKissick,* 222 N.C. 644, 24 S.E. 2d 621. In our opinion the facts in those cases are clearly distinguishable from those in the instant case.

In *Smyth v. McKissick, supra,* Ellison A. Smyth created an irrevocable trust agreement in 1932 for the benefit of certain named beneficiaries. Thereafter, in 1934, he executed a will under the terms of which the remainder of his estate was put in trust for the benefit of the same beneficiaries named in the trust indenture. The final distribution of the *corpus* of the trust under the will was directed to be made "upon the death of all," the testator's children and the death or remarriage of his daughter-in-law, but in no event earlier than 1944. The estate was then to be distributed to the children of his deceased children. Thomas Smyth, one of the children of James Adger Smyth (a son of the testator who died prior to the execution of the will), and a grandson of the testator, Ellison A. Smyth, was married in November, 1932, to Frances Thrower Smyth. Having no children born to them, in 1938 they adopted for life David Hutchinson Smyth. It was admitted that the testator knew and approved of the adoption. He treated the child as he did the children born to his other grandchildren, giving him presents

and keeping a photograph of him in his home. Thomas Smyth died in April, 1941, leaving a last will and testament by which he disposed of all his property to his widow. The testator, Ellison A. Smyth, died 3 August, 1942.

This Court, in passing upon the interest of the adopted child in the irrevocable trust which was created in 1932, held that the trust indenture was effective from the date of its execution and the adopted child took nothing thereunder. But, since the will did not become effective until the death of the testator and the testator knew and approved of the adoption, the adopted child took under the provisions of the will. The Court, in speaking through *Devin, J.*, later *Chief Justice,* said: "The will of Ellison A. Smyth spoke from his death in 1942. At that time Thomas Smyth was dead, leaving an adopted child. David Hutchinson Smyth had become in law the child of Thomas Smyth and Frances Thrower Smyth, as respects them, as much so as if he had been born to them by natural law. While his adoption did not constitute him an heir of Ellison A. Smyth (*Grimes v. Grimes,* 207 N.C. 778, 178 S.E. 573), yet as the lawful child of Thomas Smyth he was entitled to take in substitution and as representative of his adopting father. He was then qualified in every legal aspect, as the 'child' of Thomas Smyth, to step into his father's shoes, and as the son of his father take property rights which had been set aside for his father." *Cf. Tankersley v. Davis,* 195 N.C. 542, 142 S.E. 765.

The case of *Bradford v. Johnson, supra,* was heard upon the pleadings and certain facts agreed upon and set out in the judgment. The testator, John M. W. Hicks, established twelve equal and separate residuary Trusts for certain of his nieces and nephews for and during their respective lives. Each separate Trust was to cease and determine at the death of the life beneficiary thereunder. Upon the termination thereof the *corpus* of the Trust was to be divided so far as practicable in kind among the surviving children of the life beneficiary under that particular Trust. The property, which consisted altogether of personalty, was to be transferred and paid over to them absolutely and free from any Trust, and in equal shares, share and share alike, *per capita* and not *per stirpes.*

The will of John M. W. Hicks was executed on 8 December, 1926, and a codicil thereto was executed on 1 March, 1935. The testator died on 17 March, 1944. A nephew, Marion F. Wyatt, who was a life beneficiary under one of the twelve Trusts, adopted a child on 2 December, 1929, for life. We held that this adopted child, Marion F. Wyatt, Jr., was included in the word "children," used to designate the class which is to take under the will upon the termination of the Trust under which Marion F. Wyatt is the life beneficiary.

The general rule is that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child if he so desired, such adopted child will be included in the word "children" when used to designate a class which is to take under the will. *Bradford v. Johnson, supra,* and cited cases.

The dispositive provisions of a will speak as of the death of the testator. G.S. 31-41; *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151; *Ferguson v. Ferguson,* 225 N.C. 375, 35 S.E. 2d 231; *Smyth v. McKissick, supra.* However, the fact that a will speaks from the death of the testator, "relates to the subject matter of disposition only, and does not in any manner interfere with the construction in regard to the objects of the gift." *Hines v. Mercer,* 125 N.C. 71, 34 S.E. 106; *Robbins v. Windly,* 56 N.C. 286. Consequently, it is well settled in this jurisdiction that the intent of the testator is to be ascertained, if possible, from a consideration of the language used by him, and "the will is to be considered in the light of the conditions and circumstances existing *at the time the will was made.*" *Trust Co. v. Waddell, supra; Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578; *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410; *Raines v. Osborne,* 184 N.C. 599, 114 S.E. 849; *Herring v. Williams,* 153 N.C. 231, 69 S.E. 140.

In *Smyth v. McKissick, supra,* David Hutchinson Smyth was adopted some four years prior to the death of the testator, and there was nothing in his will to indicate that he intended to exclude an adopted child.

Likewise, in *Bradford v. Johnson, supra,* Marion F. Wyatt, Jr., was adopted more than fourteen years prior to the death of the testator and the will contained no provisions that would indicate an intention to exclude an adopted child of any niece or nephew.

We construe the provisions of the last will and testament of Gay Green, however, to indicate an intention to limit the beneficiaries of his estate to those of his blood.

It would be difficult indeed to understand why the testator limited the benefits under both Trusts established by his will, except for certain life beneficiaries, to his niece Marion Green Johnston, his nephew, Ottis Green, Jr., and the children of Marion Green Johnston, and to such children as should thereafter be born to either his niece or nephew, if he intended that an adopted child should share in the final distribution of the *corpus* of the estate.

It is true that paragraph 4, Item X of the testator's will calls for the distribution of the *corpus* of the Trust when terminated to "be paid and

delivered, share and share alike, to the children of Marion Green Johnston and the children of Ottis Green, Jr." Nevertheless, we hold that the word "children," as used in paragraph 4, Item X, means children as described in the other parts of his will, to wit: children born to either his niece or nephew.

It is a well settled rule of testamentary construction that "if it is apparent that in one use of a word or phrase a particular significance is attached thereto by the testator, the same meaning will be presumed to be intended in all other instances of the use by him of the same word or phrase." *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892; *Taylor v. Taylor,* 174 N.C. 537, 94 S.E. 7; *Grandy v. Sawyer,* 62 N.C. 8; *Lockhart v. Lockhart,* 56 N.C. 205; *Gibson v. Gibson,* 49 N.C. 425; 57 Am. Jur., Wills, section 1152, page 750, and cited cases; 69 C.J., Wills, section 1131 (2), page 77.

Furthermore, if the intent of the testator may be ascertained from a consideration of his will from its four corners, extrinsic evidence is not admissible for the purpose of overruling the intent expressed therein. *Reynolds v. Trust Co.,* 201 N.C. 267, 159 S.E. 416; *Kidder v. Bailey,* 187 N.C. 505, 122 S.E. 22; *Williams v. Bailey,* 178 N.C. 630, 101 S.E. 105; *McDaniel v. King,* 90 N.C. 597.

The conclusions we reached on the former appeal, together with the views expressed herein, lead us to the conclusion that the rulings of the court below were correct.

The judgment of the court below is

Affirmed.

C. K. CALLAHAM AND WIFE, ANNA H. CALLAHAM, v. HERMAN G. ARENSON AND WIFE, SARA Z. ARENSON; MAURICE W. STONE AND WIFE, EVELYN P. STONE; C. D. HARRIS AND WIFE, PAULINE D. HARRIS; HAROLD A. SMOAK AND WIFE, ANNIE F. SMOAK; F. M. BOLDRIDGE AND WIFE, ELIZABETH B. BOLDRIDGE; MYRTLE FRYE WELLONS; M. B. POUNCEY AND WIFE, ELLER M. POUNCEY; H. C. DOCKERY, TRUSTEE; CHARLES J. HENDERSON, TRUSTEE; J. M. SCARBOROUGH, TRUSTEE; J. N. MILLS, TRUSTEE; NEW YORK LIFE INSURANCE COMPANY, FIRST FEDERAL SAVINGS LOAN ASSOCIATION, UNION NATIONAL BANK OF CHARLOTTE, AND EQUITABLE LIFE ASSURANCE SOCIETY.

(Filed 17 March, 1954.)

1. Deeds § 16b—

In construing restrictive covenants in a deed, the meaning of each provision must be determined from a consideration of and in relation to the other provisions of the instrument, giving each part its effect according to the natural meaning of its language.

2. Same—

In construing restrictive covenants, each part of the contract must be given effect if this can be done by fair and reasonable intendment, before one clause may be construed as repugnant to or irreconcilable with another clause.

3. Same—

Restrictive covenants must be strictly construed against limitation on use, and be given effect as written, without enlargement by implication or construction.

4. Same—

Mere sale of lots by reference to a recorded map raises no implied covenant as to size of lots or against further subdivision.

5. Same—

Ordinarily, the creation of streets or rights of way for better enjoyment of residential property does not in itself violate a covenant restricting the property to residential purposes.

6. Same—

Plaintiff purchased four lots in a subdivision subject to restrictions limiting the use of the lots to residential purposes and stipulating the minimum frontage and size of each lot. *Held:* Plaintiff is entitled to resubdivide his lots for residential purposes by opening a street between two lots along the depth, provided the lots facing such street meet the requirements of the restrictions as to minimum frontage along the street and size.

7. Same: Easements § ½—

Restrictive covenants are negative easements in land which ordinarily cannot be created by parol.

8. Deeds § 16b: Estoppel § 6a—

The mere fact that the purchaser of lots subject to restrictive covenants is advised by the grantors at the time of his purchase that only one residence was to be built on each of the lots will not estop the purchaser from subdividing his lots in such manner as not to violate the restrictions as to the use of the lots or their size and frontage.

9. Appeal and Error § 39e—

Where evidence excluded is insufficient to alter the rights of the parties as a matter of law, the exclusion of the evidence cannot be harmful.

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

APPEAL by defendants from *Pless, J.,* and a jury, at 2 March, 1953, Regular Civil Term of MECKLENBURG.

Civil action to remove alleged cloud upon title to real estate.

These in substance are the essential undisputed facts disclosed by the pleadings, stipulations, and evidence:

1. On 27 March, 1941, the defendants F. M. Boldridge and wife, Elizabeth B. Boldridge, being the owners of all the lots shown on the

accompanying map, designated as Exhibit B, copy of which is duly registered in the Public Registry of Mecklenburg County, executed a contract for the purpose of imposing certain restrictions on the use of the lots shown on the map. The contract, registered in the Public Registry of Mecklenburg County in Book 1043, page 528, is in pertinent part as follows:

"KNOW ALL MEN BY THESE PRESENTS that the undersigned F. M. Boldridge and wife, Elizabeth B. Boldridge, do hereby covenant and agree to and with all persons, firms or corporations now owning or hereafter acquiring any property or lots shown upon a map of part of the property of F. M. Boldridge and wife, which is recorded in the office of the Register of Deeds for Mecklenburg County in Book of Maps 4, page 427, are hereby subjected to the following restrictions as to the use thereof running with said property by whomsoever owned, to wit:

"A. All lots in the tract shall be known and described as residential lots. No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single family dwelling not to exceed 2½ stories in height and a private garage for not more than three cars and other outbuildings incidental to residential use of the plot.

"B. No building shall be located on any residential building plot nearer to the front lot line than the following:

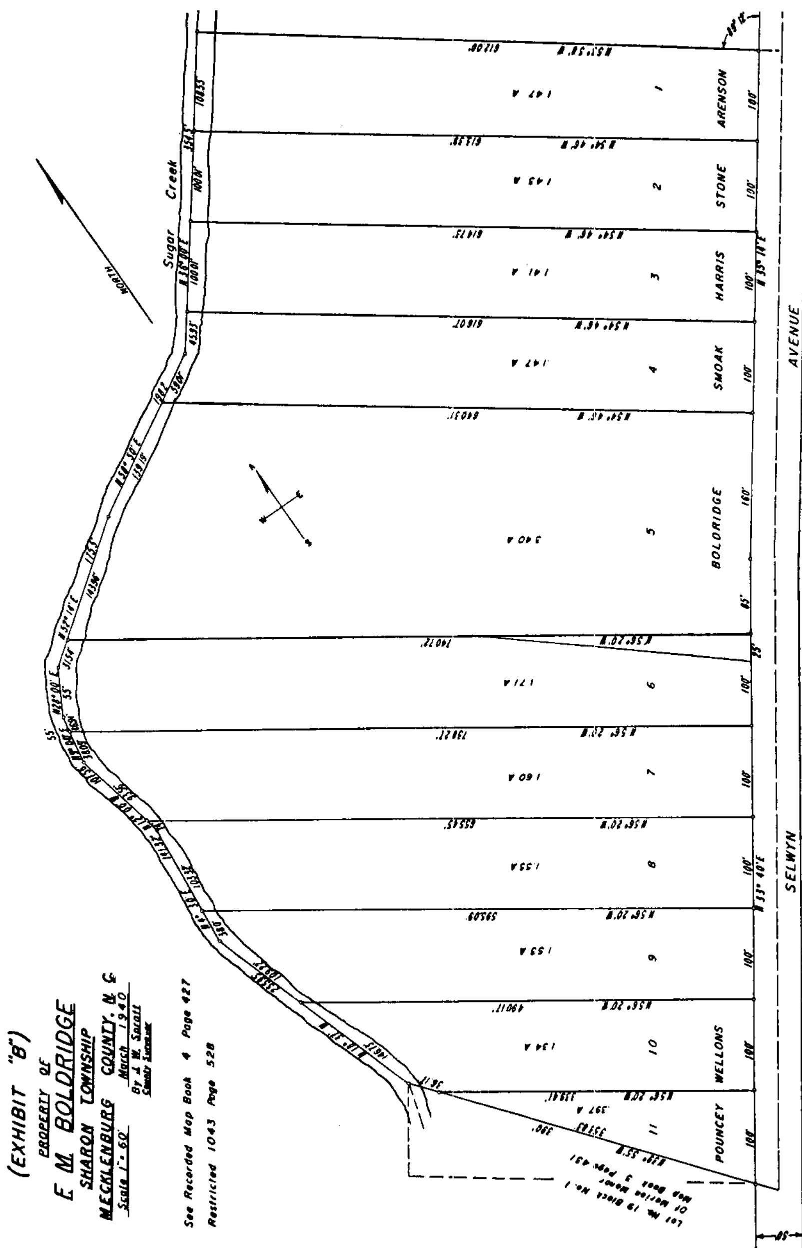
On Lot No. 1 not nearer than 80 feet
On Lot No. 2 not nearer than 90 feet
On Lot No. 3 not nearer than 100 feet
On Lot No. 4 not nearer than 100 feet
On Lot No. 5 not nearer than 100 feet
On Lot No. 6 not nearer than 100 feet
On Lot No. 7 not nearer than 100 feet
On Lot No. 8 not nearer than 90 feet
On Lot No. 9 not nearer than 80 feet
On Lot No. 10 not nearer than 70 feet
On Lot No. 11 not nearer than 60 feet.

No building shall be located on any lot nearer than 7½ feet to any side lot line except on Lot No. 11 on which no building shall be erected nearer than 5 feet to either side lot line.

"C. No residential structure shall be erected or placed on any building plot, which plot has an area of less than 20,000 square feet nor a width of less than 100 feet at the front building set-back line, except that a residence may be erected or placed on Lot 11 as shown on the recorded plat.

. . . .

CALLAHAM *v.* ARENSON.



"G. No dwelling costing less than $5,500 shall be permitted on any lot in the tract. The ground floor area of the main structure, exclusive of one story open porches and garages, shall be not less than 1200 square feet in the case of a one story structure nor less than 900 square feet in the case of a 1½, 2, 2½ story structure.

"H. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them until January 1, 1988, at which time said covenants shall be automatically extended for successive periods of ten years unless by vote of a majority of the then owners of the lots it is agreed to change said covenants in whole or in part."

2. That by deed dated 10 August, 1951, and duly registered in the Public Registry of Mecklenburg County, the defendants F. M. Boldridge and wife sold and conveyed to the plaintiffs lots 6, 7, 8, and 9 of the Boldridge property, with total frontage of 375 feet on Selwyn Avenue, as shown on Exhibit B, the triangular strip 25 feet wide on Selwyn Avenue next to Lot No. 5 having been reserved by the defendants Boldridge; that the deed conveys the four lots to the plaintiffs subject to restrictive covenants stipulated in the prior registered contract executed by F. M. Boldridge and wife 27 March, 1941.

3. That the rest of the lots shown on Exhibit B, namely, Lots 1, 2, 3, 4, 5, 10, and 11, are owned, respectively, by the defendants Arenson, Stone, Harris, Smoak, Boldridge, Wellons, and Pouncey, with the corporate defendants holding liens on four of these lots.

4. The plaintiffs propose and intend to locate a 50-foot street or roadway along the line between lots 7 and 8 and to resubdivide their four lots from a point not less than 150 feet back from Selwyn Avenue, so as to establish two rows of new lots to front on the 50-foot street, with each lot having an area of not less than 20,000 square feet and a width of not less than 100 feet at the front building set-back line; that after the proposed resubdivision, each of the lots fronting on Selwyn Avenue would have an area of not less than 20,000 square feet and a width at the front building set-back line of not less than 100 feet; "and it . . . is the further plan and purpose of the plaintiffs to cause not more than one dwelling to be erected on each of the lots as resubdivided (and) to sell such resubdivided lots by deeds containing such warranty clause as would permit erection of not more than one detached single-family dwelling not to exceed 2½ stories in height and a private garage for not more than three cars and the other out-buildings incidental to residential use of each resubdivided lot, any dwelling to cost not less than $5,500.00 and to have a ground floor area as to the main structure, exclusive of one story open porches and garages, of not less than 1200 square feet in the case of a one-story structure, nor less than 900 square feet in the case of a one-and-one-half, two and two-and-one-half story structure."

The plaintiffs bring this action, alleging in gist that the restrictive covenants stipulated in the defendants' contract of 27 March, 1941, subject to which the plaintiffs hold title, are not legally sufficient to prevent the plaintiffs from redeveloping their property and putting it to use in accordance with their proposed plan.

The plaintiffs further allege that the defendants claim a present right to restrain the plaintiffs from carrying out the foregoing plan on the ground it would be violative of the provisions of the restrictive covenants, subject to which admittedly all the lots in the subdivision are held, and that such claim on the part of the defendants constitutes a cloud upon the title to the plaintiffs' four lots which they pray the court to remove.

The defendants, answering, admit they claim the right to restrain the plaintiffs from going forward with their proposed project. They further allege that the covenants contained in the Boldridge restrictive covenant contract are legally sufficient to prevent the plaintiffs from carrying out the proposed redevelopment project. The defendants also allege by way of affirmative defense and estoppel that in the negotiations for the purchase of the lots the male plaintiff was advised by F. M. Boldridge that the area was restricted and that "only one residence was to be built on each of the lots" as shown on the map; and that the male plaintiff, wrongfully concealing his plan of redevelopment, represented to the defendant Boldridge that he would comply with the terms of the restrictions as related by Boldridge, and thereby effectuated the purchase of the property.

At the trial below, the plaintiffs offered evidence showing all the details of their proposed plan of redevelopment of lots 6, 7, 8, and 9. Following this, the defendants offered evidence in respect to the topography, grade, elevation, and general physical surroundings of the property in the Boldridge subdivision. However, all evidence proffered by the defendants in support of their plea of estoppel was excluded from consideration by the jury. It is brought forward in the record in support of the defendants' exceptions.

At the close of the evidence the court submitted the case to the jury under a peremptory instruction in favor of the plaintiffs on this issue: "Does the proposed development of the plaintiffs' property constitute a violation of the restrictions affecting the same?" The jury answered the issue "No."

Thereupon, the court entered judgment in accordance with the verdict, decreeing that the plaintiffs may resubdivide and dispose of the four lots in accordance with their plan as outlined in the complaint.

From the judgment so entered, the defendants appealed, assigning errors.

Brock Barkley for plaintiffs, appellees.

B. F. Wellons and J. A. McRae for defendants, appellants.

JOHNSON, J. Decision here turns on whether or not the plaintiffs' proposed plan for resubdividing their four lots into smaller units violates the restrictive covenant contract made by the original developers of this property, the defendants Boldridge.

The applicable rules of interpretation require that the meaning of the contract be gathered from a study and a consideration of all the covenants contained in the instrument and not from detached portions. *Lewis v. May,* 173 N.C. 100, 91 S.E. 691. See also *Strigas v. Insurance Co.,* 236 N.C. 734, 73 S.E. 2d 788; *Indemnity Co. v. Hood,* 226 N.C. 706, 40 S.E. 2d 198. It is necessary that every essential part of the contract be considered—each in its proper relation to the others—in order to determine the meaning of each part as well as of the whole, and each part must be given effect according to the natural meaning of the words used. *Electric Supply Co. v. Burgess,* 223 N.C. 97, 25 S.E. 2d 390.

Another fundamental rule of construction applicable here requires that each part of the contract must be given effect, if that can be done by fair and reasonable intendment, before one clause may be construed as repugnant to or irreconcilable with another clause. *Electric Supply Co. v. Burgess, supra.*

Further, it is to be noted that we adhere to the rule that since these restrictive servitudes are in derogation of the free and unfettered use of land, covenants and agreements imposing them are to be strictly construed against limitation on use. *Craven County v. Trust Co.,* 237 N.C. 502, 75 S.E. 2d 620. Therefore, restrictive covenants clearly expressed may not be enlarged by implication or extended by construction. They must be given effect and enforced as written. 14 Am. Jur., Covenants, Conditions and Restrictions, Sections 211 and 212; Annotations: 175 A.L.R. 1191; 26 C.J.S., Deeds, Section 163.

Moreover, the rule is that the mere sale of lots by reference to a recorded map raises no implied covenant as to size or against further subdivision. *Sedberry v. Parsons,* 232 N.C. 707, 62 S.E. 2d 88; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Stephens Company v. Binder,* 198 N.C. 295, 151 S.E. 639; 14 Am. Jur., Covenants, Conditions and Restrictions, Section 201; Annotation: 57 A.L.R. 764.

And ordinarily the opening and maintenance of a street or a right of way for the better enjoyment of residential property as such does not violate a covenant restricting the property to residential purposes. *Raleigh Port Corp. v. Faucett,* 140 Va. 126, 124 S.E. 433; *Mairs v. Stevens,* 51 N.Y.S. 2d 286, 62 N.E. 2d 238; Annotations: 25 A.L.R. 2d 904; 175 A.L.R. 1191, 1207; 14 Am. Jur., Covenants, Conditions and Restrictions, Section 255.

The covenants that control decision here are contained in three paragraphs of the contract. Paragraph "A" restricts the use of the property

to residential purposes, and provides that not more than one dwelling unit shall be placed on "any residential building plot." Paragraph "B" establishes the minimum building set-back lines, both front and side. Whereas paragraph "C" fixes the minimum size of the building lots. The minimum requirements as to size are governed by two prescribed standards—one as to width, the other as to total area. The minimum width is 100 feet at the front building set-back line; whereas the minimum area is 20,000 square feet. Therefore a lot 100 feet wide and 200 feet deep meets minimum standards fixed by paragraph "C" as to size. It is noted that all the lots from 1 to 10, inclusive, shown on the map of the original subdivision contain areas largely in excess of 20,000 square feet, yet none of these lots is less than the minimum width of 100 feet. Necessarily, then, the covenant fixing minimum standards as to width and area authorizes resubdivision of the original lots into units as small as 200 feet in depth.

The plaintiffs' proposed plan of dividing their lots into smaller units comes within the terms of the covenant which prescribes minimum lot areas. Each of the proposed nine lots has an area of at least 20,000 square feet. Each is at least 100 feet wide at the front. Plaintiffs' proposed plan also meets the requirements as to building set-back distances, both front and side. In short, the plaintiffs' plan conforms with all requirements set out in the Boldridge restrictive covenant contract.

The three controlling paragraphs of the contract, when considered each in its proper relation to the others, harmonize and reflect an over-all meaning which is free of inconsistency or repugnancy. See *Hickson v. Noroton Manor,* 118 Conn. 180, 171 A. 31. The plaintiffs' proposed plan of resubdivision when interpreted in the light of the applicable rules of law comes within the terms of the restrictive covenants under review. As parties bind themselves so must the courts leave them bound.

The case of *Starmount Co. v. Memorial Park, Inc.,* 233 N.C. 613, 65 S.E. 2d 134, cited and relied on by the defendants, is factually distinguishable.

The defendants' exceptions relating to the exclusion of evidence proffered in support of the plea of estoppel are without merit. A building restriction is a negative easement in land and cannot be created by parol. *Turner v. Glenn, supra* (220 N. C. 620); *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697. True, in proper cases an estoppel predicated upon grounds of silence or fraud may override the statute of frauds. 19 Am. Jur., Estoppel, Section 92: Annotation: 50 A.L.R. 668, 685. But in the instant case the defendants' proffered evidence is wholly insufficient to justify relief on the ground of estoppel. Therefore, if the evidence proffered and refused had been received, the conclusion here reached would not have been changed. So, in law no harm has come to the defendants

from the exclusion of the evidence. *Pate v. Duke University,* 215 N.C. 57, 1 S.E. 2d 127. Other exceptions not discussed are overruled.

The verdict and judgment will be upheld.

No error.

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

WEST VIRGINIA PULP & PAPER COMPANY v. RICHMOND CEDAR WORKS, JOHN T. TAYLOR, AND OTHERS.

(Filed 17 March, 1954.)

1. Deeds § 18—

Contested proceedings for the registration of land titles under the Torrens Law are triable in the mode prescribed by G.S. 43-11 (1), (2) and (3) under the same rules for proving title as apply in actions of ejectment and other actions involving the establishment of land titles.

2. Ejectment § 15—

In an action of ejectment or other action involving the establishment of a land title, the burden is on the plaintiff to prove a title good against the world, or a title good against the defendant by estoppel.

3. Ejectment § 17—

The plaintiff in an action of ejectment or other action involving the establishment of a land title may safely rest his case upon showing such facts and such evidences of title as would establish his right to the relief sought by him if no further testimony were offered.

4. Same—

In actions of ejectment and other actions involving the establishment of land titles, plaintiff may make out a *prima facie* title by any of the methods enumerated in *Mobley v. Griffin,* 104 N.C. 112.

5. Same—

In actions of ejectment and other actions involving the establishment of land titles, plaintiff makes out a *prima facie* case by showing a grant from the State covering the land described in his complaint and *mesne* conveyances of that land to himself.

6. Same—

The plaintiff in an action of ejectment or other action involving the establishment of a land title need not prove the title alleged by him if it is judicially admitted by the defendant.

7. Ejectment § 15—

Where, in an action of ejectment or other action involving establishment of a land title, plaintiff makes out a *prima facie* title by evidence or judicial admission establishing that the land in dispute is within the external

boundaries of plaintiff's deed, and defendant claims under an exception in plaintiff's muniments of title, the burden is on defendant to bring himself within such exception by evidence identifying the *locus in quo* and locating it upon the surface of the earth inside the exception.

8. Deeds § 18—

In this proceeding under the Torrens Law, defendant admitted a grant from the State covering the land sought to be registered and title in petitioner thereunder by *mesne* conveyances, but asserted title to the *locus* under the exception in petitioner's muniments of title. Defendant failed to offer evidence identifying the *locus* or locating it upon the surface of the earth inside the exception. *Held:* Decree establishing petitioner's title to the land sought to be registered and quieting such title as against defendant's claim is without error.

APPEAL by defendant John T. Taylor from his Honor, *Malcolm C. Paul,* a Special Superior Court Judge residing in the judicial district embracing DARE County, in a title registration proceeding pending in the Superior Court of Dare County heard by consent of the parties at Chambers in Washington, North Carolina, within the district on 5 December, 1953.

Special proceeding *in rem* under the Torrens Law for the registration of the title to certain land.

For convenience of narration, the West Virginia Pulp & Paper Company is called the petitioner, and John T. Taylor is characterized as the answering defendant. The title of the cause is abbreviated in the manner set forth above because the mere statement of the names and addresses of all of the defendants occupies fourteen pages in the original record. Since this appeal merely involves the contest of the petitioner's application for registration by the answering defendant, we omit reference to other parties. The matters necessary to an understanding of the appeal are stated in the ensuing paragraphs.

1. On 7 September, 1795, the State of North Carolina granted to John Gray Blount under one comprehensive boundary "a tract of . . . 100,000 acres" in the portion of Dare County which was then included in Tyrrell County. The grant contained this exception respecting senior entries and grants: "Within which bounds there hath been heretofore granted 22,633 acres and is now surveyed and to be granted to Mr. George Pollock 9,600 acres which begins at Samuel Jackson's northeast corner of 2,000 acre grant on Mill Tail Creek, and runs south and east for complement."

2. On 19 January, 1953, the petitioner began this proceeding by petition against numerous defendants in the Superior Court of Dare County to establish its title to a large body of land in Dare County, to determine all adverse claims to such land, and to have its title to such land registered in accordance with the provisions of the Torrens Law as embodied in Chapter 43 of the General Statutes.

3. The petition, which was signed and sworn to by the petitioner, alleged its fee simple ownership of the land sought to be registered; described and plotted the land by metes and bounds with permanent markers; disclosed when, how, and from whom the petitioner acquired its alleged title to the land; identified the persons occupying any portions of the land; and gave an account of all known liens, interests, equities and claims, adverse or otherwise, vested or contingent, upon the land. It named the answering defendant as one claiming some adverse interest in the land.

4. The answering defendant answered, admitting the petitioner's claim to all of the land sought to be registered except a parcel of undesignated acreage purportedly described by metes and bounds in paragraph one of the answer, and asserting his own fee simple ownership of that particular parcel.

5. The petition, the answer, and all exhibits filed were referred to the examiner of titles for proceedings conforming to subdivisions 1, 2, and 3 of G.S. 43-11. The examiner made an independent examination of the title, and proceeded after notice to hear the cause upon the parol and documentary evidence offered by the petitioner and the answering defendant.

6. On the hearing before the examiner, the petitioner offered the grant from the State to John Gray Blount in evidence, and avowed its purpose to present testimony showing that it derived title to the land sought to be registered under this grant and successive conveyances through intermediate parties to itself. At this juncture, the answering defendant judicially admitted, in essence, that the grant from the State to John Gray Blount covered the land sought to be registered; that the petitioner held the record or paper title to such land under *mesne* conveyances from John Gray Blount; and that the parcel of land claimed by him in his answer was located within the external boundaries of the grant to John Gray Blount. The answering defendant advised the examiner at the same time of his contentions that the 22,633 acres included in the exception in the grant to John Gray Blount as land "heretofore granted" embraced 700 acres previously granted to John Tweedy; that the parcel of land claimed by him in his answer was situated within the grant to John Tweedy; and that he had acquired title to the parcel of land claimed by him in his answer through *mesne* conveyances from John Tweedy.

7. At this stage of the hearing before the examiner, the petitioner rested its case, and the answering defendant avowedly undertook to establish the validity of his announced contentions by documentary and parol testimony. He introduced in evidence a grant dated 7 October, 1782, whereby the State of North Carolina purportedly granted to John Tweedy 700 acres of land "on the south side of Milltail Creek"; a deed dated 20 March, 1788, whereby John Twidy purportedly conveyed to William

Basnight 200 acres of land "on the southwest side of Milltail Creek"; a deed dated 5 September, 1951, whereby W. H. McClees and 24 other persons quitclaimed to D. H. Price any "right, title, and interest" they had "in any portion of the land contained within the boundaries" of the grant from the State of North Carolina to John Tweedy; and a deed dated 20 December, 1951, whereby D. H. Price purportedly conveyed to the answering defendant the parcel of land claimed by him in his answer. The answering defendant presented other evidence tending to show that the grantors in the quitclaim deed were "some of the heirs of William Basnight." He relied solely upon the rule of *idem sonans* to establish the proposition that John *Twidy* was the same person as John *Tweedy*. The answering defendant did not offer any evidence sufficient to show the location of the land purportedly described in the deed from D. H. Price to him, or the location of the land purportedly described in the deed from John *Twidy* to William Basnight, or the location of the land purportedly described in the grant from the State of North Carolina to John *Tweedy*.

8. The examiner filed with the Clerk of the Superior Court of Dare County his written report setting forth in specific detail his findings of fact, his conclusions of law, and the state of the title.

9. When the report of the examiner is reduced to ultimate terms, it comes to this: The land sought to be registered was granted by the State of North Carolina to John Gray Blount in fee simple by the grant of 7 September, 1795, and passed by title of equal dignity to the petitioner through *mesne* conveyances from John Gray Blount. The answering defendant did not identify or locate any of the land purportedly described in any of the documents allegedly constituting his supposed chain of title. Since the answering defendant admitted that the parcel of land claimed by him lay within the external boundaries of the grant to John Gray Blount, and failed to show that such parcel was located within the exception in such grant, the petitioner is not only entitled to a decree establishing and registering its fee simple title, but it is also entitled to a decree quieting its fee simple title as against the claim of the answering defendant.

10. The answering defendant filed exceptions to the crucial findings of fact and conclusions of law of the examiner. He waived trial by jury of the issues of fact arising upon his exceptions by failing to demand such mode of trial.

11. The Clerk of the Superior Court of Dare County transmitted the record to the Honorable Malcolm C. Paul, a Special Superior Court Judge residing in the judicial district embracing Dare County, who heard the cause by consent of the parties at Chambers in Washington, North Carolina, within the district. Judge Paul found the title to the land sought to be registered to be in the petitioner, overruled the exceptions of

the answering defendant, and entered a decree which provided for carrying the report of the examiner into effect. The answering defendant excepted and appealed, assigning errors.

Rodman & Rodman for petitioner, appellee.
Nere E. Day for defendant John T. Taylor, appellant.

ERVIN, J. The answering defendant asserts by his assignments of error that the proceedings hitherto had in this cause are not sufficient to establish the petitioner's title to the land sought to be registered, or to warrant quieting the petitioner's alleged title to such land as against his claim. This position is untenable.

When the answering defendant filed his answer, he put the petitioner's application for registration in contest. Contested proceedings for the registration of land titles under the Torrens Law are triable in the mode prescribed by subdivisions 1, 2, and 3 of G.S. 43-11.

These statutory provisions are couched in these words:

1. "Referred to Examiner. Upon the return day of the summons the petition shall be set down for hearing upon the pleadings and exhibits filed. If any person claiming an interest in the land described in the petition, or any lien thereon, shall file an answer, the petition and answer, together with all exhibits filed, shall be referred to the examiner of titles, who shall proceed, after notice to the petitioner and the persons who have filed answer or answered, to hear the cause upon such parol or documentary evidence as may be offered or called for and taken by him, and in addition thereto make such independent examination of the title as may be necessary. Upon his request the clerk shall issue a commission under the seal of the court for taking such testimony as shall be beyond the jurisdiction of such examiner."

2. "Examiner's Report. The examiner shall, within thirty days after such hearing, unless for good cause the time shall be extended, file with the clerk a report of his conclusions of law and fact, setting forth the state of such title, any liens or encumbrances thereon, by whom held, amount due thereon, together with an abstract of title to the lands and any other information in regard thereto affecting its validity."

3. "Exceptions to Report. Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon demand of any party to the

proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the Supreme Court, as in other special proceedings."

On a hearing before an examiner in a contested proceeding to register a land title under the Torrens Law, the same rules for proving title apply as in actions of ejectment and other actions involving the establishment of land titles. *Perry v. Morgan,* 219 N.C. 377, 14 S.E. 2d 46; *Thomasson v. Coleman,* 176 Ga. 375, 167 S.E. 879; *Glos v. Cessna,* 207 Ill. 69, 69 N.E. 634; 76 C.J.S., Registration of Land Titles, sections 18, 19.

These rules for proving title to land are presently relevant:

1. The general rule is, that the burden is on the plaintiff, in the trial of an action of ejectment or other action involving the establishment of a land title, to prove a title good against the world, or a title good against the defendant by estoppel. *Shelley v. Grainger,* 204 N.C. 488, 168 S.E. 736; *Rumbough v. Sackett,* 141 N.C. 495, 54 S.E. 421; *Campbell v. Everhart,* 139 N.C. 503, 52 S.E. 201; *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142.

2. The plaintiff in an action of ejectment or other action involving the establishment of a land title may safely rest his case upon showing such facts and such evidences of title as would establish his right to the relief sought by him if no further testimony were offered. *Power Company v. Taylor,* 196 N.C. 55, 144 S.E. 523; *Singleton v. Roebuck,* 178 N.C. 201, 100 S.E. 313; *Moore v. McClain,* 141 N.C. 473, 54 S.E. 382; *Mobley v. Griffin, supra.* "This *prima facie* showing of title may be made by either of several methods." *Mobley v. Griffin, supra.* See, also, in this connection: *Conwell v. Mann,* 100 N.C. 234, 6 S.E. 782.

3. The several methods of showing *prima facie* title to land in actions of ejectment and other actions involving the establishment of land titles are enumerated in the famous case of *Mobley v. Griffin, supra.*

4. This is one of the enumerated methods: The plaintiff proves a *prima facie* title to land by tracing his title back to the State as the sovereign of the soil. *McDonald v. McCrummen,* 235 N.C. 550, 70 S.E. 2d 703; *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627; *Caudle v. Long,* 132 N.C. 675, 44 S.E. 368; *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800; *Mobley v. Griffin, supra; Graybeal v. Davis,* 95 N.C. 508. The plaintiff satisfies the requirements of this method of proving a *prima facie* title when his evidence shows a grant from the State covering the land described in his

complaint and *mesne* conveyances of that land to himself. *Power Company v. Taylor, supra; Buchanan v. Hedden,* 169 N.C. 222, 85 N.C. 417; *Land Co. v. Cloyd,* 165 N.C. 595, 81 S.E. 752; *Deaver v. Jones,* 119 N.C. 598, 26 S.E. 156.

5. The plaintiff in an action of ejectment or other action involving the establishment of a land title need not prove a title alleged by him if it is judicially admitted by the defendant. *Collins v. Swanson,* 121 N.C. 67, 28 S.E. 65; 28 C.J.S., Ejectment, section 81.

6. Where it appears from the showing of a *prima facie* title by the plaintiff or the judicial admission of the defendant that the land in dispute in an action of ejectment or other action involving the establishment of a land title is within the external boundaries of the plaintiff's deed and that the defendant claims it under an exception in such deed, the burden is on the defendant to bring himself within such exception by proper proof. *Boyd v. Lumber Co.,* 185 N.C. 559, 117 S.E. 714; *Bright v. Lumber Co.,* 184 N.C. 614, 113 S.E. 506; *Southgate v. Elfenbein,* 184 N.C. 129, 113 S.E. 594; *Lumber Co. v. Cedar Company,* 142 N.C. 411, 55 S.E. 304; *Batts v. Batts,* 128 N.C. 21, 38 S.E. 132; *Wyman v. Taylor,* 124 N.C. 426, 32 S.E. 740; *Bernhardt v. Brown,* 122 N.C. 587, 29 S.E. 884; 65 Am. S. R. 725; *Basnight v. Smith,* 112 N.C. 229, 16 S.E. 902; *Steel and Iron Co. v. Edwards,* 110 N.C. 353, 14 S.E. 861; *Midgett v. Wharton,* 102 N.C. 14, 8 S.E. 778; *King v. Wells,* 94 N.C. 344; *Gudger v. Hensley,* 82 N.C. 481; *McCormick v. Monroe,* 46 N.C. 13. To do this, the defendant must present evidence sufficient to identify the *locus in quo* and locate it upon the surface of the earth inside the exception. *McBrayer v. Blanton,* 157 N.C. 320, 72 S.E. 1070; *Steel and Iron Co. v. Edwards, supra.*

When the record in this cause is laid alongside these rules for proving title, it is manifest that the proceedings hitherto had are ample to establish the petitioner's title to the land sought to be registered.

The petitioner undertook to carry the burden of proving its ownership of the land by tracing its title back to the State's grant to John Gray Blount. This undertaking was interrupted by the answering defendant, who judicially admitted that the grant from the State to John Gray Blount covered the land sought to be registered, and that the petitioner held the record or paper title to such land by *mesne* conveyances from John Gray Blount. By this admission, the answering defendant conceded that the petitioner had a *prima facie* title to the land sought to be registered. Since the answering defendant offered no evidence tending to defeat the petitioner's *prima facie* title, the admission itself suffices to establish the petitioner's title to the land sought to be registered.

It is manifest, moreover, that the proceedings hitherto had in this cause are ample to warrant quieting the petitioner's title to the land sought to be registered as against the answering defendant's claim. Since the

answering defendant judicially admitted that the parcel of land purportedly described in paragraph one of the answer lay within the external boundaries of the plaintiff's muniments of title and that he claimed it under an exception in such muniments of title, the burden was on the answering defendant to identify such parcel of land and locate it upon the surface of the earth inside the exception. This he failed to do.

For the reasons given, the judgment is

Affirmed.

FRED B. SINGLETARY, JR., v. MARCADE NIXON, ISHAM G. NIXON AND WILLIAM E. NIXON, CO-PARTNERS DOING BUSINESS AS NIXON BROTHERS.

(Filed 17 March, 1954.)

1. Trial § 22a—

Motion to nonsuit at the close of all the evidence must be determined upon a consideration of all the evidence taken in the light most favorable to plaintiff and giving him the benefit of every reasonable inference to be drawn therefrom. G.S. 1-183.

2. Trial § 22b—

On plaintiff's motion for involuntary nonsuit, so much of defendant's evidence as is favorable to plaintiff, or tends to explain or make clear that which has been offered by the plaintiff, may be considered, but defendant's evidence which tends to establish another and a different state of facts or which tends to contradict or impeach the evidence offered by plaintiff is to be disregarded.

3. Negligence § 19c—

Motion for involuntary nonsuit on the ground of contributory negligence will not be sustained or directed unless the evidence is so clear on that issue that no other logical inference can reasonably be drawn from the evidence considered in the light most favorable to plaintiff.

4. Automobiles § 8a—

A motorist must at all times operate his vehicle with due regard to the width, traffic and condition of the highway, keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions so as to avoid colliding with any other vehicle. G.S. 20-141.

5. Same—

The operator of a vehicle at nighttime must take notice of the existing darkness and not exceed a speed at which he can stop within the radius of his headlights, having due regard to the then existing weather conditions, and must keep a lookout in the direction of travel.

6. Automobiles §§ 8d, 18h (3)—Evidence held to show contributory negligence on part of driver colliding with trailer blocking lane of travel.

The evidence tended to show that a tractor-trailer loaded with cotton was being backed from the highway into its terminal, and that the trailer was at about a 45-degree angle across the northbound traffic lane, so that neither the rear lights nor the front lights were visible to plaintiff who was traveling north, that plaintiff's brakes were in good condition and his lights burning and focused as required by law, G.S. 20-131, that plaintiff did not see the obstruction which "looked like a cloud," until plaintiff was close, and that by reflex action he applied his brakes, veered to the right and collided with the truck almost at the same time. There was no evidence that the trailer was suddenly backed across plaintiff's lane of traffic at a time when he was too close to stop and avoid the collision. *Held:* The plaintiff's testimony compels the conclusion either that he was operating his vehicle at excessive speed or was not keeping a proper lookout at the time, which constituted contributory negligence barring recovery as a matter of law.

ERVIN and PARKER, JJ., dissent.

APPEAL by plaintiff from *Paul, Special J.*, September Term, 1953, NASH. Affirmed.

Civil action to recover compensation for personal injuries resulting from an automobile-tractor-trailer collision.

Defendants, who are engaged in the trucking business, own a terminal on the east side of Highway 301 within Smithfield. About 8:15 p.m., 16 September 1949, their employees arrived at the terminal with a tractor and a platform trailer loaded with fifty bales of cotton. They had begun to back the trailer in to the terminal to unload the cotton. When the trailer was across the east, or northbound, lane of traffic with its rear wheels off the pavement and on the east shoulder of the highway, and the tractor was in, or partly in, the southbound lane, plaintiff approached from the south, traveling on his proper side of the road, and ran into the trailer just behind the rear wheels of the tractor where the trailer is attached to the tractor. The front part of his automobile went under the trailer, and he received serious personal injuries.

The trailer was located at about a 45-degree angle across plaintiff's lane of traffic with the rear end pointing in a southeasterly direction so that its rear lights were not in his lane of traffic and not readily visible to him. The exact position of the tractor and the direction in which it was headed is not clearly disclosed by the record. The evidence does disclose that it was not in position for its headlights to give plaintiff warning a vehicle was in his lane of traffic. Plaintiff makes no contention he was blinded by its lights. He said he did not observe them.

The plaintiff testified that upon entering Smithfield he reduced his speed to 35 m.p.h.; that before he reached the tractor he met an auto-

mobile going south and dimmed his lights but had again switched on his bright lights; that his lights were in proper working order and that he could have observed any normal object in the road within a distance of two hundred feet, or a man walking, or a car driving toward him, but not the gray object, the same color as the road.

He described the actual collision in the following language:

"I didn't know what stopped my car at the moment of the collision but afterward when I come to the ambulance helpers were taking me out of the car and then I knew what stopped it, a truck and trailer loaded with cotton . . . I didn't see the tractor or truck when it came into the highway, didn't know it was in front of me, didn't know how long it had been there and didn't know why it was there. I was close to the truck loaded with cotton before I saw what it actually was, but I don't know how close because I don't know the exact number of feet. All I can say truthfully is this: I saw a cloud or something like a blur in the road. I put on my brakes and veered to the right and then the impact. I didn't see something that looked like a car. It was the appearance of something. It was not concise. You see, there were no visible lights . . . I saw the appearance of something which was not identifiable to me; more of a cloud; overcast. It was an obstruction. Upon seeing that, I put my brakes on, pulled my wheels to the right, and that is all I know. Reflex action caused me to put the brakes on. I put them on and turned to the right . . . Seeing the cloud caused the reflex action.

"I saw something and hit it and it turned out to be a truck. I didn't know it was a truck when I hit it. I don't know how far I was from the obstacle when I first saw it. When I first saw it I don't know how far away from it I was or how near, only I was close. The only statement I can make truthfully is I don't know the distance nor do I care to estimate it. All I know is this one thing: I was close, saw this cloud or obstruction, put my brake on and turned to the right. I have been asked the number of feet I was from the truck when I saw it. The only true and correct answer I can give is I was close. My lights were working. My brakes were in good working order . . . Those three things happened almost at the same time, applying brakes, turning wheel to the right and the collision, which I was not aware of until afterward.

"As I looked up the highway I didn't see any lights in the highway or pathway of the car. No lights visible. My lights were burning. I tell the jury I didn't see the object in sufficient time to enable me to stop the automobile before striking. If the tractor part of that equipment had headlights on it, and if the headlights were burning, I didn't see any lights visible whatsoever, if the lights on the tractor were going up the road in the opposite direction from me. I am saying in effect if the lights were burning on the tractor and trailer, I didn't see any of them. It was not

visible to me until just before the accident. All I saw was a blur, same color as the road. Evidently I didn't know what I hit until it was all over . . .

"The object in the road had the same appearance as the road. I had bright lights on . . . I estimated my speed at 35 miles an hour, but I am unwilling to estimate the distance in feet . . .

"I don't know what position the tractor and trailer were across Highway 301. It appeared to me like most of it was blocked. It was across the road . . .

"I couldn't say whether it was a red truck or a red trailer. If it was a red trailer, I did not see it, and if it was a green truck, I did not see it. I saw this dark spot that looked like a cloud."

At the conclusion of the testimony the court below, on motion of defendants, entered judgment as in case of involuntary nonsuit. Plaintiff excepted and appealed.

John M. King and Thorp & Thorp for plaintiff appellant.
E. J. Wellons and Cooley & May for defendant appellees.

BARNHILL, C. J. When a motion to dismiss an action as in case of involuntary nonsuit comes on to be heard at the conclusion of all the evidence, as here, the question should be decided upon a consideration of all the evidence. G.S. 1-183; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209.

This rule, however, is subject to certain limitations: (a) the evidence is to be taken in the light most favorable to the plaintiff and he is entitled to the benefit of every reasonable inference to be drawn therefrom; (b) so much of the defendant's evidence as is favorable to the plaintiff or tends to explain or make clear that which has been offered by the plaintiff, may be considered; but (c) that which tends to establish another and a different state of facts or which tends to contradict or impeach the evidence offered by plaintiff is to be disregarded. Otherwise consideration would not be in the light most favorable to the plaintiff. *Atkins v. Transportation Co., supra,* and cases cited.

Considering the evidence contained in this record, it may be that, *non constat* these limitations, some of the testimony offered by defendants might well be considered on their motion for judgment of nonsuit entered at the conclusion of all the testimony. The defendants offered evidence tending to show the location and color of the tractor and trailer—the tractor was green and the trailer was red. This was not denied by plaintiff other than in his statement that the vehicle appeared to him to be the same color as the road. They likewise offered evidence tending to show that one of their employees was on the south side of the truck directing

traffic and that when plaintiff approached he waved his light at plaintiff until he had to jump out of the road to keep from being run over; and that the truck was not moving at the time of the wreck.

Be that as it may, we need not—and do not—consider this testimony for the reason, in part, plaintiff's own description of the unfortunate mishap discloses that he was guilty of contributory negligence as a matter of law. This required a dismissal of the action.

It is established law in this jurisdiction that a judgment of involuntary nonsuit on the grounds of contributory negligence will not be sustained or directed unless the evidence is so clear on that issue that no other conclusion seems to be permissible. *Atkins v. Transportation Co., supra,* and cases cited; *Samuels v. Bowers,* 232 N.C. 149, 59 S.E. 2d 787; *Levy v. Aluminum Co.,* 232 N.C. 158, 59 S.E. 2d 632; *Goodson v. Williams,* 237 N.C. 291, 74 S.E. 2d 762; *Mikeal v. Pendleton,* 237 N.C. 690, 75 S.E. 2d 756.

In this connection it may be said that it is presumed reasonable men draw reasonable conclusions, so that the inferences contemplated are logical inferences reasonably sustained by the evidence when considered in the light most favorable to the plaintiff. *Atkins v. Transportation Co., supra.*

The hub of our motor vehicle traffic regulations is contained in G.S. 20-140, 141. Under the provisions of these sections a motorist must at all times operate his vehicle with due regard to the width, traffic, and condition of the highway, and he must decrease speed and keep his car under control "when special hazard exists . . . by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any . . . vehicle, or other conveyance on . . . the highway . . ." G.S. 20-141; *Brown v. Bus Lines,* 230 N.C. 493, 53 S.E. 2d 539; *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197; *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462; *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361.

And, specifically, he must (1) when he operates his vehicle during the nighttime, take notice of the existing darkness which limits visibility to the distance his headlights throw their rays and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his headlights (but see ch. 1145, S.L. 1953); (2) keep an outlook in the direction of travel and he is held to the duty of seeing what he should have seen; and (3) give due regard to the then existing weather conditions. *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Brown v. Bus Lines, supra; Adcox v. Austin,* 235 N.C. 591, 70 S.E. 2d 837; *Adams v. Service Co.,* 237 N.C. 136, 74 S.E. 2d 332.

Here the plaintiff was operating his vehicle on a straight road. His headlights and brakes were in good condition. There was nothing to

obstruct his view, and the light of the vehicle he met south of the truck did not obstruct his view. Indeed, it is not disclosed how far he was from the truck at that time. He testified his lights were focused as required by law, and the law provides they must be such as to permit him to see a person a distance of at least two hundred feet ahead. G.S. 20-131. He did not see the obstruction in the road, which "looked like a cloud" to him, until he was "close" to it—how near in feet he repeatedly declined to estimate. He testified in one way or another more than once that he applied his brakes, veered to the right, and collided with the truck, which "three things" happened "almost at the same time." This testimony compels the conclusion that he was either operating his vehicle at an excessive rate of speed or was not keeping a proper outlook at the time. Of necessity, such conduct on his part was, as a matter of law, a contributing cause of the collision. *Presley v. Allen & Co.,* 234 N.C. 181, 66 S.E. 2d 789.

There is no testimony in the record tending to show that the trailer was suddenly backed across his lane of travel at a time when he was too close to stop and avoid the collision or to support the other plausible explanations advanced by plaintiff. They amount to nothing more than pure speculation.

The plaintiff may, perhaps, draw consolation from the fact this record tends to show that he is the type of man who "sweareth to his own hurt and changeth not." Psalms 15:4. In his examination and cross-examination he was afforded opportunities to modify his testimony to his own advantage. Yet he adhered strictly to his first statements in respect to the manner in which the collision occurred, his nearness to the truck when he first saw it, the time when he applied his brakes, and other circumstances which tended to prove his own want of due care. For this at least he is to be commended.

For the reasons stated the judgment entered in the court below is

Affirmed.

ERVIN and PARKER, JJ., dissent.

GRANT STEWART, EMPLOYEE, v. R. H. DUNCAN (EMPLOYER), AND AMERICAN CASUALTY COMPANY AND/OR COAL OPERATORS CASUALTY COMPANY (CARRIERS).

(Filed 17 March, 1954.)

1. **Appeal and Error § 6c (2)—**

An exception to the judgment without any exception to particular findings of fact presents the sole question of whether the findings are sufficient in law to support the judgment, and does not bring up for review the evidence upon which the findings are based.

2. **Master and Servant § 55d—**

While it is a better practice ordinarily for the Superior Court to rule separately upon each specific exception to the findings of fact and conclusions of law of the Industrial Commission, when the Superior Court affirms all such findings of fact and conclusions of law and the award, it amounts to a ruling on each and all such exceptions, and appellant on further appeal to the Supreme Court may file specific exceptions to each ruling on which he wishes to base an assignment of error.

3. **Master and Servant §§ 40f, 53e—Employer and carrier during last 30-day period employee is exposed to silicosis are liable.**

Where the evidence supports the findings of the Industrial Commission that the employee suffering disability from silicosis was exposed to the hazards of the disease for more than two years in the ten years preceding his disability and that he was last injuriously exposed to the hazards of the disease for thirty working days within seven consecutive calendar months while in the employment of defendant, G.S. 97-57 places liability therefor upon such employer and his insurance carrier during that period, and the mere fact that the employee was advised that he had silicosis prior to the expiration of this 30-day period but continued for a short time to perform his same work is insufficient alone to sustain the insurance carrier's contention that his employment after the discovery of the disease was in bad faith to make the loss fall upon it.

4. **Master and Servant § 53b—**

Where the Industrial Commission finds that a disabled employee was suffering from tuberculosis as well as from silicosis, whether the award for disability from silicosis should be reduced one-sixth rests in the discretion of the Industrial Commission. G.S. 97-65.

APPEAL by defendant, American Casualty Company, from *Dan K. Moore, J.*, September, 1953, Term, of MITCHELL.

Proceeding under Workmen's Compensation Act (G.S. Ch. 97, Art. 1), wherein the plaintiff-employee claims compensation on account of disablement caused by the occupational disease of silicosis.

It was stipulated: "1. That the employer-employee relationship existed between the claimant and the defendant, R. H. Duncan. 2. That all parties were subject to and bound by the provisions of the Workmen's Compensation Act. 3. That the defendant, American Casualty Company,

was the insurance carrier for the employer from 15 June 1951 to 31 December 1951. 4. That the average weekly wage of the claimant was $30.00."

The findings of fact made by the hearing commissioner, adopted by the full Commission and approved by Judge Moore, include the following:

"1. That the defendant, R. H. Duncan, operated a feldspar mine near Spruce Pine, in Mitchell County; . . . that all drilling, blasting, and other operations carried on therein are dry operations; that there is dust in the mine; and that this dust contains free silica.

"2. That the claimant, Grant Stewart, has worked in the mining industry and particularly in feldspar mines most of his adult life; that from 1936 to 1946 he worked at various times in feldspar mines . . . as blacksmith, mucker, and driller . . . in North Carolina . . .

"3. That the claimant worked for Duncan from April 1947 until sometime in the early part of 1948; that he then quit and mined feldspar for himself until 9 April 1951; that on 9 April 1951, he returned to work for the defendant, R. H. Duncan, and worked until 3 August 1951; and that at all times while engaged in feldspar mining, the claimant was exposed to the inhalation of dust containing free silica.

"4. That the claimant was exposed to the inhalation of dust containing free silica in employment in North Carolina for more than two years in the ten years preceding 3 August 1951.

"5. That after returning to work for the defendant Duncan, the claimant worked a total of thirty-four working days or parts thereof prior to 15 June 1951.

"6. That the claimant worked on the following days for the defendant Duncan after 15 June 1951 as follows: June 18, 19, 20, 21, 22, 26, 27, 28, 29; July 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 25, 26, 27, 30, 31; August 1, 2 and 3.

"7. That the claimant was last injuriously exposed to the hazard of inhaling dust containing free silica in employment in the period beginning 21 June 1951 and ending 3 August 1951, both dates inclusive; and that these thirty working days were within seven consecutive calendar months.

"8. That the defendant, American Casualty Company, was the insurance carrier for Robert H. Duncan when the claimant was last injuriously exposed to the hazards of silicosis.

"9. That the claimant now has the characteristic fibrotic condition of the lungs caused by the inhalation of dust containing free silica known as silicosis due to the inhalation of such dust in his employment.

"10. That the claimant has been periodically examined by the Division of Industrial Hygiene of the North Carolina State Board of Health; that he has been issued work cards at intervals; that the last work card was issued on 19 December 1946; that the claimant was given an X-ray ex-

amination by the Division of Industrial Hygiene on 12 June 1951; that this examination revealed that the claimant has moderately active pulmonary tuberculosis; that no dust pathology was diagnosed at that time; that the claimant presented himself at the Western North Carolina Sanatorium for examination on 21 July 1951; that at that time he was examined by Dr. C. D. Thomas a duly qualified specialist in pathology of the lungs; that Dr. Thomas made a diagnosis of active pulmonary tuberculosis and silicosis in the first stage; that the claimant was first advised by competent medical authority that he had silicosis on 21 July 1951; and that he filed his claim for compensation with the Industrial Commission on 16 August 1951.

"11. That the claimant's condition had progressed so that the X-ray made 21 July 1951 revealed the presence of silicosis I, while that on 12 June 1951 did not.

"12. That while employed by the defendant, R. H. Duncan, the claimant worked as a mucker, driller, and foreman in a feldspar mine; and was exposed to the inhalation of dust containing free silica.

"13. That the claimant continued to work until 3 August 1951; that he then quit; that he entered Western North Carolina Sanatorium for treatment of his pulmonary tuberculosis on 27 August 1951; and that he had applied for admission on 21 July 1951.

"14. That the claimant is still a patient at the sanatorium . . .

"15. That the claimant is now actually incapacitated because of silicosis from performing normal labor as a mucker, driller, and foreman in a feldspar mine, the last occupation in which he was remuneratively employed; and that this occurred on 3 August 1951.

"16. That the claimant now has active pulmonary tuberculosis which is sufficient alone to prevent him from working; and that his silicosis is sufficient to prevent him from performing normal labor in the last occupation in which remuneratively employed.

"17. That there is no reasonable basis upon which to conclude that the claimant possesses the actual or potential capacity of body and mind to work with substantial regularity during the foreseeable future in any gainful occupation free from the hazards of silicosis."

The conclusions of law made by the hearing commissioner, adopted by the full Commission and approved by Judge Moore, were to the effect that under G.S. 97-63, 97-62, 97-54, 97-58 (a), 97-57, the plaintiff was entitled to compensation, and that the defendant, R. H. Duncan, and the defendant, American Casualty Company, its insurance carrier during the period of last injurious exposure, *i.e.*, the thirty days during the period beginning 21 June, 1951 and ending 3 August, 1951, were liable for the payment of such compensation.

Thereupon, an award was made by the hearing commissioner, which was adopted by the full Commission and approved by Judge Moore which adjudged that the defendants R. H. Duncan and American Casualty Company pay compensation to the claimant at the rate of $18.00 per week, during four hundred weeks beginning 4 August 1951, not to exceed a total of $8,000.00, and that they pay all costs incurred, and discharged the defendant, Coal Operators Casualty Company, as a party defendant upon the ground that it had no liability for the payment of the plaintiff's claim.

The judgment of Judge Moore found that there was competent evidence to support the findings of fact of the full Commission and affirmed the award.

"To the rendition and signing of the foregoing judgment the defendant American Casualty Company, in apt time, objects and excepts and gives notice of appeal to the Supreme Court of North Carolina."

Here, the appellant assigns as error the rendering and signing of the judgment and also that Judge Moore affirmed the findings of fact and conclusions of law of the full Commission in blanket form without ruling specifically upon each of its exceptions to the action of the full Commission.

Fouts & Watson for plaintiff, appellee.
Williams & Williams for defendant, appellant.
Proctor & Dameron for defendant, appellee.

BOBBITT, J. In appealing from the hearing commissioner to the full Commission, and in appealing from the full Commission to the Superior Court, the appellant filed specific exceptions to a number of the findings of fact and conclusions of law and to the award. However, the appeal here is from the judgment of Judge Moore, no exceptions having been entered to his rulings as to particular findings of fact. In the absence of such exceptions, the appeal does not bring up for review the evidence upon which the findings of fact are based. The only question presented is whether the findings of fact are sufficient in law to support the judgment. *Worsley v. Rendering Co., ante,* 547; *Wyatt v. Sharp, post,* 655; *Glace v. Throwing Co., post,* 668.

It has been pointed out that we regard it to be the better practice for the Superior Court Judge to rule *seriatim* on each of the specific exceptions of the appellant to the findings of fact, conclusions of law and award of the full Commission. However, when the Superior Court Judge affirms *all* such findings of fact and conclusions of law and the award, it is in effect a ruling on *each* and all such exceptions; and in such case the appellant is in no way precluded from filing specific exceptions to each ruling on which he wishes to base an assignment of error upon appeal to this

court. *Fox v. Mills, Inc.*, 225 N.C. 580, 35 S.E. 2d 869. The procedure is fully explained by *Chief Justice Barnhill* in *Worsley v. Rendering Co.*, *supra.*

The appellant, by brief and in oral argument, contends that he had no opportunity to file specific exceptions to the rulings of Judge Moore. There is nothing in the record before us that suggests that the appellant was precluded from doing so. A consideration of this contention would take us beyond the record and beyond the assignments of error. However, upon a careful review of the evidence we find that all of the findings of fact are amply supported by competent evidence and the appellant has suffered no harm on account of failure to comply with procedural requirements.

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

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

Any suggestion of comparative responsibility as between successive employers and their respective carriers, or as between successive carriers for the same employer, is dispelled by the plain language of the statute. The liability is upon the employer and carrier on the risk when the employee was "last injuriously exposed" to the hazards of silicosis as that expression is clearly defined in G.S. 97-57. *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 22 S.E. 2d 275; *Bye v. Interstate Granite Co.*, 230 N.C. 334, 53 S.E. 2d 274. Under the findings of fact, this casts the liability upon the defendant R. H. Duncan, and upon the defendant American Casualty Company, its carrier.

The principal grievance of the appellant is that it was assigned this risk on 15 June, 1951; that the liability of Coal Operators Casualty Company terminated on that date; and that, while it is liable under the express terms of G.S. 97-57, it is unfair to impose this liability upon it because the plaintiff was permitted to work after 21 July, 1951, when he was advised that he had silicosis. The contention is that the employment of the plaintiff by Duncan after 21 July, 1951, was in bad faith, in effect a scheme to make the loss fall upon appellant. Again, consideration of this contention would take us beyond the record and beyond the assignments of error. Suffice it to say, there was no finding of fact and no evidence supporting any contention of bad faith on the part of the employer. The

evidence shows clearly that the claimant's work after 21 July, 1951, was in all respects the same as that he had performed prior thereto. In this connection, it should be noted that an employee cannot be forced to change his occupation or be removed therefrom even by order of the Industrial Commission except after hearing held after due notice. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797.

It is true that the employer or employer and carrier on the risk when the employee "was last injuriously exposed to the hazards of such disease" within the meaning of G.S. 97-57 must bear the liability, even though the disease has been present and has progressed over a long period of time. This situation gave rise to the necessity for assigning risks by the Compensation Rating and Inspection Bureau. (G.S. Ch. 97, Art. 2.) Each company underwriting workmen's compensation insurance in this State must accept its share of these undesirable assigned risks whenever the Bureau finds that the risk is in good faith entitled to such coverage. A particular risk, standing alone, may seem to impose an unreasonable burden on the carrier to which it is assigned. However, the long range result would seem to be as equitable as under any system that can be devised.

It is noteworthy that the appellant was the insurance carrier for Duncan from 15 June, 1951, to 31 December, 1951. The coverage included *all* of Duncan's employees, not the plaintiff alone. It is also quite possible that another employee of Duncan, within a short period after 31 December, 1951, suffered disablement from silicosis under factual conditions such that the new carrier had to bear the liability.

The applicant also contends that, by reason of the finding of fact that the claimant is suffering from tuberculosis as well as from silicosis, the *rate of payment* specified in the award should be reduced one-sixth under the provisions of G.S. 97-65. The Industrial Commission, after full consideration, declined to make such reduction; and we are of opinion that, under the language of this statute, this was a matter within its discretion.

It appearing that, upon application of the pertinent statutes to the findings of fact, the award in favor of plaintiff and against the defendants R. H. Duncan and American Casualty Company was fully justified, and finding no error of law in the rulings of the trial judge, the judgment of the Superior Court is

Affirmed.

J. J. WHEELER v. MART WHEELER AND WIFE, GEORGIA WHEELER.

(Filed 17 March, 1954.)

1. Pleadings § 22b—

The trial court may permit an amendment to the pleadings before or after verdict and judgment so that the pleadings will conform to the evidence offered, provided the amendment does not change substantially the claim or defense. G.S. 1-163.

2. Same—

Independent of statute, the trial court may allow an amendment to the pleadings in its inherent discretion within the limitation that an amendment must not, in effect, add a new cause of action or change the subject matter of the original action.

3. Same—

Where plaintiff alleges that defendants agreed to convey to him a small tract of land upon which plaintiff had built a residence, but the testimony is that defendants agreed to give plaintiff notes for the amount expended by plaintiff in erecting the residence, *held*, the trial court properly permitted plaintiff to amend to make the allegation conform to the proof.

4. Deeds § 16c: Contracts § 23—

Allegation and evidence that plaintiff furnished the money for the purchase price of a tract of land in consideration of the grantees' promise to furnish plaintiff and his wife a home and medical care, and provide for them during their natural lives, and that defendants breached the contract, *is held* sufficient to overrule defendants' motion to nonsuit in plaintiff's action to rescind the contract and to recover the consideration paid by him on the ground that the contract contemplated personal care and therefore the breach could not be adequately compensated for in money.

5. Contracts § 23—

Allegations and evidence that plaintiff constructed a residence on land to which defendants had title in consideration of defendants' promise to repay upon the completion of the dwelling the cost of its construction, *is held* sufficient to overrule defendants' motion to nonsuit plaintiff's action for breach of the agreement.

6. Trial § 36—

It is the duty of the court either of its own motion or at the suggestion of counsel, to submit to the jury the issues raised by the pleadings and supported by the evidence which are necessary to settle the material controversies, G.S. 1-200.

7. Trial § 31c—Instruction held for error in failing to conform to pleadings and evidence.

Plaintiff alleged one cause of action for breach of contract to maintain and support plaintiff and his wife during their natural lives and a separate cause of action to recover money expended upon defendants' promise to repay. Defendants contended that they merely borrowed a sum of money from plaintiff which they had more than repaid. The court sub-

mitted issues relating solely to the amount plaintiff had loaned defendants and instructed the jury to answer the issues in such amount as plaintiff had satisfied them by the greater weight of the evidence plaintiff had advanced to defendants at their request under a promise to repay or to support and maintain plaintiff for the remainder of his life. *Held:* The instruction is erroneous on defendants' appeal, since it permitted the jury to answer the issues either on the theory of money advanced upon the promise to support and maintain plaintiff, or on the theory that plaintiff had merely loaned defendants money. Further, if recovery was allowed on the theory of a loan, evidence that plaintiff had been sick, without food in the house or anyone to care for him, and evidence that plaintiff had expended money for hospital and other expenses after breach of the contract to support, would be highly prejudicial.

APPEAL by defendants from *Moore, J.*, October Term, 1953, WILKES. New trial.

Civil action on two causes of action: (1) for breach of a contract to maintain and support plaintiff and his wife during their natural lives, and (2) for recovery of money expended upon defendants' promise to repay.

As plaintiff filed an amended or substitute complaint in which he states fully and separately his two causes of action, we may disregard the original complaint which appears of record.

Plaintiff is the father of the male defendant and father-in-law of the *feme* defendant. In the summer of 1947 defendants purchased a tract of land in Wilkes County consisting of three parcels for $5,500. Plaintiff alleges that (1) he provided $4,500 of the purchase price in consideration of the promise of defendants to furnish plaintiff and his wife a home and medical care, to provide for and support them during their natural lives, and give their bodies a decent burial; (2) the defendants breached said contract; (3) the contract contemplated personal care and therefore a breach thereof "cannot be adequately compensated for in money" by reason of which he "is now entitled to ask for a rescission of said contract and that the consideration paid by him be returned in full to" him; and (4) he is entitled to have the judgment for said sum declared a specific lien on said land.

This is the substance of plaintiff's first cause of action upon which he bases his prayer that he recover (1) $4,500; (2) $730 funeral expenses for his wife's burial; (3) $300 hospital and medical expense; (4) $4,150 for maintenance and subsistence from 1947 to date; and (5) $50 per month for support during the remainder of his life.

At the trial he offered evidence tending to establish the contract as alleged by him and the breach thereof.

Answering this cause of action, defendants deny any agreement on their part to furnish plaintiff maintenance, etc., as alleged in the complaint.

They allege that the male defendant borrowed $3,000 from plaintiff and $450 from plaintiff's wife, and plaintiff gave him $1,000, all of which was used to pay for said land. They further allege that all the money borrowed has been repaid and overpaid to the extent of $300.

As a second cause of action, plaintiff alleges that shortly after the land was purchased, he built a small residence thereon, near the residence to be occupied by defendants, at a cost of $2,500, in consideration of the promise of defendants that upon the completion of said house, they would convey to him the land on which it was located, consisting of approximately three acres.

After verdict plaintiff, by permission of the Court, struck the allegation that defendants agreed to convey to him the small dwelling and three acres of land on which it was located, and substituted in lieu thereof an allegation that defendants agreed that upon completion of said dwelling, they would pay to plaintiff the cost of construction of the same.

Defendants, answering, admit the erection by plaintiff of said dwelling, deny the contract alleged in plaintiff's second cause of action, plead certain set-offs in the event it shall be determined they are indebted to plaintiff in any amount on his second cause of action, and assert that in the event plaintiff recovers, then that they should be credited with the rental value of the house for the four years plaintiff has had possession thereof.

At the trial plaintiff on the one hand and defendants on the other offered evidence tending to support their respective allegations. Plaintiff testified he lived in the small house for a year or more and since then has leased it and collected the rent therefor. And defendants were permitted to, and did, offer evidence as to the market value of the house erected by the plaintiff.

Issues were submitted to and answered by the jury as follows:

"1. What amount, if any, did the plaintiff lend the defendant Mart Wheeler in the year 1947?

"Answer: $6,250.00.

"2. What amount, if any, did the plaintiff lend the defendant Georgia Wheeler in the year 1947?

"Answer: $6,250.00.

"3. What amount, if any, has the defendant Mart Wheeler repaid to the plaintiff?

"Answer: $1,800.00."

The court signed judgment on the verdict and defendants appealed.

Hayes & Davis and Moore & Gambill for plaintiff appellee.

Trivette, Holshouser & Mitchell for defendant appellants.

BARNHILL, C. J. Unquestionably the trial judge may permit a litigant to amend his pleadings either before or after verdict and judgment so that they will conform to the evidence offered, provided the amendment does not change substantially the claim or defense. G.S. 1-163; *Bank v. Sturgill,* 223 N.C. 825, 28 S.E. 2d 511; *Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565; *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602; *Waters v. Waters,* 125 N.C. 590; *Hicks v. Nivens,* 210 N.C. 44, 185 S.E. 469.

Independent of the statute, the right to permit amendments to the pleadings is an inherent discretionary power of the courts. *Gilchrist v. Kitchin,* 86 N.C. 20; *Bank v. Sherman,* 101 U.S. 403, 25 L. Ed. 866.

This rule is subject to the limitation that the amendment must not, in effect, add a new cause of action or change the subject matter of the original action. *Lefler v. Lane,* 170 N.C. 181, 86 S.E. 1022; *Wilmington v. Board of Education,* 210 N.C. 197, 185 S.E. 767; *Nassaney v. Culler,* 224 N.C. 323, 30 S.E. 2d 226; *Ely v. Early,* 94 N.C. 1.

While, in his second cause of action, plaintiff alleges that defendants agreed to convey to him the small residence and the land on which it was situated, he testified that they agreed to give him notes for the amount expended by him in erecting the building. The exception to the order authorizing plaintiff to amend the first paragraph of his second cause of action so as to make his allegation conform to his proof is without merit.

The exception to the denial of the motion of defendants to dismiss as in case of nonsuit is likewise untenable. Plaintiff offered evidence upon each of his causes of action sufficient to require the submission of issues to a jury.

The issues to be submitted to a jury are those raised by the pleadings and supported by the evidence. G.S. 1-200; *Carland v. Allison,* 221 N.C. 120, 19 S.E. 2d 245; *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648.

G.S. 1-200, as construed and applied by this Court, is mandatory. It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. *Griffin v. Insurance Co.,* 225 N.C. 684, 36 S.E. 2d 225, and cases cited; *Greene v. Greene,* 217 N.C. 649, 9 S.E. 2d 413; *Davidson v. Gifford,* 100 N.C. 18; *Falkner v. Pilcher,* 137 N.C. 449.

"All the material issues must be tried, unless waived, and it is error not to try them. *Porter v. R. R.,* 97 N.C. 66; *Davidson v. Gifford,* 100 N.C. 18;" *Gordon v. Collett,* 102 N.C. 532.

The issues submitted by the court below not only undertake to consolidate the issues raised on both causes of action, but they fail to comprehend all the issues raised by the pleadings.

The plaintiff alleges two causes of action arising out of two separate and distinct transactions. Yet the issues submitted have no substantial

relation to plaintiff's first cause of action which is bottomed on an alleged breach of contract to maintain and support. They are instead in accord with the allegations of defendants in respect to the first transaction. Hence it would seem that the court, in adopting the issues actually submitted, undertook to and did decide that the original transaction was not in the form of a contract for support and maintenance, but was, as contended by defendants, a mere loan. As plaintiff offered evidence tending to support his allegations, that was an issue for the jury to decide.

Even so, plaintiff did not appeal. And as the issues, in so far as they relate to the plaintiff's first cause of action, are in accord with the contentions of the defendants in respect to the purchase of the land, they, perhaps, have no just cause to complain. We do not, therefore, bottom our decision on the failure of the trial judge to submit issues sufficient in form and substance to settle the whole controversy. We merely take notice of that part of the record for the reason that it emphasizes the prejudicial nature of the excerpts from the charge to which defendants do except.

The court instructed the jury on the first issues in part as follows:

". . . you will answer that issue in such amount as the plaintiff has satisfied you from the evidence and by its greater weight represents the amount which he (plaintiff) has advanced to the defendant, at the request of the defendant, under a promise by the defendant to repay said amount, or to support and maintain the plaintiff for the remainder of his life."

The charge on the second issue is in almost identical language:

". . . you will answer that issue in such amount as . . . represents the amount advanced by the plaintiff to the defendant Georgia Wheeler . . . for which she promised to pay or which she promised to support and maintain the plaintiff and his wife."

Thus the court opened the door for the jury to answer these issues either on the theory plaintiff had advanced money to defendants on their promise to furnish him maintenance and support during the remainder of his life or had merely made a loan to them in some amount.

On the first cause of action plaintiff insists that defendants contracted to furnish him with support and maintenance. Defendants assert the male defendant merely borrowed $3,000. Upon which theory did the jury answer the issue? Did it find that defendants had breached their contract to maintain and support plaintiff or that plaintiff voluntarily built the small dwelling for his own convenience and therefore nothing is due him for the money expended thereon? In the original transaction did plaintiff advance $4,500, as his evidence tends to show, or $4,000, the amount he withdrew from the bank at the time, or only $3,000, as defendants allege? Is the amount arrived at by the jury made up partly of money advanced at the time the land was purchased or did the jury add hospital

and other expenses paid by plaintiff after defendants breached their contract to support? These and other questions the record fails to answer. They demonstrate, however, that the facts at issue, as raised by the pleadings filed and the testimony offered, are not fully and satisfactorily answered.

Furthermore, if the money advanced by plaintiff was merely a loan, the testimony to the effect plaintiff was sick for a month without anyone to care for him while defendants were in Ohio; that his health was "plumb bad"; that at one time while he was sick the only food he had in his home was a little brown sugar, a little piece of cake, and some vegetables; to which defendants excepted, was irrelevant and highly prejudicial to defendants.

For the reasons stated, the quoted excerpts from the charge must be held for prejudicial error which entitles defendants to a

New trial.

CHLOE PRICE GARDNER, PETITIONER, v. ALICE WALKER PRICE, BY HER GUARDIAN AD LITEM; JOHN A. PRICE AND WIFE, LILLIAN E. PRICE; HANNAH M. PRICE; HELEN PRICE POTTER; J. D. GRIMES, SR., AND WIFE, IDA W. GRIMES; JOHN A. MAYO AND WIFE, HATTIE MAYO.

(Filed 17 March, 1954.)

Appeal and Error § 2—

In this partition proceeding, two of defendants pleaded sole seizin under deed from the common ancestor and set up, for the purpose of attack, judgment setting aside such deed. By consent of the parties the question of the validity of the judgment was submitted to the court as a separate question of law, and appeal taken from the adjudication that the judgment was valid. *Held:* The appeal must be dismissed as premature, since the matter could be presented on appeal from a final judgment by exception to the interlocutory order. G.S. 1-277.

APPEAL by defendants John A. Price and wife, Lillian E. Price, from *Morris, J.*, at September Term, 1953, of BEAUFORT.

Special proceeding to sell lands for partition, converted into action in nature of ejectment on plea of sole seizin.

The lands described in the petition formerly belonged to Hannah S. Price, who died intestate 14 November, 1940, being survived by these five children, her only heirs at law: Chloe Price Gardner, Hannah M. Price, Helen Price Potter, Alice Walker Price, and John A. Price.

On 5 November, 1951, Chloe Price Gardner instituted this proceeding to sell the lands for partition, joining as defendants the other heirs at law and also J. D. Grimes, Sr., and John A. Mayo, the latter two being

joined under allegations that they collectively own a one-third undivided interest in the lands sought to be sold. The record discloses that after the death of Hannah S. Price four of her children made a deed to Grimes and Mayo for the one-third interest claimed by them.

John A. Price and wife, Lillian E. Price, by answer pleaded sole seizin.

On 26 November, 1951, the petitioner filed amended complaint, alleging that John A. Price and wife have been in the exclusive possession of the premises since the fall of 1944, and demanding an accounting for rents and profits and also an accounting for timber wrongfully cut and sold by them from the premises.

The defendants John A. Price and wife on 18 February, 1953, answering the amended complaint, renewed their plea of sole seizin, expressly alleging title under a deed made to them by Hannah S. Price dated 1 November, 1940, filed 15 November, 1940, and registered in the Public Registry of Beaufort County in Book 336, page 97. And by way of further defense, the defendants John A. Price and wife specially pleaded for the purpose of attack the judgment roll in an action instituted in December, 1941, by Chloe Price Gardner and others against John A. Price and wife for the purpose of setting aside the deed previously made by Hannah S. Price to John A. Price and wife, in which prior action judgment was entered in 1944 adjudging that the four plaintiffs, children of Hannah S. Price, deceased, each own a one-fifth undivided interest in the lands described in the deed. The defendants John A. Price and wife allege that the judgment purporting to render the deed nugatory is void and of no effect for the reason that, notwithstanding jury trial was not waived, it was entered by the Presiding Judge without the intervention of a jury. The defendants John A. Price and wife by way of further defense also set up the foregoing deed of Hannah S. Price as color of title and allege adverse possession thereunder for more than seven years.

At the February Term, 1953, Judge Bone, on finding that two defendants in the instant proceeding, namely: Hannah M. Price and Helen Price Potter, had not been served with process, entered an order adjudging them to be necessary parties and directing that they be served and brought in. While the record refers to the filing of an affidavit made by a newspaper publisher showing publication of notice of service upon these parties "once a week for four successive weeks, beginning as of July 29, 1953," there is no adjudication as to service and the record indicates no appearance by these parties.

On 30 June, 1953, the petitioner in the instant proceeding filed what is denominated an "amended supplemental complaint," alleging in gist: that prior to the commencement of the action to set aside the deed made by Hannah S. Price to John A. Price and wife, a portion of the lands therein described was sold and conveyed by John A. Price and wife to

one C. T. Godley for the sum of $700, all of which has been paid to John A. Price and wife, who have failed to account to the petitioner for her share thereof, and she alleges that she is now entitled to recover her proportionate share thereof from John A. Price and wife.

To this pleading, by which the petitioner Chloe Price Gardner apparently ratifies the sale to Godley, none of the other parties have responded.

In this state of the record it appears that "by agreement of counsel for all parties" (but it nowhere appears that Hannah M. Price or Helen Price Potter are represented by counsel) Judge Morris "was requested to examine the pleadings, . . . find the facts pertaining to the rendition of the judgment by Judge Nimocks at the September Term, 1944, . . . and . . . declare the law applicable to the pleadings and facts as found . . ."

Following the hearing, Judge Morris entered an order embodying his findings of fact and declarations of law which may be summarized as follows:

1. That summons in the action to set aside the deed was served on the defendants John A. Price and wife, Lillian E. Price, on 1 January, 1942, the day following the commencement of the action.

2. That copies of the duly verified complaint, containing allegations of ultimate facts sufficient to justify setting aside the deed on the ground of mental incapacity of Hannah S. Price, were served upon the defendants John A. Price and wife, Lillian E. Price, at the time summons was served on them.

3. That the defendants John A. Price and wife filed no answer or other pleading.

4. That on 9 February, 1942, the Clerk of the Superior Court of Beaufort County entered judgment by default and inquiry and directed that the cause be placed on the civil issue docket for trial.

5. That at the September Term, 1944, Judge Nimocks entered judgment, without the intervention of a jury, adjudging "that the plaintiffs (the four children of Hannah S. Price other than the defendant John A. Price) are each the owners of an undivided one-fifth interest in" the lands described in the deed.

6. "That counsel for the defendants John A. Price and wife . . . state in open court that they seek to attack the judgment . . . as being erroneous and irregular but that they do not seek to attack the . . . judgment for intrinsic fraud but contend that said judgment is void for that no issues of fact were submitted to the jury as to the sanity of the grantor Hannah S. Price at the time of her execution of the deed to John A. Price (and wife) . . . the court rules . . . as to their contention that . . ., the method for attack is not as pursued in this cause. . . . The court further holds that the defendants may not (in this proceeding) attack the judgment . . . as being irregular . . ."

7. "The court holds, . . . as a matter of law, that the judgment . . . was not void . . . for that . . . the court at the time of the rendition of said judgment had jurisdiction of the parties and of the subject-matter."

The order entered by Judge Morris adjudges that the previous judgment signed by Judge Nimocks is binding upon the parties to this proceeding. The order contains this concluding paragraph:

"The Court being further of the opinion that by the pleadings on file in this action issues of fact are raised which require the intervention of a jury, this cause is retained upon the civil issue docket of Beaufort County Superior Court to the end that proper issues may be submitted to a jury upon the pleadings and evidence offered at the trial."

The defendants John A. Price and wife, Lillian E. Price, in apt time excepted to the pertinent findings and conclusions of Judge Morris, and from the judgment based thereon appealed to this Court.

P. H. Bell and Charles V. Bell for defendants John A. Price and wife, Lillian E. Price, appellants.

Grimes & Grimes, Mayo & Mayo, A. W. Bailey, and James B. McMullan for plaintiff, appellee.

JOHNSON, J. This appeal is premature. It is from a nonappealable, interlocutory order. *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669.

In the hearing below it was not contemplated that Judge Morris should hear and determine the entire controversy. The parties stipulated that the inquiry should be limited to a determination of the single question whether the judgment entered by Judge Nimocks in the prior action brought to set aside the deed may be collaterally attacked in this proceeding. The order entered by Judge Morris recites that the scope of inquiry was limited to this single aspect of the case.

The procedure followed here is strikingly similar to that in *Hines v. Hines,* 84 N.C. 122. In that case, as here, counsel undertook to separate a question of law from other matters in controversy, leaving them to be disposed of afterwards, and have the question of law passed on in advance by this Court. In dismissing the appeal, *Ashe, J.,* speaking for the Court, said: "The law involved is by a '*pro forma*' judgment sent to this Court, while the facts and merits of the case are retained in the court below to await the opinion of this Court upon the question of law. Such a proceeding is an innovation upon the practice of the Court, and to entertain the appeal would be establishing a bad precedent, to which this Court cannot give its sanction."

The rule announced in the *Hines case* is firmly embedded in our appellate procedure. See G.S. 1-277; *Raleigh v. Edwards, supra; Veazey v.*

Durham, supra; Emry v. Parker, 111 N.C. 261, 16 S.E. 236; *Hilliard v. Oram,* 106 N.C. 467, 11 S.E. 514; *Blackwell v. McCain,* 105 N.C. 460, 11 S.E. 360; *Hicks v. Gooch,* 93 N.C. 112.

In *Raleigh v. Edwards, supra, Ervin, J.,* speaking for the Court, said: "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute defining the right of appeal prescribes, in substance, that an appeal does not lie to the Supreme Court from an interlocutory order of the Superior Court, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. G.S. 1-277; . . ."

In *Hilliard v. Oram, supra,* it is stated: "The court refused plaintiff judgment for recovery of the land sued for, upon the issues found, and entered an interlocutory judgment. The appeal of the defendants is premature. They should have noted their exception, and after the trial is completed by a finding upon the other issue and a final judgment, an appeal will lie. The Court here will not try causes by 'piece-meal.' This has often been decided." (Authorities cited.)

Upon entry of an interlocutory order, like the one in the case at hand, every right of the parties may be protected by entering timely exceptions, and it can affect no substantial right of anyone to postpone review of all rulings below until two trial judges accomplish the usual function of one before an appeal is taken.

Conceding *obiter,* as we may, that Judge Morris' ruling below is correct, nevertheless our established rule of appellate procedure must be upheld. Therefore the appeal is dismissed and the parties are left to proceed with the unfinished cause in the court below as if uninterrupted by this attempted appeal. *Hicks v. Gooch, supra.*

Appeal dismissed.

CORA LEE WYATT, WIDOW OF SAM WYATT, DECEASED EMPLOYEE, v. C. R. SHARP, NONINSURER.

(Filed 17 March, 1954.)

1. Master and Servant § 55d—

Where appellant on appeal to the Superior Court does not except to any finding of the Industrial Commission or to the award, but merely gives notice of appeal for a review as to errors of law, the single question presented to the Superior Court is whether the facts found were sufficient to support the award.

2. Appeal and Error § 6c (2)—

A sole exception to the judgment presents only the question whether the facts found support the judgment.

3. Master and Servant § 40e—

Findings to the effect that the employee suffered an injury arising out of and in the course of the employment, which injury aggravated a pre-existing heart condition and caused death, *is held* to support an award for compensation and burial expenses. G.S. 97-38.

APPEAL by defendant from *Clement, J.*, December Term, 1953, of TRANSYLVANIA.

Proceeding under Workmen's Compensation Act to determine liability of C. R. Sharp (employer and noninsurer) to Mrs. Cora Lee Wyatt, widow and only surviving dependent of Sam Wyatt, deceased employee.

The pertinent facts found by the hearing Commissioner are as follows:

1. That the defendant C. R. Sharp has been regularly engaged in business as a building contractor since January, 1950.

2. That on or about 10 March, 1950, the defendant as an independent contractor, entered into a contract with Pisgah Broadcasting Company to construct a building for it to house its radio broadcasting station.

3. That while Sharp was employed in the performance of his contract with Pisgah Broadcasting Company he was also engaged in constructing other buildings as a building contractor.

4. That on 24 April, 1950, and for approximately four weeks prior thereto, the deceased, Sam Wyatt, was employed by the defendant as a carpenter; that the defendant regularly employed Ben Mull, Keith Wright, Fred Wright, and Charlie Scruggs; that the performance of carpentry work was the usual type of employment performed in the course of Sharp's business or occupation as a building contractor; that on 24 April, 1950, the defendant regularly employed five persons in the conduct of his business as a building contractor; that Sam Wyatt was employed to work eight hours each day, five or five and one-half days per week, at a wage of $1.00 per hour, and that his average weekly wage while employed by the defendant was $40.00.

5. That on 24 April, 1950, Sam Wyatt, a man 71 years of age and weighing approximately 170 pounds, was working as a carpenter on the Pisgah Broadcasting Company building in the course of his employment by the defendant; that he was working on a scaffold approximately six feet above the ground; that as he raised a board to measure it the scaffold fell away from the building; that Wyatt rode down with the scaffold as it fell outward; that he landed in a sitting position on a pile of dirt; and that this constituted an injury by accident arising out of and in the course of his employment.

6. That the only trauma sustained by Wyatt in his fall occurred when he landed on the ground in a sitting position; that he was dazed for a few moments after the fall; that he complained of a pain in his neck; that after resting a short time he returned to work for about half an hour; that the fall occurred about 8:30 a.m.; that he was taken to the office of Dr. Newland about 11:00 a.m. the same day; that at that time he complained of pain in his neck, back, and chest and with shortness of breath; that he had minor contusions on the left side of his back; that he was given codeine and sent home to rest.

7. That Wyatt rested in bed at home the rest of Monday, 24 April, 1950; that he continued to complain of pain in his chest and back and shortness of breath; that about 10:00 p.m. Tuesday, 25 April, 1950, he suffered an acute pain in his chest with a smothering spell; that he was sent to the hospital immediately by Dr. Newland where he was placed in an oxygen tent and remained therein until his death at 1:15 a.m. 7 June, 1950; and that an autopsy was performed at 9:45 a.m. the same day by Dr. E. D. Peasley in the presence of Drs. Newland, Lyday, Sader, and others.

8. That prior to the fall suffered by Sam Wyatt, his heart was enlarged and the opening of the left branch of the coronary artery was reduced approximately fifty per cent of normal; that he had slight hardening of the arteries in the brain; that he had been suffering from a condition bordering on heart failure for sometime; that this condition had given him no prior trouble; and that the shock and trauma of the fall hereinabove described aggravated and accelerated the pre-existing heart condition so as to hasten the acute failure of the heart which occurred approximately 36 hours after the fall and which ultimately resulted in his death on 7 June, 1950.

9. That the death of Sam Wyatt was the result of an aggravation of a pre-existing condition which aggravation was caused by an injury by accident arising out of and in the course of his employment by the defendant C. R. Sharp.

Upon these findings of fact the hearing Commissioner concluded as a matter of law that the claimant is entitled to compensation under the provisions of G.S. 97-38 and G.S. 97-39, together with burial expenses provided by G.S. 97-38. Award was entered accordingly.

The defendant gave notice of appeal to the full Commission and filed exceptions to the hearing Commissioner's findings of fact and conclusions of law.

The full Commission reviewed the evidence, findings of fact, conclusions of law and the award theretofore made, and by a majority vote adopted as its own the findings of fact and conclusions of law of the hearing Commissioner and issued an award pursuant thereto.

The defendant appealed to the Superior Court only "for errors of law in review of award made by the full Commission."

The Superior Court affirmed the award granting compensation to plaintiff in all respects and entered judgment in accord with the ruling. To the signing of the judgment the defendant excepts and appeals to the Supreme Court, assigning error.

Fisher & Potts for plaintiff, appellee.

Ramsey & Hill for defendant, appellant.

DENNY, J. Here, as in the case of *Worsley v. Rendering Co., ante,* 547, the defendant entered no exception either to the findings of fact or conclusions of law made by the full Commission. Neither did he except to the award entered. He only gave notice of appeal to the Superior Court for a review as to errors of law.

Therefore, the single question presented to the Superior Court was whether the facts found by the full Commission were sufficient to support the award. No exception having been taken to such findings they are presumed to be supported by the evidence and are binding on appeal. *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488; *Wilson v. Robinson,* 224 N.C. 851, 32 S.E. 2d 601; *Wood v. Bank,* 199 N.C. 371, 154 S.E. 623; *Sturtevant v. Cotton Mills,* 171 N.C. 119, 87 S.E. 992.

Likewise, when an appeal is taken to the Supreme Court and the sole exception is to the signing of the judgment, the exception only challenges the correctness of the judgment and presents the single question whether the facts found are sufficient to support it. *Fox v. Mills, Inc.,* 225 N.C. 580, 35 S.E. 2d 869; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609; *Worsley v. Rendering Co., supra; Glace v. Throwing Co., Inc., post,* 668.

The findings of fact on this record are sufficient to support the judgment below, and the exception thereto must be overruled.

Even so, an examination of the record herein discloses that there is competent evidence to support the Commission's findings of fact upon which it based its award.

The judgment below is

Affirmed.

STATE v. CLYDE HARRISON.

(Filed 17 March, 1954.)

1. **Intoxicating Liquor § 9d—**

The State's evidence that one quart of nontax-paid liquor was found in defendant's home is sufficient alone to carry the case to the jury in a prosecution for the unlawful possession of nontax-paid whiskey, G.S. 18-48, notwithstanding defendant's evidence that another occupied the room and that such other claimed the liquor, since defendant's evidence on a matter of defense is not considered on motion to nonsuit.

2. **Criminal Law § 52a (1)—**

Evidence offered by defendant as a matter of defense is properly disregarded in passing upon defendant's motion for involuntary nonsuit.

3. **Constitutional Law § 19a—**

The constitutional guaranties of freedom from unreasonable search and seizure relate to a person's dwelling and other buildings within the curtilage but do not apply to open fields, orchards or other lands not an immediate part of the dwelling site.

4. **Searches and Seizures § 1: Criminal Law § 43—**

Evidence of the finding of nontax-paid liquor near defendant's premises but actually on the land of another is not rendered incompetent because not discovered under authority of a search warrant, since a warrant is not necessary for its seizure. G.S. 15-27.

5. **Intoxicating Liquor § 9c—**

Evidence of the finding of nontax-paid liquor on the land of another but within 15 feet of a path which led from defendant's home, with no other paths intersecting or joining it, is competent evidence of defendant's constructive possession of such liquor, even though it is insufficient to make out a *prima facie* case, its weight and credibility being for the jury.

6. **Criminal Law § 77c: Appeal and Error § 38—**

Where the charge of the court is not included in the case on appeal, it will be presumed that it is free from error.

7. **Searches and Seizures § 1: Intoxicating Liquor § 9c—**

Testimony of officers that while looking through a window of defendant's house on their way to serve a search warrant, they heard and saw incriminating matter, *held* not incompetent merely because the information was obtained before serving the warrant.

APPEAL by defendant from *Paul, Special Judge,* October Term, 1953, of EDGECOMBE.

The defendant was originally tried and convicted in the Recorder's Court of Edgecombe County upon a warrant charging him with the unlawful possession of nontax-paid whiskey. From the sentence imposed he

appealed to the Superior Court of Edgecombe County where he was tried *de novo* on the original warrant.

The State's evidence tends to show that between ten and eleven o'clock on the night of 30 May, 1953, ABC enforcement officers, armed with a search warrant issued by a justice of the peace, went to the home of the defendant in the village of Mildred in Edgecombe County. The officers stayed in the yard of defendant's home ten or fifteen minutes before entering the house. During that time they heard people walking on the front porch and in the house. Then some of the officers entered the house, executed the search warrant and searched the premises, finding approximately one quart of nontax-paid liquor in a chifforobe in one of the bedrooms. They also found two paper cups on a kitchen table, each cup bearing the odor of whiskey. One of the officers made a search outside the house and found a gallon jug of nontax-paid liquor near a barbecue pit used by the defendant. The barbecue pit was located a very short distance from the edge of the defendant's yard and approximately seventy-five yards from the house. A path ran directly from the defendant's house to the barbecue pit and there were no other paths intersecting or joining it; the path went on just a bit beyond or behind the pit and then stopped. The gallon jug was found about fifteen feet from the path and approximately thirty feet behind the barbecue pit.

Before serving the search warrant, one of the officers testified that as a result of a conversation he heard about whiskey, he looked through a window of defendant's house and observed the defendant in the kitchen cutting barbecue and heard a man ask to be served a quarter drink; that the defendant's wife and two or three other men were present; that he saw the defendant's wife leave the room, go in the bedroom where the nontax-paid liquor was later found, return to the kitchen and hand a paper cup to the men who asked for a quarter drink; she went back to the room and came out with another cup which she handed to a man in the kitchen.

The officers frankly admitted that they did not know who owned the premises where the gallon jug of nontax-paid whiskey was found.

The State offered in evidence, over the objection of defendant, the two containers and their contents.

The defendant offered evidence tending to show that he knew nothing about the liquor found on or near his premises; that the liquor found in the house was owned by Clyde Staton and the other liquor found by the officers belonged to Clifford Harrison; that these two young men lived in the defendant's home and occupied the room in which the quart of nontax-paid liquor was found. Clyde Staton testified that the liquor found in his room belonged to him; Clifford Harrison testified that it was his liquor, while both of them testified that the gallon of nontax-paid liquor

found by the officers outside of the defendant's home belonged to Harrison and that it was not found on the premises of the defendant. Staton testified that it was found on the land of Mr. W. G. Clark, while Harrison testified he never brought it on the land of the defendant (who is his brother), but placed it on another man's land about twenty-five feet from the barbecue pit, across a fence. The defendant's wife denied that she handed anybody a quarter drink.

The jury returned a verdict of guilty, and from the judgment pronounced the defendant appeals to the Supreme Court, assigning error.

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

Weeks & Muse for defendant, appellant.

DENNY, J. The only questions raised on this appeal, which in our opinion merit discussion, are these: (1) Was error committed in the court below in refusing to sustain the defendant's motion for judgment as of nonsuit? (2) Did the court err in admitting evidence with respect to the discovery and seizure of the gallon jug, containing nontax-paid whiskey, when the officers admitted they did not know who owned the premises where it was found? (3) Did the court commit error in overruling the defendant's motion to suppress all the evidence as to what was heard or seen after the officers reached the premises of the defendant, but before the search warrant was actually served? In our opinion each one of these questions must be answered in the negative.

The defendant contends that his motion for judgment as of nonsuit was erroneously overruled. We do not concur in this contention. The State's evidence established the undisputed fact that one quart of nontax-paid liquor was found in the home of the defendant. This evidence alone was sufficient to carry the case to the jury. G.S. 18-48; *S. v. Avery,* 236 N.C. 276, 72 S.E. 2d 670.

It is true that Clyde Staton claimed the liquor found in the room occupied by him and Clifford Harrison. The evidence also reveals that Clifford Harrison likewise claimed the ownership of this particular liquor as well as that found near the defendant's barbecue pit. But they were witnesses for the defendant. Neither was any evidence offered on behalf of the State tending to show that Clyde Staton and Clifford Harrison occupied the room in the home of the defendant pursuant to a rental contract as was the case in *S. v. Hanford,* 212 N.C. 746, 194 S.E. 481, upon which the defendant relies. Moreover, in the *Hanford case,* the search warrant only authorized the officer to search the premises of one Lacey Scott who occupied a rented room in the home of the defendant Hanford. His room was searched and fifteen gallons of liquor found. The State

offered no evidence tending to show that the officer searched the premises of the defendant Hanford or that he was authorized to do so. This Court held that the evidence tending to show the result of the search made was not incompetent but was insufficient to show that the whiskey found in the room which the defendant had rented to Lacey Scott was in the possession of the defendant Hanford and ordered a nonsuit as to him.

In the instant case, as pointed out in *S. v. Avery, supra,* the evidence offered by the defendant, as a matter of defense, may not be considered on a motion for judgment as of nonsuit. The defendant's motion was properly overruled.

As to the second question posed, it is provided by statute that "no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action." G.S. 15-27. In the instant case, the officers were armed with a search warrant issued pursuant to the provisions of G.S. 18-13, authorizing and commanding them to search the defendant's "dwelling, garage, filling station, barns, and outhouses, and premises, . . . Seizing all intoxicating liquors, containers, and other articles used in carrying on the illegal handling of intoxicating liquors."

The defendant contends, however, that since the State failed to offer evidence tending to show that the gallon of nontax-paid liquor was found on his premises, the facts relating to its discovery and seizure, as well as the container and its contents, should have been excluded upon his objection which was duly and timely made.

It seems to be generally held that the constitutional guaranties of freedom from unreasonable search and seizure, applicable to one's home, refer to his dwelling and other buildings within the curtilage but do not apply to open fields, orchards, or other lands not an immediate part of the dwelling site. Machen, *The Law of Search and Seizure,* page 95 (citing *Hester v. United States,* 265 U.S. 57, 44 Sup. Ct. 445, 68 L. Ed. 898); Cornelius, *Search and Seizure,* Second Edition, page 49; 48 C.J.S., Intoxicating Liquors, section 394, page 630, *et seq.;* 30 Am. Jur., Intoxicating Liquors, section 528, page 529; Anno. 74 A.L.R. 1454, where numerous cases on this point are collected, among them being: *Simmons v. Commonwealth,* 210 Ky. 33, 275 S.W. 369; *S. v. Cobb,* 309 Mo. 89, 273 S.W. 736; *Penney v. State,* 35 Okla. Crim. Rep. 151, 249 P. 167; *Sheffield v. State,* 118 Tex. Crim. Rep. 329, 37 S.W. 2d 1038; *Field v. State,* 108 Tex. Crim. Rep. 112, 299 S.W. 258. So, if it be conceded that the gallon of nontax-paid liquor involved in the present case was found near the premises of the defendant but actually on the land of another and not within the curtilage of the dwelling of the owner thereof, a search

warrant was not necessary for its seizure and the admissibility of evidence with respect thereto.

The facts and circumstances incident to the discovery and seizure of the gallon of nontax-paid liquor, together with the uncertainty as to whether it was actually found on the premises of the defendant, or within a few yards thereof, went to its weight and credibility but not to its admissibility.

The possession of nontax-paid liquor in any quantity, in this State, is unlawful. G.S. 18-48; *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904. Therefore, if the State had offered evidence to the effect that the gallon of nontax-paid liquor had been found on the premises of the defendant, such evidence would have made out a *prima facie* case had no other nontax-paid liquor been found on the defendant's premises. *S. v. Camel,* 230 N.C. 426, 53 S.E. 2d 313; *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. Meyers,* 190 N.C. 239, 129 S.E. 600; *S. v. Crouse,* 182 N.C. 835, 108 S.E. 911. But, the evidence of the State being uncertain in that respect, no *prima facie* case was made out by the evidence as to its discovery and seizure. Even so, a path led from the defendant's home to within fifteen feet from where the gallon of nontax-paid liquor was found and there were no other paths intersecting or joining it. Consequently, under these circumstances we think the evidence was admissible on the question of possession. *S. v. Crouse, supra.* Possession in such cases is not required to be actual, but may be constructive. *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907; *S. v. Weston, supra; S. v. Meyers, supra; S. v. Ross,* 168 N.C. 130, 83 S.E. 307; *S. v. Lee,* 164 N.C. 533, 80 S.E. 405.

The charge is not included in the case on appeal. It is, therefore, presumed to be free from error and that the jury was properly instructed as to the law arising upon the evidence as required by statute. G.S. 1-180; *S. v. Weston, supra.*

The defendant excepts and assigns as error the failure of the court to suppress all the evidence as to what the officers saw and heard after they reached the defendant's premises but before the search warrant was served.

While we do not approve of officers peeping through a window in a private dwelling in an effort to obtain additional evidence before serving a search warrant which had theretofore been issued for the express purpose of searching such premises, nevertheless, evidence as to what an officer, armed with a search warrant, saw or heard after entering upon such premises and before serving the warrant, if such evidence is otherwise admissible, may not be excluded merely because the officer obtained such information before serving the warrant. This assignment of error is without sufficient merit to justify a new trial.

We have carefully considered the remaining exceptions and in our opinion the verdict and judgment of the court below should be upheld.

No error.

R. H. HAMILTON v. EARL O. HENRY.

(Filed 17 March, 1954.)

1. **Automobiles §§ 8i, 18h (2), 18h (3)—Evidence held for jury on issues of negligence and contributory negligence in this action for collision at intersection.**

   The evidence tended to show that plaintiff, upon approaching an intersection, slowed his vehicle and looked both ways, and seeing no other vehicle in sight started into the intersection at a speed of about 20 miles per hour, that as he moved into the intersection he looked to his left and saw defendant's car about 100 feet away, traveling approximately 50 miles per hour, and that defendant was not keeping a lookout in his direction of travel but drove into the intersection without slackening speed, and that the left front of defendant's vehicle crashed into the left rear of plaintiff's vehicle as plaintiff's automobile was two-thirds of the way across the intersection. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence and failed to make out a case of contributory negligence as a matter of law.

2. **Appeal and Error § 39f—**

   An exception to the charge will not be sustained when the charge read contextually is free from prejudicial error.

3. **Trial §§ 7, 48—**

   Upon defendant's objection to remarks of plaintiff's counsel to the effect that the jury need not worry "about where the money comes from" and that a defendant who could have four lawyers "must have some money somewhere," the court, in the exercise of his discretionary control over the conduct of the trial, categorically instructed the jury not to consider the remark, and repeated the caution in his instructions to the jury. *Held:* The exception to the denial of defendant's motion to withdraw a juror and order a mistrial cannot be sustained, it appearing that the court took proper precaution to prevent prejudice.

APPEAL by defendant from *Martin, S. J.*, October Civil Term, 1953, of HARNETT.

Civil action to recover for personal injury and property damage alleged to have been sustained by plaintiff in a collision between an automobile owned and operated by plaintiff and automobile operated by defendant, about 8:05 o'clock a.m., on 21 March, 1953, at the intersection of W. Pearsall Street and S. Orange Avenue in the town of Dunn, North Carolina, as a result of alleged actionable negligence of defendant.

Upon the trial in Superior Court, plaintiff offered evidence tending to show this narrative of the factual situation at, and surrounding the scene of the collision: West Pearsall Street, approximately thirty feet wide, runs in east-west direction, and South Orange Avenue, north-south. Both streets are paved, and are level and straight, and the weather was fair. Plaintiff, accompanied by his daughter, was operating his automobile in an easterly direction along West Pearsall Street, and as he came to the intersection of that street with South Orange Avenue he slowed down and looked both ways, right and left, and seeing no other vehicle in sight, moved on into the intersection at a speed of about twenty miles per hour. At the same time, looking to the left, that is north, up the avenue he saw the automobile operated by defendant coming south about one hundred feet away, traveling at a speed approximately fifty miles per hour—and, without slackening its speed, collided with plaintiff's automobile.

The left front of defendant's automobile struck the left rear wheel of plaintiff's automobile. At the time of the impact plaintiff's automobile was two-thirds of the way across the intersection.

As defendant's automobile approached the intersection, plaintiff saw that defendant "was looking out of the side glass to his left, and was not looking where he was going." Defendant later told plaintiff, quoting, that the wreck "was caused by his carelessness," that "it was like a flash . . . said he didn't see me until he hit me"—that "he was looking over at the Fleshman house," and "when he looked back I was there," and that "there was nothing to have kept him (Henry) from seeing . . . except that he was looking outside of his car."

After the impact, the automobile of plaintiff came to rest on West Pearsall Street at a point about sixty feet east of the center of the intersection, and was headed west. The automobile of defendant came to rest upside down off the street in the edge of a yard southeast of and twenty-seven feet from the center of the intersection. Debris was found on the southwest quarter of the intersection four feet within the avenue.

In the collision plaintiff was knocked unconscious and sustained serious and permanent injury, and his automobile was demolished.

Defendant offered no evidence.

The case was submitted to the jury upon these issues raised by the pleadings, and the jury returned verdict as shown:

"1. Was the plaintiff injured and damaged by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. If so, did the plaintiff, by his own negligence, contribute to his injuries and damages? Answer: No.

"3. What amount, if any, is the plaintiff entitled to recover of the defendant for personal injuries? Answer: $25,000.00.

"4. What amount, if any, is the plaintiff entitled to recover of the defendant for damage to his automobile? Answer: $300.00."

And from judgment in accordance with the verdict, defendant appeals to Supreme Court and assigns error.

Wilson & Johnson for plaintiff, appellee.
Doffermyre & Stewart and Salmon & Hooper for defendant, appellant.

WINBORNE, J. Appellant brings up for consideration several assignments of error based upon exceptions (1) to denial of his motions, aptly made, for judgment as of nonsuit, (2) to portions of the charge as given by the court to the jury, and (3) to argument of counsel. Careful consideration of them fails to show error for which judgment below should be disturbed.

(1) The evidence offered upon the trial in Superior Court, as shown in the case on appeal, is amply sufficient to take the case to the jury on the first issue, that is, as to the negligence of defendant, and to support the verdict of the jury in respect thereto.

And the evidence so offered, and so shown, fails to make out a case of contributory negligence against plaintiff as a matter of law. Indeed, taking the evidence in respect to conduct of plaintiff in the light most favorable to defendant, it may be fairly doubted that the evidence is sufficient to require the submission of the second issue, that is, as to contributory negligence of plaintiff.

But be that as it may, the jury has found upon the uncontroverted evidence offered, and fairly presented, that defendant was negligent, and that his negligence was the proximate cause of the personal injury and property damage of which complaint is made, and that plaintiff, by his own negligence, did not contribute thereto. This conclusion is so patent that discussion of applicable principle of law and citation of authority in support of it are deemed unnecessary.

(2) Assignments of error upon exceptions to portions of the charge as given by the trial judge to the jury are untenable. For taking the charge as a whole, that is, read contextually, prejudicial error is not indicated. The principles of law enunciated and applied are too familiar to require repetition of them.

(3) Lastly, assignments of error Numbers 4 and 11 are based on exceptions to the overruling of defendant's motion for withdrawal of juror, and for a new trial on account of statement of one of the attorneys for plaintiff in his argument to the jury, and to instructions in respect thereto in the course of the charge of the court.

The statement to which exception is directed is: "It's not a matter for the jury to worry about where the money comes from; let us worry about

that, but I say that any defendant who can hire four lawyers must have some money somewhere, and I'll leave it to you where it's coming from."

Defendant objected, and made motion as above stated. Thereupon the court instructed the jury at some length to the effect that the remarks were of no concern to the jury, and should be dispelled from the minds of the jurors, concluding by saying: "You will please erase it from your minds and forget it was ever said."

And, again, the court, in the course of, and just before concluding the charge to the jury, gave these instructions: "One of the attorneys referred to sympathy for the defendant and how hard it would be on the defendant and his wife and four children to receive an adverse verdict. There is no evidence here before you that the defendant is married or that he has any children and that should not enter into your deliberation or enter your mind upon arriving at this verdict; it has nothing to do with it; you are not to decide this case upon sympathy; you are to decide it upon fairness to all parties, both the plaintiff and the defendant.

"(Then, too, one of the attorneys on the plaintiff's side said that you needn't worry where the money was coming from. That has nothing to do with the case and I charge you again to erase that from your minds and forget it as intelligent men, men of character and intelligence; that has nothing to do with the case and you must not consider it either in your minds or in your deliberations between yourselves.)"

[Defendant excepts to the foregoing portion of the charge in parenthesis.]

"Decide this case fairly and impartially and without sympathy."

Thus it would seem that the remarks of the attorney for plaintiff were invited by remarks of an attorney for defendant. Even so, it would seem the court took proper precaution.

"It is the duty of the judge to interfere, when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury. *McLamb v. R. R.,* 122 N.C. 862, 29 S.E. 894. See also McIntosh N.C.P.&P., page 621, where the author states that counsel may not 'travel outside of the record' and inject into his argument facts of his own knowledge or other facts not included in the evidence. *Perry v. R. R.,* 128 N.C. 471, 39 S.E. 27. When counsel does so, the court may interpose correction by checking the argument and restricting it within proper bounds, or he may correct it in his charge to the jury. See Annotations 86 A.L.R. 899, at page 901. On the other hand, while the conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and discretion of the presiding judge, he, to be sure, as stated by *Walker, J.,* in *S. v. Tyson,* 133 N.C. 692, 45 S.E. 838, should be careful that nothing is said or done which would be calculated

unduly to prejudice any party in the prosecution or defense of his case." *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705.

In the light of these principles applied to the situation before him, this Court is unable to conclude that the trial judge abused the discretion invested in him.

Hence, in the judgment on the verdict, after fair trial, we find

No error.

KENNETH W. GLACE (EMPLOYEE) v. PILOT THROWING CO., INC. (EMPLOYER) AND IOWA NATIONAL MUTUAL INSURANCE COMPANY (CARRIER).

(Filed 17 March, 1954.)

1. Appeal and Error § 6c (7)—

On further appeal to the Supreme Court from judgment of the Superior Court affirming an award of the Industrial Commission, the Supreme Court will review only such exceptive assignments of error as are properly made to the judgment of the Superior Court, and will not consider questions presented to the Superior Court by exceptive assignments of error to the award of the Industrial Commission in the absence of exception to the ruling of the Superior Court thereon.

2. Appeal and Error § 6c (2)—

Where on appeal from judgment of the Superior Court affirming an award of the Industrial Commission the sole exception is that the Superior Court erred in its conclusion of law and in signing the judgment, *held:* The sole question presented in the Supreme Court is whether the findings of fact supported the judgment entered in the Superior Court, and the Supreme Court is precluded from considering whether the findings of fact are supported by the evidence.

APPEAL by defendants from *Hall, Special J.,* November Term 1953 of SURRY.

Claim for compensation under Workmen's Compensation Law.

These stipulations were entered into at the commencement of the hearing by the parties: (1) The employee-employer relationship existed between the claimant and the defendant Pilot Throwing Co., Inc.; (2) all parties are subject to and bound by the provisions of the Workmen's Compensation Act; (3) the Iowa National Mutual Insurance Co. is the insurance carrier; (4) the incident giving rise to the claim occurred on 10 January 1952, and that this claim was filed with the Industrial Commission on 19 August 1952.

The essential findings of the Industrial Commission follow:

Kenneth W. Glace, the claimant, was secretary and treasurer of the Pilot Throwing Co., Inc., a commission throwster, and owned a small

number of its shares of stock. The Throwing Company had been in operation a short time, and had nine employees exclusive of the claimant. Claimant in his position as secretary-treasurer of the corporation was actually general manager of the company; supervising the operation and maintenance of the machinery and participating on the same basis as a day laborer in its every day operations; that in addition thereto, he performed supervisory functions, and spent more than 75% of his working time in the performance of actual labor in the manufacturing or throwing process.

On 10 January 1952 the claimant, as was his custom, was engaged in the performance of manual labor moving cases containing nylon yarn. These cases are 22 inches on the side and 10 or 12 inches tall, depending on the type of yarn. Each case weighed about 100 pounds. The cases were stacked in piles on the floor. On the morning of this day claimant had moved several cases of yarn. He had done similar work since the business began. About 10:00 a.m. he undertook to lift a case of yarn from the floor, which case was identical with all the other cases of yarn he had moved. To move the case of yarn to the place where it was used in the converting process, he had to lift it up. To lift it, he stood beside the case with both feet on the level concrete floor; he bent straight forward from the waist extending his hands forward and down, and inserting them under the edge of the case. He then undertook to lift the case upward. The case was no heavier than numerous other cases he had handled in a similar manner. When he lifted the case approximately 18 inches, he felt a sudden sharp pain in the center and to the right of the small of his back. Claimant immediately dropped the case. He had had no prior pain or trouble with his back.

Claimant received this injury: the discs in the fourth and fifth lumbar interspaces were herniated. These were removed by a surgical operation, and his spine was fused from the level of the fourth lumbar vertebra to the first sacral segment.

In the hearing before the Full Commission—all parties being represented by counsel—these admissions were made: (1) Claimant has lost no wages as a result of the alleged injury; (2) he was engaged in the performance of his duties as an employee at the time of the incident. The opinion and award of the Full Commission states: "The sole issue is whether or not the herniation of the claimant's intervertebral discs under the strain of lifting the case of nylon constituted an injury by accident within the meaning of G.S. N.C. 97-2(f)."

The Full Commission found as Fact No. 9 that the herniation of the intervertebral discs in the claimant's spine resulted naturally and unavoidably from lifting the case of nylon; that this was an unusual, unanticipated, and unforeseen event, not intended or designed by claimant;

that it was not an ordinary or anticipated consequence of the performance of his duties in the usual manner, and that this constituted an injury by accident arising out of and in the course of his employment by the employer.

The full Commission concluded that the claimant sustained an injury by accident arising out of and in the course of his employment on 10 January 1952 within the meaning of G.S. N.C. 97-2(f); and that he is entitled to receive the medical benefits prescribed by the Act, although entitled to no compensation because he has lost no wages. The Full Commission thereupon made an award for compensation for medical, hospital and other expenses incurred.

The defendants excepted to the finding of Fact No. 9 as not supported by any competent evidence and as based upon an erroneous conclusion of law and an erroneous interpretation of "injury" as defined in the Workmen's Compensation Act; they excepted to the conclusion as not supported by any competent evidence and as based upon an erroneous interpretation of "injury" as defined in the Act; and they further excepted to the award as not supported by any competent evidence and as contrary to law, and appealed to the Superior Court.

The Superior Court entered judgment that the findings of fact and award of the Full Commission are supported by the evidence and affirmed the award.

The defendants excepted to the judgment and appealed to the Supreme Court for that the Superior Court "erred as a matter of law in affirming the award of the Commission and for other errors to be assigned."

The Record states the ONLY EXCEPTION relates to the signing of the judgment by the judge. The only assignment of error is that the lower court erred in its conclusion of law and in signing the judgment.

John H. Blalock for plaintiff, appellee.
Woltz & Barber for defendants, appellants.

PARKER, J. The defendants excepted to the award entered by the Full Commission, and appealed to the Superior Court assigning errors as to a finding of fact and a conclusion of law. On the hearing in the court below the trial judge being of the opinion that the findings of fact and award of the Full Commission are supported by the evidence, in all respects affirmed the award. The defendants' appeal entries to the judgment in the Superior Court are that the defendants in open court except to the signing of the judgment "for that his Honor erred as a matter of law in affirming the award of the Commission and for other errors to be assigned." The defendants' sole assignment of error is that the trial judge "erred in his conclusions of law and in signing the judgment."

When an award is made by the Full Commission and an appeal is taken, the Superior Court, as an appellate court, reviews only such questions as are presented to it by exceptive assignments of errors properly made to the award. On appeal from the Superior Court's judgment affirming the award to the Supreme Court, we review only such exceptive assignments of error as are properly made to the judgment of the Superior Court alone. *Worsley v. Rendering Co., ante,* 547; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609—where many of our cases are cited.

The appeal entries and assignments of error by the defendants in this case do not bring up for review the findings of fact of the Full Commission, or the evidence upon which they are based. *Worsley v. Rendering Co., supra; Rader v. Coach Co., supra.* Such being the field of contest chosen by the defendants, the judgment will be affirmed, if it is supported by the findings of fact. *Worsley v. Rendering Co., supra; Rader v. Coach Co., supra.*

Defendants in their brief contend there is not sufficient evidence to support the findings of fact by the Industrial Commission that the claimant received an injury by accident within the meaning of the North Carolina Workmen's Compensation Act. The defendants have precluded us from considering this contention by failing to present it by exception and assignment of error duly entered to the judgment of the Superior Court. *Rader v. Coach Co., supra; Wilson v. Charlotte,* 206 N.C. 856, 175 S.E. 306; *Bakery v. Insurance Co.,* 201 N.C. 816, 161 S.E. 554; *Clark v. Henderson,* 200 N.C. 86, 156 S.E. 144.

The defendants' sole assignment of error presents only a general broadside exception to the judgment of the Superior Court, and under our decisions the judgment should be affirmed, if it is supported by the findings of fact. *Worsley v. Rendering Co., supra; Rader v. Coach Co., supra.*

After a review of the findings of fact made by the Full Commission and affirmed in all respects by the trial judge, it manifestly appears that the findings of fact support the judgment entered in the Superior Court.

This opinion is not a precedent on the merits of plaintiff's claim, because we have not been called upon to review the evidence upon which the findings of fact are based. *Worsley v. Rendering Co., supra; Rader v. Coach Co., supra.*

The judgment of the Superior Court is

Affirmed.

M. JOHN DUBOSE v. T. GILBERT HARPE.

(Filed 17 March, 1954.)

1. Partition § 4a—

A proceeding for partition of real or personal property is a special proceeding of which the clerk has jurisdiction under procedure in all respects the same as that prescribed by law in special proceedings except as modified by G.S. 46-1.

2. Same: Partition § 1a: Venue § 2d—

A proceeding for the partition of personal property is the sole remedy of a tenant in common to obtain possession as against a cotenant, and therefore it is governed by the provisions of G.S. 1-76 (4) making the venue the county in which the property sought to be partitioned is located, and not the county of the residence of the petitioner or respondent.

APPEAL by defendant from *Clement, J.*, at August Term, 1953, of YANCEY.

Special proceeding instituted by petition before Clerk of Superior Court of Yancey County for partition of certain personal property situated in said county and owned by petitioner and defendant as tenants in common.

These facts appear as parts of the record:

1. The petition of petitioner is dated 27 May, 1953, and was filed 2 June, 1953.

2. Summons for defendant was issued 2 June, 1953, and served on 3 June, 1953.

3. Defendant, by petition dated 5 June, 1953, and filed 8 June, 1953, moved before the Clerk of Superior Court of Yancey County for change of venue, as a matter of right, and for convenience of parties and of witnesses, from Superior Court of Yancey County to Superior Court of Buncombe County, for that (1) the proceeding is for partition of personal property; (2) petitioner is a resident of Henderson County and defendant is a resident of Buncombe County; and (3) certain other litigation between the parties relating to the subject matter is pending in Buncombe County, all in the State of North Carolina. To this petition and motion petitioner filed answer denying right of defendant to change of venue.

4. Defendant applied to Clerk of Superior Court of Yancey County on 8 June, 1953, for, and obtained an order allowing him "an additional twenty days in which to file answer, demur or otherwise plead to the petition, or, until and including 3rd day of July, 1953."

5. Defendant, "reserving his rights under his petition and motion for change of venue heretofore filed," entered of record his answer to the petition, in which he pleaded the pendency of a certain civil action in Superior Court of Buncombe County, in bar and abatement of this proceeding.

6. The Clerk of Superior Court, hearing the petition and motion for change of venue, and "being of opinion and finding as a fact" that Yancey County is the proper county in which this proceeding should be tried, denied the motion by an order entered 19 June, 1953.

To this order defendant excepted, and in open court gave notice of appeal to Superior Court at term.

7. The appeal came on for hearing before the judge presiding at the August Term, 1953, of Yancey Superior Court, and the judge, being of opinion that the proceeding is for the recovery of personal property situated in Yancey County, and that Yancey County is the proper venue for the cause of action, entered an order, under date of 18 August, 1953, denying the motion.

Defendant appeals therefrom to Supreme Court, and assigns error.

M. John DuBose, petitioner, in propria persona.
Ward & Bennett for respondent, appellant.

WINBORNE, J. This is the question involved on this appeal, as presented by the appellant: "Must a special proceeding for partition of personal property, brought by one tenant in common against his cotenant, be tried in the county in which the petitioner or respondent reside at its commencement?" The answer is "No."

It is pertinent to note that Chapter 46 of the General Statutes is entitled "Partition," Article 1 of which relates to partition of real property, and Article 4 to the partition of personal property. It is provided that "Partition under this chapter shall be a special proceeding, and the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein." G.S. 46-1. And when the statute expressly declares that a certain thing shall be done by a special proceeding, its character is fixed. Thus it appears from the statute a proceeding for the partition of real or personal property is a special proceeding by petition filed before the Clerk, with jurisdiction to render such relief as is conferred by the statute. McIntosh Secs. 96-97, pp. 89, 90 and 91. In a special proceeding the summons is returned, and the pleadings filed, and the case heard before the Clerk at any time.

And as to venue in partition, it is provided in G.S. 46-2 that "The proceeding for partition, actual or by sale, must be in the county where the land or some part thereof lies . . ."

On the other hand, in reference to "partition of personal property," it is provided in G.S. 46-42 that "When any persons entitled as tenants in common, or joint tenants, of personal property desire to have a division of the same, they, or either of them, may file a petition in the Superior Court for that purpose; and the court, if it think the petitioners entitled

to relief, shall appoint three disinterested commissioners . . . to divide such property . . . among the tenants in common, or joint tenants." While the statute as to venue does not expressly refer to proceeding for partition of personal property, it may be considered *in pari materia* with the provisions of the statute prescribing procedure in such cases. *Clark v. Homes,* 189 N.C. 703, 128 S.E. 20. And it is inconceivable that the General Assembly intended to provide different rules for venue in respect to partition of the two classes of property.

Be that as it may, the General Assembly may have considered, and we hold properly so, that the provisions of the statute G.S. 1-76 (4) is applicable to cases of proceedings for the partition of personal property. It provides that actions for the recovery of personal property where the recovery of the property itself is the sole or primary relief demanded must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in cases provided by law.

In this connection, it is said in *Marshburn v. Purifoy,* 222 N.C. 219, 22 S. E. 2d 431: "Decisions of this Court interpretive of the statutory rule are to the effect that where the recovery of personal property is the sole relief demanded, or even the chief, main or primary relief, the other being an incidental part, the county in which the personal property or some part of it is situated is the proper venue," citing *Brown v. Cogdell,* 136 N.C. 32, 48 S.E. 515.

It is a well established principle of law in this State that a tenant in common cannot maintain an action against a cotenant to recover specific personal property. His remedy is partition. *Powell v. Hill,* 64 N.C. 169. See also *Blakely v. Patrick,* 67 N.C. 40; *Ins. Co. v. Davis,* 68 N.C. 17; *Grim v. Wicker,* 80 N.C. 343; *Strauss v. Crawford,* 89 N.C. 149; *Shearin v. Riggsbee,* 97 N.C. 216, 1 S.E. 770. Also compare *Moore v. Eure,* 101 N.C. 11, 7 S.E. 471.

In *Grim v. Wicker, supra, Ashe, J.,* writing for the Court, said: "A petition for the division of personal property held in common, or a sale for the purpose of division depending upon the nature of the property, is the only remedy one tenant in common has against another for withholding from him the possession."

Thus a special proceeding for the actual partition of personal property has for its sole relief the obtaining possession of the interest of the petitioner therein, by division of the property.

So holding, it is unnecessary to consider the question of waiver of right to ask for removal. See *Teer v. Hitchcock Corp.,* 235 N.C. 741, 71 S.E. 2d 54, and cases cited, including *Garrett v. Bear,* 144 N.C. 23, 56 S.E. 479.

For reasons stated, the judgment below is

Affirmed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.

(Filed 17 March, 1954.)

Utilities Commission § 5: Appeal and Error § 50—

Where the Utilities Commission fails to find facts necessary to support its order, the cause will be remanded for appropriate findings.

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

APPEAL by defendant from *Bone, J.*, at Chambers in Nashville, North Carolina, on 2 and 9 January 1954. From EDGECOMBE.

A petition was filed by the Carolina Telephone and Telegraph Company, a North Carolina Corporation, before the North Carolina Utilities Commission for authority to issue and sell 33,320 shares of its Common Capital Stock.

On 17 August 1953 the defendant, the Carolina Telephone and Telegraph Company, pursuant to G.S.N.C. 62-82, 62-83 and 62-84, filed with the North Carolina Utilities Commission a petition for authority to issue and sell 33,320 shares of its authorized but unissued Common Capital Stock at not less than par value of $100.00 per share, the net proceeds from such sale to be applied to the reduction of amounts then owing by the Company on short term bank loans. Attached to the petition as an exhibit was a certified copy of resolutions adopted by the Company's Board of Directors, wherein it was specified that the shares of Common Capital Stock of this proposed issue were to be "first offered for subscription at the par value of $100.00 per share to the holders of the outstanding Common Capital Stock of the Company, in accord with their pre-emptive rights, at the rate of one share of Common Capital Stock to be issued for each five shares of Common Capital Stock held"; the resolution further specifies that after a certain fixed time the Chairman of the Board or President of the Company be authorized to sell for the Company in such manner and upon such terms as he may deem desirable, but at not less than $100.00 per share, such of the 33,320 shares of Common Capital Stock of the Company as may not be subscribed for by the stockholders or the assigns of their rights.

The Company's application in Paragraph 6 states that the proposed issue and sale of its Common Capital Stock will be compatible with the public interest; is necessary or appropriate for or consistent with the proper performance by it of its service to the public, and will not impair its ability to perform that service; is for some lawful object within its corporate purposes; and is reasonably necessary and appropriate for such purpose.

On 10 September 1953 the North Carolina Utilities Commission entered an order finding the facts substantially as alleged in defendant's petition and authorizing the defendant "to issue and sell at not less than $115.00 per share a total of 33,320 shares of Common Capital Stock of the Company"—the stock to be offered to the present stockholders or the assigns of their rights at the rate of one share for every five shares held, and in the event the stockholders or the assigns of their rights fail to purchase all of said stock issue at not less than $115.00 per share, then any of the stock issue not so purchased may be offered for sale by the Company at a price of not less than $115.00 per share.

The defendant on 22 September 1953 sought, and the Utilities Commission granted a re-hearing. In a letter supplementing its petition for re-hearing the defendant explained its limited scope: "It was the intent of the Carolina Telephone and Telegraph Company to confine the questions on re-hearing to the power and the authority of the Commission to make a limitation of sale (a) to stockholders under their pre-emptive rights and (b) to outsiders to a minimum price greater than the par value of the stock; and the propriety of the Commission's exercise of any such authority. It was not our intent to raise and we do not raise, in this proceeding, any question as to the adequacy or inadequacy of the record to support a factual finding that the present value of the Common Capital Stock of the Company is not less than the minimum price limit fixed by the Commission."

On 24 November 1953 the Utilities Commission entered its final order affirming its order of 10 September 1953.

On 30 November 1953 the defendant appealed from the orders of the Utilities Commission, and each of them, to the Superior Court.

On 2 January 1954 this appeal was heard before Bone, J., Resident Judge of the Second Judicial District, in Chambers at Nashville, North Carolina, and on 9 January 1954, Bone, J., in Chambers at Nashville, North Carolina, signed a judgment affirming in all respects the orders of the Utilities Commission.

From the judgment signed by Bone, J., the defendant excepts and appeals.

Attorney-General McMullan and Assistant Attorney-General Paylor for appellee.

W. T. Joyner, C. H. Leggett, and Ward & Tucker for appellant.

PARKER, J. The Utilities Commission found as a fact that the present value of the Common Capital Stock of the defendant Carolina Telephone and Telegraph Company is such that it cannot approve the sale of such shares of stock at a price of less than $115.00 per share. The defendant

in a letter supplementing its petition for a re-hearing before the Utilities Commission stated: "it is not our intent to raise and we do not raise, *in this proceeding,* any question as to the adequacy or inadequacy of the record to support a factual finding that the present value of the Common Capital Stock of the Company is not less than the minimum price limit fixed by the Commission."

The Utilities Commission made no findings of fact as to why the Commission deemed it necessary or appropriate in the premises to fix the sale price of the 33,320 shares of the Common Capital Stock of the defendant at no less than $115.00 per share; nor did it make any findings of fact as to whether the sale of said shares of stock at such price is compatible with the public interest.

It would seem from the Record that the Utilities Commission heard no evidence in the proceeding, and that its orders are based entirely upon the petition filed by the defendant. It is so stated in the dissenting opinion of Commissioner McMahan.

The judgment of the lower court will be vacated *without prejudice to either side,* and the lower court will remand this proceeding to the North Carolina Utilities Commission for further proceedings ordering the Commission to make specific and definite findings of fact as follows: (1) Why the Commission deemed it necessary or appropriate in the premises to fix the sale price of the 33,320 shares of the Common Capital Stock of the defendant at a price not less than $115.00 per share; and (2) as to whether the sale of said shares of stock at such a price is compatible with the public interest. If the Utilities Commission finds the sale of said shares of stock at such price is compatible with the public interest, it shall make definite findings of fact to support this conclusion. The Utilities Commission will be authorized in the judgment of the lower court to hear evidence in the further proceeding herein, if the Commission deems it proper.

It is ordered that the proceeding be

Remanded.

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

W. H. LAUGHINGHOUSE T/A C & L TRACTOR & IMPLEMENT COMPANY v. FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY.

(Filed 17 March, 1954.)

1. Appeal and Error §§ 20a, 31g—

The rule requiring that the evidence be set out in the record in narrative form is mandatory, and failure to comply with the rule limits the appeal to errors presented by the record proper, and in the absence of such error, the appeal will be dismissed. Rules of Practice in the Supreme Court No. 19 (4).

2. Insurance § 51½—

Allegations that insurer's agent, at the time of the sale of a car by the dealer, orally agreed with the dealer to issue a collision policy on the vehicle in the name of the purchaser with loss payable clause in favor of the dealer, that thereafter the car was wrecked and that insurer failed to issue the policy as it had agreed to do, resulting in loss to the dealer, *is held* to state a cause of action against insurer for breach of the contract.

APPEAL by defendant from *Burgwyn, Emergency Judge,* September Term, 1953, of HARNETT.

The complaint alleges that, upon the plaintiff's sale of a Frazer automobile to one Andrew Palmer, the defendant, through its authorized agent, W. B. Boles, entered into an oral agreement with the plaintiff to issue a collision insurance policy in the name of Palmer, the purchaser, and attach a loss payable clause in favor of the plaintiff; that a few days after the oral agreement for insurance coverage, Palmer wrecked the car; that the defendant failed to issue the policy as it had agreed to do; and that on account of the defendant's breach of its agreement to issue the policy the plaintiff was damaged in the amount of $452.27. The defendant answered, denying that it entered into the oral agreement alleged in the complaint.

Upon conflicting evidence, trial was conducted on the issues indicated above; and the jury found that the parties entered into the oral contract as alleged, and that the plaintiff suffered loss in the amount of $452.27 on account of the defendant's breach thereof. Judgment on the verdict was signed in the plaintiff's favor. The defendant appealed.

Young & Taylor for plaintiff, appellee.
J. A. McLeod and Max E. McLeod for defendant, appellant.

PER CURIAM. The defendant assigned as error the denial of its motion for nonsuit at the close of all the evidence. The record discloses that the case on appeal was settled by agreement of counsel. Notwithstanding, the case on appeal sets out the evidence by question and answer and not in

narrative form as required by Rule 19 (4), Rules of Practice in the Supreme Court, 221 N.C. 544 (556). The rule is mandatory. Failure to comply therewith necessitates a dismissal of the appeal. *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *Rhoades v. Asheville,* 220 N.C. 443, 17 S.E. 2d 500. In such case this Court will consider only errors presented by the record proper. *Cressler v. Asheville,* 138 N.C. 482, 51 S.E. 53; *Hall v. Hall,* 235 N.C. 711, 71 S.E. 2d 471.

In this Court, the defendant, for the first time, demurred *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The complaint, liberally construed in favor of the plaintiff, discloses that the allegations are sufficient to state a cause of action against the defendant for damages caused by its breach of an agreement to insure the plaintiff under a loss payable clause to the extent of plaintiff's loss resulting from a collision in which the Frazer automobile was damaged. The demurrer is overruled.

Judgment affirmed and appeal dismissed.

STATE v. MARY B. McNEILL.

(Filed 17 March, 1954.)

Appeal and Error §§ 20a, 31g: Criminal Law § 77b—

The rule requiring that the evidence be set out in the record in narrative form is mandatory and may not be waived by the parties, and will be enforced by the Supreme Court *ex mero motu*, and failure to comply with the rule requires dismissal of the appeal in the absence of error appearing on the face of the record proper.

APPEAL by defendant from *Burgwyn, Emergency J.*, September Criminal Term 1953 of HARNETT. Judgment affirmed; appeal dismissed.

Criminal action tried on appeal from the Recorder's Court of Harnett County on a warrant charging the defendant with the unlawful possession of intoxicating liquor for the purpose of sale.

The jury returned a verdict of guilty, and from the judgment imposed the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, Gerald F. White, Member of Staff, and William P. Mayo, Member of Staff, for the State.

Young & Taylor for defendant, appellant.

PER CURIAM. The case was settled by agreement of counsel. All the evidence in the case is by question and answer, and not in narrative form, and therefore does not comply with Rule 19 (4), Rules of Practice in the Supreme Court, 221 N.C. 544, p. 556.

This Rule is mandatory, and may not be waived by the parties. *S. v. Powell,* 238 N.C. 550, 78 S.E. 2d 248; *Casey v. R. R.,* 198 N.C. 432, 152 S.E. 38; *Bank v. Fries,* 162 N.C. 516, 77 S.E. 678. See also *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

This mandatory Rule will be enforced by this Court *ex mero motu. Anderson v. Heating Co.,* 238 N.C. 138, 76 S.E. 2d 458, and cases cited. "The Court has not only found it necessary to adopt them (the Rules), but equally necessary to enforce them and to enforce them uniformly." *Pruitt v. Wood, supra,* where many of our cases are cited in which appeals were disposed of for failure to comply with the Rules.

According to our decisions the judgment will be affirmed, and the appeal dismissed, as no error appears in the Record proper.

Judgment affirmed; appeal dismissed.

UNITED STATES FIRE INSURANCE COMPANY, A CORPORATION, v. DALL PARKS, GRAYSON PARSONS, BOBBY GRAY BAUGUESS, AND THE TRAVELERS INDEMNITY COMPANY, A CORPORATION.

(Filed 17 March, 1954.)

Appeal and Error § 40f—

Even though motion to strike certain matter from the pleading is made as a matter of right, appellant must show error prejudicial to him from the ruling of the lower court in order to prevail on appeal.

APPEAL by individual defendants from *Moore, J.,* December Term, 1953, WILKES. Affirmed.

Proceeding under Declaratory Judgment Act, G.S. ch. 1, art. 26, heard on motion to strike certain allegations contained in the further defense and counterclaim filed by the individual defendants.

Plaintiff issued and delivered to the individual defendants an automobile liability insurance policy on a certain tractor and trailer which excludes liability when either the tractor or trailer is used with another tractor or trailer not covered by the policy. The individual defendants undertook to plead a counterclaim and new matter not material to the cause of action alleged by plaintiff. Plaintiff moved to strike. The motion was allowed and the individual defendants appealed.

Trivette, Holshouser & Mitchell for plaintiff appellee.
Hayes & Hayes and E. James Moore for defendant appellants.

PER CURIAM. We have heretofore fully discussed the law as it relates to the question here presented. Any further discussion at this time could add nothing to what we have already said. It comes to this: Even though the motion is made in the court below as a matter of right, the appellant, on appeal, must show prejudicial error in the ruling thereon by the trial judge, whether the motion is allowed or denied.

The new matter alleged in the answer and stricken by the court below is foreign to the issues plaintiff seeks to raise. The alleged counterclaim is couched in language which amounts to nothing more than a conclusion. Furthermore, even if we concede that facts sufficient to constitute a cause of action are alleged, the counterclaim is one which is not properly pleadable in this cause. *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555; *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614.

As no prejudicial error is made to appear, the judgment entered in the court below is

Affirmed.

JODY DANIEL BEASLEY v. COCA-COLA BOTTLING COMPANY, DUNN, NORTH CAROLINA.

(Filed 17 March, 1954.)

Food § 6c—

In an action to recover damages resulting to plaintiff from a foreign and deleterious substance found in a bottled drink, failure of evidence that the bottled drink was manufactured and marketed by the defendant compels nonsuit.

APPEAL by plaintiff from *Paul, Special J.,* January Term, 1954, JOHNSTON. Affirmed.

Civil action to recover compensation for personal injuries.

On 25 December 1951 plaintiff purchased a bottle of Coca-Cola at Stewart's combination store and filling station. After drinking a part of the Coca-Cola, he discovered the bottle contained a partly decomposed mouse. He became nauseated, and he testified he still suffers ill effects as a result thereof.

At the conclusion of plaintiff's evidence in chief, the court, on motion of defendant, entered judgment of involuntary nonsuit, and plaintiff appealed.

E. R. Temple, Jr., for plaintiff appellant.
Young & Taylor and Shepard & Wood for defendant appellee.

PER CURIAM. To make out a case for the jury, the plaintiff must prove that the Coca-Cola he drank was manufactured and marketed by this defendant for human consumption. This record is devoid of any evidence to that effect. That the Coca-Cola was purchased from "the Coca-Cola man from Dunn," and the bottle had "Dunn" written on the bottom will not suffice. Indeed, the operator of the delivery truck from defendant's plant, testifying for plaintiff, stated he did not deliver any Coca-Cola to Stewart's place of business. In the absence of proof of this essential element of plaintiff's cause of action, the judgment in the court below must be

Affirmed.

R. PAUL JAMISON v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; AND COUNTY OF MECKLENBURG; AND S. Y. McADEN, CHAIRMAN, AND E. K. BROWN, W. CRAIG LAWING, C. J. McEWEN AND S. S. McNINCH, MEMBERS OF THE BOARD OF COMMISSIONERS FOR THE COUNTY OF MECKLENBURG.

(Filed 24 March, 1954.)

1. Pleadings § 25—

When each basic fact upon which the conclusions of law are predicated are admitted in the pleadings or stipulated by the parties in an agreed statement of facts, no issue of fact is raised for the determination of a jury.

2. Appeal and Error § 6c (2)—

An exception "to each conclusion of law embodied in the judgment" is a broadside exception and ineffectual. G.S. 1-187, Rules of Practice in the Supreme Court No. 19 (3).

3. Same—

An assignment of error to the judgment presents the sole question whether the judgment is supported by the facts found.

4. Taxation § 38 (a)—

A taxpayer may maintain an action to enjoin on constitutional grounds the proposed issuance of bonds approved in an election irrespective of whether the action is instituted within the statutory period of thirty days after the publication of the result of the election.

5. Taxation § 4—

Only a single proposition may be placed on the ballot for submission to the voters in a bond election, since the submission of dual propositions would defeat the right of the voters to express their choice. Constitution of North Carolina, Article V, Section 4; Article VII, Section 7.

6. Same—

In a bond election in a county and a city situate therein, the submission to the voters of the question of the issuance of county bonds in a stipulated sum and city bonds in a stipulated sum for the purpose of providing funds for erecting and equipping public libraries for the city and for the county, and the imposition of a tax within the city for the payment of the city bonds and a tax in the entire county, including the city, for the payment of the county bonds, as a single question, *is held* the submission of but a single proposition so related and united as to form a rounded whole and does not violate the Constitution of North Carolina, Article V, Sec. 4, or Article VII, Sec. 7.

7. Taxation § 1a—

Uniformity in taxation on real and personal property is effected when a tax is levied equally and uniformly on all property in the same class.

8. Same: Taxation § 9—County tax for libraries and city tax for libraries held not unconstitutional for placing heavier burden on city property.

The imposition of a tax on county property, including property within a city situate therein, to provide funds for county library purposes, and the imposition of a tax within the city to provide funds for municipal library purposes, does not violate the rule prescribing uniformity in taxation, notwithstanding that a greater burden of taxation will be placed on the taxpayers of the municipality, nor does it constitute double taxation, since one tax will be imposed by the city for municipal purposes and the other by the county for county purposes. Further, double taxation is prohibited by neither the State nor Federal Constitutions. Constitution of North Carolina, Article V, Sec. 3; Chapter 1034, Session Laws of 1949.

9. Same—

The rule of uniformity in taxation does not apply to the expenditure of the funds derived from a tax.

10. Taxation § 5—

While bonds for public library purposes are not for a necessary county or municipal expense, they are for a public purpose and may be issued by the county and by a municipality therein upon statutory authority with the approval of the qualified voters of the respective taxing units. Constitution of North Carolina, Article IX, Sec. 1; Chapter 1034, Session Laws of 1949.

APPEAL by plaintiff from *Whitmire, Special J.,* Extra February Term 1954 of MECKLENBURG.

Civil action instituted by plaintiff, a resident of, and taxpayer within, the City of Charlotte and County of Mecklenburg, to restrain by permanent injunction the City and County from issuing bonds for the purpose of erecting and equipping public library buildings for the City and County and acquiring such real and personal property as may be useful or necessary for such purposes, and levying and collecting a tax for said bonds in the City for the bonds of the City and a tax in the County, including the City, for the bonds of the County.

This civil action was in this Court before, and was remanded because the trial court had not sufficiently complied with the requirement of G.S. 1-185 as to the finding of facts. *Jamison v. Charlotte, ante,* 423, 79 S.E. 2d 797.

After this action was remanded, the plaintiff filed an amendment to his complaint, and the defendants filed an answer to the amendment admitting every allegation therein to be true, except they denied a conclusion of law pleaded.

At the February Term 1954 the plaintiff and the defendants stipulated that in addition to the facts alleged in the complaint and admitted in the answer, certain additional facts should be made a part of the findings of fact by the court.

When the case came on for trial at the February Term 1954, the plaintiff and defendants did not waive a jury trial, and agree that the Judge could find the facts, make conclusions of law and render judgment, though the parties had done so at the trial at the October Term 1953. At the February Term 1954 the Judge found as facts all of the allegations in Paragraphs One to Nine, both inclusive, of the Complaint, which allegations were admitted in the defendants' answer, though the judgment does not state these facts, except as above stated, and the Judge further found as facts, and set them forth in the judgment, all the facts stipulated between the parties in the same language used in the stipulation. The pleadings were introduced in evidence. The Record shows that the only evidence before the Judge were the pleadings and the stipulations of the parties.

It will clarify the summation of the findings of fact of the Judge essential to a decision of this case by first setting forth a summary of Ch. 1034, Session Laws of North Carolina 1949. The General Assembly at its 1949 Session enacted Ch. 1034, 1949 Session Laws of North Carolina, which is captioned "An Act to Provide for a Special Election for the Issuance of Bonds by the City of Charlotte and Mecklenburg County to Finance the Building and Equipping of Public Library Buildings." This Act provided that the Governing Board of the City and County may, by a majority vote of each body, after 30 days notice at the courthouse door and publication in the newspapers, order a special election to determine the will of the people of the City and County as to whether the Governing Body of the City shall issue City Bonds in a sum not less than $500,000.00 and not more than $1,000,000.00 and to provide for the payment thereof, and as to whether the Board of County Commissioners shall issue the County's Bonds in a like sum, for the purposes set forth in the caption of the Act. This Act provided that each voter in the City shall be supplied by the election officials with a ballot on which the form of the question shall be in substance "For City and County Library Bonds" and

"Against City and County Library Bonds"; and each voter in the County outside the City with a ballot worded in substance "For County Library Bonds" and "Against County Library Bonds." The Act goes on to provide that if a majority of the votes cast in the entire County shall approve the issuance of the bonds, and also if a majority of the votes cast within the City shall approve the issuance of the Bonds, then the Governing Body of the City shall issue and sell Bonds of the City in the amount previously determined, and pledge the faith and credit of the City to the payment of the Bonds, and shall annually levy and collect an *ad valorem* tax to pay the principal and interest on the Bonds, and the Board of County Commissioners shall issue and sell Bonds of the County in a similar manner. The Board of County Commissioners and the Governing Body of the City shall, acting jointly and upon the voting basis pursuant to the provisions of the law governing the joint meetings of said bodies, have the direction and control of the expenditure of all funds from the sales of said Bonds, and shall approve and make all contracts covering the purchase of property and the erection and equipment of buildings for library purposes, which funds shall be disbursed by their respective treasuries. The title to property acquired shall be vested in such trustees, organizations or corporations, as the said Joint Bodies shall determine in their discretion, and no property now owned or hereafter acquired shall be sold, encumbered, conveyed or otherwise disposed of, except by joint action and approval of the Board of County Commissioners and the Governing Body of the City to be exercised in a joint meeting. This Act applies only to Charlotte and Mecklenburg County, and shall be in force for ten years after ratification, and only one election shall be held under its authority.

This is a synopsis of the Judge's findings of fact.

1. The plaintiff is a citizen and resident of the City and County, and owns property therein subject to taxation.

2. On 12 November 1952 the Governing Body of the City pursuant to Ch. 1034, 1949 Session Laws of North Carolina and the Municipal Finance Act 1921, as amended, adopted an ordinance authorizing $800,000.00 Library Bonds of the City, and a resolution calling a special bond election to be held 13 December 1952 for the purposes set forth in Ch. 1034, 1949 Session Laws, and following the procedure therein set forth. The form of the official ballot used in the City of Charlotte is as follows:

"OFFICIAL BALLOT

SPECIAL BOND ELECTION ON DECEMBER 13, 1952

CITY OF CHARLOTTE AND COUNTY OF MECKLENBURG, NORTH CAROLINA

"LIBRARY BONDS

"Instructions

"1. To vote for the question submitted below, make a cross (X) mark in the square to the left of the word 'FOR.'

"2. To vote against the question submitted below, make a cross (X) mark in the square to the left of the word 'AGAINST.'

"3. If you tear or deface or wrongly mark this ballot, return it and get another.

"Question

"Shall an ordinance passed November 12, 1952, by the City Council of the City of Charlotte, authorizing not exceeding $800,000.00 Library Bonds of said City, and an order finally passed November 10, 1952, by the Board of Commissioners for the County of Mecklenburg, authorizing not exceeding $800,000.00 Library Bonds of the County, for the purpose of providing funds for erecting and equipping public library buildings for the City of Charlotte and Mecklenburg County and acquiring such real and personal property as may be useful or necessary for such purposes, and a tax for said bonds in the City of Charlotte for the bonds of said City, and a tax in the entire County of Mecklenburg, including said City, for the bonds of said County, be approved?

"☐ *For* City and County Library Bonds

☐ *Against* City and County Library Bonds

"LILLIAN R. HOFFMAN
Facsimile of signature of City Clerk
W. C. DAVIS
Facsimile of signature of Chairman of County Board of Elections.

"Facsimile of signature of Clerk of Board of Commissioners."

3. On 10 November 1952 the Board of County Commissioners of the County acted in a similar manner as the Governing Body of the City for a like sum of county bonds. Paragraph four of the Complaint is not clear, but it would seem that the voters in the County outside the City were supplied the same form of ballot as the voters in the City.

4. At the election held on 13 December 1952, 4,447 of the qualified voters within the City cast their ballots "For City and County Library Bonds," and 1,919 of such voters within the City cast their ballots "Against City and County Library Bonds." At this election 5,872 of the

qualified voters of the entire county voted for said bonds and 2,554 such voters voted against said bonds. Though it is not set forth in the pleadings, nor found as a fact by the Judge, it would seem that of the qualified voters of the County outside of the City, 1,425 voted for the bonds and 635 against the bonds.

5. The Governing Body of the City and the Board of County Commissioners on 17 December 1952 caused to be published in newspapers published in and having a general circulation in the City and County, the result of the Library Bond Election, and a notice to the citizens and taxpayers of the City and County to the effect that no right of action or defense founded upon the invalidity of the said election shall be asserted, nor shall the validity of such election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within 30 days after the publication of this statement.

6. On 13 May 1953 the Governing Body of the City adopted a resolution providing for the issuance of $800,000.00 Library Bonds of the City authorized at the election held on 13 December 1952 and fixing the form and details of the bonds.

7. On 11 May 1953 the Board of County Commissioners adopted a similar resolution for the issuance of $800,000.00 Library Bonds of the County authorized at the same election and fixing the form and details of the bonds.

Thus far we have stated the facts alleged in the Complaint and admitted in the Answer of the defendants. The only other facts found by the Judge were the stipulated facts which follow.

"(1) That the proposed bond election was not for the purpose of establishing any new system of libraries for Charlotte and Mecklenburg County, but was for the purpose of extending and enlarging a library system already in existence, which library system is a corporation duly chartered by the Legislature of 1903, and because of an endowment from Andrew Carnegie became known as the Charlotte Carnegie Public Library.

"(2) That by act of the Legislature this Library is now 'Public Library of Charlotte and Mecklenburg County' and is governed by a Board of eight Trustees, two of whom are appointed by the Mayor of the City of Charlotte; two are appointed by the Chairman of the Board of County Commissioners of Mecklenburg County, and the other four consist of the Mayor of the City of Charlotte, the Superintendent of the Public School System of the City of Charlotte, the Superintendent of the Public School System of Mecklenburg County, and the Chairman of the Board of County Commissioners of Mecklenburg County.

"(3) That at the time of the bond election referred to in this proceeding, this Library corporation operated a system consisting of the main

Library in the City of Charlotte and also branches located in the Towns of Matthews, Pineville, Huntersville, Cornelius and Davidson. Two branches are also operated exclusively for Negroes, one on Brevard Street in the City of Charlotte and another in the community known as Fairview Homes, and it is proposed that these branches be enlarged and expanded and possibly additional branches established, and that the Library also operates two large Bookmobiles on regular bi-weekly schedules with designated stops, both within and outside the City of Charlotte.

"(4) That all books and other material dispensed by this Library system are completely interchangeable among all of the above branches and that no distinction is made between the materials available for the Negro branches and that obtainable from the branches for White people.

"(5) That any resident of Mecklenburg County may obtain the services of this Library system regardless of his place of residence, the main branch inside of the City of Charlotte being regularly patronized by citizens of Mecklenburg County living outside of the City.

"(6) That this Library system is supported by countywide taxation, a $2500.00 annual appropriation made by the City Council of the City of Charlotte, having been approved by a vote of the people of said City; and by a percentage of the net profits from the operation of the Alcoholic Beverage Control Stores throughout Mecklenburg County under special provision in the Alcoholic Beverage Control Act.

"(7) That the valuation of property in Mecklenburg County for *ad valorem* taxes in 1953 was approximately $468,482,000, and the valuation of property inside the City of Charlotte was approximately $351,354,000, so that property inside the City of Charlotte bears approximately 75% of the County *ad valorem* tax burden; that such relative valuations will probably continue to be substantially the same during the period over which the proposed bonds will be retired."

The Judge entered judgment that the judgment entered herein 15 October 1953 including the findings of fact and conclusions of law therein be, and the same are ratified and affirmed in all respects, and the prayer of the plaintiff for injunctive relief is denied. The judgment referred to entered at the Extra Civil Term October 1953 of Mecklenburg so far as material is: "the Court finds as a fact that said Library bonds are for a public purpose, having been duly authorized by a vote of the people in accordance with Chapter 1034 of the North Carolina Session Laws of 1949, and is of the opinion and concludes as a matter of law that said bonds are for a public purpose and that said Chapter 1034 of the North Carolina Session Laws of 1949 is constitutional and does not violate the sections of the Constitution cited by the plaintiff in his complaint, or otherwise, and that the bonds to be issued pursuant to the election held thereunder will be valid obligations of the City of Charlotte and Mecklen-

burg County, respectively;" and the prayer of the plaintiff for injunctive relief was denied.

The plaintiff objected and excepted to each finding of fact, and each conclusion of law and to the judgment, and appealed.

Covington & Lobdell for plaintiff, appellant.

John D. Shaw for appellee City of Charlotte.

Whitlock, Dockery, Ruff & Perry for appellees County of Mecklenburg and Commissioners of County of Mecklenburg.

H. I. McDougle for Public Library of Charlotte and Mecklenburg County, amicus curiae.

PARKER, J. It is passing strange that plaintiff's counsel "objects and excepts to each finding of fact embodied in the judgment," when each fact found by the Judge was either alleged in the Complaint, which they signed, and was admitted in the defendants' Answer, or copied verbatim from a stipulation and agreement of facts which they and the defendants' counsel signed.

No issues of fact are raised by the pleadings in this action.

As to the Judge's conclusions of law, the plaintiff's appeal entry is: "The plaintiff objects and excepts to each conclusion of law embodied in the judgment." This is merely a broadside exception. It does not comply with G.S.N.C. 1-186 and Rule 19 (3), Rules of Practice in the Supreme Court, 221 N.C. 544, pp. 554, 555, that the exceptions must be specific. *Arnold v. Trust Co.,* 218 N.C. 433, 11 S.E. 2d 307; *Roberts v. Davis,* 200 N.C. 424, 157 S.E. 66; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175.

The plaintiff objects and excepts to the signing and entry of the judgment. "The assignment of error based on the exception to the signing of the judgment raises the solitary question whether the facts found by the Judge and the jury support the judgment." *Bradham v. Robinson,* 236 N.C. 589, 73 S.E. 2d 555—a case where the parties agreed to the unique procedure that a jury should answer one issue of fact and the Judge should find the facts as to other issues of facts in the case.

Notwithstanding the form of the appeal entries we shall decide the questions raised by the pleadings and discussed in the briefs of the parties, as this is a case of great public interest to the residents of Charlotte and Mecklenburg County, and has been remanded once. These questions are: *One,* was the submission to the voters in the City of Charlotte and the submission to the voters in the County of Mecklenburg outside of the City of the single question of issuing "City and County Library Bonds" a combination of two distinct and unrelated propositions in violation of Sec. 4 Art. V, as amended, and Sec. 7 Art. VII, as amended, of the State Constitution? *Two,* will the issuance of $800,000.00 Library Bonds of

the County of Mecklenburg and of a similar amount of Library Bonds of the City of Charlotte result in a lack of uniformity of taxation as between the taxpayers in the County and the taxpayers in the City in violation of Sec. 3 Art. V of the State Constitution? *Three,* will the issuance of $800,000.00 Library Bonds of the County of Mecklenburg violate Sec. 3 Art. V, as amended, and Sec. 2 Art. VII of the State Constitution as not being for public purposes? *Four,* will the issuance of a similar amount of Library Bonds of the City of Charlotte violate Sec. 3 Art. V, as amended, of the State Constitution as not being for public purposes?

The plaintiff as a taxpayer in the City and County has the right to bring this action to test the authority of the City and County to issue the proposed bonds. *Wilson v. High Point,* 238 N.C. 14, 76 S.E. 2d 546.

Plaintiff's action to restrain the issuance of the bonds by the City and County upon the alleged ground that the issuance of the bonds would be in violation of the State Constitution is not barred because not brought within thirty days after the publication of the result of the election and the Notice to the Taxpayers and Citizens of the City and County. *Sessions v. Columbus County,* 214 N.C. 634, 200 S.E. 418.

As to the first question presented for decision. The Appellant contends that Ch. 1034, 1949 Session Laws of North Carolina, and the proceedings had by the City and County in pursuance thereof, violate Art. V Sec 4, as amended, and Art. VII Sec. 7, as amended, of the State Constitution, in that the Statute and the Proceedings had thereunder provided for the issuance of bonds for two distinct and unrelated purposes, to wit; public library buildings for the City and public library buildings for the County, and provided for submission to the voters residing in the City of these dual purposes in a single question, and did not permit the voters residing in the City to vote separately upon the question of issuing bonds of the City for library buildings for the City and upon the question of issuing bonds of the County for library buildings for the County.

Practically all the cases, expressly or by necessary implication, recognize the basic rule that a single proposition must be placed on the ballot for submission to the voters at a bond election for each distinct and independent object for which an indebtedness is contemplated; or to phrase it differently, several propositions cannot be submitted as a single question so as to have one expression of the voters answer all propositions. The submission of dual propositions as a single question could be used for log rolling purposes, and to defeat the right of the voters to express their choice. *Winston v. Bank,* 158 N.C. 512, 74 S.E. 611; *Hill v. Lenoir County,* 176 N.C. 572, 97 S.E. 498; *Lazenby v. Comrs. of Iredell,* 186 N.C. 548, 120 S.E. 214; Anno. 4 A.L.R. 2d 617, Secs. 3, 4 and 5 (an elaborate annotation where cases are cited from thirty-one states); 43 Am.

Jur., Public Securities and Obligations, Secs. 91 and 92; 64 C.J.S., Mun. Corp., Sec. 1925. See also *Goforth v. Construction Co.,* 96 N.C. 535, 2 S.E. 361.

Did the question presented to the voters in this case contain separate and unrelated propositions, or was it the submission to the voters of a single proposition so related and united as to form in fact but a rounded whole? If the question submitted contained separate and unrelated propositions, it deprived the voters of the right to express their choice on a single proposition and violated Art. V Sec 4, as amended, and Art. VII Sec. 7, as amended, of the North Carolina Constitution, for the proposed bonds concedingly not being for *a necessary expense* of the City and County, must be approved by a majority of those who voted in the election of 13 December 1952, and the voters must have had freedom of choice to vote separately upon each proposition submitted to tax themselves. *Hill v. Lenoir County, supra.* If the question presented to the voters was a single proposition so related and united as to form in fact but a rounded whole, it did not violate the above mentioned provisions of the State Constitution. *Briggs v. Raleigh,* 166 N.C. 149, 81 S.E. 1084; *Hill v. Lenoir County, supra; Taylor v. Greensboro,* 175 N.C. 423, 95 S.E. 771; *Allen v. Reidsville,* 178 N.C. 513, 101 S.E. 267; *Riddle v. Cumberland,* 180 N.C. 321, 104 S.E. 662; *Lazenby v. Comrs. of Iredell, supra;* Anno. 4 A.L.R. 2d 617, Sec. 6; 43 Am. Jur., p. 345.

In *Briggs v. Raleigh, supra,* the question presented to the voters was the issuance of $100,000.00 of bonds of the city for extending a sewer line, for purchasing a site and building thereon a fire house and for permanent improvements. This Court held the purposes of the various items are related to each other, and the bonds voted upon as a single proposition or upon a single ballot are valid.

In *Taylor v. Greensboro, supra,* these two propositions were voted on for or against on a single ballot, to wit; the creation of a board of education and an increase of the maximum tax rate for school purposes. This Court said: "There was only one proposition submitted to the voters of Greensboro, and that was to amend the city charter in two particulars."

In *Allen v. Reidsville, supra,* it was held the sale of an electric light plant and the grant of a franchise to the purchaser, under which it could be operated, are so closely related as to justify submission to the voters as one proposition.

In *Lazenby v. Comrs. of Iredell, supra,* one ballot was used in submitting to the voters of the district the three propositions whether a special tax should be levied, whether the school should have additional grades, and whether the site should be changed. This Court held the submission of these propositions on a single ballot did not invalidate the election because the order of election showed and the court found as a

fact that the levy of the special tax was the single question the voters had in mind.

In *Board of Education v. Woodworth,* 89 Okla. 192, 214 P. 1077, it was held that the submission of a proposed bond issue in the sum of $1,900,000.00 to the voters of Oklahoma City for the purpose of purchasing additional sites for school buildings and playgrounds, the erection of ward school buildings, a junior high school building and a senior high school building comprised a single proposition.

In *Kellams v. Compton,* Mo. Sup. (1947), 206 S.W. 2d 498, 4 A.L.R. 2d 612, there was submitted to the voters one question, whether a school district should issue bonds in an amount specified, for the purpose of constructing athletic field bleachers, a high school building, and an elementary school building. That Court said: "The notice follows, substantially, the language of the statute, and the projects were not so unrelated or incongruous as to constitute log rolling and a fraud upon the voters."

The form of the official ballot furnished to the voters in the election 13 December 1952 followed substantially the provisions of Ch. 1034, 1949 Session Laws of North Carolina. Unquestionably the words on the official ballot informed the voters inside the City and the voters inside the County outside of the City, with certainty and exactitude as to the proposition submitted, and how to cast an affirmative or negative vote. It seems clear from examining the official ballot that the voting for the issuance of City and County Bonds to erect and equip public library buildings for the City and County and to levy a tax for said bonds in the City for the bonds of the City, and a tax in the entire County, including the City, for the bonds of the County, was the single question which the voters had in mind at the election.

The purpose of the proposed issuance of bonds is to extend and enlarge the "Public Library of Charlotte and Mecklenburg County," which library is governed by a Board of Trustees consisting of representatives from Charlotte and the County, and is supported, according to the facts stipulated and found by the court, by county-wide taxation, an annual appropriation by the City and a percentage of the net profits from the A.B.C. Stores throughout the County, and which has its main library in Charlotte and branches in five towns of the County.

Under the facts presented to us, we are of opinion that the question presented to the voters was in fact a single proposition so related and united as to form a rounded whole, and did not violate the provisions of Art. V Sec. 4, as amended, and Art. VII Sec. 7, as amended, of the State Constitution.

Concerning the second question presented for decision the appellant contends that Ch. 1034, 1949 Session Laws of North Carolina, and the proceedings thereunder, violate this provision of Art. V Sec. 3, as

amended, of the State Constitution that "taxes on property shall be uniform as to each class of property taxed," in that the proposed issuance of bonds will place a greater burden of taxation on the taxpayers in Charlotte than on the taxpayers in the County outside of Charlotte.

Art. V Sec. 3 of our Constitution imperatively requires in express terms that all real and personal property be taxed by a uniform rule. *Guano Co. v. Biddle,* 158 N.C. 212, 73 S.E. 996. In this respect the Constitution "shows no favor and allows no discretion." *Wiley v. Comrs. of Salisbury,* 111 N.C. 397, 16 S.E. 542.

Uniformity in taxation on real and personal property is effected, when the tax is levied equally and uniformly on all property *in the same class. Wiley v. Comrs. of Salisbury, supra; Guano Co. v. Biddle, supra; R. R. v. Lacy,* 187 N.C. 615, 122 S.E. 763; *Roach v. Durham,* 204 N.C. 587, p. 591, 169 S.E. 149. The General Assembly of North Carolina has classified intangible personal property for taxation at a lower rate than tangible personal property or realty. G.S.N.C. 105-198 *et seq.*

In *Holton v. Comrs. of Mecklenburg County,* 93 N.C. 430, a statute authorized a tax for public roads to be imposed upon all the property in Mecklenburg County, and that no part of the tax be expended in the City of Charlotte for that purpose. The plaintiff, a taxpayer in Charlotte, contended the provision that no part of the tax should be expended in Charlotte was unequal and unjust. This Court said: "The Constitution does not prohibit such inequality. While it is very true that there must be equality and uniformity in imposing the burden of taxation upon property subject to it, so that each taxpayer shall pay the same proportionate tax on the same species of property taxed that every other taxpayer pays . . . this rule of equality does not apply to the distribution of the revenue arising from such taxation."

We have stated in *Martin County v. Trust Co.,* 178 N.C. 26, 100 S.E. 134, that the construction of roads and bridges is a matter of general public concern, and that "the Legislature may cast the expense of such public works upon the State at large, or upon territory specially and immediately benefited, even though the work may not be within a part of the total area attached." Among the cases cited is *Holton v. Comrs. of Mecklenburg County, supra.*

The appellant contends that residents of Charlotte will pay a tax to the City and then a tax to the County to support one institution, and that is in effect double taxation upon taxpayers in Charlotte.

To constitute double taxation both taxes must be imposed on the same property, for the same purpose, by the same state, federal or taxing authority, within the same jurisdiction, or taxing district, during the same taxing period and there must be the same character of tax. *Pure Oil Co. v. State,* 244 Ala. 258, 12 So. 2d 861, 148 A.L.R. 260; *Fox v.*

Board for Louisville & Jefferson County Children's Home, 244 Ky. 1, 50 S.W. 2d 67; *C. F. Smith Co. v. Fitzgerald,* 270 Mich. 659, 259 N.W. 352, appeal dismissed 296 U.S. 659, 80 L. Ed. 470; *Spencer v. Snedeker,* 361 Pa. 234, 64 A. 2d 771; 84 C.J.S., Taxation, Sec. 39; 51 Am. Jur., Taxation, Sec. 284; Cooley Taxation 4th Ed. Vol. One, Secs. 223 and 230. See also *S. v. Wheeler,* 141 N.C. 773, 53 S.E. 358, 5 L.R.A. (N.S.) 1139; ("Nor is there any constitutional prohibition against double taxation."); *Kenilworth v. Hyder,* 197 N.C. 85, 147 S.E. 736 ("furthermore, neither the State nor the Federal Constitution affords protection against double taxation by the State."); *Bottling Co. v. Shaw, Comr. of Revenue,* 232 N.C. 307, 59 S.E. 2d 819 ("double taxation, as such, is not prohibited by the Constitution, and is not invalid if the rule of uniformity is observed."); *Sabine v. Gill, Comr. of Revenue,* 229 N.C. 599, 51 S.E. 2d 1 (". . . double taxation, even within the State, is not *ipso facto* necessarily obnoxious to the Constitution when the intention to impose it is clear and it is free from discriminatory features, however odious to the taxpayer."). *Anderson v. Asheville,* 194 N.C. 117, 138 S.E. 715; *Banks v. Raleigh,* 220 N.C. 35, 16 S.E. 2d 413, relied upon by the appellant, are distinguishable.

The 14th Amendment to the U. S. Constitution does not prohibit a state from imposing double taxation. *Cream of Wheat Co. v. County of Grand Forks,* 253 U.S. 325, 64 L. Ed. 931; *Baker v. Druesedow,* 263 U.S. 137, 68 L. Ed. 212; *Swiss Oil Corp. v. Shanks,* 273 U.S. 407, 71 L. Ed. 709.

Absolute equality and uniformity in taxation are seldom, if ever, attainable. Such a conception has been characterized as "utopian" and "a baseless dream." The diversity of human judgment and the fallibility of all human beings preclude such a possibility. "The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the Constitutions of some states is complied with when designed and manifest departures from this rule are avoided." *Stanley v. Board of Supervisors of Albany County,* 121 U.S. 535, 30 L. Ed. 1000.

Ch. 1034, 1949 Session Laws of North Carolina, and the proceedings thereunder, do not violate Art. V Sec. 3 of the North Carolina Constitution, as contended by the plaintiff. There is no double taxation for one tax will be imposed by the City of Charlotte and another by the County of Mecklenburg, and further double taxation is neither prohibited by the State nor Federal Constitutions, though the courts do not look upon it with favor. *Sabine v. Gill, Comr. of Revenue, supra.*

We shall discuss together the third and fourth questions, which present for decision whether the proposed issuance of bonds of the City of Charlotte and of the County of Mecklenburg for "The Public Library of Charlotte and Mecklenburg County," and tax levies by the City and County to

pay their respective bonds, authorized by the election had by virtue of Ch. 1034, 1949 Session Laws of North Carolina, are for public purposes of the City and County within the purview of Art. V Sec. 3, as amended, and Art. VII Sec. 2 of the State Constitution. The answer without qualification is Yes.

Art. IX Sec. 1 of the North Carolina Constitution declares: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Thomas Carlyle in "Heroes and Hero Worship, Lecture V, The Hero as Man of Letters" says: "The true University of these days is a collection of books."

G.S.N.C. 153-77 provides that the special approval of the General Assembly is hereby given to the issuance by counties of bonds for the purposes named in the section and to the levy of property taxes for the payment of the bonds; this includes purchase of necessary land, and in case of buildings the necessary equipment. The purpose named in subsec. (m) is the erection and purchase of library buildings and equipment.

G.S.N.C. 115-300 gives the State Board of Education authority to adopt such rules governing the establishment of public libraries receiving State aid as will best serve the educational interest of the people. G.S. N.C. 115-301 says the State Board of Education may use such portion of the State appropriation to rural libraries as it may deem necessary to aid the public schools in establishing local libraries as provided in this section.

The General Assembly at its 1953 Session rewrote Art. 8, Ch. 160 of the General Statutes relating to Public Libraries in Ch. 721, 1953 Session Laws. Prior to the 1953 Session of the General Assembly G.S.N.C. 160-77 provided that two or more counties or municipalities, or *a county or counties and a municipality or municipalities,* may join for the purpose of establishing and maintaining a free public library under the terms and provisions of Art. 8 Ch. 160 G.S. This provision was re-enacted in the 1953 Session of the Legislature in Sec. 160-75 with additional provisos as to the amount each participating unit shall contribute to the establishment and support of the joint library. Prior to 1953 the old statute, G.S. 160-75, and the 1953 statute, G.S. 160-74, gave counties and municipalities power to contract with existing libraries.

G.S.N.C. 153-9, subsec. 37, provides that the Boards of Commissioners of the counties in which there is a public city or town library, in order to help in extending the services of such libraries to rural communities of the county, can appropriate out of the funds under their control an amount sufficient to pay the expenses of such library extension service.

G.S.N.C. Ch. 125 concerns the State Library in Raleigh, North Carolina.

Ch. 1034, 1949 Session Laws, is not in conflict with the general State Law as to Public Libraries.

Art. V Sec. 3 of the State Constitution states: "Taxes shall be levied only for public purposes." We have stated many times what a public purpose is. A clear and succinct statement of a public purpose is in *Green v. Kitchin,* 229 N.C. 450, 50 S.E. 2d 545: "A tax or an appropriation is certainly for a public purpose if it is for the support of government, or for any of the recognized objects of government."

It seems to be the general rule that funds may be raised by taxation for the establishment and support of public libraries. 51 Am. Jur., Taxation, Sec. 356; 38 Am. Jur., Municipal Corporations, Sec. 562.

A public library is not a necessary public expense. *Westbrook v. Southern Pines,* 215 N.C. 20, 1 S.E. 2d 95; *Twining v. Wilmington,* 214 N.C. 655, 200 S.E. 416.

The people of this State speaking directly in their Constitution have said that religion, morality and knowledge being necessary to good government and the happiness of mankind the means of education shall be forever encouraged; and speaking indirectly through their representatives in their General Assembly have repeatedly enacted laws to promote the establishment and maintenance of public libraries by counties and municipalities. They are convinced that "a good book is the precious life-blood of a master spirit, embalmed and treasured up on purpose to a life beyond life" (Milton "Areopagitica"), and such a book says to every man "I will go with thee, and be thy guide in thy most need, to go by thy side." The levying of taxes for public libraries by the State, counties and municipal corporations is for "a public purpose" under Art. V Sec. 3, as amended, of our Constitution, and the people have said so in emphatic tones. Neither does it conflict with Art. VII Sec. 2 of the Constitution, as contended by appellant.

By virtue of Ch. 1034, 1949 Session Laws of North Carolina, the people of Charlotte who will be liable for the City Bonds, and necessarily affected by the tax to pay them voted for the issuance of these bonds, sanctioning and approving by a majority vote the action of the Legislature. Under our government ultimate sovereignty is vested in the people, and they alone can say how they shall be governed. The people of Charlotte by their vote have said an increase in the public library facilities of their City and County Library will spread the means of education and thereby promote good government in their city and county, which will be to the distinct benefit of the City of Charlotte which pays the greater part of the taxes in Mecklenburg County, and the fact that some of the money from the City Bonds will, or may be, spent outside of the City does not prevent the City Bonds being issued for a public purpose of the City under the facts presented to us. *Briggs v. Raleigh,* 195 N.C. 223, 141

S.E. 597; *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211. The case of *Wilson v. High Point, supra,* is clearly distinguishable.

Sir William Osler in "A Way of Life": An Address delivered to Yale students on the evening of Sunday, April 20, 1913: used words which could well be inscribed on the wall of public libraries. "As the soul is dyed by the thoughts, let no day pass without contact with the best literature of the world. Learn to know your Bible, though not perhaps as your fathers did. In forming character and in shaping conduct, its touch has still its ancient power. Of the kindred of Ram and sons of Elihu, you should know its beauties and its strength. Fifteen or twenty minutes day by day will give you fellowship with the great minds of the race, and little by little as the years pass you extend your friendship with the immortal dead. They will give you faith in your own day." Man is always changing, but the elemental passions of the human heart remain as at creation's dawn. The great ideas of the classic writers come ringing down the centuries vibrant and alive, inspiring and influencing our thoughts as effectually as in the days when Homer throughout the Greek world sang the wrath of Achilles.

". . . In furtherance of a general public policy, it has been held that courts must, as a rule, wherever possible, uphold the validity of municipal bond elections, unless clear grounds for invalidating them are shown." 43 Am. Jur., Public Securities and Obligations, Sec. 78.

Ch. 1034, 1949 Session Laws of North Carolina, is constitutional and the proposed bonds, when issued, will be valid obligations of the City of Charlotte and the County of Mecklenburg.

The judgment of the lower court is

Affirmed.

LEGRAND K. JOHNSON AND LESBIA G. JOHNSON v. CITY OF WINSTON-SALEM AND S. C. HARPER.

(Filed 24 March, 1954.)

1. **Waters and Watercourses § 4—**

Where there is an open drainway following a natural depression draining the surface waters, each upper proprietor has an easement in the lower estates for the surface waters to flow in their natural course or manner without obstruction or interruption, and each lower proprietor is required to receive and allow the passage of the natural flow of the surface waters from the higher land.

2. **Same—**

Where upper proprietors have constructed a conduit to take care of the natural drainage of the waters along a depression, the lower proprietor

at the mouth of the conduit may allow the surface waters to continue to flow across his land in the natural depression, but if for his own convenience and the better enjoyment of his property he continues the underground conduit across his land, the law imposes upon his ownership the burden of exercising ordinary care to keep the artificial drain open and in repair so as to accommodate the natural flow of surface waters from the upper tenements without injury to the lower tenements along the line of the drainway.

3. Same: Easements § 6—

Where the purchaser takes land with notice of a private underground conduit taking care of the natural flow of surface waters, he takes *cum onore*, and is under the duty to exercise ordinary care to keep the artificial underground drainage open and in repair.

4. Trial § 24a—

Plaintiff may be nonsuited on the ground of an affirmative defense only when plaintiff's own evidence establishes the truth of the affirmative defense as a matter of law.

5. Municipal Corporations § 15d—

A municipality may be held liable for damages to lands resulting from obstructions of drains and culverts constructed by third persons only when the city adopts the drains and culverts as a part of its drainage system or assumes control and management thereof.

6. Same: Waters and Watercourses § 4—

In this action against a landowner for negligent failure to maintain a conduit under his land to take care of the natural drainage of surface waters, plaintiff's evidence disclosed that the city widened the street and constructed catch basins along land draining into the conduit, but did not show that the city increased the volume of surface waters beyond the capacity of the private conduit as constructed or exercise any control or supervision over it. *Held:* The evidence does not justify nonsuit on the ground that plaintiff's evidence showed that the city and not defendant was under legal duty to maintain the conduit.

7. Same—

The fact that a municipality, after the basement in the house occupied by plaintiff had been flooded from overflow of a private culvert which had become obstructed, sent its employee to the premises and assisted in cleaning out the basement, and thereafter constructed another drain to take care of a part of the flow of surface waters, defendant furnishing the pipe, shows at most a joint undertaking by the city and defendant insufficient to exonerate the defendant from liability for failure to maintain his private conduit.

8. Waters and Watercourses § 4—Evidence of defendant's failure to exercise due care to keep private drain in repair held for jury.

Plaintiff's evidence tended to show that a hole started developing over an underground drain which had been constructed by defendant's predecessor in title to take care of the natural drainage of surface waters, that defendant had bought with knowledge of the artificial drain, that the hole

which developed was triangular in shape and from 20 to 25 feet deep, that a fence was erected around it, and that some several weeks later, during a hard rain, the waters washed a large piece of terra cotta pipe so that it stuck across the outlet on the other side of a manhole near the house in which plaintiff resided, causing the waters to overflow and flood the basement of the house and damage the plaintiff's personal property stored in the basement. *Held:* Plaintiff's evidence makes out a *prima facie* case of actionable negligence on the part of defendant in failing to exercise proper care to keep the drain open and in repair.

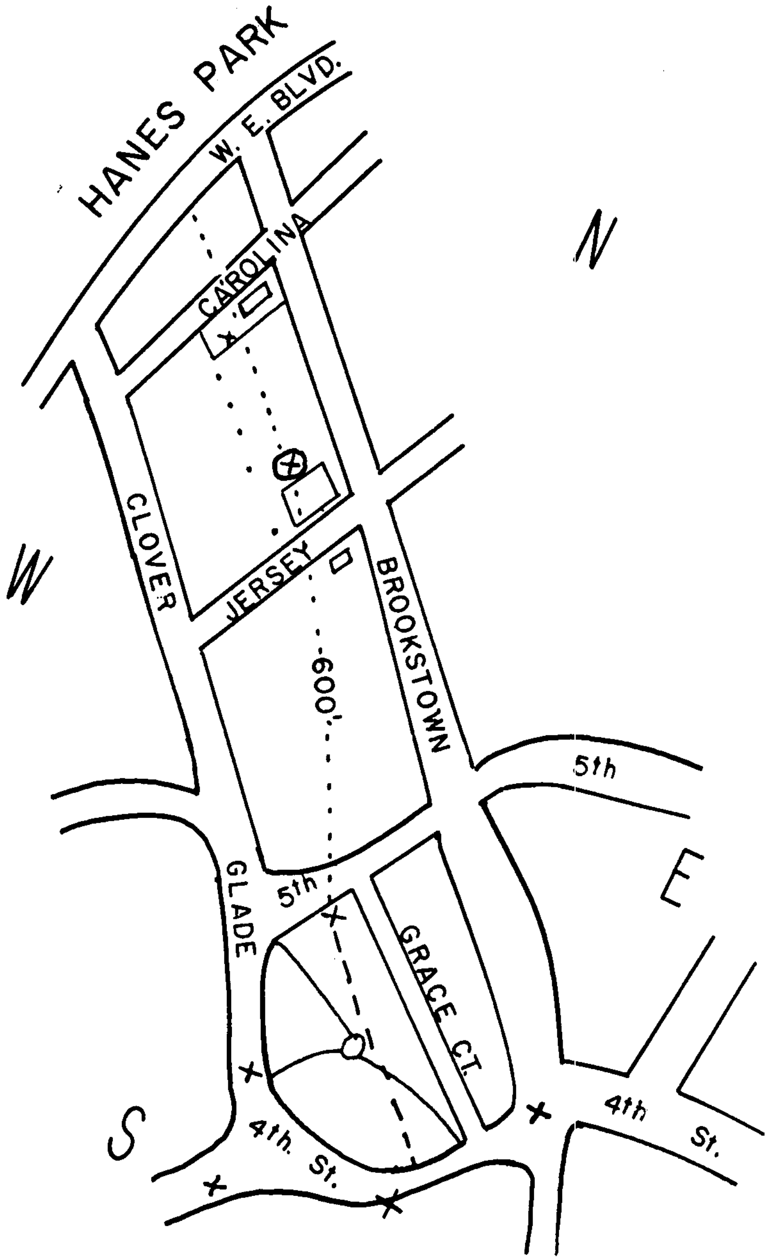
APPEAL by plaintiffs from *Crisp, Special Judge,* at 13 April Term, 1953, of FORSYTH.

Civil action by plaintiffs, lower proprietors, to recover for flood damage to personal property located in the basement of their home, due to the alleged negligence of the defendant Harper, upper proprietor, in failing to keep in proper repair a large subsurface drain pipe running under his property.

The drain was installed many years ago—exactly when not appearing, but sometime prior to 1920—in a natural drainage depression just off 4th Street in the City of Winston-Salem. The depression through which the pipe was laid was filled in and thereafter most of the land along its course was developed as residential property. The drain begins on the north side of 4th Street about the center of the block at Grace Court and runs thence in a northwesterly direction, about parallel with Brookstown Avenue, through the approximate center of three city blocks, passing under 5th Street, Jersey Avenue, Carolina Avenue, and there emptying into the open channel of the original drainway, from whence the waters ultimately flowed on beyond Hanes Park into Peters Creek.

The accompanying map, made from a photograph of the blackboard sketch used by the plaintiffs in the trial below to illustrate the testimony of the witnesses, shows the location of the drain. It is indicated by the dotted line running from 4th Street through Grace Court to Carolina Avenue. The plaintiffs resided in the house on Carolina Avenue indicated on the map by the rectangular figure near the intersection of Carolina and Brookstown Avenues. The rest of the property along the drain in that block, east of the plaintiffs' home, was owned by the defendant Harper.

The area of 4th Street which drained into this underground pipe line was about 540 feet in length on the south side and from 615 to 620 feet on the north side. The street is about 65 feet wide east of Grace Court and 100 feet wide where it converges into Glade Street on the southwest. The waters from this area flowed into the catch basins on 4th Street, one on the north side and the other on the south side of the street. These catch basins emptied into 18-inch drains and then into a single 18-inch


HANES PARK
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drain which ran across Grace Court to another catch basin at the north end of the park. From that point on 5th Street the drain was a 24-inch pipe all the rest of the way to Carolina Avenue.

Grace Court is a small public park covered with grass and trees. In 1928 the City of Winston-Salem widened 4th Street approximately 12 feet, taking from the park and paving as a part of the street a strip approximately 12 x 500 feet, from which the water flowed directly into the catch basins on the street. The evidence discloses no drainage into this underground drain above the Harper property except the surface waters from Grace Court and the upper and lower reaches of 4th Street—though Harper admits in his answer that the down spouts from the buildings on his property emptied into the drain. There were no catch basins on 5th Street or on Jersey Avenue. There were catch basins on Carolina Avenue which emptied into the drainway.

Sometime prior to 1920, C. M. Thomas acquired the eastern part of the block between Jersey and Carolina Avenues and extended the artificial drain all the way across his property (300 feet), using pipe 24 inches in diameter, the same size used by the upper landowners in bringing the artificial drain down to the Thomas property line at Jersey Avenue. Thomas, after extending the pipe line across his property, then filled in the open depression through which the water from above had previously flowed and developed the property for residential purposes. He built a large residence at the upper end of his lot, partly over the underground drain. The house is shown on the map by the square figure near the intersection of Jersey and Brookstown Avenues.

Some years later the defendant Harper acquired all the Thomas property and converted the old Thomas residence into an apartment house. The defendant Harper later conveyed about 50 feet of the property at the lower end next to Carolina Avenue to his son, Roger Harper, the plaintiffs' landlord. There was a manhole on the Roger Harper property just above the western end of the house where the plaintiffs live. This manhole, approximately 10 feet from the plaintiffs' house, is indicated on the map with a figure "X." The manhole was about 20 feet deep and about 2 feet across. The pipe entered at the bottom of the manhole from the southeast side. The outlet pipe was on the opposite side of the manhole. The distance from the catch basins on 4th Street to the manhole was approximately 600 feet. The fall from 4th Street to the manhole was from 40 to 50 feet.

Some weeks prior to 27 June, 1949, a hole started developing over the underground drain on the downhill side of the old C. M. Thomas house. This hole is indicated on the map by an "X" inside a circle. The hole was triangular in shape, with 20-foot sides, and was from 20 to 25 feet deep. The plaintiff L. K. Johnson testified in part: ". . . there was a

hole that started developing several weeks prior to the flood; the ground started eroding away and going down into the old drain pipe . . . I went up there and looked at it, . . . they erected a sort of fence around this hole. . . . some posts stuck up there, with a string running across it, as a warning that the hole was there. For this period of a few weeks apparently this cedar tree had washed a little bit down into it and was falling down into it; . . . I thought that hole was 20 to 25 feet from top to bottom. . . . I saw Mr. Harper (the defendant) looking at the hole . . . the sunken place, with some men, before the flood and after."

On the evening of 27 June, 1949, there was a very heavy rain for about four hours. One witness testified: ". . . at that time, we felt like we'd almost had a cloudburst." Another witness said: "The rain that night looked like to me it was a flood. We have rains like that around here right smart, sometimes; it happens maybe three or four times a year; . . ." Other witnesses testified that the rain was very heavy, but they had seen it rain as heavy or heavier.

During the rain the manhole just below the property occupied by the plaintiffs overflowed by reason of the fact that it became stopped up by a large piece of terra cotta pipe which washed down the pipe into the manhole and lodged against the outfall side of the manhole. This caused the water to gush out of the manhole in great volume and force. It forced the lid off the manhole and rose several feet into the air like a geyser, and so continued for an hour or more. Pieces of the terra cotta drain pipe and various kinds of foreign substances and debris washed out of the manhole. Water in great force and volume flooded the space between the manhole and the house and poured into the basement through two ground-level windows on the south side of the house. The basement filled completely up with water in less than an hour—"from top to bottom . . . to a depth of 65 inches," doing considerable damage to plaintiffs' personal property stored in the basement. Next day fronds from a cedar tree were found pasted on the walls of the basement.

Witness Thompson, who assisted in cleaning out the manhole next morning, testified: "We worked a long time before we finally got to the bottom. We finally got some tools we call books and spearheads, and . . . pulled a piece of pipe away from over the mouth of . . . the outlet of the manhole. . . . What caused the stoppage of the flow through there was a piece of terra cotta line . . . sitting up over the mouth of the outlet of the pipe, . . . it came down from above the line somewhere."

The witness Ellis testified that next day he crawled up the pipe line 120 feet from the manhole toward the apartment house on the defendant Harper's land and there found where a piece of pipe was broken out. As the witness put it: ". . . I found where that piece had left from there and come down and stopped it up, and all the pipe was 'squashed' down

. . . I couldn't go any farther than 120 feet because the pipe was . . . blocked and closed entirely; the pipe was broke all to pieces; the hole where the pipe had been, . . . had dropped down, like it done give out. . . . I crawled to the place on the Harper property and located the place up there . . . where that piece of pipe (identified as resembling the large piece taken out of the manhole) fitted in the break."

The City of Winston-Salem sent its employees to drain and assist in cleaning out the basement after the flood. Later a catch basin was put in the drain on the upper side of Jersey Avenue and the entire line of drainage from that point was diverted to another drain under Brookstown Avenue. The City did this work and the defendant Harper paid for the pipe.

The plaintiffs instituted this action against both the City of Winston-Salem and S. C. Harper, alleging that the damage complained of was proximately caused by the concurrent negligence of the City and the individual defendant, the negligence alleged being in gist that the City wrongfully diverted surface waters into this drain, and that each defendant, being under legal duty to maintain the drain, failed to exercise due care in keeping it in proper repair.

The defendants filed separate answers, denying all allegations of negligence. The defendant Harper by way of further defense alleges in substance that the drain was under the control of the City of Winston-Salem and that no legal duty rested on him to maintain or repair it. The defendant Harper also pleaded over against the City in the alternative, alleging in substance that he is entitled to (1) exoneration under application of the doctrine of primary and secondary liability, or (2) contribution under the joint tort-feasor statute, G.S. 1-240.

At the opening of the trial the plaintiffs submitted to a voluntary nonsuit as to the City of Winston-Salem. Thereupon the defendant Harper submitted to like nonsuits in respect to his cross-actions against the City.

At the close of the plaintiffs' evidence, the motion of the defendant Harper for judgment as of nonsuit was sustained, and from judgment entered in accordance with such ruling the plaintiffs appeal.

Deal, Hutchins & Minor for plaintiffs, appellants.

Ratcliff, Vaughn, Hudson, Ferrell & Carter for defendant S. C. Harper, appellee.

JOHNSON, J. The gravamen of the plaintiffs' cause of action is that the defendant Harper, being under legal duty to maintain the drain pipe under his land, negligently permitted it to remain in a known state of disrepair, thereby proximately causing the injury and damage in suit.

The individual defendant takes the position it was the sole duty of the City of Winston-Salem to maintain the drain, and that if this be so, he may not be held actionably negligent for failure to make the repairs.

Therefore, at the threshold of the appeal we are confronted with the question whether the evidence below is sufficient to show *prima facie* that the defendant Harper was under legal duty to maintain the section of the drain pipe under his property. This seems to be the pivotal question on which decision turns.

The circumstances and events by which the underground drain across the defendant Harper's land came to be substituted for the original open drain are relevant to the inquiry at hand.

The original open drain on the defendant Harper's land was part of an open drainway which followed a natural drainage depression leading downgrade from 4th Street to and beyond what is now Hanes Park. In this situation the ownership of each of the various parcels or tracts of land along the course of the drainway was subject to these reciprocal rights and duties with respect to drainage: The law conferred on the owner of each upper estate an easement or servitude in the lower estates for the drainage of surface water flowing in its natural course and manner, without obstruction or interruption by the owners of the lower estates to the detriment or injury of the upper estates. Each of the lower parcels along the drainway was servient to those on higher levels in the sense that each was required to receive and allow passage of the natural flow of surface water from the higher land. *Phillips v. Chesson,* 231 N.C. 566, 58 S.E. 2d 343; *Davis v. Atlantic Coast Line R. Co.,* 227 N.C. 561, 42 S.E. 2d 905; *Darr v. Aluminum Co.,* 215 N.C. 768, 3 S.E. 2d 434; *Winchester v. Byers,* 196 N.C. 383, 145 S.E. 774; *Porter v. Durham,* 74 N.C. 767; *Overton v. Sawyer,* 46 N.C. 308. See also 56 Am. Jur., Waters, Sec. 68 *et seq.*

The then owner of the Harper property, located as it was in an intermediate position along the course of this drainway, was both a dominant and a servient proprietor. As servient to the upper proprietors, he was not permitted by law to interrupt or prevent the natural passage of waters, to their detriment. And conversely, as the owner of an estate dominant to the lower tenements, he was required, under pain of incurring actionable liability, to refrain from interfering with the natural flow of waters by artificial obstruction or device, to the detriment or injury of the lower tenements. *Phillips v. Chesson, supra; Commissioners v. Jennings,* 181 N.C. 393, 107 S.E. 312; Farnham, Waters and Water Rights, Sec. 889d.

Prior to 1920, with the ownership of the property along this natural drainway being subject to the foregoing reciprocal rights and duties as to drainage, the upper segments of the present underground line of drain-

age were installed, beginning at 4th Street and running through the first and second blocks down to the edge of the Harper property at Jersey Avenue. Sometime thereafter, C. M. Thomas, the then owner of all the property along the drainway between Jersey and Carolina Avenues, extended the artificial drain on through his property the entire length of the block, using pipe the same size and capacity as that used by the adjoining landowners in the block above, and then filled in the natural drainage depression and channel through which the conduit was laid and developed his lands as residential property.

Thomas was not required to extend the underground conduit that had been brought down to Jersey Avenue by the upper owners. On the record as presented his act in so doing was entirely voluntary and unaided by any other person or by the City of Winston-Salem. He could have left this drainway open across his land, so as to let the natural flow of waters from the upper tenements empty from the end of the conduit at Jersey Avenue into the established open channel and continue to flow thence across his land to Carolina Avenue, and from there on, as at present, in an open channel across the block immediately below Carolina Avenue and on to West End Boulevard. In such manner Thomas, as owner of a lower parcel of land, servient for natural drainage purposes to higher lots along this hillside drainway, may well have fulfilled his duties to the upper proprietors.

However, when Thomas, presumably for his own convenience and for the better enjoyment of his property, closed the natural depression and channel through which the waters from the upper, dominant tenements had been accustomed to flow and installed in lieu thereof the underground conduit, the law imposed upon his ownership the burden of maintaining the artificial drain, requiring him to take care, not as an insurer but in the exercise of ordinary care, to keep the conduit through his land open and in repair so as to accommodate the natural flow of surface waters from the upper tenements across his land without injury to the lower tenements along the line of the drainway. The true rule as to this would seem to be that ordinarily a lower or intermediate proprietor along a natural drainway who for his own convenience and the better enjoyment of his property closes the natural channel of open drainage and installs in lieu thereof an underground conduit into which the natural flow of upper waters is channeled to the next tenement below, is required to maintain the artificial drain so installed, and in doing so he must exercise ordinary care, under pain of subjecting himself to actionable tort liability, to see that no injury by breakage, leakage, seepage, or overflow is done by it to lower tenements. *Commissioners v. Jennings, supra; Phillips v. Chesson, supra;* Farnham, Waters and Water Rights, Sections 448, 830, 889d, and

926; *Armstrong v. Luco,* 102 Cal. 272, 36 P. 674; 67 C.J. 887; 56 Am. Jur., Waters, Sec. 68, pp. 551, 552.

We see no reason why the general rule which fixes the mutual and reciprocal rights and liabilities of adjoining landowners under the maxim *sic utere tuo ut alienum non laedas,* requiring that each use and maintain his own land in a reasonable manner as not to injure the property or invade the legal rights of his neighbor, should not apply with all its rigor to a property owner who for the better enjoyment of his property closes an open drainway fixed by nature across his land and installs in lieu thereof an underground conduit. 1 Am. Jur., Adjoining Landowners, Sections 3 and 13; 2 C.J.S., Adjoining Landowners, Sections 1, 41 and 44.

The evidence here is plenary that when the defendant Harper purchased the lands from Thomas, he did so with notice of the artificial condition previously created by Thomas. This being so, the property passed to the defendant Harper *cum onere,* and specifically subject to all existing servitudes with respect to maintenance of the underground drainage system. See 17 Am. Jur., Easements, Sections 128 and 130.

Similarly, when the defendant Harper conveyed the lower 50-foot lot to the plaintiffs' landlord, Harper's original duty of upkeep and maintenance continued as to the conduit under the portion of the tract retained by him. See Farnham, Water and Water Rights, Sections 831 and 908.

It necessarily follows that the plaintiffs' evidence is sufficient to show *prima facie* that the defendant Harper was under legal duty to maintain the conduit under his land.

This brings us to a consideration of the defendant Harper's further defense that the City and not he was under the legal duty to maintain the conduit under his land. The gist of the further defense and contentions made thereunder is that although this underground drain originally may have been a private drainage project, it had lost its identity as such and had been taken over or appropriated as a part of the city street and park drainage system, and while the burden of maintenance and upkeep may have rested originally upon the property owners along the drain, this burden had passed to the City by operation of law as incident to its use and control of the pipe line. The plea so made by Harper necessarily stands as an affirmative defense only against the plaintiffs, since the City of Winston-Salem was released from the case by voluntary nonsuits taken before the commencement of the trial, by the plaintiffs as to their action against the City, and also by Harper in respect to his cross-actions against the City.

Even so, Harper's affirmative defense is entitled to consideration under application of the rule of procedural law which provides that "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." *Hedgecock v. Ins. Co.*, 212 N.C. 638, 641, 194 S.E. 86. Nevertheless, the merits of the affirmative defense are to be determined by principles of substantive law. And as to this, the general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof. *City of Irvine v. Smith,* 304 Ky. 868, 202 S.W. 2d 733; 63 C.J.S., Municipal Corporations, Sec. 877; 38 Am. Jur., Municipal Corporations, Sec. 636. Accordingly, there is no municipal responsibility for maintenance and upkeep of drains and culverts constructed by third persons for their own convenience and the better enjoyment of their property unless such facilities be accepted or controlled in some legal manner by the municipality. *Robinson v. Danville,* 101 Va. 213, 43 S.E. 337; *Lander v. Bath,* 85 Me. 141, 26 Atl. 1091; McQuillin, Municipal Corporations, Third Edition, Sec. 53.118.

The defendant Harper in support of his affirmative defense points to the evidence that the City in 1928 made extensive street improvements along 4th Street in the vicinity of Grace Court and thereby materially increased the flow of street surface waters into the catch basins around Grace Court, and diverted into this underground drain vast quantities of surface waters which naturally would have flowed elsewhere than along the original channel where the underground drain was installed. Upon the record as presented, this evidence is without material significance as tending to show legal appropriation or control of the entire conduit by the City. This is so for the reason it affirmatively appears that when Harper's predecessor in title voluntarily extended the line through his property, he used pipe 24 inches in diameter, the same size as that used by the upper landowners in the block above him. This, nothing else appearing, indicates assent by the owners of the lands along the conduit to its use up to capacity. There is no evidence that the City augmented the flow of water to the point of overloading the drain or causing an overflow, and the plaintiffs' claim here asserted is not, on this record, traceable to any such causal origin. Therefore the appeal as presented does not bring into focus the rules of law applicable where there is an acceleration or increase in the volume of surface waters in or through a drain incident to the improvement of lands. Accordingly, we deem it unnecessary to discuss the refinements of these rules of law. See *Davis v. Atlantic Coast Line R. Co., supra* (227 N.C. 561); 56 Am. Jur., Waters, Sections 71, 72, and 73. Moreover, the fact that a private line of drainage is connected with a municipal culvert under circumstances involving

no dedication by the private owner or control by the municipality, ordinarily does not make the latter liable for damages to private property caused by a break in the private line. See *Lynch v. Clarke,* 25 R.I. 495, 56 Atl. 779; *City of Irvine v. Smith, supra; Kansas City v. Brady,* 52 Kan. 297, 34 P. 884, 39 Am. S. R. 349.

The defendant Harper also points to the evidence tending to show that the City sent its employees to the plaintiffs' premises and assisted in cleaning out the basement after it was flooded, and that sometime later the City installed a catch basin on the upper side of Jersey Avenue and diverted this entire line of drainage into another drain under Brookstown Avenue. This line of evidence is without probative force of substance. The events related took place after the flood, and while city employees made the new installation, the record discloses that the defendant Harper furnished the pipe. So, at most, this was a joint undertaking by the City and Harper.

In determining whether the evidence establishes Harper's affirmative defense, we are not concerned with the plaintiffs' abandoned allegations against the City. Decision here must be rested wholly and solely upon an evaluation of the plaintiffs' evidence as it comes to us at the *prima facie* level. Our examination of it leaves the impression that the plaintiffs did not prove themselves out of court by fixing upon the City the duty of maintaining this conduit and keeping it in repair. The record discloses no evidence tending to show dedication or legal acceptance by the City of the drain as a part of its drainage system, nor control over it by the City as such, within the purview of the controlling principles of law. Instead, the plaintiffs have established *prima facie* that the duty and responsibility of keeping up the drain rested upon the defendant Harper.

So, then, we come to consider the final question whether the plaintiffs made out a *prima facie* case of actionable negligence against the defendant Harper for failure to keep in repair the drain under his land.

The evidence adduced below, when tested by the principles which control the law of actionable negligence (*Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63; 38 Am. Jur., Negligence, Sections 57, 58, and 62), leaves the impression that it is sufficient to justify, though not necessarily to impel, the inference of negligence on the part of the defendant Harper as the proximate cause of the plaintiffs' injury and damage. Thus a jury trial is necessary. This being so, we deem it appropriate to refrain from further comment or elaboration on the various aspects of the evidence.

The judgment of nonsuit entered below is

Reversed.

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

STATE v. JULIAN DAVID HART.

(Filed 24 March, 1954.)

1. Criminal Law § 42c: Evidence § 19—

A party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation, and this rule includes the right to cross-examine an opposing witness to elicit information that the opposing witness had brought, or was preparing to bring, a civil action for damages against the accused based on the acts involved in the criminal prosecution.

2. Same—

The right to elicit information on cross-examination of an opposing witness tending to show that the witness is biased or is interested in the outcome of the litigation, *held* a substantial right which the trial judge has no discretionary power to abrogate or abridge to the prejudice of the cross-examining party.

3. Criminal Law § 42f: Evidence § 17—

Where a party cross-examines an adverse witness as to matters which tend to show the partiality of the witness for his adversary or the hostility of the witness toward him, the party is not bound by the answers of the witness denying partiality or hostility, but is at liberty to contradict the witness by the testimony of other persons disclosing such partiality or such hostility.

4. Criminal Law § 81c (3): Automobiles § 28d—

In this prosecution for manslaughter the refusal of the court to permit defendant to show that the main witnesses for the State were suing the defendant for damages resulting from the same accident *held* prejudicial.

APPEAL by defendant from *Williams, J.*, and a jury, at November Term, 1953, of HARNETT.

Criminal prosecution for manslaughter arising out of an accident on the highway in which a motorist struck and killed the driver of a team of mules.

At dusk on 26 March, 1953, the deceased John Lockamy, who was the sixteen-year-old son of Willie Lockamy, was conveying his father's mowing-machine eastward along the highway with his father's team of mules. An eastbound automobile operated by the defendant Julian David Hart, who was accompanied by a guest, Floyd Suitt, Jr., overtook and struck the mowing-machine, the deceased, and the mules, demolishing the machine and killing the deceased and the mules. Willie Lockamy witnessed the collision, and Floyd Suitt, Jr., suffered personal injury in it.

The death of John Lockamy prompted the indictment of the defendant for manslaughter. Both sides offered evidence at the trial of the defend-

ant on this charge. The State's evidence indicated that the defendant was guilty of criminal negligence in the operation of the automobile, and that his criminal negligence in such respect proximately resulted in the death of the deceased. The defendant's evidence would have exonerated him from criminal responsibility for the death if it had been accepted at its face value by the jury.

The case for the prosecution was based in the main upon the testimony of Willie Lockamy and Floyd Suitt, Jr., who were called to the stand by the State as its first and second witnesses.

Counsel for the defense addressed to Willie Lockamy on his cross-examination questions calculated to draw out the facts that he had brought two pending civil actions for damages against the defendant, one in his representative capacity as administrator for the death of his son, and the other in his individual capacity for the destruction of his mowing-machine and mules. Counsel for the defense also put to Floyd Suitt, Jr., on his cross-examination questions designed to elicit the fact that he, too, was suing the defendant in a pending civil action to recover damages for the personal injury sustained by him in the collision. The State objected to the questions, the trial judge sustained the objections, and the defendant excepted to the rulings. The case on appeal shows that Willie Lockamy and Floyd Suitt, Jr., would have admitted the bringing and the pendency of the civil actions if the State's objections to the questions had not been sustained.

The jury found the defendant guilty of manslaughter, the trial judge pronounced sentence against the defendant on the verdict, and the defendant appealed, assigning various adverse rulings as error.

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

Salmon & Hooper for defendant.

ERVIN, J. The defendant stresses his exceptions to the disallowance of his counsel's cross-examination of the State's witnesses Willie Lockamy and Floyd Suitt, Jr., as to their having brought civil actions against him based on the identical acts involved in this criminal prosecution.

Truth does not come to all witnesses in naked simplicity. It is likely to come to the biased or interested witness as the image of a rod comes to the beholder through the water, bent and distorted by his bias or interest. The law is mindful of this plain psychological principle when it fashions rules of evidence to aid jurors in their search after truth. As a consequence, the law decrees that "any evidence is competent which tends to show the feeling or bias of a witness in respect to the party or the cause," and that jurors are to consider and weigh evidence of this char-

acter in determining the credibility of the witness to whom it relates. *S. v. Sam,* 53 N.C. 150. To enable litigants to present such evidence to jurors, the law establishes and enforces these rules:

1. A party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation. *S. v. Jones,* 229 N.C. 276, 49 S.E. 2d 463; *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593; *Manufacturing Co. v. R. R.,* 222 N.C. 330, 23 S.E. 2d 32; *S. v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *Riverview Milling Co. v. State Highway Commission,* 190 N.C. 692, 130 S.E. 724; *Bailey v. City of Winston,* 157 N.C. 252, 72 S.E. 966; *Stewart v. Stewart,* 155 N.C. 341, 71 S.E. 308; *S. v. Harston,* 63 N.C. 294. Under this rule, a witness for the prosecution in a criminal case may be compelled to disclose on cross-examination that he has brought, or is preparing to bring a civil action for damages against the accused based on the acts involved in the criminal case. *Villaroman v. United States,* 87 App. D. C. 240, 184 F. 2d 261, 21 A.L.R. 2d 1074; *Cabel v. State,* 18 Ala. App. 557, 93 So. 260; *State v. McLemore,* 99 Kan. 777, 164 P. 161; *Coleman v. Commonwealth,* 208 Ky. 601, 271 S.E. 662; *Commonwealth v. Marcellino,* 271 Mass. 325, 171 N.E. 451; *People v. Drolet,* 157 Mich. 90, 121 N.W. 291; *State v. Decker,* 161 Mo. App. 396, 143 S.W. 544; *State v. Williams,* 16 N. J. Super. 372, 84 A. 2d 756; *Hoffman v. State,* 85 Tex. Cr. 11, 209 S.W. 747; *Lane v. Commonwealth,* 190 Va. 58, 55 S.E. 2d 450; *State v. Constantine,* 48 Wash. 218, 93 Pa. 317; 70 C.J., Witnesses, section 1189.

2. Despite *dicta* (*S. v. Stone,* 226 N.C. 97, 36 S.E. 2d 704, S. v. Coleman, 215 N.C. 716, 2 S.E. 2d 865) and decision (*S. v. Wray,* 217 N.C. 167, 7 S.E. 2d 468) to that effect, evidence obtainable by cross-examination showing bias or interest of an opposing witness is not to be revealed in one case and concealed in another at the caprice or the discretion of the trial judge. Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party. *S. v. Roberson, supra; S. v. Harston, supra; Commonwealth v. Taylor,* 319 Mass. 631, 67 N.E. 2d 237; *Commonwealth v. Sansone,* 252 Mass. 71, 147 N.E. 574; *Commonwealth v. Russ,* 232 Mass. 58, 122 N.E. 176; *State v. Radon,* 45 Wyo. 383, 19 P. 2d 177; 58 Am. Jur., Witnesses, section 715; 70 C.J., Witnesses, section 1165. A contrary rule would substitute the whim of the trial judge for the law of the land, which certainly contemplates that the causes of all men in like circumstances are to be determined by uniform laws, impartially administered.

3. Where a party cross-examines an adverse witness as to matters which tend to show the partiality of the witness for his adversary or the hostility of the witness toward him, the party is not bound by the answers of the witness denying partiality or hostility, but is at liberty to contradict the witness by the testimony of other persons disclosing such partiality or such hostility. *S. v. Spaulding,* 216 N.C. 538, 5 S.E. 2d 715; *S. v. Roberson, supra; S. v. Banks,* 204 N.C. 233, 167 S.E. 851; *Scales v. Lewellyn,* 172 N.C. 494, 90 S.E. 521; *In re Craven,* 169 N.C. 561, 86 S.E. 587; *S. v. Crook,* 133 N.C. 672, 45 S.E. 564; *Cathey v. Shoemaker,* 119 N.C. 424, 26 S.E. 44; *S. v. Dickerson,* 98 N.C. 708, 3 S.E. 687; *S. v. Ballard,* 97 N.C. 443, 1 S.E. 685; *Kramer v. Electric Light Co.,* 95 N.C. 277; *S. v. Davis,* 87 N.C. 514; *S. v. Roberts,* 81 N.C. 605; *Jones v. Jones,* 80 N.C. 246; *Clark v. Clark,* 65 N.C. 655; *S. v. Kirkman,* 63 N.C. 246; *S. v. Sam, supra; S. v. McQueen,* 46 N.C. 177; *Edwards v. Sullivan,* 30 N.C. 302; *S. v. Patterson,* 24 N.C. 346, 38 Am. D. 699.

The circumstance that the State's witnesses Lockamy and Suitt were suing the defendant for damages in civil actions based on the acts involved in the prosecution for manslaughter showed that they were interested in pecuniary ways in the conviction of the defendant. These observations of the Supreme Judicial Court of Massachusetts concerning the prosecuting witness Lombard in *Commonwealth v. Marcellino, supra,* are rather relevant:

"Lombard testified as a witness called by the Commonwealth. On cross-examination, he was asked, 'Is it not a fact that you have brought a civil suit for $5,000.00 against the defendant based on this assault which is now pending?' On objection this question was excluded. This was error. The question was designed to elicit information tending to show bias and personal interest in the outcome of the indictment then on trial. It was of great importance to the witness that a verdict of guilty should be returned. Judgment against the defendant upon the indictment on trial would at the least have a strong tendency to prevent the defendant from testifying in his own behalf on the trial of the civil action brought by the witness against him or, if he testified, to impair the value of such testimony. In other respects it would be or might become a difficult obstacle in the defense of the civil case and an important advantage to the plaintiff in prosecuting it."

It cannot be said that the exclusion of the facts showing that Lockamy and Suitt were suing the defendant for damages in civil actions based on the acts involved in the prosecution for manslaughter constituted harmless error. The exclusionary ruling enabled the State to present its witness Suitt to the jury as the defendant's friendly traveling companion, who was wholly free from temptation to be partial to the prosecution or hostile to the defense. The ruling likewise permitted the State to repre-

sent to the jury that its witness Lockamy had no motive to color his testimony to the defendant's disadvantage other than the emotive bias of a grief-stricken parent sorrowing for a lost child. The jurors might well have discounted the testimony of Lockamy and Suitt in a material manner had they been informed that these witnesses were pecuniarily interested in the conviction of the defendant. This being true, the exclusion of the facts relating to the civil actions brought by Lockamy and Suitt against the defendant constituted prejudicial error, necessitating a new trial.

Since the other challenged rulings may not recur on the retrial of the cause, we omit consideration of them.

New trial.

STATE v. DONALD DYER.

(Filed 24 March, 1954.)

1. Criminal Law § 47—

Where separate indictments charge two or more persons with committing offenses of the same class, which offenses are so connected in time and place that the evidence at the trial upon one of the indictments would be competent and admissible at the trial of the other, or others, the indictments may be consolidated for trial. G.S. 15-152.

2. Same—

Where two persons are charged in separate bills of indictment with receiving stolen goods knowing them to have been stolen, and there is no evidence tending to show there was a conspiracy between them, or between them and other parties, but the indictments relate to the receiving of goods separately by each defendant at different times and places, the consolidation of the indictments for trial over objection of appealing defendant must be *held* for prejudicial error.

APPEAL by defendant from *Williams, J.*, November-December Term, 1953, of WAYNE.

The appellant and one Ted Gray were charged in separate bills of indictment with the statutory offense of receiving stolen goods knowing them to have been stolen.

The defendant Donald Dyer was charged with receiving fifty-five cartons of cigarettes of the value of less than $100.00 on 1 January, 1953, the goods and chattels of Colonial Stores, Inc., knowing the said cigarettes to have been stolen. The defendant Ted Gray was charged with receiving one case of Jewel oil, one-half case of Crisco, twenty-five cartons of cigarettes, twelve pounds of coffee, of the value of less than $100.00, on 12 January, 1953, the goods and chattels of Colonial Stores, Inc., knowing the said goods to have been stolen.

Donald Dyer, B. G. Porter, Ted Gray, Willis Gray, and Milton Warren were each charged in separate bills of indictment with receiving stolen goods, the property of Colonial Stores, Inc., knowing them to have been stolen. All five were called and each one entered a plea of not guilty, whereupon the solicitor moved to consolidate the cases against Donald Dyer and Ted Gray for the purpose of trial. Both defendants objected. The objections were overruled and each one excepted.

The State's evidence tends to show that Harold Cashwell, Elmer Keen, and Billie Matthews were employed by Colonial Stores, Inc., in Goldsboro; that they entered into a conspiracy to steal and did steal from said store a large quantity of merchandise; that Cashwell and Matthews waived a bill of indictment and pleaded guilty to the charge of larceny and conspiring with each other to commit larceny.

Harold Cashwell testified for the State to the effect that he was employed by Colonial Stores in Erwin, North Carolina, on 4 July, 1952; that while working in Erwin he lived in Dunn. In October, 1952, he was transferred by his employer to its store in Goldsboro; that beginning in December, 1952, and over a period of approximately five weeks, he began to take cigarettes, margarine, Jewel oil, pepper, and cheese from the Colonial Store in Goldsboro; that he was produce clerk, Matthews was produce manager, and Keen was the assistant manager; that the merchandise was put in lettuce crates and cardboard boxes and taken out of the store by Matthews, Keen and himself through the front door during business hours; that he used a car belonging to Matthews to dispose of the goods; that in disposing of the goods he made about two trips a week for four or five weeks. He testified that on his first trip he sold merchandise to Ted Gray whose place of business was between Dunn and Erwin; that Gray ran a filling station and pool room. The testimony of this witness is to the effect that he sold Ted Gray stolen merchandise on numerous occasions; that he sold him Jewel oil for thirty cents a quart that sold for fifty-nine cents in the store; cigarettes for $1.00 a carton that sold for $1.55 in the store. The only sale made to the defendant Dyer, according to the State's evidence, was fifty-five cartons of cigarettes at $1.15 per carton, which were delivered to him at his place of business in Dunn, North Carolina, on 1 January, 1953.

The defendant Dyer testified in his own behalf to the effect that he purchased fifty-five cartons of cigarettes for $67.75; that at the time he made the purchase he did not know Cashwell and had never received any communication from him; that when Cashwell came to his place of business and made inquiry about selling him cigarettes, he told him he did not need any. Cashwell then said he would sell them to him at $1.25 per carton. Upon inquiry as to why he could sell them so cheap, Cashwell

said he was working at a cigarette factory in Durham and they allowed him so many; that he had saved them and wanted to get rid of them.

The jury returned a verdict of not guilty as to Gray and guilty as to Dyer. From the judgment imposed the defendant Dyer appeals, assigning error.

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

Doffermyre & Stewart for defendant, appellant.

DENNY, J. We think the defendant's exception to the order of consolidation is well taken and should be upheld.

It is provided by G.S. 15-152 that when there are several charges against any person for the same act or for two or more transactions connected together, or for two or more transactions of the same class of offenses, which may be properly joined, the court will order them to be consolidated for trial. *S. v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460; *S. v. Norton,* 222 N.C. 418, 23 S.E. 2d 301; *S. v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250.

In *S. v. Truelove, supra,* two men and a woman were charged with abducting a little girl under fourteen years of age, who, at the time, was skating along the sidewalk near her grandmother's home; the two male defendants were also indicted for an assault on the child with intent to commit rape. The cases were consolidated and tried together as both charges arose out of the same transaction or a series of connected transactions. The consolidation was upheld and properly so.

Likewise, it is pointed out in *S. v. Combs,* 200 N.C. 671, 158 S.E. 252, that "the court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others," citing *S. v. Cooper,* 190 N.C. 528, 130 S.E. 180; *S. v. Jarrett,* 189 N.C. 516, 127 S.E. 590; *S. v. Malpass,* 189 N.C. 349, 127 S.E. 248.

In the case of *S. v. Norton, supra, Winborne, J.,* in speaking for the Court, said: "The offenses charged are of the same class, relate to an assault upon the same person, and appear to be so connected in time and place as that evidence at the trial upon one of the indictments would be competent and admissible at the trial of the other. In such cases there is statutory authority for consolidation," citing authorities.

We think the present case is factually distinguishable from the cases cited and relied upon by the State. It is true the defendants Dyer and Gray were charged with separate offenses of the same class, but with

having been committed at different times and places. Moreover, the State offered no evidence tending to show that there had been or was a conspiracy between these defendants, or between them and other parties to commit the alleged crimes. The indictments were not against the same person but were against different individuals. Separate and distinct offenses were charged, complete in themselves and independent of each other, and not provable by the same evidence. *McElroy v. United States,* 164 U.S. 76, 41 L. Ed. 355; Wharton's Criminal Procedure, Vol. I (10th Ed.), Section 352, page 405, *et seq.* The State offered a great deal of evidence to the effect that numerous sales of merchandise stolen from the Colonial Stores, Inc., were made to Ted Gray and others, which evidence was not admissible against the defendant Dyer and the court so ruled with respect thereto many times during the progress of the trial. Even so, in our opinion the defendant was prejudiced by the order of consolidation. See *S. v. Bonner,* 222 N.C. 344, 23 S.E. 2d 45. Hence, the defendant is entitled to a new trial and it is so ordered.

New trial.

IN RE THE LAST WILL AND TESTAMENT OF P. L. RADFORD.

(Filed 24 March, 1954.)

APPEAL by caveators from *Hall, S. J.,* at October Term 1953, of WAYNE.

Civil action,—an issue of *devisavit vel non,* raised by a caveat to the will of P. L. Radford, deceased, filed by his nieces. These issues were submitted without objection, and answered as shown:

"1. Was the paper writing propounded for probate, and dated January 24, 1951, executed by Plummer L. Radford, in the manner and form required by law, for the execution of a Last Will and Testament? A. Yes (by consent).

"2. At the time of the execution of said paper writing on the 24th day of January 1951, did Plummer L. Radford have sufficient mental capacity to execute a valid Last Will and Testament? A. Yes.

"3. Is the paper writing propounded for probate, and each and every part thereof, the Last Will and Testament of Plummer L. Radford? A. Yes (by the court)."

The first issue was answered "Yes" by consent. It was agreed also that the third issue might be answered by the court in accordance with the jury's answer to the second issue. And the jury having answered the second issue "Yes," the court answered the third issue "Yes," and signed

judgment admitting the last will and testament of Plummer L. Radford to probate, and probating it in solemn form.

Caveators excepted thereto, and appeal to Supreme Court and assign error.

B. F. Aycock and Dees & Dees for propounders, appellees.

J. Faison Thomson & Sons and W. Dortch Langston for caveators, appellants.

PER CURIAM. Careful consideration of the record and all assignments of error shown in the case on appeal, reveals that the trial of this case in Superior Court was conducted in accordance with well established and applicable principles of law and rules of evidence in such cases. Prejudicial error is not made to appear.

Therefore, express consideration of the many assignments of error presented would serve only to restate familiar principles and rules to no useful purpose. Hence, in the judgment from which appeal is taken, there is

No error.

APPENDIX.

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

The following amendments to the Rules and Regulations of The North Carolina State Bar and the Rules and Regulations of the Board of Law Examiners were duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar, January 15, 1954:

(1) Amend Article X-13, appearing 221 N.C. Reports, 596, to read as follows:

"13. *Contingent Fees.* Reasonable contracts for contingent fees, both in criminal and civil cases, unless forbidden by law and in cases of guardianships or minors, are recognized and approved."

(2) Amend Article X-E, appearing 221 N.C. Reports, 606, by adding thereto a new paragraph as follows:

"When any member of the North Carolina State Bar shall be financially interested, either directly or indirectly, in any bonding company authorized to write appearance bonds for any person charged with violation of the criminal laws of the State of North Carolina, or whenever such member of the North Carolina State Bar shall be regularly retained and employed as attorney for such bonding company, neither shall said member nor any partnership of attorneys with whom he is associated, or by whom he is employed, be permitted to represent as attorney any person charged with a criminal offense or a misdemeanor, whose appearance bond shall have been written with such bonding company as surety thereon for the appearance of said person in any Court of the State."

(3) Amend Rules Governing Admission to Practice Law in the State of North Carolina by adding the following after Rule 19, 221 N.C. Reports, 615:

"20. *Appeals.* (a) Any applicant may appeal from an adverse ruling or determination of the Board of Law Examiners as to his eligibility to take the bar examination. After an applicant has successfully passed the bar examination, he may appeal from any adverse ruling or determination withholding his license from him.

"(b) Any appealing applicant shall, within ten days after notice of such ruling or determination, give notice of appeal in writing and file with the Secretary of the Board his written exceptions to the ruling or determination, which exceptions shall state the grounds of objection to such ruling or determination.

"(c) The record on appeal to the Superior Court shall consist of the following—

"(1) The papers filed by the applicant with the Board under its rules.

"(2) A certified copy of the evidence taken by the Board upon the question or questions appealed.

"(3) The rulings and determinations of the Board.

"(4) The notice of appeal.

"(5) The exceptions.

"Within sixty days of receipt of the exceptions filed by the applicant with the Board, the Secretary of the Board shall certify such record at the expense of the applicant.

"(d) Such appeal shall lie to the Superior Court of Wake County and shall be heard by the Presiding Judge, without a jury. The findings of fact by the Board, when supported by evidence or reliable information, shall be conclusive and binding upon the Court. If the Court is of the opinion that the Board was in error, it shall so specify and remand the matter to the Board, which may appeal as hereinafter provided. Said appeal shall operate as a *supersedeas*. In case no appeal is taken by the Board, it shall proceed in accordance with the judgment of the Court.

"(e) The said applicant, or the Board of Law Examiners, may appeal to the Supreme Court from any order or judgment of the Superior Court. If the said cause is remanded by the Supreme Court to the Superior Court, then the Superior Court shall remand the same to the Board of Law Examiners, to be proceeded with in accordance with the opinion of the Supreme Court."

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar were duly adopted by The North Carolina State Bar in that the said Council did by resolutions at a regular quarterly meeting unanimously adopt said amendments to said Rules and Regulations.

Given over my hand and the seal of The North Carolina State Bar, this the 15th day of January, 1954.

EDWARD L. CANNON, *Secretary,*
The North Carolina State Bar.

[The North Carolina State Bar
Seal
July 1, 1933.]

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar, it is my opinion that the same comply with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto, Chapter 84 General Statutes, and Chapter 1012 Session Laws, 1953.

This the 20th day of January, 1954.

(Signed) W. A. DEVIN, *Chief Justice,*
Supreme Court of the State of North Carolina.

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that the same be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 29th day of January, 1954.

R. HUNT PARKER, *J.*,
For the Court.

MEMORIAL ADDRESS

ON THE OCCASION OF THE PRESENTATION OF THE PORTRAIT

OF

JUSTICE AARON ASHLEY FLOWERS SEAWELL

TO

THE SUPREME COURT OF NORTH CAROLINA

By Frank P. Graham

In the unveiling of this portrait of the late Associate Justice, A. A. F. Seawell, in which the artist, W. C. Fields of Cumberland, has caught the likeness, character and spirit of the man, we would in grateful memory briefly recall his life and services to the people of North Carolina. In the making of the man were the physical and spiritual robustness of the stock from which he came, the self-reliant democracy of the community in which he grew to manhood and the issues of the stirring times in which he lived and struggled for the better life of the people.

From These Roots

Aaron Ashley Flowers Seawell, son of Aaron Ashley Flowers Seawell, was born in that part of Moore County, now Lee County, on October 30, 1864. He came from God-fearing pioneer stock whose self-reliance and independence of spirit are a robust and common part of the epic story of the making of America. His grandfather was Jessie Seawell, a stonemason and Baptist preacher whose sermons on Sundays were as rugged as the stones he fashioned on the days between. Steeped in the Old and New Testaments, he gave his children Biblical names. The name Aaron was the first name of one of his sons, from whom the name descended in full force to his son, grandson and great grandson.

We find ancestral Seawells with three different spellings, Sewell, Sewall and Seawell in 17th century Massachusetts, one of whom was Judge Samuel Sewell of the famous Sewell Diary, who in a church meeting courageously recanted for his part in the Salem witch trials. The Seawells migrated north to Maine, south all the way to Texas and west all the way to California. In these Seawells was the spirit of those dissenters and pioneers by which Americans, early and since, self-selected by the will to get away from the regimentations of older countries, older states, more static societies and church establishments, kept moving on to fresher soils, newer freedoms and wider vistas. In such a spirit, grandfather Jessie Seawell and his wife, Nancy Ritter Seawell, after they were eighty years old, moved on in a covered wagon from North Carolina to the fresh lands of Texas. Another Seawell, a contemporary of our Justice Seawell, was a Justice of the Supreme Court of California.

New England Sewells Meet Highland Scots in the Bonnie Braes of Moore, now Lee, County

Some of the New England Seawells who trekked south stayed in North Carolina where their roots struck deep in the sandhill country for generations. In the making of the Old North State, the Seawells, with the heritage of the pioneers, the imprint of the frontier and the crossing of robust strains, have played, and are playing, a lively part in the general life, at the bar and as leaders of both political parties. The first A. A. F. Seawell was a physically powerful man, a farmer, lawyer, skilled mechanic, buggy maker, breeder of plants and fruits and master of a fine orchard. A zest for learning sent him to all the rummage sales where he was the chief bidder for good books. Mainly self-taught, he was the homespun philosopher of the community. Governor David S. Reid, whom he had actively supported in the campaign for manhood suffrage, appointed him Lieutenant Colonel of the North Carolina militia. Later, during the Civil War, by appointment of Governor Vance, he commanded the local forces of three counties.

While some Seawells were moving on, he stayed in North Carolina and married a bonnie Scottish lass of Moore County. Janet Anne Buie was the granddaughter of Malcolm Buie of the Highland MacDonald clan on the Isle of Jura of Argyleshire. The Buies and MacDonalds were among the thousands of loyal followers of Bonnie Prince Charlie, latest of the Stuart contenders for the British throne, whose gallant Highlanders were defeated at the battle of Culloden by the English Army of George II of the House of Hanover. The King did not know what to do with these Scottish rebels against his title to the British throne. Upon the plea of Gabriel Johnston, professor of Oriental languages at the University of Glasgow, who had lately been appointed Colonial Governor of North Carolina, they were permitted to migrate to North Carolina with consequences historic for the Old North State and personal for A. A. F. Seawell. The Buies, coming from the Highlands of Scotland, were to meet the Seawells, coming from New England, in the bonnie braes between the branches of the Upper Cape Fear. A. A. F. Seawell, 1st, married Janet Anne Buie, January 7, 1853, in Moore County where they reared a large family. The sixth child was A. A. F. Seawell, 2nd, who was born during the Civil War on October 30, 1864. The Buies and Seawells gave this child his inheritance of robust body and mind and the enduring ties of a closely knit family of love and loyalty.

Influences of Time and Place in the Post-bellum South

The times were to test and develop his character in the years of strife and desolation. The community was to imprint him with the hardships and sympathies of a rural democracy struggling for self-recovery from

the ruins of war and the tragedies of Reconstruction toward the hopes of a better day. Near the Seawell place was a farm of the Scottish family of McIvers whose son, Charles Duncan McIver, was to be the founder of what is now the distinguished Woman's College of the University of North Carolina. Edwin A. Alderman, a college mate of Seawell at Chapel Hill and later President of the University of North Carolina, Tulane and Virginia, himself from southeast North Carolina, said of the community in which lived the McIvers and Seawells, that it had the self-reliant spirit of the simplest democracy in America, and that, in common with the rural South, the people believed in God, revered Robert E. Lee, read the Bible and Sir Walter Scott, and voted the Democratic ticket.

In such a family, in such a time, and in such a community, A. A. F. Seawell grew in the sharing of needs, struggles, sympathies and hopes. There was a challenge in the poverty of a broken civilization and a lift in the unconquered spirit of the people. For all the meagerness of the times there was a wholeness in the development of a boy into whose wholesome life went the powerful influence of family, school, church, fields, streams, forests, dogs, horses, cows, work on the farm and in the shop, play in the neighborhood, and through it all the simple life of a community in which everybody knew everybody and shared in the struggles, sorrows and hopes of all. Of such was A. A. F. Seawell made—strong in body, serious in mind, touched with good humor and lively wit, reverent in spirit, steeped in the Bible and the literature of the ages, inventive wth skilled hands, sensitive in poetic and musical soul, at one with nature speaking to him in many languages whose mystic meanings were the sources of his unending youth, his zest for life and quest of various learning for almost ninety-five years.

Education in Rural School, Jonesboro and Chapel Hill

It was natural, when the Seawells met in family council to decide which one of the many sons and daughters should, out of the combined family income, go to college, that the unanimous choice was the one with the most versatile talents, who most loved books, nature and people, and was most loved by them all. Flowers had been prepared for college by his oldest sister, Kate, by the short-termed rural schools, and in the school at Jonesboro, where the family moved for the better schools of the town. He had also taught himself and often read Cicero seated on a big stone in the cotton field while he rested his mule from plowing.

In the fall of 1881 we find him in Chapel Hill where part of the family moved in 1882. Like many other older sisters in large families, Kate, self-forgetting, threw herself into the task of helping brother through college. She kept house on Rosemary Street. Sister Nancy, not allowed to attend classes in the University, studied all her brother's courses with

him at home and passed the examinations given privately by the professors in their homes. Though not awarded a degree, she won high distinction in Latin and the special commendation of Professor George Taylor Winston, later President of Carolina, Texas and State College in Raleigh. Father weekly brought supplies to his son and daughters in Chapel Hill from the farm in Moore County. The Seawell sisters helped to keep brother in the University for three years, where he excelled in the classics, the sciences, and in debate in the old Dialectic Literary Society. At the University in the early eighteen eighties were a group of students—Aycock, Alderman, McIver, Joyner, Noble, W. J. Peele, Pell, Locke Craig, Josephus Daniels, and others—who were later to lead in the renaissance which became an heroic chapter in the history of the risen South.

In the overturned civilization of the South the way of life was hard but the spirit of the people was unbroken in defeat.

Because of the hard times, Flowers had to drop out at the end of his Junior year and teach school until the fall of 1888. His first school lasted three months with sixty-five students in one room, ranging from the first grade to college preparatory years. He returned to the University and graduated in 1889 *cum laude* with special honors in Latin in a class in which Dan J. Currie and John Sprunt Hill won the highest honors in scholarship, Charles A. Webb the Mangum medal in oratory, and Shepard Bryan the prize in Greek. After graduating he taught school in Wilmington where Dr. M. C. S. Noble, a leader of statewide movement for public schools, was teaching and General Van Metts was a student. His three sisters, Kate, Nancy and Jeannette, were teaching at the same time. Flowers was thus enabled to finish his law course under Dr. John Manning in 1892, was admitted to the bar and practiced with his father in Jonesboro the year before his father died. Colonel Seawell, sister Jeannette and brother Malcolm, who had managed the farm, all three died within three weeks of typhoid fever, a dread disease in those days. Flowers then became the mainstay of the family which had been his mainstay in earlier years. With his growing law practice he supported his mother, his two widowed sisters, their children and an unmarried sister.

Three Great Loves: Family, Community and The Law

He practiced in the courts of Moore, Montgomery, Chatham and Harnett counties, was on the school board, taught a Bible class, was a ruling elder in the Presbyterian Church, wrote and directed plays, was the speaker on many causes for the church, the schools and the community. In the courtroom he impressed juries, lawyers, judges and people with his thorough preparation of his cases, clear analysis of the facts and the law, logical arrangement of his points, widely various learning

and simple eloquence. His law partners in Sanford and opponents in the courtroom emphasize his integrity and fairness.

In 1904 he met Bertha Alma Smith of Lemon Springs in Moore County. His sensitive musical ear had been much attracted by a voice over long-distance telephone belonging to a young lady who operated the rural line switchboard in the general merchandise store. He could hardly wait to meet the owner of that voice. When he tracked her down she turned out to be a person no less attractive than her voice, the daughter of the owner of the store, who was also a farmer and lumberman. She was born in Cumberland County while the family were prospecting in the turpentine forests northwest of Fayetteville. In her blood met McIntoshes, Dixons, Shaws, Smiths and also Buies, for whom Buies Creek was named. She grew up at the old homeplace in Moore County and was educated in the public schools and the Union school near Carthage. To her, as his wife, comrade and inspiration for forty-six years, he gave his complete love and devotion.

Their marriage was blessed with four sons and two daughters. Elizabeth won an A.B. from the Woman's College in Greensboro and an A.M. from the University at Chapel Hill. Another daughter, Sarah, now Mrs. R. J. Somers of Raleigh, and the four sons, A. A. F., the third, Donald, Malcomb and Billie, won their A.B. degrees at Chapel Hill. Billie gave his life as an ensign on the U. S. heavy cruiser *Quincy* covering the landing of the U. S. Marines on Guadalcanal in some of the most decisive fighting of the Second World War. To his children he was father, teacher, philosopher, friend, and always companion. With them he read, sang, studied the flowers and trees, walked in the pine forests of Lee and over the wooded hills of Orange. Amid the wooded hills and ivied halls of Orange great traditions, teachers and books, the beauty of nature and the fresh cleanness of the outdoors became with him a part of their lives. His skillful hands, versatile mind, creative insights and universal interest in mechanisms, the sciences, history, philosophy, the fine arts and the law, caused one of his friends to call him "That Renaissance Man." Though scattered far now in Chapel Hill, Raleigh, Lumberton, Washington and New York, this family, close-knit in the common recollections of the old homes in Lee, Chapel Hill and Raleigh, is tied together across all the miles and years with the happy associations and blessed memories of him who is with them always in living spirit, ever fair and ever young.

The Man Who Belonged to His Family and Lee County,
Soon Belonged to the People of North Carolina

In a great love he belonged to his family, in civic devotion he belonged to the people of Lee County, and in the last decades of his life he belonged to the people of North Carolina. He served the people of the State as

legislator, Attorney-General, and Justice of the Supreme Court in a public service which is now a distinguished part of the history of the State.

He served in the House in 1901, 1913, 1915 and 1931 and in the State Senate in 1907 and 1925. In 1901 he was in the middle of the legislative struggle over the impeachment of the members of the Supreme Court and joined in the successfully fought battle for their acquittal. In 1907 he successfully led the fight for making the new County of Lee out of parts of Moore and Chatham. In 1907 and 1913 he joined in the struggle for regulation of railroad rates and for restriction of child labor. He always fought for better public schools and better roads.

As legislator he had a vital part in the establishment of the State-wide primary, the State banking system, and the State-supported six-month school term, and in helping to save the University, the State institutions and the public schools from near destruction.

The Hot Battle for the Seawell Banking Bill

In Governor O. Max Gardner's program for the reorganization of the State government, based on the Brookings Survey, was a recommendation that a State Banking Department be created to take over from the Corporation Commission all responsibility for supervising the banks of the State. The tremendous new development of bus lines, trucks, power companies and utilities made the load of duties too heavy for the Corporation Commission to give the time and care needed for the supervision of the banks. The economic depression precipitated the collapse of banks all over the State and revealed faults and failures which cause the public to demand reform of the administration and supervision of the banks.

Representative Seawell of Lee County introduced the Bill to transfer the supervision of banks from the overloaded Corporation Commission to a State Commissioner of Banks. Seawell then had one of the toughest fights of his life. Opposing his Bill were powerful financial and political interests. The Corporation Commission, bankers in all sections of the State and many political leaders in the Legislature fought to defeat the Bill. The Speaker of the House left the chair to fight the Bill on the floor. Seawell, quiet and gentle in spirit, while accepting suggestions for the improvement of his Bill, was aroused to fight hard for essential reforms in the cause of the safety of the people's savings and took on all comers, slugging it out, toe to toe and blow for blow. Governor Gardner took the case over the air to the people. Robert M. Hanes and Gurney P. Hood, themselves masters of banking, fought valiantly for the Seawell Bill. The Seawell Bill passed after hot fights in both Houses. Much of the triumph was due to the knowledge of the subject, wisdom in strategy, clarity in analysis, fairness and valor in combat.

The banking reforms of the Seawell Act for the specialized supervision of the banks and the responsible safeguarding of the savings of the people, necessary and timely as they were on a State scale, could not withstand the heavy blows of the depression, whose national and global impacts brought not only the banks but the American system itself to the brink of disaster. The policy of isolation, the tremendous surpluses, piled up behind our high tariff walls obstructing trade with the world, foreclosure of farm mortgages, the shut-down of factories, unemployment spiraling upward, purchasing power spiraling downward, and the great fear which seized the people all over the country, all these together continued to carry down the banks in all the states as they collapsed from sea to sea.

The valient fight for banking reforms by Gardner and Seawell in North Carolina in 1931 was to be enlarged by a bold leader of the people into a struggle in America in 1933, not only to conquer fear and repair the national banking system, but to reform and undergird American free enterprise with the more abundant energies, wider purchasing power and more equal well-being of all the people.

Nationally re-enforced by banking and other basic national reforms, and most ably administered by Gurney P. Hood, the first State Commissioner of Banks, and his successors, the North Carolina banking system as provided by the Seawell Act, with progressive improvements, is one of the best in the forty-eight states. The people gratefully have called A. A. F. Seawell "the Father of the North Carolina banking system."

North Carolina Pioneers Among American States in State Basis of State-wide School System

Representative Seawell was not only a contender for the equal security of the savings of the people but he was a fighting champion of the equal educational opportunity of the children of the people. A public school system based mainly on local support through local taxation resulted in unequal opportunity for hundreds of thousands of the children of the people of North Carolina. The richer communities had better schools and the poorer communities had poorer schools for their children. The rural schools had shorter terms, fewer grades and lower salaries for teachers. The State Equalization Fund, increased over the decades, had reduced some of the inequalities in educational opportunities but the foundation of the public schools still mainly rested on local support through local taxation.

In the Legislature of 1931, A. D. McLean, the distinguished and brilliant Senator from Beaufort, introduced the then revolutionary bill to shift the basis for the annual maintenance of the six months school term from the locality to the State as a whole so that every child in North

Carolina, regardless of locality, revenues and color, would have the minimum basis of public education. In this resolution was the shifting of the basis of the schools from local property taxes to State taxes on wealth, franchises, corporation profits and general income. Again came battle of the giants. Representative Seawell of Lee, who had in five other Legislatures fought whatever had been the pending battle for the public schools, became in the House a fighting champion of the more democratic State-wide support of the public schools of North Carolina. Since that victory, the State, by progressive steps, is providing for the annual maintenance of a nine months twelve grade public school system with free textbooks for all the children of the State and with free bus transportation for the rural children. In this shift from local to State annual maintenance of the public schools North Carolina was the pioneer of the forty-eight states. In North Carolina one of the fighting pioneers was A. A. F. Seawell. He did not live to see the hoped for day when the vast inequalities in educational opportunity of American children due to the fact that the largest proportion of children is in areas with the least proportion of wealth, will in the democratic logic of North Carolina be corrected by federal aid to the states for schools without federal control.

The Battle for the University and
All Agencies of the People's Higher Life

In the Legislature of 1931 the University and all State institutions and departments were under a heavy budget axe whose impending fall threatened their vital services to youth and the people. The hearings on the University came last. The institutions and departments had with protests accepted the cuts. The University decided to make a fight not for itself alone but for the public schools and all the institutions and departments, and Seawell became its spokesman in the joint committee on appropriations. He and others fought vigorously against the philosophy of the then assistant director of the budget who was intent upon balancing the budget disproportionately out of the meagre salaries of the public service. The committee stood with the University and then reopened the fight for like consideration of all the others. The resulting battle, involving the whole State budget, lasted over four months with appropriations for all above the proposed figures of near destruction. The University, the State College, and the Woman's College, whose consolidation he championed, had no better friend than A. A. F. Seawell who always fought for the schools and agencies of the people's higher life. Many legislators, including Representative John W. Umstead, Jr., in the forefront joined Seawell, and scores of thousands of people all over the State rallied in support during this long fight, whom we recall with him in gateful remembrance today. The inimitable Tom Bost, in speaking of the many able leaders in

the General Assembly of 1931, in his report to the *Greensboro News* on April 20th, in characteristic style, made this observation about the Representative from Lee County: "When Seawell takes the floor everybody forgets everybody else and wonders how this meek, freckle-faced sorrel top of 67 years ever managed to hide himself so long in North Carolina."

Assistant Attorney-General, Attorney-General and The State Department of Justice

The modest, gentle and yet fighting sorrel top was not hidden from Governor Gardner who, in July, 1931, appointed him Assistant Attorney-General. The able Attorney-General, Dennis G. Brummitt, wisely put upon his new assistant the special responsibility of interpreting the McLean Act. His knowledge of the Act and the intent of the Legislature became part of the Attorney-General rulings which enabled the prompt effectuation of this pioneering legislation by the State School Commission and the State Department of Public Instruction.

Upon the untimely death of Brummitt in 1935, Governor J. C. B. Ehringhaus, himself a distinguished lawyer, from a list of a score of able lawyers suggested for the post, appointed as Attorney-General the man whose incorruptible character and manifold abilities he deeply admired, A. A. F. Seawell. Seawell's advisory opinions and rulings as Attorney-General were characterized by forthrightness, clarity, logic and knowledge of the language, procedures and intent of law-making bodies. He also was a leader in the movement for the establishment of a State Department of Justice to reinforce the local and district agencies of justice as a necessity of this age of quick transportation and instant communication. In 1938 the University of North Carolina conferred on him the honorary degree of Doctor of Laws.

On the Supreme Court

Upon the lamented death of Associate Justice George W. Connor in 1938, Governor Clyde R. Hoey pleased the people well in appointing Attorney-General Seawell to the Supreme Court of North Carolina. Though then 73 years old, he had the vigor and spirit of youth. The nationally eminent Chief Justice Stacy, and the present able and beloved Chief Justice, have eloquently voiced the appreciation of this court for his character, his knowledge of the law, his rich and various learning and his sound judicial opinions, forever bound in Volumes 213-232 of the Supreme Court Reports.

In the famous case of *State v. Emery* the issue arose as to whether women could serve on juries in North Carolina. The majority of the Court held that they could not under Article I, section 13, which provides: "No person shall be convicted of any crime but by a unanimous

verdict of a jury of good and lawful men in open court." Devin and Seawell dissented.

In his dissenting opinion, Justice Seawell expressed much of his philosophy of the law in general and its construction in a particular case. He was by no means in favor of the Court usurping the function of the Legislature and legislating by judicial interpretation beyond the valid meaning of the language of the Constitution and the statutes. He held that the language of the law developed rightful and lawful content with life and experience and took on the added meaning of the life and circumstances of the times in which the case arose. To him the law grew beyond the letter and logic of a past age into the meaning of the language and logic, the common sense and experience of the present time. With high respect for precedents, he yet held that construction of the law should be both in the perspective of history and in the context of the meaning of words in the living present. He argued that the word "male" was generally used if the intent was to exclude "females," and that the word "men" should be construed in the generic sense, especially in view of the recent progress of women in property rights, domestic and civil rights, and in more equal participation in the professions, business, politics and the general life. In line with the views of the people and the educational values of Seawell's agitation of the issue as Attorney-General and the Devin and Seawell dissenting opinions, the people adopted a constitutional amendment providing for the right of women to serve on juries in North Carolina.

In the life of A. A. F. Seawell we have an illustration of the value of the freedom, dignity, struggle and enterprise of the individual, the loyalties and spiritual strength of the family, the crossing of pioneer strains, the democratic fellowship of a small community in work, worship and civic association, and the struggle of a people to build a fairer State.

In him we have embodiment of the will of a people to recover from desolation on farms and in the towns, as dauntless in peace as had been their valor in war. In North Carolina the crossing of rugged strains—the pioneer English of the older East, the Highland Scot of the Cape Fear, the Scotch-Irish and German of the Piedmont and mountain West—is a part of the robust blend of people whose farms and factories, schools and churches, struggles and hopes, have built under a Southern sun, in a pleasant land between the mountains and the sea, a great commonwealth we all love and call "The Old North State."

In the commemoration of A. A. F. Seawell we refresh ourselves in the meaning of North Carolina in the making of America. We see him rise, self-reliant, clean and dedicated to the people whose cause he made his own as he recalled that the dissenters, oppressed and disinherited of many lands crossed the seas, mountains, rivers, mountains again to another sea,

subduing a continent to their relentless wills and making America to the pattern of their restless dream.

As citizen, churchman, lawyer, legislator and judge, he helped to make the American dream more real for the people and the children of the people yet to come. In the meaning of that dream he would not have America, the haven of heretics and a great faith in the days of her infant weakness, become a stronghold of bigots and a great fear in the time of her vast power. In the evolution of States from the city states and empire states of ancient and medieval times to the nation states of modern times, A. A. F. Seawell, by his philosophy of religion, law and life, would have us stand steadfast so that the next transition shall not be from the nation states to the totalitarian world communist or fascist police state, but rather to the more effective co-operation of nation states in a more adequate United Nations for a more inclusive collective security of freedom, justice and peace.

In the spirit of Him who gave His all and suffered and died for the sins of man and the immortal hopes of the people, A. A. F. Seawell, in simple loyalty to the Christian hope and the American dream, would have the pioneer people on their great pilgrimage, share their strength, their toil and their dream with all the people under the Fatherhood of one God and the brotherhood of all people for peace on earth and good will among men.

REMARKS OF CHIEF JUSTICE DEVIN, UPON ACCEPTING THE PORTRAIT OF THE LATE ASSOCIATE JUSTICE A. A. F. SEAWELL IN THE SUPREME COURTROOM, 15 DECEMBER, 1953.

The Court is pleased to receive this portrait of Justice A. A. F. Seawell, a former member of this Court. We have heard with interest and appreciation the thoughtful and well prepared address of presentation delivered by Dr. Frank P. Graham.

Justice Seawell served as a Justice of the Supreme Court of North Carolina for more than 12 years. The opinions which he wrote for the Court appear in Volumes 213 to 232, inclusive, of the official reports of the decisions of the Court. These are enduring monuments of his labors. These 20 volumes of our reports have been enriched by the ornate language in which he expressed the Court's decisions. These opinions reflect his legal learning, his ripe scholarship and a philosophy of constructive thinking. They evince a keen search for the ideal of human justice. His command of language, the facility with which he expressed the most delicate shades of thought and meaning have served to give both elegance and precision to the language of the Court. His opinions will be cited and quoted for many years as authoritative expositions of the principles of law and of the human approach to justice according to law. He was endowed by the Creator with unusual gifts. His mental faculties were varied, brilliant, comprehensive. To him was given by reason of strength more than four score years of life, but all of these years were filled with worthwhile tasks courageously undertaken, and illumined by an understanding mind and sympathetic heart. To those qualities which enabled him to render distinguished service to the State he added a genial friendliness which endeared him to his associates.

His labors here culminated many years of service to his generation as lawyer, Attorney-General and Judge. He was sustained by a staunch faith in the ultimate good and he fashioned his conduct in public and private life in accord with the highest standards of righteousness and truth. He contributed greatly to the ideals of citizenship and to the traditions of this Court.

The Marshal will see that this portrait is hung at an appropriate place on the walls of this building.

The proceedings of this occasion will be published in the forthcoming volume of our reports.

STATEMENT OF W. A. DEVIN ANNOUNCING HIS RETIREMENT FROM THE OFFICE OF CHIEF JUSTICE.

Having served for more than forty years as Judge of the Superior Court and as Justice of the Supreme Court of North Carolina, I have reached the conclusion that the time has come when I should retire.

While my physical health and mental vigor seem unimpaired and I feel capable of continuing to perform the duties of Chief Justice of the Supreme Court to which the people have elected me for an unexpired term, I am mindful of the fact that having passed the eighty-second milestone in life's journey, I cannot hope for an indefinite prolongation of unabated strength. Time takes its toll, and I feel that I owe it to the people of the State to retire now before perceptible lessening of capacity makes its appearance.

In announcing my retirement I wish to avail myself of the opportunity to express to the people of North Carolina my profound gratitude for their confidence and esteem through the years. Six times they have chosen me for high judicial office, culminating in my election as Chief Justice in 1952. I cherish these honors with unforgettable appreciation. In return I have sought only to hold the scales of Justice evenly, and to do justice to all men without fear or favor. In this long period, in retrospect, will be found many imperfections, but I feel confident these will be ascribed by a generous people to errors of judgment and not of purpose.

In making the decision to retire, for the reasons I have stated, my first reaction was regret at severing the ties of intimate and cordial friendship with my brethren on the bench. Our association has been one of cooperation and mutual helpfulness in rendering a high service to the State. This association has been characterized by feelings of sincere and affectionate regard. Occasional disagreements as to the disposition of causes have always been free from acrimony. The kindly attentions of the members of the entire staff of this Department will always be remembered. Let me add that in my judgment no other group of men has ever been chosen by the people of North Carolina to serve as members of the Supreme Court who were of greater ability than the distinguished Justices who now wear the robes of office.

I have today advised the Governor of my desire to retire, under the statutes, as of January 30th, 1954. My services as Chief Justice will end on that date. An outstanding jurist will likely be chosen to carry on. To him I extend my congratulations and sincere good wishes.

REMARKS BY GOVERNOR WILLIAM B. UMSTEAD AT THE PRESENTATION OF HONORABLE MAURICE VICTOR BARNHILL AS CHIEF JUSTICE OF THE NORTH CAROLINA SUPREME COURT—FEBRUARY 1, 1954, AT 11:00 O'CLOCK A.M.

May It Please the Court:

Twenty-seven years ago a young Solicitor of the 10th Judicial District and a Judge of the Superior Court, during the noon recess on the first day of a criminal term, were walking down the steps of the courthouse in Durham. The Solicitor said to the Judge, "I would like to know what your attitude will be towards accepting recommendations of the Solicitor in the disposition of cases on the docket." The Judge did not stop walking. His answer was, "That will depend in each case upon the recommendation." I was the Solicitor, and the man I am presenting as the Chief Justice of the Supreme Court of North Carolina was the Presiding Judge. His answer to that question was typical of the man and his record as a Jurist and, although he never failed to accept a recommendation made by me to him in the succeeding years during my term as solicitor, I always knew that he would not hesitate to do so if he did not, with confidence, feel that the recommendation was correct. I knew that day that I had met, and was dealing with, a man who understood the high responsibility of his office, and that he was willing to trust the discharge of his obligation to another only if consistent with his own ideas of justice and fairness.

A few years later, fate led me into other branches of public service but the Judge stayed upon the Bench, studying the law, increasing his knowledge of people and of the complex questions with which the courts had to deal. Special difficult assignments were given him by succeeding Governors until July 1, 1937, when he was appointed by a great Governor as an Associate Justice of the Supreme Court of North Carolina in which capacity he has served with distinction. He has a fine legal mind which, incisively and quickly, cuts through the form and finds the substance. His opinions are clear—in simple language. He inspires confidence and respect. Although not robust in body, he has an indomitable will power. Soft-spoken and gentle, yet firm and forcible. Patient and tolerant, yet always courageous. He is a churchman without hypocrisy, and a devoted student of the law, with a passion that the supremacy of the law shall be maintained and that the rights and individual liberties of men, under the law, shall be preserved without fear or favor.

In my Inaugural Address I stated, "The profound respect which the people have always had for our courts and judicial system has been a powerful factor for good in the life of our State." This has resulted

largely from the character and the ability of those who have administered our laws. I have undertaken to remember the high and tremendous responsibility placed upon the Chief Executive of this State in the selection of our judicial officers. I had this in mind when I was faced with the duty of naming a new Chief Justice, rather than the matter of his seniority. He will, in my judgment, as a man and as the Chief Judicial Officer of our State, measure up to the highest traditions of this great Court, and will leave for all time to come, in his acts and decisions, a worthwhile contribution to the people of our State.

The Solicitor who asked the Judge the question on the courthouse steps in Durham in July, 1927, now, as the Governor of the State of North Carolina, has the honor and the personal pleasure of presenting the Judge to whom the question was asked to this Court as its next Chief Justice of the Supreme Court of North Carolina, Honorable Maurice Victor Barnhill.

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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 10. Death of Party and Survival of Action in General.

Under the provisions of G.S. 28-172 all causes of action survive the death of the person in whose favor or against whom they have accrued, except the causes of action specified in G.S. 28-175. *McIntyre v. Josey*, 109.

§ 12. Survival of Causes for Negligent Injury or Damage.

A cause of action for tortious injury to personal property survives the death of either party. *McIntyre v. Josey*, 109.

ACCORD AND SATISFACTION.

§ 1. Nature and Validity of Agreement.

Agreements constituting an accord and satisfaction fall into two categories (1) where the parties agree that the agreement itself shall operate as the satisfaction of the old right, (2) where the parties agree that it is only the performance of the agreement that shall have that effect. *Dobias v. White*, 409.

An accord and satisfaction is compounded of two elements: An accord which is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, something other than or different from what he is or considers himself entitled to; and a satisfaction which is the execution or performance of such agreement. *Ibid.*

§ 3. Effect and Enforcement of Agreement.

An agreement to convey the land purchased in satisfaction of notes given for the purchase price of the land does not operate as a satisfaction of the notes unless and until the accord is fully performed, and the tender of deed in conformity with the agreement does not bar a suit on the notes if the payee violates his agreement for the accord and refuses to accept the deed. *Dobias v. White*, 409.

An accord is as much a contract as any other agreement, and an action may be maintained against the party in default for the breach or nonperformance of an accord under the ordinary principles of the law of contracts. *Ibid.*

If an accord is not performed by the debtor, the creditor may enforce his original claim or recover damages for the breach of the accord. *Ibid.*

If the creditor breaches the agreement for the accord, the debtor's original obligation to him is not discharged, but the debtor acquires a right of action against the defaulting creditor for damages for breach of the agreement for the accord, or the alternative right to specific enforcement of the agreement, if this remedy is practicable, which would discharge the original obligation. *Ibid.*

Where a creditor who has breached his agreement for an accord sues the debtor to enforce the original claim, the debtor may set up as a counterclaim either a demand for damages for the breach of the accord or a demand for its specific enforcement. *Ibid.*

Where, in the payees' suit on the notes given for the purchase price of lands, the makers allege that the parties had agreed that the makers should

ACCORD AND SATISFACTION—*Continued.*

reconvey the land to the payees in satisfaction of the notes and also other notes executed at the same time, and that the makers had tendered deed in performance of the agreement, and that they are still able, ready and willing to perform the accord in full, and that plaintiffs still hold all the notes evidencing the original claim, *held* the answer sets up facts entitling the makers to specific performance of the accord even though the answer does not demand such relief in explicit terms, and therefore the payees' motion for judgment on the pleadings should not be allowed. *Ibid.*

ADMINISTRATIVE LAW.

§ 6. Appeal and Review of Orders of Administrative Agencies and Boards.

If there is no provision for appeal from an order of an administrative agency of the State the proper method for review is by *certiorari. Baker v. Varser,* 180.

The courts will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable or arbitrary action, or disregard of law. *Ibid.*

Where in an action for *mandamus,* the complaint liberally construed is sufficient to allege that the Board of Law Examiners, in denying plaintiff's application to take the law examination, acted in misapprehension as to what is in law "residence" within the purview of its rule, the applicant is entitled to have the Board act in the light of the true meaning of the term, and rather than dismiss the action, the complaint may be considered as an application for a writ of *certiorari. Ibid.*

ADVERSE POSSESSION.

§ 4i. Hostile Character of Possession as Affected by Relationship between the Parties—Life Tenant and Remainderman.

The grantee in a deed conveying only the life estate of the grantor cannot hold adversely to the remaindermen until the death of the grantor, and where one of the remaindermen is then under the disability of infancy the grantee cannot acquire title by adverse possession against him under color of the deed until after the lapse of seven years from the removal of the disability. *Lovett v. Stone,* 207.

APPEAL AND ERROR.

§ 1. Appellate Jurisdiction of Supreme Court in General.

The jurisdiction of the Supreme Court is derivative, and where the court below has no jurisdiction the Supreme Court can acquire none by appeal. *Spaugh v. Charlotte,* 149; *Baker v. Varser,* 180.

The Supreme Court will not decide questions on appeal which have not been adjudicated in the court below. *Bank v. Caudle,* 270; *Trust Co. v. Green,* 612.

Where there is no contention or evidence of breach of a contract between the parties, the Supreme Court will not determine the rights of the parties in the event of a breach. *Rex Hospital v. Comrs. of Wake,* 312.

On appeal from judgment of the Superior Court affirming or reversing an award of the Industrial Commission, the Supreme Court is limited to questions of law presented by assignments of error based on exceptions to specific rulings of the Superior Court. *Worsley v. Rendering Co.,* 547.

APPEAL AND ERROR—*Continued.*

§ 2. Judgments Appealable—Premature Appeals.

In this partition proceeding, two of defendants pleaded sole seizin under deed from the common ancestor and set up, for the purpose of attack, judgment setting aside such deed. By consent of the parties the question of the validity of the judgment was submitted to the court as a separate question of law, and appeal taken from the adjudication that the judgment was valid. *Held:* The appeal must be dismissed as premature, since the matter could be presented on appeal from a final judgment by exception to the interlocutory order. *Gardner v. Price*, 651.

§ 6c (1). Necessity for Exceptions and Matters Cognizable Ex Mero Motu.

Supreme Court will take notice *ex mero motu* of failure of complaint to state cause of action. *Dulin v. Williams*, 33; *Daniels v. Yelverton*, 54; *Fuquay Springs v. Rowland*, 299.

Supreme Court will take notice of want of jurisdiction *ex mero motu*. *Spaugh v. Charlotte*, 149; *Baker v. Varser*, 180.

Supreme Court will quash void judgment *ex mero motu*. *Glod v. Shippers*, 304.

§ 6c (2). Exception and Assignment of Error to Judgment or to Signing of Judgment.

Where there is no effective exception to the findings of fact, the assignment of error to the signing of the judgment presents the sole question as to whether the facts found support the judgment. *St. George v. Hanson*, 259.

An exception to the judgment without any exception to particular findings of fact presents the sole question of whether the findings are sufficient in law to support the judgment, and does not bring up for review the evidence upon which the findings are based. *Stewart v. Duncan*, 640; *Wyatt v. Sharp*, 656.

Where on appeal from judgment of the Superior Court affirming an award of the Industrial Commission the sole exception is that the Superior Court erred in its conclusion of law and in signing the judgment, *held:* The sole question presented in the Supreme Court is whether the findings of fact supported the judgment entered in the Superior Court, and the Supreme Court is precluded from considering whether the findings of fact are supported by the evidence. *Glace v. Throwing Co.*, 668; *Worsley v. Rendering Co.*, 547.

An exception "to each conclusion of law embodied in the judgment" is a broadside exception and ineffectual. *Jamison v. Charlotte*, 682.

An assignment of error to the judgment presents the sole question whether the judgment is supported by the facts found. *Ibid.*

§ 6c (3). Exceptions and Assignments of Error to Findings of Fact.

In the absence of a request that the court find a particular fact, appellant may not object to the failure of the court to find such fact. *St. George v. Hanson*, 259.

§ 6c (4). Objections and Exceptions to Evidence.

Objection that portions of corroborative testimony did not in fact corroborate the witness cannot be sustained in the absence of a motion to strike that part deemed objectionable. *Gibson v. Whitton*, 11.

APPEAL AND ERROR—*Continued.*

§ 6c (5). Objections and Exceptions to Charge.

An exception to a portion of the charge stating several propositions of law will not be held ineffectual when the exception presents the sole question of whether the court correctly construed and applied a pertinent statute to the facts of the case. *Hartley v. Smith,* 170.

An exception to the charge which fails to point out in what particular the alleged error was committed is ineffectual as a broadside exception. *Edgewood Knoll Apts. v. Braswell,* 560.

§ 6c (6). Necessity for Bringing Misstatement of Contentions to Trial Court's Attention.

A misstatement of the contentions must be brought to the trial court's attention in apt time. *Wilson v. Finance Co.,* 349; *Edgewood Knoll Apts. v. Braswell,* 560.

Error in stating law in stating contentions need not be brought to trial court's attention. *Hartley v. Smith,* 170; *McKinney v. High Point,* 232; *S. v. Grayson,* 453.

§ 6c (7). Objections and Exceptions to Proceedings in Superior Court on Review or Orders or Judgments of Inferior Court or Administrative Board.

On appeal from judgment affirming the award of the Industrial Commission, the Supreme Court does not review the rulings and decisions of the Industrial Commission, but only the judgment of the Superior Court for errors of law properly presented, and it will not consider assignments of error relating to alleged errors of law made by the Commission upon which the Superior Court has made no ruling. *Worsley v. Rendering Co.,* 547; *Glace v. Throwing Co.,* 668.

§ 7. Motions in Supreme Court.

Motion of appellant in the Supreme Court to be allowed to amend its pleading will not be allowed when upon the facts of the record the ends of justice will not be promoted by the granting of the motion. *Edgewood Knoll Apts. v. Braswell,* 560.

§ 8. Theory of Trial in Lower Court.

An appeal of necessity must follow the theory of the trial in the lower court. *Lyda v. Marion,* 265.

§ 10b. Service of Case on Appeal.

Clerks of the Superior Court have no discretionary power to enlarge the time for service of statement of case on appeal. *Little v. Sheets,* 430.

G.S. 1-281 does not authorize a clerk of Superior Court to enlarge the time for service of statement of case on appeal in those instances in which appeal is taken from judgment rendered by the court out of term and out of the district by agreement. *Ibid.*

§ 12. Appeals in Forma Pauperis.

Where the judge writes on the judgment that plaintiff be allowed to appeal *in forma pauperis* upon compliance with the statute, but plaintiff obtains no order allowing appeal *in forma pauperis* after the filing of affidavit of poverty subsequent to the term, the appeal must be dismissed for failure to comply

APPEAL AND ERROR—*Continued.*

with the mandatory provision of the statute. G.S. 1-288. *Prevatte v. Prevatte,* 120.

The statutory requirements of appeals *in forma pauperis* are mandatory, and failure to comply deprives the Supreme Court of any appellate jurisdiction. *Ibid.*

§ 20a. Form and Requisites of Transcript.

The rule requiring that the evidence be set out in the record in narrative form is mandatory, and failure to comply with the rule limits the appeal to errors presented by the record proper, and in the absence of such error, the appeal will be dismissed. *S. v. McNeill,* 679; *Laughinghouse v. Ins. Co.,* 678.

§ 20c. Matters Properly Included in Record and Forming Part Thereof.

An order entered after the entry of the judgment appealed from and after case on appeal has been agreed to, is no part of the case on appeal and will not be considered. *Alexander v. Galloway,* 554.

§ 23. Form and Requisites of Assignments of Error.

An assignment of error must be bottomed on an exception duly entered in the record. *Worsley v. Rendering Co.,* 547.

A single assignment of error to several rulings of the trial court must fail if any one of the rulings is correct. *Ibid.*

§ 29. Abandonment of Exceptions by Failure to Discuss in the Brief.

Exceptions not set out in the brief and in support of which no argument is stated or authority cited, are deemed abandoned. *S. v. Turberville,* 25; *Rex Hospital v. Comrs. of Wake,* 312.

Exceptions not discussed in the brief are deemed abandoned, and therefore where there is a general exception to the entire judgment, but the brief is addressed solely to a particular part of the judgment specifically assigned as error, only the particular assignment of error will be reviewed, and other portions of the judgment will not be disturbed. *Gatling v. Gatling,* 215.

Assignments of error not brought forward in the brief and in support of which no reason or argument is stated or authority cited, are deemed abandoned. *Edgewood Knoll Apts. v. Braswell,* 560.

§ 31b. Dismissal of Appeal for Failure of Case on Appeal.

Where statement of case on appeal is not filed within time allowed, G.S. 1-282, it is a nullity, but failure of case on appeal does not require dismissal, since the record proper may be reviewed for error appearing on its face, and the judgment affirmed on motion of appellant when no error so appears. *Little v. Sheets,* 430.

§ 31g. Dismissal of Appeal for Defective or Insufficient Record.

The rule requiring that the evidence be set out in the record in narrative form is mandatory and may not be waived by the parties, and will be enforced by the Supreme Court *ex mero motu,* and failure to comply with the rule requires dismissal of the appeal in the absence of error appearing on the face of the record proper. *Laughinghouse v. Ins. Co.,* 678; *S. v. McNeill,* 679.

§ 38. Présumptions and Burden of Showing Error.

It will be presumed that judicial acts and duties have been regularly performed. *Lovett v. Stone,* 206.

APPEAL AND ERROR—*Continued.*

The burden is on appellants to show error. *Woody v. Barnett,* 420.

The burden is on appellant not only to make error plainly appear but also show that such error prejudicially affected a substantial right and that there is a reasonable probability that the result would be more favorable to him if the error had not occurred. *Moore v. Deal,* 224.

Where charge is not in record it is presumed correct. *S. v. Harrison,* 659.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

In a proceeding to assess compensation for the taking of part of a dairy farm upon which a spring was located, the admission of testimony of another dairy farm owner that he had five springs on his property and "valued" his springs is not held for prejudicial error, since the testimony could not have influenced the jury in the decision of the case. *Highway Commission v. Black,* 198.

An exception to the exclusion of testimony cannot be held harmful when the record fails to show what the testimony would have been if the witness had been permitted to answer the questions. *Ibid.*

The admission of evidence over objection cannot be held prejudicial when substantially the same evidence is admitted without objection. *Wilson v. Finance Co.,* 349.

The refusal to admit in evidence portions of a complaint filed by the same plaintiff in another action against a different defendant relating to damages sustained by plaintiff will not be held for prejudicial error when it appears that defendants had the benefit of evidence showing that such other suit was pending and what was alleged in the paragraph in dispute, and that the trial court explicitly limited plaintiff's recovery to such damages as were caused by defendants' breach of the contract in suit and excluded any damages relating to the breach of another contract by the defendant in the other suit. *Edgewood Knoll Apts. v. Braswell,* 560.

Where evidence excluded is insufficient to alter the rights of the parties as a matter of law, the exclusion of the evidence cannot be harmful. *Callahan v. Arenson,* 619.

§ 39f. Harmless and Prejudicial Error in Instructions.

An erroneous instruction upon a material aspect of the case must be held for reversible error notwithstanding that in other portions of the charge the court may have correctly instructed the jury as to the law on such aspect. *Hartley v. Smith,* 170.

Erroneous statement of law, even though made in stating a contention of a party, must be held prejudicial. *Hartley v. Smith,* 170; *McKinney v. High Point,* 232; *S. v. Grayson,* 453.

Conflicting instructions on burden of proof is prejudicial. *S. v. Grayson,* 453.

An exception to the charge will not be sustained when the charge read contextually is free from prejudicial error. *Hamilton v. Henry,* 664.

§ 40d. Review of Findings of Fact.

Findings of fact by court under waiver of jury trial are as conclusive as verdict of jury if supported by evidence. *Lovett v. Stone,* 206; *St. George v. Hanson,* 259; *Woody v. Barnett,* 420; *Little v. Sheets,* 430; *Nesbitt v. Fairview Farms,* 481.

APPEAL AND ERROR—*Continued.*

Findings of court in hearing of motion are conclusive, but court's conclusions of law thereon are reviewable. *Moore v. Deal*, 224.

§ 40i. Review of Judgments on Motions to Nonsuit.

In passing upon an exception to the refusal of the trial court to grant a motion for involuntary nonsuit, the evidence supporting plaintiff's cause must be considered in the light most favorable to him, and any evidence which tends to contradict or impeach such evidence must be disregarded. *Hartley v. Smith*, 170.

§ 50. Remand.

Cause remanded for finding of material facts necessary to determination of question of validity of bonds for public libraries. *Jamison v. Charlotte*, 423.

Where the Utilities Commission fails to find facts necessary to support its order, the cause will be remanded for appropriate findings. *Utilities Com. v. Tel. Co.*, 675.

§ 51a. Law of the Case.

Allegations to the effect that the aluminum paint used on defendant municipality's water storage tank reflected the rays of the sun and concentrated an excessive glare on plaintiffs' premises to such an extent as to materially lessen the value of the property, were held on a former appeal to state a cause of action as for a taking of the property *pro tanto* for a public use. The decision constitutes the law of the case and precludes nonsuit upon evidence supporting such allegations. *McKinney v. High Point*, 232.

Where it is determined on appeal that the evidence upon a particular cause of action is sufficient to be submitted to the jury and overrule defendant's motion to nonsuit, the question of the sufficiency of the evidence is precluded upon the subsequent trial upon substantially the same evidence, and judgment of involuntary nonsuit entered on such cause of action will be reversed. *Alexander v. Brown*, 527.

§ 51c. Interpretation of Decisions of Supreme Court.

The language of a judicial opinion must be read in the light of the circumstances under which it is used. *Dulin v. Williams*, 33.

ASSAULT.

§ 9a. Self-Defense.

The plea of self-defense must be based upon force exerted in good faith to prevent a threatened injury, and such force must not be excessive or disproportionate to the force it is intended to repel, the question of excessive force being ordinarily for the determination of the jury. *S. v. Ritter*, 89.

Evidence held not to require submission of issue of self-defense to the jury. *S. v. Pettiford*, 301.

§ 9b. Defense of Others.

If an affray is willingly entered into by both parties and there is no retreat by either of them, the brother of one of the parties may not be excused in entering the affray on the ground that he did so in the defense of his brother, since the right to fight in the defense of another cannot be more extensive than the right of such other to use force in self-defense. *S. v. Ritter*, 89.

ASSAULT—*Continued.*

§ 11. Presumptions and Burden of Proof.

In a prosecution for assault with a deadly weapon in which defendant's evidence tends to show that he acted only in his own necessary self-defense, the burden of proof rests on the State throughout the trial to prove that defendant willingly or unlawfully assaulted the prosecuting witness and that in so doing he used a deadly weapon, and thus rebut any suggestion of self-defense, and an instruction that the burden was on defendant of proving his plea of self-defense to the satisfaction of the jury constitutes prejudicial error. *S. v. Cephus*, 521.

§ 13. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that ill feeling had existed between appealing defendants and their adversary, and that in consequence all of them willingly entered into an affray in which the adversary of the appealing defendants was seriously injured by knife wounds and a beating with a tire tool, *is held* sufficient to sustain the denial of the appealing defendants' motion for nonsuit in a prosecution for an assault with a deadly weapon with felonious intent to kill, inflicting serious injuries not resulting in death. *S. v. Ritter*, 89.

§ 14b. Instructions on Defenses.

The charge of the court in this case *is held* to have given appealing defendants the benefit of their contentions that they were the innocent victims of an unlawful assault by their adversary and to have charged the law on the right of self-defense applicable to the evidence, and defendants' assignments of error to the charge cannot be sustained. *S. v. Ritter*, 89.

Introduction placing burden on defendant to prove self-defense held error. *S. v. Cephus*, 521.

ASSIGNMENTS.

§ 2. Requisites and Validity of Assignment.

Where performance bond provides that it should not be assignable without written consent of surety, written assignment by owner to bank alone does not complete the assignment, and owner remains real party in interest for purpose of action on bond. *Edgewood Knoll Apts. v. Braswell*, 560.

ATTACHMENT.

§ 23. Wrongful Attachment—Liability of Plaintiff and Surety.

Where an order of attachment is improperly obtained or tortiously employed, the attachment defendant may (1) proceed on the attachment bond if either of the two conditions specified in G.S. 1-440.10 exists, (2) sue for malicious and wrongful attachment if the essential elements of that tort are present, (3) sue for abuse of process if the order of attachment is used to accomplish a result not lawfully or properly obtainable under it. *Brown v. Estates Corp.*, 595.

If an order of attachment is dissolved, dismissed, or set aside by the court, or if the attachment plaintiff fails to obtain judgment against the attachment defendant, G.S. 1-440.10, the attachment defendant may, without the necessity of showing malice or want of probable cause, proceed against the attachment plaintiff and his surety jointly or severally by independent action or motion in the cause, G.S. 1-440.45 (c), on the contractual obligations of the attach-

ATTACHMENT—*Continued.*

ment plaintiff and his surety embodied in the bond and the statute under which it is given. *Ibid.*

The right of the attachment defendant to sue the attachment plaintiff for wrongfully and maliciously suing out the order of attachment without probable cause and in procuring its levy on the property of the attachment defendant, is for an independent tort committed by the attachment plaintiff, and the surety's liability on the attachment bond may not be asserted in a suit against the attachment plaintiff for such tort. *Ibid.*

Damages recoverable by the attachment defendant in a statutory proceeding against the attachment plaintiff and the surety on his bond is limited as to the attachment plaintiff to the actual damages sustained by attachment defendant by reason of the levy of the order of attachment, and is limited as to the surety to the amount of the attachment bond. *Ibid.*

In an action by attachment defendant against attachment plaintiff for malicious and wrongful attachment, the attachment defendant must show that attachment plaintiff maliciously sued out his order of attachment without probable cause for believing that the alleged ground for attachment existed, that the order of attachment was actually levied upon property of attachment defendant, thereby depriving him of his right to use his property for any legitimate purpose to his damage, and that the attachment proceeding legally terminated in favor of attachment defendant. *Ibid.*

Malice necessary to support an action for wrongful and malicious attachment may be either legal malice, which consists of the doing of a wrongful act intentionally without just and lawful cause or excuse, or actual malice, in which instance exemplary or punitive damages may be awarded. *Ibid.*

Neither the guardian of insane creditor nor his personal representative after his death, may be held liable personally for wrongful attachment sued out in representative capacities. *Ibid.*

ATTORNEY AND CLIENT.

§ 2. Admission to Practice.

Certiorari and not *mandamus* is proper procedure to test correctness of Examining Board's legal construction of "residence" in denying application to take law examination. *Baker v. Varser*, 180.

§ 7. Duties and Liabilities to Client.

An attorney who contracts to prosecute an action in behalf of his client impliedly represents 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 he will assert his best judgment in the prosecution of the litigation, and that he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. *Hodges v. Carter*, 517.

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers. *Ibid.*

Evidence held to show mere error of judgment on part of attorneys on unsettled point of law, and nonsuit was properly entered in client's action against them. *Ibid.*

AUTOMOBILES.

§ 5. Sale and Transfer of Title.

The purchaser of an automobile under agreement for a cash sale gave his check for the purchase price, and the owner surrendered possession of the car and the unsigned registration card, but retained the certificate of title constituting the sole evidence of title under the law of the State of the owner's residence. The purchaser mortgaged the car. The check was dishonored. Upon repeated demand of the owner by long distance telephone, the purchaser made assurances that he would make the check good, and then advised the owner, while allegedly talking from the mortgagee's office, to draw a sight draft on the mortgagee. The mortgagee refused to pay the draft and took possession of the automobile. *Held:* Title did not pass to the mortgagee even though he took the mortgage in good faith, for value, and without notice, and the owner is not estopped to assert his title, since the unsigned registration card could in no event be an *indicium* of title, and the owner's conduct did not manifest an intent on his part to abandon or relinquish his right to cash payment. *Wilson v. Finance Co.*, 349.

§ 8a. Due Care in Operation of Car in General.

Apart from statutory requirements, the operator of a motor vehicle is under duty to exercise that degree of care which an ordinarily prudent person would exercise under the circumstances in keeping a proper lookout, in keeping his car under proper control, and in exercising due care to avoid collision with persons or other vehicles upon the highway. *Henderson v. Henderson*, 487.

A motorist must at all times operate his vehicle with due regard to the width, traffic and condition of the highway, keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions so as to avoid colliding with any other vehicle. *Singletary v. Nixon*, 634.

§8c. Starting and Turning.

Evidence that defendant was parked on left side of street, and drove car diagonally across street in path of plaintiff's vehicle held to raise issue of negligence for jury. *Medlin v. Spurrier & Co.*, 48.

§ 8d. Stopping, Parking and Parking Lights.

Failure to give hand signal upon stopping because of exigencies of traffic *held* not proximate cause of following car's colliding with rear of plaintiff's car, since plainly visible circumstances gave notice that plaintiff would have to stop. *Cozart v. Hudson*, 279.

The operator of a vehicle at nighttime must take notice of the existing darkness and not exceed a speed at which he can stop within the radius of his headlights, having due regard to the then existing weather conditions, and must keep a lookout in the direction of travel. *Singletary v. Nixon*, 634.

§ 8i. Intersections.

Party traveling on dominent highway may assume that motorist traveling along servient highway will stop before entering intersection. *Gibson v. Whitton*, 11.

Notwithstanding that vehicles approach intersection at same time, driver on right may be negligent in driving at excessive speed. *Hartley v. Smith*, 170.

While the driver of a car along the dominant highway, in the absence of anything which gives or should give notice to the contrary, is entitled to

AUTOMOBILES—*Continued.*

assume and act upon the assumption, even to the last moment, that the operator of a car along the intersecting servient highway will stop before entering the intersection, the driver along the dominant highway is nevertheless required to exercise the care of an ordinarily prudent person under similar circumstances to keep a reasonably careful lookout, not to exceed a speed which is reasonable and prudent under the circumstances, and to take such care as a reasonably prudent man would exercise to avoid collision when danger of a collision is discovered, or should have been discovered. *Blalock v. Hart*, 475.

Evidence held for jury on issues of negligence and contributory negligence in this action for collision at intersection. *Hamilton v. Henry*, 664.

§ 8j. Sudden Emergencies.

When confronted with a sudden emergency created by the negligence of the adverse party, the driver of an automobile, who is in no respect at fault, is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made. *Henderson v. Henderson*, 487.

§ 12a. Speed in General.

Fact that evidence fails to show that accident occurred in residential or business district does not make statutory limit of 55 miles per hour apply without limitation of duty to reduce speed when approaching intersections or when hazards exist with respect to traffic or pedestrians. *Medlin v. Spurrier & Co.*, 48.

§ 13. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

Evidence that truck driver was driving to left of center of highway upon entering bridge, and forced car approaching from opposite direction off the road, so that car driver lost control and hit car following truck, *held* sufficient for jury on issue of truck driver's negligence, even though truck did not strike either vehicle. *Cotton Co. v. Ford*, 292.

A motorist meeting a car traveling in the opposite direction may ordinarily assume that the oncoming driver will turn to his right so that the two cars may pass each other in safety, but if he sees, or in the exercise of due care should see, that the approaching driver cannot or will not do so, it is incumbent upon him then to exercise due care under the then existing conditions. *Henderson v. Henderson*, 487.

Failure to stop immediately upon seeing car approaching out of control *held* not negligence. *Ibid.*

§ 14. Following and Passing Vehicles Traveling in Same Direction.

The driver of a motor vehicle must not follow another vehicle on the highway more closely than is reasonable and prudent, having due regard for the speed of both vehicles, and the traffic upon and the condition of the highway, and negligence in this regard is actionable if it proximately causes injury to the person or property of another. *Cozart v. Hudson*, 279.

§ 16. Pedestrians.

Evidence held sufficient for jury on issue of last clear chance in action by pedestrian injured by truck while pedestrian was lying disabled on highway. *Wade v. Sausage Co.*, 524.

AUTOMOBILES—*Continued.*

§ 18b. Negligence and Proximate Cause in General.

Failure to give statutory hand signal before stopping *held* not proximate cause of rear end collision, since giving of signal, under circumstances, could not have prevented accident. *Cozart v. Hudson*, 279.

Even though vehicle does not strike either of cars involved in collision, the negligence of the driver of the vehicle may be the proximate cause of the accident if his negligence forces driver of car off the road and thus causes it to collide with the other car. *Cotton Co. v. Ford*, 292.

Negligence involves more than merely being at particular place at particular time when driver of other car lost control. *Henderson v. Henderson*, 487.

Failure of driver to stop immediately upon seeing car approaching out of control from opposite direction *held* not proximate cause of collision. *Ibid.*

§ 18d. Concurrent Negligence.

Evidence held for jury on question of concurrent negligence of driver of car along dominant highway and driver of car along servient highway, causing accident at intersection, injuring passenger. *Blalock v. Hart*, 475.

§ 18e. Doctrine of Last Clear Chance in Auto Accident Cases.

Evidence tending to show that defendant was parked on the left side of the street and turned his car diagonally across the street to the right in plaintiff's lane of travel, that plaintiff immediately applied his brakes upon seeing defendant's car but was unable to avoid the collision, *is held* insufficient to support the submission of the issue of last clear chance. *Medlin v. Spurrier & Co.*, 48.

Plaintiff pedestrian, in invoking the doctrine of last clear chance, must show that he negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care, that defendant motorist discovered, or by the exercise of reasonable care should have discovered, plaintiff's position of peril and his incapacity to escape from it before injury, and in time to have avoided the injury to plaintiff with the means at hand, and that defendant negligently failed to use the available time and means to avoid the injury, and injured him. *Wade v. Sausage Co.*, 524.

§ 18g (5). Evidence in Auto Accident Cases—Physical Facts at Scene.

The fact that after the collision, a vehicle ran into a house more than twenty-five feet from the sidewalk is not conclusive on the question of the driver's lack of control when the evidence discloses that the driver was fatally injured in the collision. *Hartley v. Smith*, 170.

§ 18g (6). Evidence in Auto Accident Cases—Admissions.

Defendant's declaration that the accident would not have occurred if he had stopped his vehicle or pulled it out on the shoulder of the highway cannot be held for an admission of negligence when it amounts to nothing more than a statement that if defendant's truck, which was being operated in a lawful manner under control on its right side of the highway, had not been where it was, it would not have been struck by the other vehicle, since negligence involves more than being at a particular place at a particular time. *Henderson v. Henderson*, 487.

AUTOMOBILES—*Continued.*

§ 18h (2). Sufficiency of Evidence and Nonsuit.

Evidence tending to show that before pulling his car out from its parked position on the left side of the street defendant looked to his rear and saw no car coming and drove diagonally across the street into an intersection in the path of plaintiff's car which was approaching from his rear, together with evidence that plaintiff's car left skid marks for a distance of some forty feet, *is held* sufficient to be submitted to the jury on the issue of plaintiff's negligence in defendant's cross action. *Medlin v. Spurrier & Co.*, 48.

Notwithstanding that vehicles approach intersection at same time, driver on right may be negligent in driving at excessive speed. *Hartley v. Smith*, 170.

Evidence *held* for jury on issues of negligence of driver along dominent highway and negligence of driver along servient highway in concurring to cause accident at intersection, injury to passenger in one of cars. *Blalock v. Hart*, 475.

Evidence of negligence of driver in entering intersection at excessive speed without proper lookout *held* for jury. *Hamilton v. Henry*, 664.

Evidence that defendant was following plaintiff's car on highway more closely than was reasonable and prudent under the circumstances, resulting in rear end collision, *held* to take case to jury on issue of negligence. *Cozart v. Hudson*, 279.

Evidence *held* for jury on question of negligence of driver of truck in forcing a car off the road, causing driver of car to lose control and strike another car, even though truck did not strike either vehicle. *Cotton Co. v. Ford*, 292.

Failure of driver to stop immediately upon seeing car approaching out of control held not proximate cause of accident. *Henderson v. Henderson*, 487.

§ 18h (3). Nonsuit for Contributory Negligence.

Plaintiff's evidence in this case *held* not to show contributory negligence on his part as a matter of law in colliding with defendant's vehicle at an intersection within a municipality, it appearing upon plaintiff's evidence that he was traveling upon a through street, that defendant's vehicle approached the intersection along the servient highway from plaintiff's left, and that, as the vehicles approached the intersection at approximately the same time, plaintiff assumed that defendant would stop before entering the intersection, and acted on this assumption until too late to avoid the accident. *Gibson v. Whitton*, 11.

Evidence held to show contributory negligence on part of driver colliding with trailer blocking lane of travel at night. *Singletary v. Nixon*, 634.

Evidence *held* not to disclose contributory negligence on part of motorist having right of way at intersection. *Hamilton v. Henry*, 664.

Evidence of plaintiff's failure to give statutory hand signal before stopping because of exigencies of traffic *held* not to warrant nonsuit on ground of contributory negligence, since such failure, under circumstances, was not proximate cause of rear end collision. *Cozart v. Hudson*, 279.

§ 18i. Instructions in Auto Accident Cases.

Where the evidence tends to show that the collision occurred at an intersection within a city, an instruction to the effect that in the absence of evidence that the accident occurred in a business or residential district, the maximum statutory limit would be fifty-five miles per hour, without an instruction that

AUTOMOBILES—*Continued.*

the fact that the speed of a vehicle is lower than the statutory limit does not relieve the driver of the duty to decrease speed when approaching an intersection or when special hazards exist with respect to pedestrians or traffic, etc., must be held for reversible error. *Medlin v. Spurrier & Co.*, 48.

§ 18j. Issues and Verdict.

Plaintiff's evidence tended to show that he was subject to dizzy spells of a disabling character, that notwithstanding he undertook to walk upon the main traveled portion of a highway at nighttime, became dizzy, lost consciousness and fell on the hard surface, that the truck driven by defendant employee had headlights burning, rendering plaintiff's prostrate body visible when the vehicle was some 225 feet away, and that the truck, driven at a speed of some forty-five miles per hour, continued at unabated speed and ran over plaintiff's ankles and feet, inflicting injury, notwithstanding that the driver, throughout the intervening 225 feet, could have avoided striking plaintiff by stopping the truck or by driving it onto the shoulder of the highway. *Held:* The evidence was sufficient to require the submission of the issue of the last clear chance to the jury. *Wade v. Sausage Co.*, 524.

§ 22. Parties Liable to Guest or Passenger.

In this action to recover for the death of a passenger killed in a collision at an intersection of highways, the evidence *is held* sufficient to be submitted to the jury on the theory of the concurrent negligence of the drivers of the cars involved. *Blalock v. Hart*, 475.

§ 24½a. Actions against Owner—Pleadings.

An admission in the answer that the *feme* defendant owned the car and that at the time of the collision it was being driven by her son who frequently drove the car with her consent, knowledge and approval is an admission on the issue of *respondeat superior* binding upon the parties without the necessity of introducing the admission in evidence. *Hartley v. Smith*, 170.

The provisions of G.S. 20-71.1 do not relieve a party of the necessity of alleging facts supporting the application of the doctrine of *respondeat superior* when relied upon, and allegations that the driver of defendant's vehicle was defendant's son, who was operating the vehicle with the express consent, knowledge and authority of defendant is insufficient to resist such defendant's demurrer. *Parker v. Underwood*, 308.

§ 24½e. Actions against Owner—Presumptions and Sufficiency of Evidence on Issue of Respondeat Superior.

An admission of the ownership of one of the vehicles involved in a collision is sufficient to make out a *prima facie* case of agency sufficient to support, but not to compel, a verdict against the owner under the doctrine of *respondeat superior* for damages proximately caused by the negligence of the driver. *Hartley v. Smith*, 170.

G.S. 20-71.1 provides that proof of registration is *prima facie* proof of ownership, and that proof of ownership is *prima facie* proof of agency. *Ibid.*

§ 24½f. Actions against Owner—Instructions on Issue of Respondeat Superior.

Where plaintiff relies upon an admission of ownership of the other vehicle involved in the collision to support the application of the doctrine of *respondeat*

AUTOMOBILES—*Continued.*

superior, the court is required to analyze and explain the provisions of G.S. 20-71.1 as a part of the law of the case, but inadvertence of the court in charging the effect of registration rather than the effect of the admitted ownership, even though error, is harmless. G.S. 1-180. *Hartley v. Smith*, 170.

Where under the issue of whether intestate was injured and killed by the negligence of the owner of the other vehicle involved in the collision, the court instructs the jury to the effect that such defendant's admission of ownership is sufficient to send the case to the jury and support a finding against the defendant upon the issue, the instruction must be held for prejudicial error. *Ibid.*

An instruction to the effect that if the jury found that the operator of the vehicle was guilty of negligence proximately causing the collision, the jury should answer in the affirmative the issue as to the liability of the owner of the vehicle, must be held for reversible error. *Ibid.*

§ 28d. Homicide Prosecutions—Competency of Evidence.

In this prosecution for homicide growing out of an automobile collision, testimony that defendant was staggering *is held* upon the record to refer to defendant's actions shortly before the collision and not to defendant's actions at the coroner's inquest some time after the accident, and therefore exception to the admission of the testimony is not sustained. *S. v. Turberville*, 25.

In this prosecution for manslaughter the refusal of the court to permit defendant to show that the main witnesses for the State were suing the defendant for damages resulting from the same accident *held* prejudicial. *S. v. Hart*, 709.

§ 28e. Homicide Prosecutions—Sufficiency of Evidence.

Evidence tending to show that shortly before the accident defendant was staggering and cursing, that he declared his intention to drive his car, and got in the driver's seat and drove off in a rapid manner in the direction of the scene of the collision, that the car was not stopped nor the driver changed, and that immediately before and at the point of collision the car was being driven on its left side of the center line of the highway at a speed of from 40 to 50 miles per hour approaching the crest of a hill, resulting in a collision with a car traveling in the opposite direction, in which several occupants of the cars were fatally injured, *is held* sufficient to sustain verdict of involuntary manslaughter. *S. v. Turberville*, 25.

§ 28f. Homicide Prosecutions—Instructions.

An instruction that a person is under the influence of intoxicating beverages if he has drunk such a quantity thereof as to cause him to lose the normal control of his bodily or mental "factors" or both to such an extent as to cause partial impairment of either or both of these "factors" *is held* insufficient to justify a new trial, it being apparent that "factors" was used for the word "faculties" and must have been so understood by the jury, and the term "partial impairment" being insufficient to constitute prejudicial error when read in connection with other portions of the charge. *S. v. Turberville*, 25.

§ 30a. Nature and Essentials of Offense of Drunken Driving

The operation of a vehicle upon a highway within this State while under the influence of intoxicating liquor is a misdemeanor, and therefore all who partcipate therein as aiders or abettors or otherwise are guilty as principals. *S. v. Nall*, 60.

AUTOMOBILES—*Continued.*

§ 30d. Drunken Driving Prosecutions.

Instruction defining under the influence of intoxicating liquor held not prejudicial. *S. v. Turberville*, 25; *S. v. Nall*, 60.

The evidence offered by the State in this case and so much of defendant's evidence as is favorable to the State or tends to explain or make clear that offered by the State, *is held* sufficient to show that defendant was operating his truck upon a highway within this State while he was under the influence of intoxicating liquor, or that another, also in an intoxicated condition, was driving the truck under defendant's direction and control, defendant being in the vehicle, and therefore was sufficient to sustain a verdict of guilty in a prosecution of defendant under G.S. 20-138. *S. v. Nall*, 60.

§ 31b. Prosecutions for "Hit and Run" Driving.

The evidence in this case taken in the light most favorable to the State *is held* sufficient to support a finding by the jury beyond a reasonable doubt that after an accident between defendant's truck and an automobile on the highway, in which the driver of the other car was injured and his car damaged, defendant did not stop and comply with the provisions of G.S. 20-166 (c). *S. v. Nall*, 60.

§ 31½. Taking Vehicle without Consent of Owner under G.S. 20-105.

To constitute a violation of G.S. 20-105, it must be made to appear that the offending driver drove the vehicle without the consent of the owner and with the intent temporarily to deprive the owner of his possession of the vehicle. *Auto Co. v. Ins. Co.*, 416.

§ 34b. Revocation and Suspension of License to Drive.

The Department of Motor Vehicles has exclusive power to suspend or revoke a license to operate a motor vehicle. *Winesett v. Scheidt*, 190.

Where the Department of Motor Vehicles suspends or revokes a driver's license under the provisions of G.S. 20-16, the Department must notify the licensee, and upon request afford him a hearing which is *de novo*, with right of appeal as prescribed by statute, and where the Department elects to proceed under this statute it may not contend that the licensee has no right of appeal because of a conviction of, or a plea of *nolo contendere* to, an offense requiring mandatory revocation of license. G.S. 20--25. *Ibid.*

Plea of nolo contendere is insufficient evidence to support suspension of driver's license in proceeding under G.S. 20-16. *Ibid.*

While Motor Vehicle Department has exclusive authority to suspend or revoke license, court may make surrender of license condition upon which sentence is suspended. *Ibid.*

BETTERMENTS.

§ 4. Good Faith in Making Improvements.

Where the grantee knows that his grantor has only a life estate in the lands and nevertheless accepts deed in form sufficient to convey fee simple title, and makes improvements upon the land, he may not recover for such betterments placed on the land as against a remainderman, since such improvements were not made under the belief that his color of title to the interest of the remainderman was good. *Lovett v. Stone*, 206.

BILLS AND NOTES.

§ 3. Consideration.

In an action on notes between the original parties thereto, the payee is entitled to set up the defense of total failure of consideration, and evidence in support of such defense does not violate the parol evidence rule. *Mills v. Bonin*, 498.

The presumption of consideration arising from the fact that notes are under seal is rebuttable. *Ibid.*

A total failure of consideration for a note under seal renders it unenforceable in the hands of any person other than a holder in due course, G.S. 25-33, and in an action on notes given for the purchase price of property defendant maker may set up this defense. *Ibid.*

Evidence of total failure of consideration for notes given for net worth of partner's interest held for jury. *Ibid.*

BOUNDARIES.

§ 6. Processioning Proceedings—Nature and Grounds.

Where in a processioning proceeding petitioners allege ownership of contiguous tracts by the respective parties, and a dispute between them as to the true dividing line, and respondents do not deny petitioners' allegation of ownership except with respect to lappages and infringements on lands owned by respondent, and join in the prayer that the dividing line be properly located, title is not in dispute, G.S. 38-1. *Nesbitt v. Fairview Farms*, 481.

§ 7. Processioning Proceedings—Parties and Procedure.

During coverture the husband is entitled to the full possession, control and use of lands owned by himself and wife by the entireties and can maintain a processioning proceeding to establish the dividing line between such lands and the contiguous lands of another, even without the joinder of his wife. *Nesbitt v. Fairview Farms*, 481.

Therefore, husband may compromise processioning proceedings without joinder of wife. *Ibid.*

§ 13. Processioning Proceedings—Verdict and Judgment.

Where judgment in a processioning proceeding establishing the dividing line between the tracts of the respective parties is affirmed on appeal, the lower court may retain the cause thereafter only for the purpose of putting into effect the provisions of G.S. 38-3 (3). *Nesbitt v. Fairview Farms*, 481.

BROKERS.

§ 12. Actions to Recover Commissions.

In broker's action on written contract, allegations relating to contemporaneous parol agreement in conflict with writing are properly stricken. *Neal v. Marrone*, 73.

CARRIERS.

§ 2. Matters and Transactions Subject to State Regulation.

The interchange of freight between an intrastate and an interstate carrier, even though the property is being moved in interstate commerce, is left to the state commissions. *Utilities Com. v. Fox*, 253.

CARRIERS—*Continued.*

§ 5. Licensing and Franchises.

The effect of the grandfather clause in the Truck Act of 1947 is to preserve substantial parity between future and prior operations and to preserve to carriers, upon proper application, their rights existing at the time of the effective date of the statute. *Utilities Com. v. Fox*, 253.

At the time of the effective date of the Truck Act of 1947 plaintiff, an irregular route intrastate carrier, was interchanging freight with interstate carriers, and was authorized to continue its operations under the grandfather clause. Thereafter, under the provisions of G.S. 62-121.6, the Utilities Commission promulgated a rule prohibiting the interchange of freight between carriers except upon approvel of the Commission. The Interstate Commerce Commission advised plaintiff that he could conduct operations in interstate commerce only to the extent permitted him in intrastate commerce, and thereafter plaintiff's application to the Utilities Commission for authority to exchange freight in intrastate commerce was denied on the ground that applicant did not intend to exercise such right. *Held:* The Commission could not promulgate the rule which would have the effect of denying the carrier his rights under the grandfather clause. *Ibid.*

§ 8. Carriage of Goods—Boxcars, Loading and Unloading.

An initial carrier by rail furnishing a car for moving freight owes to the employees of the consignee, who are required to unload the car, the legal duty to exercise reasonable care to supply a car in reasonably safe condition, so that the employees of the consignee can unload the same with reasonable safety. *Yandell v. Fireproofing Co.*, 1.

A carrier delivering to the consignee for unloading a car received by it from a connecting carrier owes to the employees of the consignee who are required to unload the car the legal duty to make reasonable inspection of the car to ascertain whether it is reasonably safe for unloading, and to repair or give warning of any dangerous condition in the car discoverable by such an inspection. *Ibid.*

A shipper is under duty so to conduct its business as not negligently to injure another by any agency set in operation by it. *Ibid.*

A shipper loading a car with actual or constructive knowledge that it is so defective as to be dangerous for unloading is liable to an employee of the consignee, who unloads the car, for injuries received by such employee as a result of such dangerous condition. *Ibid.*

Carriers *held* entitled to joinder of shipper for contribution in action by employee of consignee to recover for injuries received in unloading defective freight car. *Ibid.*

CHATTEL MORTGAGES.

§ 13. Title and Rights of True Owner as Against Mortgagee.

In the absence of estoppel, the true owner who is induced to part with possession by fraud may reclaim his chattel from a *bona fide* purchaser from or under the person obtaining such possession; but if the true owner is induced to part with title by fraud he may not reclaim the chattel from a *bona fide* purchaser from the fraudulent buyer. This rule applies to a mortgagee of the person obtaining possession or title from the owner by fraud. *Wilson v. Finance Co.*, 349.

COMPROMISE AND SETTLEMENT.

§ 1. Nature and Validity of Agreement.

Petitioners, husband and wife, instituted this processioning proceeding to establish the true dividing line between lands owned by them by entireties and contiguous lands of respondent. Pending trial, an agreement was executed between respondent and the husband alone, stipulating that a survey be made in accordance with the agreement and that the parties be bound by the result thereof. *Held:* The agreement is binding upon the parties to the agreement and also upon the wife, even though she did not sign it, since title was not in issue and the stipulation was made by her husband in the course of the proceeding to establish the dividing line, which the husband could have maintained without her joinder, she being a proper but not a necessary party thereto. *Nesbitt v. Fairview Farms*, 481.

§ 2. Operation and Effect of Agreements—Offer to Compromise.

An offer to compromise is incompetent against the party making the offer. *Gibson v. Whitton*, 11.

CONSPIRACY.

§ 3. Nature and Elements of the Crime.

While single person may not be guilty of conspiracy, each person aiding and abetting commission of felony, all being present, is guilty as principal. *S. v. Spencer*, 604.

CONSTITUTIONAL LAW.

§ 8b. Legislative Powers over Municipal Corporations.

Where General Assembly ratifies municipal ordinance setting up commission, the commission is creature of Legislature and city may not thereafter change it. *Greensboro v. Smith*, 138.

§ 8c. General Assembly—Delegation of Powers.

The power to grant franchises to public service corporations and to fix their rates rests in the General Assembly, which power the General Assembly may delegate to an administrative agency provided the General Assembly prescribes rules and standards to guide such agency in the exercise of the delegated authority. *Utilities Com. v. State*, 333.

While the General Assembly may not delegate its power to make laws, it may delegate power to a subordinate agency of the State, under proper guiding standards, to determine the facts or state of things upon which a law enacted by it shall become effective. *Williamson v. Snow*, 493.

Statute delegating power to Medical Care Commission to create hospital district held to provide proper guiding standards and is constitutional. *Ibid.*

§ 10b. Power of Courts to Declare Statute Unconstitutional.

While every presumption is to be indulged in favor of the constitutionality of a statute, it is the duty of the Court to declare an act unconstitutional when it clearly transgresses the authority vested in the General Assembly by the Constitution. *S. v. Felton*, 575.

§ 12. Police Power—Regulation of Trades and Professions.

The statute prescribing rules and regulations for the licensing of pilots is constitutional. *St. George v. Hanson*, 259.

CONSTITUTIONAL LAW—*Continued.*

§ 14. Police Power—Morals and Public Welfare.

The General Assembly has the authority, in the exercise of the police power, to enact legislation making gambling a criminal offense. *S. v. Felton*, 575.

§ 17. Monopolies and Exclusive Emoluments.

Municipalities and counties may be granted exclusive emoluments or privileges in consideration of public service. *S. v. Felton*, 575.

But holder of franchise for dog track may not be given exclusive rights in consideration of payment of percentage of receipts to county. *Ibid.*

§ 19a. Searches and Seizures.

The constitutional guaranties of freedom from unreasonable search and seizure relate to a person's dwelling and other buildings within the curtilage but do not apply to open fields, orchards or other lands not an immediate part of the dwelling site. *S. v. Harrison*, 659.

§ 21. Due Process—Notice and Hearing.

Party must be given opportunity to be heard upon question of his joinder for contribution. *Hayes v. Wilmington*, 238.

Judgment entered without service of summons is nullity. *Glod v. Shippers, Inc.*, 304.

§ 34a. Constitutional Guarantees of Persons Accused of Crime in General.

Every person charged with crime has an absolute and fundamental right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *S. v. Grayson*, 453.

§ 35. Constitutional Guarantees of Persons Accused of Crime—Self Incrimination.

Testimony of an expert that defendant was sane within the rule of mental responsibility for crime does not violate defendant's constitutional safeguard against self-incrimination, Article I, Section 11, Constitutional of North Carolina, even though it is based upon the witness' personal interview with defendant. *S. v. Grayson*, 453.

The constitutional privilege against self-incrimination protects the accused from the extraction from his own lips against his will of an admission of guilt, and does not preclude testimony as to his bodily or mental conditions when relevant and material, even when obtained by compulsion. *Ibid.*

§ 36. Constitutional Guarantees of Person Accused of Crime—Double Jeopardy.

No person can be twice put in jeopardy of life or limb for the same offense. *S. v. Crocker*, 446.

CONTRACTS.

§ 5. Consideration.

As a general rule, the term "consideration," as affecting the enforceability of contracts, consists of some benefit or advantage to the promissor, or some loss or detriment to the promissee. *Mills v. Bonin*, 498.

§ 23. Actions for Damages for Breach.

Allegations and evidence that plaintiff constructed a residence on land to which defendants had title in consideration of defendants' promise to repay upon the completion of the dwelling the cost of its construction, *is held* suffi-

CONTRACTS—*Continued.*

cient to overrule defendants' motion to nonsuit plaintiff's action for breach of the agreement. *Wheeler v. Wheeler*, 646.

§ 25d. Rescission for Breach and Recovery of Consideration.

Allegation and evidence that plaintiff furnished the money for the purchase price of a tract of land in consideration of the grantees' promise to furnish plaintiff and his wife a home and medical care, and provide for them during their natural lives, and that defendants breached the contract, *is held* sufficient to overrule defendants' motion to nonsuit in plaintiff's action to rescind the contract and to recover the consideration paid by him on the ground that the contract contemplated personal care and therefore the breach could not be adequately compensated for in money. *Wheeler v. Wheeler*, 646.

Where plaintiff's evidence tends to show breach by defendant of executory contract, nonsuit is improperly allowed in action to restore parties to *status quo*. *Brannon v. Wood*, 112.

CONTROVERSY WITHOUT ACTION.

§ 4. Hearings and Judgment.

Where the parties submit a cause to the court upon an agreed statement of facts, as distinguished from an agreement that the court should hear the evidence and find the facts, the facts agreed are in the nature of a special verdict, and in the absence of a statement providing otherwise, the court is without power to find facts not embraced in the agreement or to draw any inferences of fact except those necessarily implied as a matter of law. *Auto Co. v. Ins. Co.*, 416.

While the parties may admit or agree on the facts submitted to the court for judgment, they cannot make admissions of law which will be binding on the courts. *Ibid.*

CORPORATIONS.

§ 8. Rights, Duties and Liabilities of Stockholders in General.

While minority stockholders do not have the right to dictate the corporation's policies, they are required to submit to the will of the majority only so long as the majority act in good faith and within the limitation of the law. *Hill v. Erwin Mills*, 437.

Majority stockholders have a fiduciary relationship to the minority stockholders, and are under duty in their control of the management to exercise good faith, care and diligence, and to protect the interest of the minority stockholders. *Ibid.*

§ 10. Stockholders—Attack on Corporate Acts or Transactions.

In an action by a minority stockholder and director against the corporation and its officers attacking a proposed contract of the corporation as contrary to its interests, allegation of demand upon and refusal of the corporation to bring the suit is not necessary when it is alleged that the corporation was under control of a group of stockholders who intended to have the corporation execute the contract for the benefit of another corporation in which they were interested, pursuant to a conspiracy, and that the plaintiff had opposed the contract within the structure of the corporation by all legal means within his power. *Hill v. Erwin Mills*, 437.

In an action by a minority stockholder and director against the corporation and its officers, allegations to the effect that a majority of the stockholders of

the corporation also had controlling interest in another corporation, that pursuant to a conspiracy, the majority stockholders, through their control of the management of defendant corporation, intended to have it execute a contract with such other corporation, that the contract would be detrimental to the interest of defendant corporation and its minority stockholders and would be to the benefit of such other corporation, *is held* to state a cause of action as against demurrer. Plaintiff would be entitled to attack the contract for unfairness, even though it were fully executed. *Ibid.*

Where minority stockholders assert that the majority stockholders were controlling the corporation for their personal gain and to the detriment of the corporation, the burden is upon the majority stockholders to prove their good faith and show that their conduct is inherently fair from the viewpoint of the corporation and those interested therein. *Ibid.*

Upon the findings of fact made by the lower court in this case, the order dissolving the temporary order restraining defendant corporation and its officers and agents from executing the proposed contract of the corporation, is affirmed. *Ibid.*

§ 20. Representation of Corporation by Officers and Agents.

The vice-president of a corporation owning lands was also the president of a company contracting to erect a building thereon. Evidence that he authorized a subcontractor to substitute material in the performance of the subcontract *held* properly excluded as against the owner, when the other evidence discloses that the scope of his duties in respect to the project was that of principal contractor and was not that of representative of the owner. *Edgewood Knoll Apts. v. Braswell*, 560.

§ 47. Actions to Dissolve Corporation.

In an action to dissolve a corporation under the provisions of G.S. 55-125 the stockholders may not be represented by officers of the corporation, but must be made parties and served with process as required by G.S. 55-131. *Glod v. Shippers, Inc.*, 304.

COUNTIES.

§ 14. Purchase of Land by County.

A county may accept deed from the trustees of a charitable hospital upon condition that the property be used for general hospital purposes under the same name, notwithstanding that the instrument conveys a base, qualified or determinable fee. *Rex Hospital v. Comrs. of Wake*, 314.

§ 18. Contracts by Counties.

While a county may not contract away its power involving the exercise of judgment and discretion, a provision in a lease by a county of hospital facilities that differences under the contract should be arbitrated does not invalidate the lease when it is further provided that the findings of the arbitrators should not be binding but should be merely recommendatory, since such provision is not an agreement for arbitration in the legal sense, but such clause should be deleted since its purpose can be accomplished as effectively by direct negotiations between the parties or by a committee or committees appointed for such purpose. *Rex Hospital v. Comrs. of Wake*, 312.

COURTS.

§ 2. Jurisdiction in General.

Objection to the jurisdiction may be made at any time during the progress of the action or controversy without action, and even in the absence of objection, the court will take cognizance thereof *ex mero motu*. *Spaugh v. Charlotte*, 149; *Baker v. Varser*, 180.

Where court has no jurisdiction to enter an order, the order is a nullity. *Baker v. Varser*, 180; *Glod v. Shippers, Inc.*, 304.

§ 3a. Jurisdiction of Superior Court in General.

The failure of a clerk of a local court to collect and account for moneys rightfully belonging to a municipality because of alleged error in the taxing of costs in criminal prosecutions in his court may not be instituted under the Declaratory Judgment Act, since that statute does not vest in the Superior Court the general power to oversee, supervise, direct or instruct officials of inferior courts in the discharge of their official duties. *Fuquay Springs v. Rowland*, 299.

§ 5. Jurisdiction of Superior Court after Orders or Judgments of Another Superior Court Judge.

While ordinarily one Superior Court judge may not review the judgment of another, where an order making an additional party is entered without notice or hearing to such party, the order making him an additional party cannot preclude him from thereafter moving that his name be stricken from the pleadings, since the rule cannot abrogate rights guaranteed by the due process clause of the Constitution. *Hayes v. Wilmington*, 238.

Where plaintiff fails to prosecute her appeal from judgment against her, and her application for writ of *certiorari* has been denied, litigation involved in the action is at an end, and her motion thereafter made in the Superior Court to set aside the judgment and grant a new trial is properly denied, since one Superior Court judge may not modify, reverse or set aside judgment of another Superior Court judge. *Davis v. Jenkins*, 533.

CRIMINAL LAW.

§ 5a. Mental Responsibility for Crime.

The test of mental responsibility is the capacity of defendant to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Grayson*, 453.

§ 8b. Parties and Offenses—Aiders and Abettors.

Since drunken driving is a misdemeanor, aiders and abettors in the commission of the offense are guilty as principals. *S. v. Nall*, 60.

When two or more persons aid and abet each other in the commission of a felony, all being present, all are principals and equally guilty without regard to any previous confederation or design. *S. v. Spencer*, 604.

§ 17c. Plea of Nolo Contendere.

While a plea of *nolo contendere* establishes defendant's guilt for the purpose of judgment in that particular prosecution, such plea cannot be considered as an admission of guilt in any other proceeding, criminal or civil. *Winesett v. Scheidt*, 190.

A plea of *nolo contendere* cannot be entered as a matter of right, but is pleadable only by leave of the court, and both the court and the prosecuting attorney

CRIMINAL LAW—*Continued.*

may decline to accept such plea in cases where the due administration of justice might be improperly affected. *Ibid.*

§ 20. **Attachment of Jeopardy.**

Jeopardy attaches when a defendant in a criminal prosecution is placed on trial (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been impaneled and sworn to make true deliverance in the case. *S. v. Crocker*, 446.

§ 22. **Double Jeopardy—Mistrial and New Trials.**

Order of mistrial entered upon motion of defendant or with defendant's consent will not support a plea of former jeopardy. *S. v. Crocker*, 446.

An order of mistrial properly entered for physical necessity or for necessity of doing justice will not support a plea of former jeopardy. *Ibid.*

Order of mistrial for intoxication of jurors during night *held* not necessary for administration of justice, and plea of former jeopardy upon subsequent trial should have been sustained. *Ibid.*

§ 31c. **Qualification of Experts.**

The court's finding that a witness is a medical expert as well as an expert in the field of psychiatry is conclusive when supported by competent evidence. *S. v. Grayson*, 453.

§ 33. **Confessions.**

Where the court finds upon the *voir dire* upon supporting evidence that defendant's confession was voluntary, the admission of the confession in evidence will not be held for error on the ground that defendant was insane and had also denied the offense, and that therefore the confession was involuntary, there being evidence for the State tending to show that defendant was sane within the rule of criminal responsibility. *S. v. Grayson*, 453.

§ 38. **Presumptions and Burden of Proof.**

In criminal prosecutions a defendant's plea of not guilty clothes him with a presumption of innocence which continues to the moment the State offers evidence sufficient to rebut the presumption and to show beyond a reasonable doubt that the defendant in fact committed the crime charged, or some lesser degree thereof. *S. v. Cephus*, 521.

The general rule, which is subject to certain exceptions, is that the burden of proof in a criminal prosecution never shifts to defendant but remains on the State throughout the trial, and defendant does not have the burden of proving matters in justification or excuse. *Ibid.*

§ 42c. **Cross-Examination.**

It is not permissible for a party to put before the jury under the guise of cross-examination incompetent matter inimical to his adversary. *S. v. Tilley*, 245.

A party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation, and this rule includes the right to cross-examine an opposing witness to elicit information that the opposing witness had brought, or was preparing to bring, a civil

CRIMINAL LAW—*Continued.*

action for damages against the accused based on the acts involved in the criminal prosecution. *S. v. Hart*, 709.

The right to elicit information on cross-examination of an opposing witness tending to show that the witness is biased or is interested in the outcome of the litigation, *held* a substantial right which the trial judge has no discretionary power to abrogate or abridge to the prejudice of the cross-examining party. *Ibid.*

§ 42f. Rule that Party May Not Impeach Own Witness.

In this prosecution for larceny and conspiracy to commit larceny, the solicitor knew that one of the accomplices had repudiated his statement implicating appealing defendant, but nevertheless called him as a witness and on cross-examination interrogated him by questions framed so as to suggest to the jury that the appealing defendant was guilty and that the witness was testifying falsely in giving testimony favorable to appealing defendant, and also introduced in evidence the repudiated statement incriminating defendant. *Held:* Permitting the cross-examination and the introduction in evidence of the repudiated statement was prejudicial error. *S. v. Tilley*, 245.

Where a party cross-examines an adverse witness as to matters which tend to show the partiality of the witness for his adversary or the hostility of the witness toward him, the party is not bound by the answers of the witness denying partiality or hostility, but is at liberty to contradict the witness by the testimony of other persons disclosing such partiality or such hostility. *S. v. Hart*, 709.

§ 43. Evidence Obtained by Unlawful Means.

Search warrant not necessary for search of land not included in curtilage, and evidence obtained by such search is competent. *S. v. Harrison*, 659.

Testimony of what officers saw through window while on way to serve search warrant *held* competent. *Ibid.*

§ 47. Consolidation of Indictments for Trial.

Indictment was returned against one defendant charging him with murder in the first degree of a named person and another indictment was returned against two other defendants charging them with murder in the first degree of the same person and on the same date. The State was relying upon the same set of facts at the same place and time as against each of the defendants: *Held:* The trial court had authority to consolidate the indictments for trial. *S. v. Spencer*, 604.

Where separate indictments charge two or more persons with committing offenses of the same class, which offenses are so connected in time and place that the evidence at the trial upon one of the indictments would be competent and admissible at the trial of the other, or others, the indictments may be consolidated for trial. *S. v. Dyer*, 713.

Where two persons are charged in separate bills of indictment with receiving stolen goods knowing them to have been stolen, and there is no evidence tending to show there was a conspiracy between them, or between them and other parties, but the indictments relate to the receiving of goods separately by each defendant at different times and places, the consolidation of the indictments for trial over objection of appealing defendant must be *held* for prejudicial error. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 48c. Admission of Evidence Competent for Restricted Purpose.

The general admission of evidence competent only for the purpose of corroboration will not be held for error in the absence of a request by defendant at the time of its admission that its purpose be restricted. *S. v. Turberville*, 25.

§ 50g. Course and Conduct of Trial—Conduct and Acts of Witnesses.

Upon motion of defendants the court ordered the segregation of witnesses for the State. Upon motion of the solicitor, the court then ordered the segregation of defendants' witnesses over defendants' objection that they might rely on the weakness of the State's case and call no witnesses, or would not know who their witnesses would be until the State rested. *Held:* The order for the segregation of defendants' witnesses rested in the sound discretion of the trial judge, and no abuse of discretion being made to appear in this case, exception is not sustained. *S. v. Spencer*, 604.

Statement of prospective witness in hearing of jury *held* insufficient to justify order of mistrial. *Ibid.*

§ 52a (1). Consideration of Evidence on Motion to Nonsuit.

Upon defendant's motion to nonsuit in a criminal prosecution, defendant's evidence in conflict with that of the State is not to be considered, but defendant's evidence may be considered when it is favorable to the State or tends to explain or make clear that which has been offered by the State. *S. v. Nall*, 60.

On motion for judgmnt of nonsuit, the evidence is to be considered in the light most favorable to the State, and it is entitled to the benefit of every reasonable inference to be drawn therefrom. *S. v. Ritter*, 89.

Evidence offered by defendant as a matter of defense is properly disregarded in passing upon defendant's motion for involuntary nonsuit. *S. v. Harrison*, 659.

§ 52a (2). Sufficiency of Evidence to Overrule Nonsuit in General.

The unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *S. v. Tilley*, 245.

§ 52a (4). Motions to Nonsuit—Conflicting Evidence.

Defendant's evidence in conflict with that of the State cannot justify nonsuit, since conflict in the testimony is for the jury to solve. *S. v. Turberville*, 25.

§ 53d. Instructions—Statement of Law and Application of Evidence Thereto.

An erroneous statement of the law, even though made in stating the contentions of a party, must be held for reversible error. *S. v. Grayson*, 453.

§ 57a. Motion for New Trial for Misconduct of or Affecting Jury.

During the course of the trial, a person who had been sworn as a witness for defendant upon the court's order for the segregation of witnesses, came into the courtroom in the absence of the judge while the jury was still in the box and said in a loud voice to one of the attorneys for defendant that she didn't know anything about the case and that he would be sorry if he put her on the stand. Upon the court's later inquiry as to whether any of the jurors had heard the remark, only two of them stated that they had, and upon interrogation by the court the one juror who stated that the occurrence might have some bearing on his consideration of the case, nevertheless stated that he could hear the

CRIMINAL LAW—*Continued.*

evidence and the charge of the court and return a verdict uninfluenced by the witness' statement. *Held:* The competency of the jurors is a question of law for the court, G.S. 9-14, and the occurrence was insufficient to justify the withdrawal of a juror and order of mistrial, and therefore defendants' exception to the refusal of the court to do so is not sustained. *S. v. Spencer*, 604.

§ 58. Power of Court to Order Mistrial ex Mero Motu.

The trial court may order a mistrial for physical necessity, as when a juror or a defendant, by reason of illness or insanity or other physical reason, is wholly disabled, or for the necessity of doing justice, as when necessary to guard the administration of justice against fraudulent practices. The court must find the facts upon which his conclusion is based and set them out in the record so that his action may be reviewed. *S. v. Crocker*, 446.

The power of the trial court to order a mistrial under the necessity of doing justice is not an unlimited discretionary power but must be based upon the occurrence of some incident of such a nature that would render impossible a fair and impartial trial under the law. *Ibid.*

The trial court found that during the progress of this trial for a capital felony several of the jurors became intoxicated in their hotel at night, during recess of the court, one of them being so unruly as to require thirty minutes to quiet him. Upon these findings, the court ordered a mistrial. There was no evidence or finding that any juror could not continue his service when court convened the next morning or within a reasonable time thereafter, or of any tampering or fraudulent practice with regard to the jury. *Held*, the findings are insufficient to support the court's order for a mistrial, and defendant's plea of former jeopardy upon the subsequent trial should have been sustained. *Ibid.*

The court may not order a mistrial through information obtained by an *ex parte* investigation. *Ibid.*

§ 62f. Suspended Judgments and Executions.

While the Department of Motor Vehicles is given the exclusive authority to suspend or revoke a driver's license, a court, either upon a plea of guilty or *nolo contendere*, may make the surrender of defendant's driver's license a condition upon which prison sentence or other penalty is suspended. *Winesett v. Scheidt*, 190.

§ 77b. Form and Requisites of Transcript.

Evidence must be set out in narrative form. *S. v. McNeill*, 679.

§ 77c. Matters Not in Record Deemed without Error.

Where charge is not included in record it is deemed without error. *S. v. Harrison*, 659.

§ 78d (1). Necessity and Form of Objections and Exceptions to Evidence.

While G.S. 1-206 (3) obviates necessity for exception to admission of evidence over objection, it does not obviate necessity for objection and exception to exclusion of evidence upon objection of adverse party. *S. v. Howell*, 78.

§ 78e (2). Necessity for Calling Court's Attention to Misstatement of Contentions or Evidence.

In this prosecution for assault, an inadvertence of the court in referring to certain witnesses as witnesses offered by the State, when as a matter of fact

CRIMINAL LAW—*Continued.*

they were witnesses of a codefendant, the appealing defendants' adversary in the affray, comes within the rule requiring misstatements of the evidence or contentions of the parties to be brought to the trial court's attention in time to afford opportunity for correction in order for an exception thereto to be subject to review. *S. v. Ritter*, 89.

§ 79. Appeal—Briefs.

Exceptions not set out in the brief and in support of which no argument is stated or authority cited, are deemed abandoned. *S. v. Turberville*, 25.

The failure of defendant to file a brief works an abandonment of the exceptions and assignments of error, and when no error appears on the face of the record the appeal will be dismissed under Rule 28. *S. v. Graham*, 119.

§ 80b. Dismissal of Appeal.

The failure of defendant to file a brief works an abandonment of the exceptions and assignments of error, and when no error appears on the face of the record the appeal will be dismissed under Rule 28. *S. v. Graham*, 119.

§ 81c (2). Appeal—Harmless and Prejudicial Error in Instructions.

An excerpt from the charge will not be held for reversible error when the charge construed contextually is not prejudicial. *S. v. Turberville*, 25.

An erroneous instruction upon the burden of proof must be held for reversible error even though in another part of the charge the law be correctly stated, since the jury may have acted upon the incorrect instruction. *S. v. Howell*, 78.

The court's charge to the jury is to be construed contextually and in its entirety. *S. v. Grayson*, 453.

Erroneous statement of law, even though given in stating contentions, is prejudicial. *Ibid.*

Conflicting instruction on the burden of proof requires a new trial. *Ibid.*

§ 81c (4). Harmless and Prejudicial Error—Error Relating to One Count Only.

Defendant was put on trial upon indictments charging larceny and embezzlement of the same property from the same person by the same acts, and was convicted by the jury on all counts. Judgment was entered imposing concurrent sentences on each count of larceny and embezzlement. *Held:* It not appearing that the sentences were augmented by the dual verdicts of larceny and embezzlement, defendant was not prejudiced by the failure of the court to require the solicitor to elect between prosecutions for larceny or for embezzlement. *S. v. Griffin*, 41.

§ 81f. Appeal—Review of Denial of Nonsuit.

Where defendant's motions for compulsory nonsuit are sustained on his appeal to the Supreme Court, the rulings have the force and effect of verdicts of not guilty. *S. v. Wooten*, 117.

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Scope of Statute in General.

The failure of a clerk of a local court to collect and account for moneys rightfully belonging to a municipality because of alleged error in the taxing of costs in criminal prosecutions in his court may not be instituted under the Declaratory Judgment Act, since that statute does not vest in the Superior Court the

DECLARATORY JUDGMENT ACT—*Continued.*

general power to oversee, supervise, direct or instruct officials of inferior courts in the discharge of their official duties. *Fuquay Springs v. Rowland,* 299.

The Declaratory Judgment Act does not confer upon the courts jurisdiction to render advisory opinions, and it is necessary that the facts agreed present a justiciable question upon which a judgment could be rendered in a pending civil action. *Development Co. v. Braxton,* 427.

Where the question submitted in a controversy without action under G.S. 1-250, is whether a county has the right to tax an individual's property located on a military reservation, but it appears that no assessment or levy has been made and no attempt to collect a tax on the property involved undertaken, the action must be dismissed as presenting a purely abstract question. *Ibid.*

Statute does not supersede rule that taxpayer must pay tax under protest and sue to recover. *Ibid.*

Right to close alley at *cul-de-sac* end may be determined under Declaratory Judgment Act, but all parties asserting interest which would be affected must be brought in. *Hine v. Blumenthal,* 537.

DEDICATION.

§ 1. In General.

Dedication of land to the use of the public may be made either in express terms or implied from the conduct of the owner manifesting an intent to set the land apart for the benefit of the public, and such dedication is effective immediately upon acceptance on the part of the public without regard to the length of time of its use by the public. *Spaugh v. Charlotte,* 149.

A political subdivision of the State may dedicate lands owned by it to a particular public use. *Ibid.*

§ 3. Implied Dedication by Sale of Lots with Reference to Map.

Where land is subdivided and sold into lots with reference to a map showing streets and alleyways, the owner dedicates the streets and alleyways to the use of those who purchase the lots, regardless of whether the streets and alleyways be in fact opened or whether the dedication be accepted by the municipality in which the property lies. *Hine v. Blumenthal,* 537.

§ 6. Revocation of Dedication.

Dedication of land to the public, once fully made, is irrevocable. *Spaugh v. Charlotte,* 149.

Where revocation of a dedication is made in the manner provided in G.S. 136-96, streets and alleys theretofore dedicated become private property and are not subject to any easement by reason of the dedication except in so far as their use may be necessary to afford convenient ingress to and egress from any lot previously sold and conveyed by the dedicator. *Hine v. Blumenthal,* 537.

DEEDS.

§ 13a. Estates and Interests Conveyed.

A grantor cannot convey an estate of greater dignity than the one he has, and when he has only a life estate, his deed to the land, even though in the form of a conveyance in fee simple, conveys only his life estate. *Lovett v. Stone,* 206.

§ 16b. Restrictive Covenants.

Where the owner subdivides a tract of land and sells lots therein by deeds containing covenants restricting the use of the land pursuant to a general plan

DEEDS—*Continued.*

of development, such restrictions are valid and are enforceable by any grantee against any other grantee. *Maples v. Horton*, 394.

Where the owner, in subdividing and selling lots in a development, inserts restrictive covenants in his deeds, but provides that such restrictions are inserted for the benefit of the remaining land of the grantors, their heirs and assigns, and retains the right in grantors to release any of the restrictions and sell any part of the remaining land free from such restrictions, *held* the development is not according to any general plan or scheme, and such restrictions may not be enforced by the grantees *inter se*. *Ibid.*

Restrictive covenants in a deed may be enforced as personal covenants only by the grantor or his executor or administrator, and may not be enforced by an heir, devisee or assignee of the grantor. *Ibid.*

In the husband's deed containing restrictive covenants the wife joined for the purpose of relinquishing her inchoate right of dower. The husband died leaving a will devising the remaining lands in the development to the wife. *Held:* The wife, as devisee, may not enforce the restrictions as personal covenants. *Ibid.*

In construing restrictive covenants in a deed, the meaning of each provision must be determined from a consideration of and in relation to the other provisions of the instrument, giving each part its effect according to the natural meaning of its language. *Callahan v. Arenson*, 619.

In construing restrictive covenants, each part of the contract must be given effect if this can be done by fair and reasonable intendment, before one clause may be construed as repugnant to or irreconcilable with another clause. *Ibid.*

Restrictive covenants must be strictly construed against limitation on use, and be given effect as written, without enlargement by implication or construction. *Ibid.*

Mere sale of lots by reference to a recorded map raises no implied covenant as to size of lots or against further subdivision. *Ibid.*

Ordinarily, the creation of streets or rights of way for better enjoyment of residential property does not in itself violate a covenant restricting the property to residential purposes. *Ibid.*

Plaintiff purchased four lots in a subdivision subject to restrictions limiting the use of the lots to residential purposes and stipulating the minimum frontage and size of each lot. *Held:* Plaintiff is entitled to resubdivide his lots for residential purposes by opening a street between two lots along the depth, provided the lots facing such street meet the requirements of the restrictions as to minimum frontage along the street and size. *Ibid.*

The mere fact that the purchaser of lots subject to restrictive covenants is advised by the grantors at the time of his purchase that only one residence was to be built on each of the lots will not estop the purchaser from subdividing his lots in such manner as not to violate the restrictions as to the use of the lots or their size and frontage. *Ibid.*

§ 16c. Covenants to Support Grantor.

Father furnishing purchase price for land under son's agreement to support father may recover for breach of the agreement, in like manner as though contract were contained in deed. *Wheeler v. Wheeler*, 646.

§ 18. Procedure to Establish Title under Torrens Act.

Contested proceedings for the registration of land titles under the Torrens Law are triable in the mode prescribed by G.S. 43-11 (1), (2) and (3) under

DEEDS—*Continued.*

the same rules for proving title as apply in actions of ejectment and other actions involving the establishment of land titles. *Paper Co. v. Cedar Works*, 627.

In this proceeding under the Torrens Law, defendant admitted a grant from the State covering the land sought to be registered and title in petitioner thereunder by *mesne* conveyances, but asserted title to the *locus* under the exception in petitioner's muniments of title. Defendant failed to offer evidence identifying the *locus* or locating it upon the surface of the earth inside the exception. *Held:* Decree establishing petitioner's title to the land sought to be registered and quieting such title as against defendant's claim is without error. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 1. Nature and Incidents of Titles by Descent in General.

Upon the death of a person intestate, his real property descends directly to his heirs, and the sole right of the administrator therein is the right to sell the land to make assets to pay debts of the estate and the cost of administration provided the personalty is insufficient for that purpose. *Alexander v. Galloway*, 554.

§ 12. Rights and Liabilities of Heirs.

Heirs at law have the right to pay off indebtednesses against the estate, including costs of administration, in order to prevent the sale of realty to make assets. *Alexander v. Galloway*, 554.

DIVORCE AND ALIMONY.

§ 3. Jurisdiction.

In the wife's action for alimony without divorce, G.S. 50-16, in which alimony *pendente lite* has been allowed, the merits of the cause are not before the court upon the hearing of an order to show cause, and the judge in chambers in another county is without jurisdiction to render judgment for permanent alimony in the action. *Hester v. Hester*, 97.

§ 9½. Issues.

Validity of deed of separation *held* presented under issues submitted and failure to submit separate issue thereon was not prejudicial. *O'Briant v. O'Briant*, 101.

§ 12. Alimony Pendente Lite.

Where in the wife's suit for alimony without divorce under G.S. 50-16, order for alimony *pendente lite* has been rendered, but subsequent thereto there is a reconciliation and a resumption of marital relations in the home, the necessity for alimony ceases, and a judge of the Superior Court has no power to reactivate the order for alimony *pendente lite.* However, the original cause is still pending and upon a subsequent separation and need for subsistence for the wife, the courts are open for whatever relief may be justified by the situation then existing. *Hester v. Hester*, 97.

EASEMENTS.

§ ½. Nature and Incidents in General.

Restrictive covenants are negative easements in land which ordinarily cannot be created by parol. *Callahan v. Arenson*, 619.

EASEMENTS—*Continued.*

§§ 1, 2. Creation by Deed and Implication.

Grantees of lots *held* entitled to easement in alley at rear only so far as its use was necessary to enjoyment of premises conveyed. *Hine v. Blumenthal*, 537.

The express grant of an easement will convey by implication only such rights as are reasonably necessary to the fair enjoyment of the easement conveyed. *Ibid.*

The conveyance of an easement will be construed to effectuate the intent of the parties as expressed in the instrument, and if the language is ambiguous the court will give it an interpretation which will effect a rational purpose and not one which will produce an unusual and unjust result. *Ibid.*

§ 6. Easements Running with the Land.

Where the purchaser takes land with notice of a private underground conduit taking care of the natural flow of surface waters, he takes *cum onore*, and is under the duty to exercise ordinary care to keep the artificial underground drainage open and in repair. *Johnson v. Winston-Salem*, 697.

EJECTMENT.

§ 15. Pleadings and Burden of Proof.

In an action of ejectment or other action involving the establishment of a land title, the burden is on the plaintiff to prove a title good aaginst the world, or a title good against the defendant by estoppel. *Paper Co. v. Cedar Works*, 627.

Where, in an action of ejectment or other action involving establishment of a land title, plaintiff makes out a *prima facie* title by evidence or judicial admission establishing that the land in dispute is within the external boundaries of plaintiff's deed, and defendant claims under an exception in plaintiff's muniments of title, the burden is on defendant to bring himself within such exception by evidence identifying the *locus in quo* and locating it upon the surface of the earth inside the exception. *Ibid.*

§ 17. Sufficiency of Evidence and Nonsuit.

The plaintiff in an action of ejectment or other action involving the establishment of a land title may safely rest his case upon showing such facts and such evidences of title as would establish his right to the relief sought by him if no further testimony were offered. *Paper Co. v. Cedar Works*, 627.

In actions of ejectment and other actions involving the establishment of land titles, plaintiff may make out a *prima facie* title by any of the methods enumerated in *Mobley v. Griffin*, 104 N.C. 112. *Ibid.*

In actions of ejectment and other actions involving the establishment of land titles, plaintiff makes out a *prima facie* case by showing a grant from the State covering the land described in his complaint and *mesne conveyances of that* land to himself. *Ibid.*

The plaintiff in an action of ejectment or other action involving the establishment of a land title need not prove the title alleged by him if it is judicially admitted by the defendant. *Ibid.*

§ 20. Damages and Mesne Profits.

The owner of a life estate executed deed purporting to convey the fee in the lands. The grantee in the deed admitted he had been in continuous possession since the execution of the deed, and acquired title by adverse possession as

EJECTMENT—*Continued.*

against all of the remaindermen but one, who was under disability as an infant until the institution of the action. *Held:* Upon recovery by this remainderman of his share of the land, he is entitled to recover also his proportion of the rents and profits against defendant, first in the character of a disseizor and then in the character of a tenant in common. *Lovett v. Stone*, 206.

ELECTION OF REMEDIES.

§ 1. In General.

The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress of a single wrong. *Smith v. Oil Corp.*, 360.

§ 7. Bar of Alternate Remedy.

When a party elects which remedy he will pursue, such election is final and irrevocable, since the adverse party should not be twice vexed for one and the same cause. *Smith v. Oil Corp.*, 360.

ELECTRICITY.

§ 10. Contributory Negligence of Person Injured.

Evidence tending to show that intestate, in the face of warnings, walked toward a fallen wire, which was emitting sparks, and stopped some five feet from the wire, looking at it, and that the wire suddenly moved and came in contact with his body, resulting in his death by electrocution, *is held* to show contributory negligence on the part of intestate, barring recovery as a matter of law. *Baker v. Lumberton*, 401.

§ 11. Intervening Negligence.

Evidence tending to show that a wire maintained by defendant municipality broke and fell into the yard of a residence, that the broken wire was "dead," but that the owner of the residence threw it toward a pole so that it came in contact with and was energized by another wire, and that plaintiff's intestate then came in contact with the wire so charged, resulting in his death by electrocution, *is held* to disclose intervening negligence on the part of the owner of the residence insulating as a matter of law any negligence on the part of the municipality, since, as far as it appears from the evidence, no injury would have resulted from the fallen wire had it not been moved so as to come in contact with the live wire. *Baker v. Lumberton*, 401.

EMBEZZLEMENT.

§ 1. Elements and Essentials of the Offense.

Embezzlement is a statutory offense distinct from larceny in that possession of the property of another must have been lawfully acquired by virtue of some fiduciary relationship, and the person acquiring possession must thereafter with felonious intent fraudulently convert the property to his own use. *S. v. Griffin*, 41.

EMINENT DOMAIN.

§ 3. Acts Constituting Taking of Property.

Depreciation of property in a residential district resulting from the erection of a water storage tank is not a "taking," since city has right to erect the tank and is not bound by its own zoning ordinances. *McKinney v. High Point*, 232.

EMINENT DOMAIN—*Continued.*

But property owner may recover for depreciation from manner of maintenance of tank. *Ibid.*

Allegations and evidence to the effect that defendant municipality caused drainage ditches to be dug across plaintiffs' land from catch basins on the street to a branch in the rear of plaintiffs' property makes out a cause of action for a partial taking of plaintiffs' land. *Lyda v. Marion*, 265.

§ 8. Amount of Compensation for Taking of Land or Interest Therein in General.

In a proceeding to assess compensation for an easement for highway purposes, an instruction by the court that the landowner is entitled to recover compensation for the part taken and compensation for injury to the remaining portion of the land, offset by general and special benefits, G.S. 136-19, will not be held erroneous on the ground that it permits recovery for the fee when only an easement is taken and precludes any reduction of compensation on account of any use which the landowner might be permitted to make of the portion of the right of way not covered by the highway, since the petitioner acquires the unrestricted right to use in perpetuity the entire surface of the right of way for highway purposes, and any possibility of abandonment of the easement is too remote and uncertain for consideration on the question of compensation. *Highway Commission v. Black*, 198.

Compensation for the taking of private property for a public use must be determined as of the time of the taking and must be based upon the rights acquired by the condemnor at that time and not on the basis of the condemnor's subsequent exercise of such rights, and therefore the fact that the condemnor may thereafter allow a permissive use of a part of the right of way is not to be considered. *Ibid.*

A municipality is not bound by its own zoning ordinances, and therefore in an action by a landowner to recover compensation for the depreciation of his property resulting from the erection of a water storage tank in a residential zone, the existence of the ordinance has no bearing upon the question of damages and its admission in evidence is error, since the municipality has the right to erect the tank and compensation may be recovered only for a manner of use amounting to a taking. *McKinney v. High Point*, 232.

§ 14. Proceedings to Recover Compensation—Petition.

A petition in a special proceeding by a landowner to recover compensation for the taking of his land for highway purposes must allege, among other things, facts showing that his land has been taken or damaged for highway purposes without just compensation. *Newton v. Highway Com.*, 433.

In a special proceeding under G.S. 136-19, allegations in the landowners' petition to the effect that the State Highway and Public Works Commission constructed a by-passing highway through a deep cut bordering petitioners' lot, that large cracks thereafter appeared in the lot, splitting the foundations of the petitioners' residence, and that the displacement of the embankment and damage to petitioners' property was caused by the construction of the by-pass, *are held* insufficient to withstand demurrer, since they state mere legal conclusions without allegation of facts showing how the embankment was displaced or the construction of the by-passing highway effected its displacement. *Ibid.*

§ 18e. Proceedings to Recover Compensation—Instructions.

In a proceeding to assess compensation for the taking of an easement for highway purposes, an instruction that it is the duty of the jury in assessing

EMINENT DOMAIN—*Continued.*

compensation to leave the owners of the land "in as near the same position in respect to their entire tract as you can," the burden being upon them to show by the greater weight of the evidence the damages, if any, and that the possibility of abandonment of the easement was too remote for consideration in passing upon the question of compensation, *is held* without error. *Highway Commission v. Black,* 198.

ESTOPPEL.

§ 3. Estoppel by Record.

Where, in the creditors' suit on the original claim, the debtor sets up breach of an accord and satisfaction by the creditor, and demands either damages for such breach or specific enforcement of the accord, *held* the debtor by necessary implication asserts that the accord is fair in substance and honest in origin, and is estopped thereafter to assume any subsequent inconsistent position to the prejudice of the creditor. *Dobias v. White,* 409.

§ 5. Equitable Estoppel—Nature and Grounds in General.

Void sale cannot form basis of estoppel. *Daniels v. Yelverton,* 54.

The mere fact that the purchaser of lots subject to restrictive covenants is advised by the grantors at the time of his purchase that only one residence was to be built on each of the lots will not estop the purchaser from subdividing his lots in such manner as not to violate the restrictions as to the use of the lots or their size and frontage. *Callahan v. Arenson,* 619.

§ 6d. Equitable Estoppel—Estoppel by Conduct.

The fact that he has entrusted the bare possession of a chattel to another does not estop the true owner from denying such possessor's authority to sell or encumber it, but if the true owner invests the possessor with *indicia* of title, the true owner is estopped to claim ownership of the chattel as against an innocent purchaser or encumbrancer who pays value or loans money to the possessor in reliance thereon. *Wilson v. Finance Co.,* 349.

Unsigned registration card is not sufficient *indicia* of title upon which to base estoppel of true owner of automobile. *Ibid.*

§ 6h. Equitable Estoppel—Knowledge.

The grantee in a registered deed is not estopped to deny the validity of an outstanding interest evidenced by an unrecorded instrument previously executed by his grantor unless the registered deed contains an express recital making it subject to such outstanding interest, and such grantee cannot incur any liability to the owner of such outstanding interest by accepting the deed and asserting his rights thereunder, since he has the right to purchase as if the unregistered instrument did not exist and cannot incur liability by exercising such legal right. *Dulin v. Williams,* 33.

§ 11b. Evidence and Burden of Proof.

The burden of proof on the issue of estoppel is on the party asserting this defense. *Wilson v. Finance Co.,* 349.

Whether the seller under a contract for a cash sale abandoned or relinquished his right to demand immediate cash payment was put in issue. *Held:* Testimony that upon dishonor of the check given in payment of the purchase price, the seller caused a sight draft to be drawn on the purchaser's mortgagee at the instance of the purchaser, and the draft itself, are competent in evidence to show the seller's state of mind after he learned of the nonpayment of the purchaser's check. *Ibid.*

EVIDENCE.

§ 2. Judicial Knowledge of Political and Administrative Subdivisions and Official Acts.

The courts will take judicial notice as to the residence of a regular Superior Court judge and the district to which he is assigned by rotation and whether he was assigned at any particular time to hold court in a particular district. *Baker v. Varser*, 180.

The courts will take judicial notice that a particular county is located in a particular judicial district. *Ibid.*

The courts will take judicial notice as to the county in which a municipality of this State is situate. *Ibid.*

In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereupon take judicial notice of it. *Jamison v. Charlotte*, 423.

§ 6. Presumptions in General.

A presumption of law is generally a mandatory deduction which the law directs to be made in the sense of a rule of law; a presumption of fact is a deduction from the evidence, having its origin in the well recognized relation between certain facts in evidence and the ultimate question to be proven. *S. v. Chambers*, 115.

Evidence that on a certain date three leaks were discovered in underground pipes connecting buried gasoline tanks to service station pumps, that the equipment was installed in rocky soil in ground that had been partially filled in, and that motor vehicles and trucks frequently drove over the buried equipment, *held* not to raise an inference or presumption that the leaks existed at the time the equipment was installed almost two years prior thereto. *Smith v. Oil Corp.*, 360.

§ 17. Rule that Party May Not Impeach Own Witness.

A party cannot impeach his own witness either in a civil or in a criminal case. *S. v. Tilley*, 245.

A party makes a witness his own within the rule forbidding impeachment by putting him on the stand and examining him as a witness at the trial of the cause. *Ibid.*

Since a party calling and examining a witness represents him to be worthy of belief he may not impeach the credibility of such witness even though the witness be the adverse party. This rule is not invoked merely by the subpoenaing or causing a witness to be sworn or by taking a deposition unless the deposition or part of it is offered in evidence. This rule does not apply where the calling of the witness is required by law, such as attesting or subscribing witnesses to an instrument, and in the examination of a judgment debtor by the judgment creditor to disclose assets. *Ibid.*

The rule that a party cannot impeach his own witness precludes him from showing that the general character of the witness is bad or that the witness had made statements at other times inconsistent with or contradictory to his testimony at the trial. Nor may this be done under the guise of corroborating evidence. *Ibid.*

The trial court has the discretionary power to permit a party to cross-examine his own witness who is hostile, or surprises him by his testimony, for the purpose of refreshing the memory of the witness and enabling him to testify correctly, but not solely for the purpose of proving the witness to be unworthy of belief. *Ibid.*

EVIDENCE—*Continued.*

The rule that a party may not impeach his own witness does not preclude a party from proving the facts to be different from those to which his witness testifies. *Ibid.*

Where a party cross-examines an adverse witness as to matters which tend to show the partiality of the witness for his adversary or the hostility of the witness toward him, the party is not bound by the answers of the witness denying partiality or hostility, but is at liberty to contradict the witness by the testimony of other persons disclosing such partiality or such hostility. *S. v. Hart*, 709.

§ 18. Evidence Competent to Corroborate Witness.

Where it appears in the record that the credibility of plaintiff's testimony had been challenged by vigorous cross-examination, the ruling of the trial court in admitting testimony corroborating plaintiff will not be held for error, especially when it appears that defendant cross-examined the corroborating witness. *Gibson v. Whitton*, 11.

The admission of corroborative evidence rests largely in the discretion of the trial court to keep its scope and volume within reasonable bounds. *Ibid.*

§ 19. Evidence Competent to Impeach Witness.

Party is entitled to show former inconsistent statement of witness in order to impeach witness' testimony. *Cotton Co. v. Ford*, 292.

§ 22. Cross-Examination.

It is not permissible for a party to put before the jury under the guise of cross-examination incompetent matter inimical to his adversary. *S. v. Tilley*, 245.

A party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation. *S. v. Hart*, 709.

The right to elicit information on cross-examination of an opposing witness tending to show that the witness is biased or is interested in the outcome of the litigation, *held* a substantial right which the trial judge has no discretionary power to abrogate or abridge to the prejudice of the cross-examining party. *Ibid.*

§ 26. Evidence of Similar Facts or Transactions.

In plaintiff's action to recover for injuries resulting from the explosion of a bottle containing a carbonated beverage prepared by defendant, evidence of the explosion of other bottles prepared by the same bottler is competent when, and only when, there is proof of substantially similar circumstances and reasonable proximity in time. *Styers v. Bottling Co.*, 504.

§ 39. Parol or Extrinsic Evidence Affecting Writings.

Where a contract is not required to be in writing it may be partly written and partly oral, but in the absence of fraud or mistake evidence of an asserted parol provision is incompetent when such parol provision is inconsistent with the writing or tends to substitute a new and different contract for the one evidenced by the writing, since it will be presumed that the writing was intended to represent all engagements dealt with therein, and merged therein all prior and contemporaneous negotiations. *Neal v. Marrone*, 73.

EVIDENCE—*Continued.*

In an action on notes between the original parties thereto, the payee is entitled to set up the defense of total failure of consideration, and evidence in support of such defense does not violate the parol evidence rule. *Mills v. Bonin*, 498.

§ 42a. Admissions in General.

Evidence of an offer to compromise, as such, is inadmissible as to the party making it. *Gibson v. Whitton*, 11.

Testimony of plaintiff to the effect that the day after the collision, while both he and defendant were in the hospital, defendant stated that if plaintiff would wait until defendant got out of the hospital defendant would take care of everything, *is held*, when considered in context, not an offer to compromise, but competent as an admission of liability on the part of defendant. *Ibid.*

§ 46. Subjects in Exclusive Province of Experts.

While nonexperts may testify as to a person's physical appearance before and after taking certain medical treatment, they may not testify as to the effect such treatment had upon the patient, since such an opinion must be based upon scientific knowledge pertaining to a particular branch of learning. *Hawkins v. McCain*, 160.

Reference by a witness to his certificate of title to his automobile as "the title" to his car will not be held prejudicial when it appears that the witness was merely identifying the certificate preparatory to its introduction in evidence and was not testifying as to its contents or legal effect. *Wilson v. Finance Co.*, 349.

§ 51. Qualification of Expert Witnesses.

Court's finding upon supporting evidence that witness is expert is conclusive. *S. v. Grayson*, 453.

EXECUTION.

§ 6. Issuance of Execution and Levy.

Where the Commissioner of Revenue has the clerk of a Superior Court to docket his certificate setting forth the tax due by a resident of the county pursuant to G.S. 105-242 (3), execution on such judgment directed to the sheriff of the county must be issued by the clerk of the Superior Court of the county, or in his name by a deputy or assistant clerk, and it cannot be issued by the Commissioner of Revenue, G.S. 1-307, G.S. 1-303. *Daniels v. Yelverton*, 54.

§ 22. Attack of Sale or Execution.

A bidder at an execution sale which is void is not estopped to deny the validity of the sale, since in such instance the doctrine of estoppel does not apply. *Daniels v. Yelverton*, 54.

The issuance of a proper writ of execution is an essential step in the sale of property under execution, and when the execution is not issued by the clerk of the court in which the judgment is docketed, or in his name by a deputy or assistant clerk, as required by law, the sale is a nullity. *Ibid.*

§ 23. Enforcing Payment of Bid.

Plaintiff tax debtor instituted this action against the last and highest bidder at a sale under execution of a certificate issued by the Commissioner of Revenue pursuant to G.S. 105-242 (3), to recover for failure of the bidder to comply with his bid, but the complaint alleged that the execution was issued by the Com-

EXECUTION—*Continued.*

missioner of Revenue. *Held:* Upon the allegations the sale was a nullity, since an execution to be valid must be issued by the clerk of the county in which the judgment is docketed, and therefore the complaint fails to state a cause of action. *Daniels v. Yelverton*, 54.

Where, from the allegations of the judgment debtor relative to the debts outstanding against him it is apparent that he could not be entitled to any part of the amount bid by the last and highest bidder, such allegations preclude any inference that he would be entitled to any part of the bid had it been paid, and therefore he is not entitled to maintain an action against the bidder to enforce payment. This result is not affected by the provisions of G.S. 1-399.69 ,(d). *Ibid.*

§ 27. Execution Against the Person.

In an action to recover cash paid by plaintiff on the purchase price of an article upon defendant's failure to perform his executory contract to sell, plaintiff is not entitled, upon recovery, to the incarceration of defendant if execution upon the judgment is returned unsatisfied in whole or in part. *Brannon v. Wood*, 112.

EXECUTORS AND ADMINISTRATORS.

§ 12½. Liability of Estate for Torts Committed in Administration.

Ordinarily, an action will not lie against an administrator or executor in his representative capacity for torts of the administrator or executor committed in administering the estate, except where the estate actually receives assets acquired by the tortious act of the administrator or executor, the estate may be held responsible to the extent of the value of such assets. *Brown v. Estates Corp.*, 595.

§ 13a. Sale of Lands to Make Assets.

Under direction of will, lands of testator other than lots specified should first be sold if necessary to make assets. *Gatling v. Gatling*, 215.

Where petition by an administrator to sell lands to make assets to pay debts does not allege that certain secured creditors had filed claim to have the debts paid out of the general assets of the estate, the petition fails to make out a right to sell the lands to make assets for the purpose of paying such secured creditors. *Alexander v. Galloway*, 554.

The pendency of contested actions against the estate to recover upon an implied contract for services rendered decedent will not support a petition of the administrator to be allowed to sell lands of the estate to make assets to pay debts. *Ibid.*

In proceedings by the administrator to sell lands to make assets to pay debts of the estate, allegations of respondents denying the existence of any debt of the estate which would warrant the relief, *is held* to raise issues of fact precluding judgment on the pleadings in favor of petitioner. *Ibid.*

Heirs at law have the right to pay off indebtednesses against the estate, including costs of administration, in order to prevent the sale of realty to make assets. *Ibid.*

§ 15c. Liability of Estate on Notes of Deceased.

Where husband and wife execute notes jointly and severally promising to pay moneys used by them in the improvement or purchase of property held by them by entireties, each is primarily liable, jointly and severally, and upon the

EXECUTORS AND ADMINISTRATORS—*Continued.*

death of the husband, his estate is liable only for one-half the balance remaining due at his death, without credit for any sums realized from the property after his death. *Underwood v. Ward,* 513.

§ 16. Priorities in Payment of Debts of Decedent.

The provision of G.S. 28-105 that debts constituting a specific lien on property to the amount not exceeding the value of the property shall be paid in the first class of priority is solely for the purpose of preserving the equity in property for the benefit of the creditors and beneficiaries of the estate, and the statute can have no application when the property subject to the lien is not a part of the assets of the estate, even though the estate be liable for the payment of the debt secured, or any part of it. *Underwood v. Ward,* 513.

Husband and wife were jointly and severally liable on notes secured by liens on lands held by them by entireties. *Held:* Upon the death of the husband, the liability of his estate for one-half the balance due on the notes at the time of his death is not a debt coming within the first class of priority, since even though the debt is secured by specific lien on the property, the property is not an asset of the estate. *Ibid.*

§ 17. Filing and Proof of Claim.

A secured creditor need not present his claim for allowance to an executor or administrator in order to preserve his right to enforce his security. *Alexander v. Galloway,* 554.

A secured creditor must present his claim to the executor or administrator if he seeks to obtain payment either in full or in part out of the general assets of the estate. *Ibid.*

§ 19. Actions Against Estate.

The collector of the estate of a deceased tort-feasor may be sued in his representative capacity for an injury to personal property caused by the wrongful act of the tort-feasor. *McIntyre v. Josey,* 109.

§ 30e. Liabilities of Personal Representative for Torts Committed in Administration of Estate.

An administrator or executor is personally liable for his own torts even though they are committed in the administration of the estate. *Brown v. Estates Corp.,* 595.

FOOD.

§ 6. Actions for Damages by Purchaser.

Proof of injury caused by the explosion of a bottle containing a carbonated beverage, standing alone, is not sufficient to carry the case to the jury on the issue of negligence, the principle of *res ipsa loquitur* not being applicable. *Styers v. Bottling Co.,* 504.

The installation by the bottler of modern machinery and appliances, such as are in general and approved use, does not *ipso facto* exculpate the bottler of liability. *Ibid.*

In an action against a bottling company by an employee of a grill to recover for injuries sustained from the explosion of a bottle of Coca-Cola, evidence that the crate containing the bottle was delivered by defendant and left in the sun outside the building, that the employee moved the crate into the building, and that shortly thereafter the bottle exploded, together with evidence that on six

FOOD—*Continued.*

different occasions during the same summer bottles prepared and sold by the defendant had exploded under similar conditions, *is held* sufficient to carry the case to the jury on the issue of defendant's negligence. *Ibid.*

In plaintiff's action to recover for injuries resulting from the explosion of a bottle containing a carbonated beverage prepared by defendant, evidence of the explosion of other bottles prepared by the same bottler is competent when, and only when, there is proof of substantially similar circumstances and reasonable proximity in time. *Ibid.*

Evidence tending to show only that the employee of a grill took a crate of Coca-Cola that had been delivered by defendant, and left standing in the sun, into the grill and set it down on a stack of other crates, when one of the bottles exploded, causing the injury in suit, *is held* insufficient evidence of contributory negligence on the part of the employee as a proximate cause of the injury so as to require the submission of the issue of contributory negligence to the jury. *Ibid.*

In an action to recover damages resulting to plaintiff from a foreign and deleterious substance found in a bottled drink, failure of evidence that the bottled drink was manufactured and marketed by the defendant compels nonsuit. *Beasley v. Bottling Co.*, 681.

GAMBLING.

§ 1. Construction and Operation of Statutory Provisions in General.

The General Assembly, by the enactment of general statutes has made gambling in its variety of guises and disguises illegal in this State. *S. v. Felton*, 575.

The betting on races of any sort is illegal under the general laws of North Carolina. G.S. 16-1, 16-2, and 14-292. *Ibid.*

Pari-mutuel machines or appliances, or systems, of the kind employed and used at recognized racing courses, provide a system for betting on the outcome of races. *Ibid.*

Currituck dog track statute *held* unconstitutional. *Ibid.*

§ 7. Warrant and Indictment.

The bill of information in this case *is held* to charge the offense of placing wagers and bets on dog races under the pari-mutuel system by defendant, and defendant's motion to quash on the ground that the bill does not express the charge in a plain, intelligible and explicit manner was properly denied. *S. v. Felton*, 575.

HIGHWAYS.

§ 4a. Highways Under Construction—Signs and Warnings.

In this action involving a collision of two automobiles at the end of a detour on a highway under construction, it *is held* that the motions of the defendant construction companies for involuntary nonsuit in plaintiffs' actions and the cross-action of defendant driver, both based on alleged negligence of the road contractors in failing to maintain proper signs, signals and warnings along the highway under construction, were properly allowed for insufficiency of the evidence to support the inference that negligence on the part of either contractor contributed as the proximate cause or as one of the proximate causes of the accident. *Wrenn v. Graham*, 462.

HIGHWAYS—*Continued.*

§ 11. Nature and Establishment of Neighborhood Public Roads.

Where an action to have a portion of abandoned highway adjudged to be a neighborhood public road under G.S. 136-67 is submitted to the court under agreement of the parties, findings of fact by the court, supported by evidence, to the effect that the abandoned road was not necessary for ingress or egress to any dwelling, there having been by-roads constructed giving access to the dwelling in question and connecting the schools involved, and that the abandoned road had not remained open and in general use by the public, *held* to support the judgment dismissing the action. *Woody v. Barnett*, 420.

HOMICIDE.

§ 4d. Murder Committed in Perpetration of or Attempt to Perpetrate Felony.

When murder is committed in the perpetration of, or attempt to perpetrate rape, the State is not required to prove premeditation and deliberation, G.S. 14-17. *S. v. Grayson*, 453.

§ 16. Presumptions and Burden of Proof.

An intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree, placing the burden upon defendant to prove to the satisfaction of the jury legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether on the ground of self-defense, accident, or misadventure. *S. v. Howell*, 78.

§ 17. Competency of Evidence.

Under an indictment for murder in the first degree in the usual form, G.S. 15-144, the State is entitled to introduce evidence that defendant committed the homicide in the perpetration of, or attempt to perpetrate rape, it being incumbent upon defendant if he desires more definite information to request a bill of particulars, G.S. 15-143. *S. v. Grayson*, 453.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of murder in the first degree *held* sufficient to be submitted to the jury in this prosecution. *S. v. Grayson*, 453.

The State's evidence tended to show that appealing defendant had an altercation with deceased, that he and his two codefendants left the cafe where the altercation had occurred and returned thereto in about 30 minutes, that one of defendants was armed with a pistol, that the three defendants entered the cafe together and gathered round the deceased, and that one defendant shot deceased while the appealing defendant and the other defendant were physically and violently aiding and abetting the assault. *Held:* The evidence was sufficient to overrule appealing defendant's motion to nonsuit. *S. v. Spencer*, 604.

§ 27b. Instructions on Presumptions and Burden of Proof.

After charging the jury that if they were satisfied beyond a reasonable doubt from the State's evidence that defendant intentionally killed deceased with a deadly weapon, the law raised the presumptions that the killing was unlawful and that it was done with malice, constituting murder in the second degree, the court charged further that if the jury should find from the evidence beyond a reasonable doubt that defendant killed the deceased in the heat of passion by reason of sudden anger, defendant would be guilty of manslaughter, *is held*

HOMICIDE—*Continued.*

reversible error as placing the burden upon defendant to show beyond a reasonable doubt facts and circumstances sufficient to reduce the crime to manslaughter. *S. v. Howell*, 78.

A charge in a homicide prosecution which correctly places the burden upon the State to prove beyond a reasonable doubt defendant's guilt of an unlawful killing of a human being with malice and with premeditation and deliberation, but later places the burden upon the defendant to show that he did not have sufficient mental capacity to premeditate and deliberate, must be held for reversible error. *S. v. Grayson*, 453.

§ 27d. Instructions on Question of Murder in Second Degree.

The court's definition of malice in this homicide prosecution *is held* without error on authority of *S. v. Benson*, 183 N.C. 795. *S. v. Spencer*, 604.

§ 27g. Instructions on Question of Parties and Offenses.

In this prosecution for homicide there was evidence that the three defendants aided and abetted each other in the commission of the crime, all being present, and also some evidence that the crime was committed pursuant to a conspiracy. The court correctly charged on the question of conspiracy and also on the principle of the guilt of defendants as principals. *Held:* On the aspect of defendants' guilt as principals, the court correctly charged that the jury could convict any one or all of them. *S. v. Spencer*, 604.

HOSPITALS.

§ 6½. Public Hospitals.

Trustees authorized to convey property to county for operation of charitable hospital under same name and lease same to the trustees for operation. *Rex Hospital v. Comrs. of Wake*, 312.

G.S. Article 13C, Chapter 131, as amended, providing that after the filing of petition signed by at least five hundred qualified voters of a proposed hospital district in conformity with G.S. 131-126.31, and after a public hearing pursuant to notice, with the approval of the county commissioners, the Medical Care Commission may create a hospital district by resolution upon its finding that it is advisable to create the proposed district (G.S. 131-126.32) *is held* a lawful delegation of legislative power to the Commission. The provision that the resolution find that all the residents of the proposed territory will be benefited by the creation of the district requires only a determination by the Commission that the hospital is needed in the area. The bond election pursuant to G.S. 131-126.33 must be called by the county commissioners and the county commissioners constitute the governing body of the hospital district, G.S. 131-126.40 (a). *Williamson v. Snow*, 493.

HUSBAND AND WIFE.

§ 12c. Conveyances by Husband and Wife.

Where a married woman joins in her husband's deed solely for the purpose of relinquishing her inchoate right of dower, she is not bound by any covenants contained therein, nor may she enforce as personal covenants restrictions contained therein, since she conveys nothing by the deed but merely relinquishes her dower right. *Maples v. Horton*, 394.

HUSBAND AND WIFE—*Continued.*

§ 13a (3). Husband as Agent for Wife.

Evidence *held* sufficient to support finding that husband acted for wife in letting contract for construction on her premises; but not that he was her agent in letting contract for digging of well. *Lowery v. Haithcock*, 67.

§ 14. Creation and Existence of Estates by Entireties.

A deed to husband and wife, unless the instrument provides otherwise, vests in the husband and wife an estate by entireties. *Nesbitt v. Fairview Farms*, 481.

§ 14½. Estates by Entireties—Liability for Liens.

Where husband and wife execute notes jointly and severally promising to pay moneys used by them in the improvement or purchase of property held by them by entireties, each is primarily liable, jointly and severally, and upon the death of the husband, his estate is liable only for one-half the balance remaining due at his death, without credit for any sums realized from the property after his death. *Underwood v. Ward*, 513.

§ 15. Nature and Incidents of Estates by Entireties.

During coverture the husband is entitled to the full possession, control and use of lands owned by himself and wife by the entireties and can maintain a processioning proceeding to establish the dividing line between such lands and the contiguous lands of another, even without the joinder of his wife. *Nesbitt v. Fairview Farms*, 481.

Therefore, husband may compromise processioning proceeding without signature of wife. *Ibid.*

Upon the death of the husband, the wife becomes the sole owner of lands held by them by entireties, and no right, title or interest of any kind passes to the estate of the husband. *Underwood v. Ward*, 513.

INDICTMENT AND WARRANT.

§ 8. Joinder and Severance of Counts and Election.

The indictments in this case charge defendant with larceny and with embezzlement of the same property from the same person by the same acts. Defendant moved that the solicitor be required to elect whether defendant should be put on trial for larceny or embezzlement. *Held:* Since defendant could not be guilty of both offenses upon the same facts, his motion should have been allowed. *S. v. Griffin*, 41.

§ 24. Necessity for Allegation to Support Proof.

Under an indictment for murder in the first degree in the usual form, G.S. 15-144, the State is entitled to introduce evidence that defendant committed the homicide in the perpetration of, or attempt to perpetrate rape, it being incumbent upon defendant if he desires more definite information to request a bill of particulars, G.S. 15-143. *S. v. Grayson*, 453.

INFANTS.

§ 10. Appointment of Next Friend.

Since the court has the discretionary power to appoint any person whom it considers suitable next friend of an infant plaintiff, whether such person is related or not to the infant, the fact that application for appointment is made

INFANTS—*Continued.*

by a non-relative of the infant does not affect the efficacy of the appointment of such person upon proper findings. Rule of Practice in the Superior Courts No. 16. *Lovett v. Stone*, 206.

Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed. So, where the court grants the application of a non-relative of the infant for appointment as next friend, it will be presumed that the court made the appointment because no person closely connected with the infant would apply. *Ibid.*

Where an infant plaintiff attains his majority during the prosecution of the cause, he ratifies the appointment of the next friend by continuing the prosecution of the action in his own right. *Ibid.*

INJUNCTIONS.

§ 1b. Mandatory Injunctions.

A mandatory injunction to compel a board or public official to perform a duty imposed by law is identical in its function and purpose with that of a writ of *mandamus*. *St. George v. Hanson*, 259.

§ 4d. Subjects of Injunctive Relief—Nuisances.

Illegal gambling establishment may be enjoined as nuisance. *Summerell v. Racing Asso.*, 591.

Artificial, unenclosed pond is not attractive nuisance and may not be abated. *Stribbling v. Lamm*, 529.

§ 4j. Enjoining Ultra Vires Acts of Public Officers.

While ordinarily private citizen may not enjoin public officials from putting into effect provisions of statute, where statute permitting gambling on dog races is unconstitutional, private citizen may enjoin operation of track as nuisance. *Summerell v. Racing Asso.*, 591.

§ 8. Continuance, Modification and Dissolution.

Ordinarily a temporary restraining order should not be dissolved when the injury, if any, which defendant would suffer from its operation would be slight compared to the irreparable damage which would result to plaintiffs from its dissolution. *Casey v. Grantham*, 121.

Upon the findings of fact made by the lower court in this case, the order dissolving the temporary order restraining defendant corporation and its officers and agents from executing the proposed contract of the corporation, is affirmed. *Hill v. Erwin Mills*, 437.

The court's ruling upon whether a temporary restraining order issued in the cause should be continued to the hearing has no bearing whatever on the rights of the parties when the action is tried on its merits. *Ibid.*

INSANE PERSONS.

§ 1. Inquisition and Commitment.

While the initial affidavit-application under G.S. 122-42 must be sworn to before the clerk or a deputy clerk, the affidavits of physicians under G.S. 122-43 may be sworn to before a notary public, and the statute permits affiant in the affidavit-application to act as intermediary in carrying the papers to and from the physician for the execution of the physician's affidavit. *Jarman v. Offutt*, 468.

INSANE PERSONS—*Continued.*

G.S. Ch. 35 deals only with inebriates and mental incompetents in matters of a civil nature; G.S. Ch. 122, Art. 6, deals exclusively with mentally disordered criminals. *In re Tate*, 94.

An inquisition of lunacy as regards the person whose sanity is in question is a proceeding *in personam;* as it affects his property, is a proceeding *in rem. In re Dunn*, 378.

An inquisition in lunacy is for the benefit of the alleged insane person, and necessary for the protection of his person and property, and every reasonable safeguard should be thrown around a person whose sanity is inquired into. *Ibid.*

§ 3. Appointment of Guardian or Trustee.

Under G.S. 35-2 the clerk of Superior Court may appoint either a guardian or trustee to manage the estate of a person who is found by an inquisition of lunacy to be mentally incompetent to manage his own affairs, and a trustee appointed under this statute is subject to the laws enacted for the control and handling of estates by guardians. *Brown v. Estates Corp.*, 595.

§ 4. Allowance to Attorneys and Guardians, etc.

Court may make allowances for attorney, guardian *ad litem* and psychiatrist for services rendered incompetent at inquisition of lunacy as for necessaries notwithstanding that incompetent is ordered *held* in hospital. *Dunn, In re*, 378.

§ 9d. Claims Arising Out of Management of Estate.

Ordinarily, an action will not lie against a guardian or trustee of an insane person in his representative capacity for torts which the guardian or trustee commits in managing the estate. *Brown v. Estates Corp.*, 595.

§ 10. Personal Liability of Representative for Claims Arising Out of Management of Estate.

A guardian or trustee of an insane person is personally liable for his own torts, even though they are committed in the management of the estate of his ward. *Brown v. Estates Corp.*, 595.

§ 15. Representation of Incompetent.

Where there has been no inquisition of lunacy, a lunatic may defend by a guardian *ad litem. In re Dunn*, 378.

§ 17. Discharge and Release.

A person committed to a State Hospital under the provisions of G.S. 122-84 because of mental incapacity to answer to an indictment in the Superior Court remains in the technical custody of that court and upon his recovery must be returned to it for trial, G.S. 122-87, and may be discharged only by a judge of the Superior Court, either at term, or by writ of *habeas corpus. In re Tate*, 94.

A person accused of crime who is committed to a State Hospital under the provisions of G.S. 122-84 may not procure his release in a proceeding instituted under G.S. 35-4. *Ibid.*

INSURANCE.

§ 34d. Occurrence of Disability During Life of Certificate Under Group Policy.

Where, in an action upon a certificate under a group policy to recover for disability, plaintiff testifies that after the termination of her employment she

INSURANCE—*Continued.*

worked over a month and a half at a regular hourly wage, and introduces testimony of her employer's medical officer, who had examined her, that she was able to work at that time, although she was suffering from some physical ills, nonsuit is properly entered, notwithstanding the testimony of insured and her friend that she was physically disabled at the time of the termination of her employment. *Johnson v. Assurance Co.*, 296.

§ 45½. Auto Theft Policies.

The terms "theft," "larceny," "robbery," and "pilferage," as used in a policy of automobile insurance, all denote loss or damage resulting from some form of larceny. *Auto Co. v. Ins. Co.*, 416.

This action on a policy of automobile theft insurance was submitted to the court upon an agreed statement of facts to the effect that insured entrusted the automobile to an employee to drive it to a garage for repairs, that the employee, upon arrival at the garage, learned the job could not be done at that time, drove to his home for breakfast, and had an accident damaging the car while on the way back to the garage. It was also stipulated that the employee had been convicted of driving the car in violation of G.S. 20-105. There was no stipulation that the employee drove the vehicle without the consent of the owner or with intent to temporarily deprive the owner of possession of the vehicle. *Held:* Upon the facts agreed, the loss was not occasioned by larceny, and even if it be conceded that the terms "theft" or "larceny" as used in the policy should include the statutory taking of the vehicle as defined by G.S. 20-105, the facts agreed fail to show a violation of this statute, the statement to the effect that the employee had been convicted of violating this statute being a conclusion of law not binding on insured who was not a party nor privy to the criminal prosecution. *Ibid.*

§ 51½. Auto Insurance—Contracts to Insure.

Allegations that insurer's agent, at the time of the sale of a car by the dealer, orally agreed with the dealer to issue a collision policy on the vehicle in the name of the purchaser with loss payable clause in favor of the dealer, that thereafter the car was wrecked and that insurer failed to issue the policy as it had agreed to do, resulting in loss to the dealer, *is held* to state a cause of action against insurer for breach of the contract. *Laughinghouse v. Ins. Co.*, 678.

INTOXICATING LIQUOR.

§ 9c. Competency of Evidence.

Evidence of the finding of nontax-paid liquor on the land of another but within 15 feet of a path which led from defendant's home, with no other paths intersecting or joining it, is competent evidence of defendant's constructive possession of such liquor, even though it is insufficient to make out a *prima facie* case, its weight and credibility being for the jury. *S. v. Harrison*, 659.

Testimony of officers that while looking through a window of defendant's house on their way to serve a search warrant, they heard and saw incriminating matter, *held* not incompetent merely because the information was obtained before serving the warrant. *Ibid.*

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant's house and a church faced each other across an unpaved street and that officers found nontax-paid liquor in a

INTOXICATING LIQUOR—*Continued.*

broom sedge field and concealed in vines between the rear of the church and a paved highway, is insufficient to show that defendant had either actual or constructive possession of the liquor, and nonsuit should have been entered in a prosecution for unlawful possession of intoxicating liquor and unlawful possession of intoxicating liquor for the purpose of sale. *S. v. Wooten*, 117.

The State's evidence that one quart of nontax-paid liquor was found in defendant's home is sufficient alone to carry the case to the jury in a prosecution for the unlawful possession of nontax-paid whiskey, G.S. 18-48, notwithstanding defendant's evidence that another occupied the room and that such other claimed the liquor, since defendant's evidence on a matter of defense is not considered on motion to nonsuit. *S. v. Harrison*, 659.

JUDGES.

§ 2a. Jurisdiction and Authority of Regular Judges.

The jurisdiction of a regular judge of the Superior Court over the subject matter of an action depends upon the authority granted to him by the Constitution and the laws of this State, and is fundamental. *Baker v. Varser*, 180.

A regular judge of the Superior Court while assigned by rotation to hold the courts of the judicial district of his residence has no jurisdiction to hear a petition for *mandamus* in Chambers in another judicial district to which he is not assigned to hold court. *Ibid.*

§ 2b. Jurisdiction and Authority of Special Judges.

The jurisdiction of a special judge is limited to that granted him by the Constitution as implemented by statute. *Spaugh v. Charlotte*, 149; *Parker v. Underwood*, 308.

In the district of his residence, a special judge has concurrent jurisdiction with the resident judge of the district and the judge regularly presiding over the courts of the district, to hear chambers matters, in or out of term. *Ibid.*

Neither Ch. 1119, Session Laws of 1951, nor Ch. 1322, Session Laws of 1933, repeals G.S. 7-65 as amended by Ch. 78, Session Laws of 1951, giving special judges jurisdiction of chambers matters in the districts of their residences, the later acts being supplemental and not repugnant to the former in regard to the jurisdiction of special judges. *Ibid.*

§ 4. Civil Liability.

A judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties, and therefore an action under the Declaratory Judgment Act against a judge to determine the correctness of his adjudication as to what items should be included in a bill of costs in a criminal action will be dismissed, even *ex mero motu*, for failure to state a cause of action. *Fuquay Springs v. Rowland*, 299.

JUDGMENTS.

§ 19. Time and Place of Rendition.

In the wife's action for alimony without divorce, G.S. 50-16, in which alimony *pendente lite* has been allowed, the merits of the cause are not before the court upon the hearing of an order to show cause, and the judge in chambers in another county is without jurisdiction to render judgment for permanent alimony in the action. *Hester v. Hester*, 97.

JUDGMENTS—*Continued.*

§ 25. Void Judgments.

A judgment entered without service of process is a nullity and may be disregarded or quashed by the Court *ex mero motu*. *Glod v. Shippers, Inc.*, 304.

§ 27a. Setting Aside Judgments for Surprise and Excusable Neglect.

The standard of care required of a litigant is that which a man of ordinary prudence usually bestows on his important business, but where a litigant employs a reputable attorney licensed in this State, the neglect of the attorney will not ordinarily be imputed to the client, provided the client is without fault. *Moore v. Deal*, 224.

A judgment will not be set aside on the ground of surprise or excusable neglect on motion of defendant unless defendant shows a real and substantial defense on the merits. *Ibid.*

The findings of fact by the trial court on motion to set aside the judgment under G.S. 1-220 are conclusive on appeal when supported by any competent evidence, but conclusions of law made by the judge upon such facts are reviewable. *Ibid.*

The trial court found that defendant employed a reputable attorney licensed in this State to defend the suit against him, that defendant was constantly in communication with the attorney who assured him that he was taking care of the matter, that defendant had been guilty of no neglect, but that judgment was taken against him through the inexcusable neglect of his attorney. *Held:* Such findings, supported by competent evidence, are sufficient to show excusable neglect on the part of the defendant. *Ibid.*

While ordinarily the court upon a motion to set aside a judgment under G.S. 1-220 must find the facts upon which he bases his conclusion of a meritorious defense, and the Supreme Court will not consider affidavits for the purpose of making findings of fact on such motion, when the verified motion itself sets forth facts which, if believed, constitute a meritorious defense, the order setting aside the judgment may be upheld under the presumptions obtaining upon appeal. *Ibid.*

Where defendant pays a judgment obtained against him upon inquiry after default, but pays the judgment under protest upon the advice of his attorney upon execution issued upon the judgment, such payment is involuntary and does not constitute such laches as will preclude or estop him from moving to set aside the judgment under G.S. 1-220. *Ibid.*

A judgment affirming the order of the clerk entering a judgment by default and inquiry does not preclude the defendant from moving thereafter to set aside the default judgment under G.S. 1-220. *Ibid.*

§ 32. Operation of Judgments as Bar.

Adjudication that plaintiff had failed to state a cause of action against one defendant as a joint tort-feasor does not preclude the other defendant from asserting a cross action against such defendant for contribution. *Yandell v. Fireproofing Corp.*, 1.

LABORERS' AND MATERIALMEN'S LIENS.

§ 1. Nature and Essentials of Lien.

In this action by a contractor to enforce a lien for labor and materials, the mortgagee in an instrument recorded after the contractor had started work

LABORERS' AND MATERIALMEN'S LIENS—*Continued.*

resisted the lien on the ground that the contract for the construction was let by the husband of the owner of the land and that she was not a party thereto. Evidence tending to show that the *feme* owner participated in the preliminary negotiations and agreed to the contract for the erection of a store building and a house on her land, visited the premises after construction was begun and suggested and agreed on changes in the plans and in the materials to be used, *is held* to support the conclusion that her husband, with her consent, spoke for her as well as himself in making the contracts and therefore that she was a party to the contract so as to support lien for labor and materials. *Lowery v. Haithcock*, 67.

But not that he was her agent in letting contract for digging of well on property. *Ibid.*

In order to support a lien for labor and materials it is necessary that claimant show a contract between himself and the owner out of which the debt arose, and claimant, as against a subsequent lienor, may prove the existence of such contract by admissions made by the owner in her answer. *Ibid.*

§ 5. Time of Filing and Requisites of Notice of Lien.

Notice of lien for labor and materials must be filed in the office of the clerk of the Superior Court of the county in which the land is located within six months from and after the date the work is completed, and the claim must specify in detail the work done and the materials furnished. *Lowery v. Haithcock*, 67.

G.S. 44-38 does not require the listing of material item by item, or the labor hour by hour, but does require sufficient detail to put parties who are or may become interested in the premises on notice as to the labor performed and materials furnished, the amount due therefor, and the property upon which employed. *Ibid.*

In a notice of claim for labor and materials, an item which merely stipulates the amount due a named company, even though its name discloses the nature of its business, is insufficient itemization to show either the nature of the material or the date it was furnished as required by G.S. 44-38, and upon exception to such item it will be deleted from the amount of the lien on motion of a subsequent mortgagee. *Ibid.*

Where the owner lets a contract for the construction of a store building and a house on her land, and thereafter a contract is let for the digging of a well thereon, the contract for the digging of the well is separate and distinct from the original contract and when notice of lien therefor is not filed within six months after the completion of the well it is ineffective to create a lien therefor. *Ibid.*

Where notice of claim of lien for labor and materials, considered as a whole, is in substantial compliance with the statute, an exception to the sufficiency of the notice as a whole cannot be sustained, even though some items therein may not be sufficiently specific. *Ibid.*

§ 10. Enforcement of Lien.

Claimant must institute action to enforce a lien for labor and materials within six months from the date of the filing of the notice of claim of lien. G.S. 44-33, G.S. 44-48 (4). *Lowery v. Haithcock*, 67.

LARCENY.

§ 1. Elements and Essentials of the Offense.

Larceny is a common law offense and is the taking and carrying away of the personal property of another without his consent with felonious intent at the time of the taking to deprive the owner of his property and to appropriate it to the taker's use, and the act of taking must involve either an actual trespass or a constructive trespass in acquiring possession by fraud through some trick or artifice. *S. v. Griffin*, 41.

The possession of the custodian of a company's warehouse is in contemplation of law the possession of the company, and therefore the felonious asportation of the goods from the warehouse with the connivance and aid of the custodian constitutes larceny. *S. v. Tilley*, 245.

Common law larceny is the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. *Auto Co. v. Ins. Co.*, 416.

§ 5. Presumptions and Burden of Proof.

The fact that stolen goods are found in the possession of a person, by his own act or concurrence, soon after the goods were stolen, permits the logical inference therefrom that he is the thief. *S. v. Chambers*, 114.

The presumption arising from the recent possession of stolen property is one of fact only, and is to be considered by the jury merely as an evidential fact along with other evidence in determining defendant's guilt. *Ibid.*

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence that defendant had possession of stolen tires close to the place from which they were stolen, soon after they had been stolen, and was selling them after dark for a fraction of their value, and that some time later when defendant was apprehended he referred to "tires," although tires had not been mentioned to him by the officer, *is held* sufficient to be submitted to the jury in this prosecution for larcany and receiving stolen goods. *S. v. Chambers*, 114.

§ 8. Instructions.

Instructions to the effect that where a defendant is found in recent possession of property feloniously stolen that there is a presumption that defendant did the stealing, which presumption is strong or weak depending upon the length of time intervening, *is held* not prejudicial in view of the evidence in this case that stolen tires were found in defendant's possession close to the place from which they were stolen soon after they had been stolen, and that defendant was selling them after dark for a fraction of their value. *S. v. Chambers*, 114.

LIBEL AND SLANDER.

§ 7c. Absolute Privilege.

The general rule is that a defamatory statement made in the due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice. *Jarman v. Offutt*, 468.

A judicial proceeding within the rule of absolute privilege is not restricted to trials in civil actions or criminal prosecuctions, but includes every proceeding of a judicial nature before a competent court, administrative agency, or officer

LIBEL AND SLANDER—*Continued.*

clothed with judicial or *quasi*-judicial powers, including statements made in an affidavit pertinent to a judicial proceeding or which the affiant has reasonable grounds to believe is pertinent. *Ibid.*

A lunacy proceeding is a judicial proceeding within the rule of absolute privilege. *Ibid.*

In a lunacy proceeding instituted by the husband of the alleged incompetent by proper affidavit sworn to before the clerk, G.S.122-42, a statement of a physician sworn to before a notary public, G.S. 122-43, is absolutely privileged and will not support an action for libel. *Ibid.*

MALICIOUS PROSECUTION.

§ 8. **Probable Cause.**

In an action for malicious prosecution the question of probable cause must be determined in accordance with whether the facts and circumstances within the knowledge of defendant at the time he instituted the criminal prosecution were sufficient to induce a reasonably prudent man to believe that plaintiff was guilty of the offense. *Bryant v. Murray*, 18.

Where plaintiff's evidence tends to show that plaintiff had sold and delivered stone to defendant, and then repossessed same in defendant's absence, but with defendant's knowledge, because of dispute as to payment, the evidence is sufficient for jury on question of want of probable cause in defendant's swearing out warrant charging plaintiff with larceny, since it shows that defendant had knowledge of facts negating felonious intent in plaintiff's taking the stone, irrespective of contractual rights of parties in regard to sale. *Ibid.*

The fact that defendant in an action for malicious prosecution, before instituting the criminal prosecution, was advised by a reputable attorney, who had been given full statement of the facts, that in his opinion the plaintiff was guilty of the offense, is not conclusive upon the question of probable cause. *Ibid.*

The fact that plaintiff in an action for malicious prosecution had waived preliminary examination and given bond for his appearance in the Superior Court on the charge constituting the basis for the action, and that the grand jury had returned a true bill against him in the Superior Court, makes out a *prima facie* case of probable cause only, and plaintiff is entitled to rebut the *prima facie* case. *Ibid.*

The fact that in the first prosecution of the offense constituting the basis for an action for malicious prosecution, plaintiff's motion for judgment of nonsuit was denied at the close of the State's evidence, and a mistrial thereafter ordered for illness of the judge, is not conclusive on the question of probable cause. *Ibid.*

§ 10. **Directed Verdict.**

Court may not direct verdict on issue of want of probable cause in plaintiff's favor, since burden on such issue rests on plaintiff. *Bryant v. Murray*, 18.

MANDAMUS.

§ 1. **Nature and Grounds of Writ.**

Mandamus will not lie to review final action of the Board of Law Examiners, an administrative agency of the State, in refusing an application for permission

MANDAMUS—*Continued.*

to take the law examination, since *mandamus* is an exercise of original jurisdiction and may not be used as a substitute for an appeal. *Baker v. Varser*, 180.

A party seeking a writ of *mandamus* must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be required. *St. George v. Hanson*, 259.

A mandatory injunction to compel a board or public official to perform a duty imposed by law is identical in its function and purpose with that of a writ of *mandamus. Ibid.*

Mandamus cannot be invoked to control the exercise of discretion in the performance of a judicial or *quasi*-judicial act unless it is clearly shown there has been an abuse of discretion. *Ibid.*

The function of *mandamus* is to compel the performance of a ministerial act and not to establish a legal right. *Ibid.*

MASTER AND SERVANT.

§ 4a. Distinction Between Employee and Independent Contractor.

The usual test for determining whether the relationship between the parties is that of employer and employee or independent contractor is whether the employer has the right to control the workmen with respect to the manner and method of doing the work as distinguished from the mere right to require certain results, and it is not material as determinative of the relationship whether the employer actually exercises the right of control. *Hinkle v. Lexington*, 105.

§ 39b. Workmen's Compensation Act—Employees and Independent Contractors.

The evidence disclosed that a cemetery caretaker employed by a municipality was charged with the duties, under the direction and control of the cemetery committee, of cutting grass, selling cemetery lots, digging graves, removing surplus dirt and other duties incidental to the position, and was paid a monthly salary by the city and was paid for digging graves by persons requiring his services. *Held:* The evidence supports the conclusion of the Industrial Commission to the effect that in digging graves he was an employee of the city and not an independent contractor. *Hinkle v. Lexington*, 105.

§ 40c. Workmen's Compensation Act—Whether Accident Arises Out of Employment.

The term "arising out of the employment" as used in the Workmen's Compensation Act refers to the origin or cause of the injury, and requires that there be some causal relation between the employment and the injury, but does not require that such injury could have been foreseen or expected. *Hinkle v. Lexington*, 105.

Evidence tending to show that a cemetery caretaker in the discharge of his duties customarily visited the funeral homes in the city early each evening to learn if graves were to be dug, funerals to be arranged, or cemetery lots to be sold, and that during the evening in question as he crossed the street enroute to a funeral home he was struck by an automobile, *is held* sufficient to support the conclusion that the injury arose out of the employment as a hazard incident to the performance of his duties. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 40d. Workmen's Compensation Act—Whether Accident Arises in Course of Employment.

The words "in the course of the employment" as used in the Workmen's Compensation Act relate to the time, place and circumstances under which an injury occurs. *Hinkle v. Lexington*, 105.

§ 40e. Workmen's Compensation Act—Heart Disease.

Findings to the effect that the employee suffered an injury arising out of and in the course of the employment, which injury aggravated a pre-existing heart condition and caused death, *is held* to support an award for compensation and burial expenses. *Wyatt v. Sharp*, 655.

§ 40f. Workmen's Compensation Act—Occupational Diseases.

Employer and carrier during last 30-day period employee is exposed to silicosis are liable. *Stewart v. Duncan*, 640.

§ 53b. Workmen's Compensation Act—Amount of Recovery.

Where the Industrial Commission finds that a disabled employee was suffering from tuberculosis as well as from silicosis, whether the award for disability from silicosis should be reduced one-sixth rests in the discretion of the Industrial Commission. *Stewart v. Duncan*, 640.

§ 53e. Employers and Insurance Carriers Liable for Award.

Where the evidence supports the findings of the Industrial Commission that the employee suffering disability from silicosis was exposed to the hazards of the disease for more than two years in the ten years preceding his disability and that he was last injuriously exposed to the hazards of the disease for thirty working days within seven consecutive calendar months while in the employment of defendant, G.S. 97-57 places liability therefor upon such employer and his insurance carrier during that period, and the mere fact that the employee was advised that he had silicosis prior to the expiration of this 30-day period but continued for a short time to perform his same work is insufficient alone to sustain the insurance carrier's contention that his employment after the discovery of the disease was in bad faith to make the loss fall upon it. *Stewart v. Duncan*, 640.

§ 55c. Workmen's Compensation Act—Preservation of Grounds of Review by Superior Court.

The procedure in appeals from the Industrial Commission to the Superior Court should conform substantially to that in appeals from subordinate courts when such appeals are restricted to questions of law by statute, and appellant should file a bill of exceptions setting out specifically each error of law he asserts was committed by the Commission in making the award. *Worsley v. Rendering Co.*, 547.

Where appellants on appeal from the full Commission to the Superior Court given written notice of appeal for errors of law in the review of an award made by the Industrial Commission, but file no exception to any finding of fact or conclusion of law made by the full Commission, the appeal constitutes a broadside exception to the award, which does not challenge the sufficiency of the evidence to support the findings of fact of the Commission or any one of them, and the record must be affirmed if the Commission's conclusions of law are supported by facts found. *Ibid.*

MASTER AND SERVANT—*Continued.*

Where appellant on appeal to the Superior Court does not except to any finding of the Industrial Commission or to the award, but merely gives notice of appeal for a review as to errors of law, the single question presented to the Superior Court is whether the facts found were sufficient to support the award. *Wyatt v. Sharp*, 655.

§ 55d. Workmen's Compensation Act—Review of Award in Superior Court.

When supported by competent evidence, the findings of fact by the Industrial Commission on a claim properly constituted under the Workmen's Compensation Act are conclusive on appeal, both in the Superior Court and in the Supreme Court. *Hinkle v. Lexington*, 105.

An exception to a finding of fact by the Industrial Commission on the ground that there was not sufficient competent evidence to support the same presents a question of law for the court. *Worsley v. Rendering Co.*, 547.

On appeal from the Industrial Commission, the Superior Court is an appellate court without power to find facts, but is limited to review of alleged errors of law made by the Commission and presented for decision by exceptions duly entered, and each such exception should be ruled upon separately so as to preserve the right to further review. *Ibid.*

While it is a better practice ordinarily for the Superior Court to rule separately upon each specific exception to the findings of fact and conclusions of law of the Industrial Commission, when the Superior Court affirms all such findings of fact and conclusions of law and the award, it amounts to a ruling on each and all such exceptions, and appellant on further appeal to the Supreme Court may file specific exceptions to each ruling on which he wishes to base an assignment of error. *Stewart v. Duncan*, 640.

§ 58. Employees Within Coverage of Employment Security Law.

When employment within the meaning of the Employment Security Law is once established and the employer becomes covered thereunder, he remains so until coverage is terminated as provided by G.S. 96-11. *Employment Security Com. v. Coe*, 84.

Findings *held* to support conclusion that shoeshine boy was employee of barber shop within meaning of Employment Security Law. *Ibid.*

A finding by the Employment Security Commission that the employer "engaged" the services of a shoeshine boy is tantamount to a finding that it employed the shoeshine boy, and his compensation in being permitted to retain whatever he was paid for shines, plus tips, constitutes wages or remuneration for his services within the meaning of the Act. *Ibid.*

When the Employment Security Commission finds upon competent evidence that a person was an employee of a defendant prior to 1949, the statute then in effect put the burden on such defendant to show to the satisfaction of the Commission that the services performed by such employee came within the exceptions provided by A, B and C of subsection (g) 7 of G.S. 96-8, and since the statute states these exceptions conjunctively, all three must be met in order for the employee to be exempt. *Ibid.*

§ 62. Appeal and Review of Orders of Employment Security Commission.

Findings of fact of the Employment Security Commission are conclusive on appeal when supported by competent evidence. *Employment Security Com. v. Coe*, 84.

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

Where a party pays in good faith, in ignorance of the facts, a sum of money to another for certain property, rights or interest, which in fact is worthless, so that there is a total failure of consideration, the money may be recovered under principles of justice, and where the purchaser sets up the defense of total failure of consideration in the seller's action for the balance of the purchase price represented by notes, it is error to nonsuit the purchaser's counterclaim to recover the cash paid. *Mills v. Bonin*, 498.

MORTGAGES.

§ 2e. Purchase Money Mortgages.

A purchase money deed of trust must be made as a part of the same transaction in which the debtor purchases land, embrace the land so purchased, and secure all or part of its purchase price. *Dobias v. White*, 409.

§ 27. Satisfaction by Reconveyance of Land to Mortgagee.

Where, in the payees' suit on the notes given for the purchase price of lands, the makers allege that the parties had agreed that the makers should reconvey the land to the payees in satisfaction of the notes and also other notes executed at the same time, and that the makers had tendered deed in performance of the agreement, and that they are still able, ready and willing to perform the accord in full, and that plaintiffs still hold all the notes evidencing the original claim, *held* the answer sets up facts entitling the makers to specific performance of the accord even though the answer does not demand such relief in explicit terms, and therefore the payees' motion for judgment on the pleadings should not be allowed. *Dobias v. White*, 409.

§ 36. Deficiency and Personal Liability.

Where a purchaser, to secure the balance of the purchase price for land, executes a deed of trust on land other than that purchased from the grantor, the instrument is not a purchase money deed of trust and G.S. 45-21.38 relating to deficiency judgments is inapplicable. *Dobias v. White*, 409.

MUNICIPAL CORPORATIONS.

§ 8e. Special Commissions.

Where the General Assembly by legislative act approves and ratifies a municipal ordinance setting forth therein the ordinance in full, the ordinance is merged into the legislative act, and a war memorial commission which is created therein as a legal entity becomes a creature of the Legislature and derives all of its legal functions and powers from the statute. *Greensboro v. Smith*, 138.

Where a municipal war memorial commission as constituted by statute of the General Assembly consists of fifteen commissioners with final authority to determine and designate the location of the proposed memorial, the city council is thereafter without authority to amend such commission's charter or modify its corporate powers, and an ordinance thereafter enacted increasing the number of commissioners to seventeen is void so that subsequent acts by the seventeen man commission, including the approval of a site for the memorial, are a nullity. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 12. Liability for Torts—Exercise of Governmental or Proprietary Function.

A municipality may not present the defense of governmental immunity by demurring unless the facts alleged in the complaint disclose that the acts complained of were committed by it in furtherance of a governmental function. *Foust v. Durham,* 306.

This action was instituted to recover damages resulting to plaintiff's goods stored in a basement when the basement was flooded with water from defendant municipality's main. Plaintiff alleged that the city owned and operated its water system in its proprietary capacity. *Held:* The allegation is not a mere conclusion, but is an allegation of an ultimate fact admitted by the demurrer. *Ibid.*

In the absence of statutory provision to the contrary, a municipality is not liable for the tortious acts of its officers or agents in discharging a duty imposed upon the municipality solely for the public benefit in the exercise of police power, or of judicial, discretionary or legislative authority. *Baker v. Lumberton,* 401.

In maintaining wires used in transmitting electricity solely for street lighting purposes, a municipality exercises a governmental function, and is not liable for any negligence of its officers and agents in the installation and maintenance of such wires. *Ibid.*

§ 15d. Torts—Injuries to Property from Drains and Culverts.

A municipality may be held liable for damages to lands resulting from obstructions of drains and culverts constructed by third persons only when the city adopts the drains and culverts as a part of its drainage system or assumes control and management thereof. *Johnson v. Winston-Salem,* 597.

In this action against a landowner for negligent failure to maintain a conduit under his land to take care of the natural drainage of surface waters, plaintiff's evidence disclosed that the city widened the street and constructed catch basins along land draining into the conduit, but did not show that the city increased the volume of surface waters beyond the capacity of the private conduit as constructed or exercise any control or supervision over it. *Held:* The evidence does not justify nonsuit on the ground that plaintiff's evidence showed that the city and not defendant was under legal duty to maintain the conduit. *Ibid.*

The fact that a municipality, after the basement in the house occupied by plaintiff had been flooded from overflow of a private culvert which had become obstructed, sent its employee to the premises and assisted in cleaning out the basement, and thereafter constructed another drain to take care of a part of the flow of surface waters, defendant furnishing the pipe, shows at most a joint undertaking by the city and defendant insufficient to exonerate the defendant from liability for failure to maintain his private conduit. *Ibid.*

§ 24½. Dedication of Property.

Held: Municipality dedicated land for school purposes and its use could not be diverted from this purpose without compensation to school authorities. *Spaugh v. Charlotte,* 149.

§ 37. Zoning Ordinances.

A municipality is not bound by its own zoning ordinances, and therefore in an action by a landowner to recover compensation for the depreciation of his

MUNICIPAL CORPORATIONS—*Continued.*

property resulting from the erection of a water storage tank in a residential zone, the existence of the ordinance has no bearing upon the question of damages and its admission in evidence is error, since the municipality has the right to erect the tank and compensation may be recovered only for a manner of use amounting to a taking. *McKinney v. High Point*, 232.

Zoning ordinances are enacted in the exercise of the police power granted a municipality and are subject to amendment or repeal at the will of its governing body, and therefore landowners within a residential zone can acquire no vested right therein and may not recover compensation for the depreciation of their property resulting from the erection by the municipality of a water storage tank in such zone in the exercise of a governmental function, and an instruction to the effect that such landowners are entitled to compensation for the impairment or destruction of their property right that the zone remain a residential area, and permitting the jury to consider as elements of damage the proximity of the tank to their premises, its height, etc., must be held for prejudicial error. *Ibid.*

§ 38. Ordinances Relating to Public Morals and Welfare—Sunday Observance.

In enacting and enforcing an ordinance for the observance of Sunday, a municipal corporation is vested with discretion in determining the kinds of pursuits, occupations or businesses to be included or excluded, and classifications will be upheld if they are reasonable and affect all within each class equally, the test being whether there is discrimination within a class and not whether there is discrimination as between the classes. *S. v. Towery*, 274.

The operator of a market coming within the purview of a municipal ordinance proscribing the carrying on of such business on Sunday may not defend a prosecution for selling prohibited articles by attacking the validity of the ordinance on the ground that some of his items of stock were sold by his competitors who came within a different classification and were permitted to sell such articles on Sunday. *Ibid.*

§ 43. Application of Revenue.

Municipality *held* to have authority to use profits from A.B.C. stores for recreational purposes in supplementing funds from special tax. *Greensboro v. Smith*, 138.

No site for having been chosen for War Memorial in contemplation of law, city *held* without authority to disperse war memorial funds or appropriate city funds of any kind toward the construction of the memorial at the site approved by the seventeen man commission. *Ibid.*

§ 46. Actions Against City in Tort—Notice and Filing of Claim.

A cause of action by a property owner to recover for depreciation of the value of his property resulting from the reflection of the rays of the sun by the aluminum paint on defendant's water storage tank does not arise until the tank is painted with aluminum paint, and this date must be used in determining whether plaintiff's claim was filed in apt time, if indeed, the municipal charter provisions in regard thereto apply to such action. *McKinney v. High Point*, 232.

Action for taking of easement does not come within charter provisions requiring notice. *Lyda v. Marion*, 265.

MUNICIPAL CORPORATIONS—*Continued.*

Action for continuous trespass in diversion of surface water does come within provision requiring notice. *Ibid.*

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

Negligence is the failure to exercise that degree of care which an ordinarily prudent man would exercise under like conditions in the performance of some legal duty which the defendant owes the plaintiff under the circumstances in which they are placed. *Henderson v. Henderson,* 487.

Negligence involves more than merely being at particular place at particular time. *Ibid.*

§ 2. Sudden Peril and Emergencies.

When confronted with a sudden emergency created by the negligence of the adverse party, the driver of an automobile, who is in no respect at fault, is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made. *Henderson v. Henderson,* 487.

§ 3½. Res Ipsa Loquitur.

Where the thing causing injury is under the exclusive management and control of defendant, and the occurrence is such as does not happen in the ordinary course of things if the person having the management and control uses the proper care, the doctrine of *res ipso loquitur* applies. *Young v. Anchor Co.,* 288.

Doctrine *held* applicable to fall of store patron resulting from jerking of escalator. *Ibid.*

The doctrine of *res ipsa loquitur* does not apply when the instrumentality causing the injury is not under the exclusive control or management of the defendant. *Smith v. Oil Corp.,* 360.

The operator of a service station made a contract with an oil company under which the company installed storage tanks, pumps and connecting pipes, retaining title to all the equipment, and defendant was obligated to maintain the equipment in good condition and repair so long as he continued to use same. *Held:* The doctrine of *res ipsa loquitur* does not apply to leaks discovered in the pipes connecting the storage tanks and pumps, since the instrumentality was not under the exclusive control of the company. *Ibid.*

§ 4b. Attractive Nuisances.

Allegations to the effect that defendants constructed a dam creating an artificial pond on defendants' land, without allegation of any unusual condition or artificial feature other than the mere existence of the pond, *is held* insufficient to state a cause of action to enjoin the maintenance of the pond or to abate it as an attracive nuisance, allegations that it constituted a nuisance and dangerous condition being disregarded as mere conclusions of law, and the maintenance of an unenclosed pond not being negligence *per se. Stribbling v. Lamm,* 529.

§ 4f. Injury to Store Patrons.

Evidence tending to show that an escalator under the exclusive management and control of the defendant store suddenly jerked, stopped and then moved

NEGLIGENCE—*Continued.*

forward, causing the plaintiff patron to fall to her injury, *is held* sufficient to make out a case for the jury under the doctrine of *res ipsa loquitur. Young v. Anchor Co.*, 288.

A store providing an escalator for the use of its customers is under duty of continuous inspection and maintenance and due care in its operation. *Ibid.*

§ 5. Proximate Cause in General.

Omission to perform duty cannot constitute a proximate cause unless its performance would have prevented injury. *Cozart v. Hudson*, 279.

Proximate cause of an injury is that cause which produces the injury in continuous sequence under circumstances from which any man of ordinary prudence could have foreseen that such result was probable under the existing facts, foreseeability being an essential element of proximate cause. *Henderson v. Henderson*, 487.

§ 6. Concurrent Negligence.

Concurrent negligence consists of negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence in producing a single, indivisible injury. *Yandell v. Fireproofing Co.*, 1.

§ 7. Intervening Negligence.

Mere negligent omission of a person under duty of making inspection to discover and interrupt the result of a dangerous condition caused by the act of another does not constitute an intervening or superseding efficient cause relieving the original actor of liability. *Yandell v. Fireproofing Co.*, 1.

Allegations *held* to show that negligence of gas company in maintaining pipes too near surface of ground and failing to maintain proper safety devices at meter was insulated by negligence of street contractor in striking pipe with excavating machine. *Hayes v. Wilmington*, 238.

§ 8. Primary and Secondary Liability.

Upon allegations, negligence of gas company in maintenance of pipes too close to surface, etc., was passive, and negligence of road contractor in striking pipes was active, and therefore contractor could not maintain that gas company was primarily liable. *Hayes v. Wilmington*, 238.

§ 10. Last Clear Chance.

Evidence *held* insufficient to support issue of last clear chance. *Medlin v. Spurrier & Co.*, 48.

Plaintiff pedestrian, in invoking the doctrine of last clear chance, must show that he negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care, that defendant motorist discovered, or by the exercise of reasonable care should have discovered, plaintiff's position of peril and his incapacity to escape from it before injury, and in time to have avoided the injury to plaintiff with the means at hand, and that defendant negligently failed to use the available time and means to avoid the injury, and injured him. *Wade v. Sausage Co.*, 524.

§ 11. Contributory Negligence in General.

The law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, and the degree of such care should be commensurate with the danger to be avoided. *Baker v. Lumberton*, 401.

NEGLIGENCE—*Continued.*

§ 17. Presumptions and Burden of Proof.

Mere fact of injury raises no presumption of negligence. *Smith v. Oil Corp.*, 260.

§ 19b (1). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence *held* insufficient to be submitted to jury on issue of oil company's negligence in installing underground equipment for gasoline pumps or in failing to discover leakage from underground pipes. *Smith v. Oil Corp.*, 260.

§ 19b (3). Sufficiency of Evidence and Nonsuit—Res Ipsa Loquitur.

Proof of circumstances invoking the doctrine of *res ipsa loquitur* merely constitutes a mode of proving negligence sufficient to make out a case for the jury, but does not affect the burden of proof, and plaintiff still has the burden of showing by the preponderance of the evidence that her injuries were proximately caused by the negligence of the defendant. *Young v. Anchor Co.*, 288.

§ 19b (4). Sufficiency of Evidence and Nonsuit—Circumstantial Evidence.

Direct evidence of actionable negligence on defendant's part is not requisite; such negligence may be inferred from relevant facts and circumstances. *Styers v. Bottling Co.*, 504.

§ 19c. Nonsuit on the Ground of Contributory Negligence.

Nonsuit on the ground of contributory negligence may be properly entered only when plaintiff's own evidence establishes this defense as the sole reasonable inference deducible therefrom, and it may not be entered when it is necessary to rely in whole or in part on defendant's evidence or when diverse inferences upon the question are reasonably deducible from plaintiff's evidence. *Gibson v. Whitton*, 11.

Motion for involuntary nonsuit on the ground of contributory negligence will not be sustained or directed unless the evidence is so clear on that issue that no other logical inference can reasonably be drawn from the evidence considered in the light most favorable to plaintiff. *Singletary v. Nixon*, 634.

Act of intestate in walking toward fallen wire, which was emitting sparks, *held* contributory negligence barring recovery. *Baker v. Lumberton*, 401.

§ 19d. Nonsuit for Intervening Negligence.

Act of third person in throwing fallen "dead" wire toward pole, so that it became energized by another wire, and electrocuted intestate, *held* to insulate city's negligence in maintenance of wire. *Baker v. Lumberton*, 401.

§ 19e. Nonsuit on Question of Proximate Cause.

When evidence relating to the questions of negligence and proximate cause is so clear that only a single conclusion can reasonably be drawn therefrom, the court should draw the conclusion as a matter of law. *Wrenn v. Graham*, 462.

§ 20. Instructions in Negligence Actions.

An instruction to the effect that a finding by the jury of facts sufficient to constitute a predicate for the application of the doctrine of *res ipsa loquitur* was sufficient to warrant a judgment for plaintiff must be held for reversible error in failing to instruct the jury to the effect that such circumstance must

NEGLIGENCE—*Continued.*

have been the proximate cause of plaintiff's injury in order to warrant such a verdict. *Young v. Anchor Co.*, 288.

NUISANCE.

§ 6b. Public Nuisances—Matters Relating to Public Morals.

An establishment used for the purpose of gambling constitutes a nuisance, G.S. 19-1. *Summerell v. Racing Asso.*, 591.

PARTIES.

§ 1. Necessary Parties Plaintiff.

Under the general rule that all persons claiming an interest in the subject matter or whose rights might be affected by the judgment, it is *held* in this action to close an alleyway at the *cul-de-sac* end that parties having or claiming an easement in the alleyway are necessary parties, but parties who have leased or conveyed their interest are not necessary parties. *Hine v. Blumenthal*, 537.

§ 12. Deletion of Parties.

When no cause of action is stated either in the complaint or cross action against a codefendant joined on motion of the original defendant for the purpose of contribution, such additional defendant is an unnecessary party and the inclusion of his name is mere surplusage, and he is entitled to have his name stricken from the pleadings on motion. *Hayes v. Wilmington*, 238.

While ordinarily one Superior Court judge may not review the judgment of another, where an order making an additional party is entered without notice or hearing to such party, the order making him an additional party cannot preclude him from thereafter moving that his name be stricken from the pleadings, since the rule cannot abrogate rights guaranteed by the due process clause of the Constitution. *Ibid.*

PARTITION.

§ 1a. Right to Partition in General.

The will devised farm lands to testator's three children with provision that his widow take a dower right therein. By further provision testator stipulated that it was his will that the farms be operated jointly by the beneficiaries for a period of ten years after his death. *Held:* Testator's intent will be given effect, and none of the beneficiaries is entitled to partition of the lands during the ten-year period, the limitation not being an unlawful restraint on alienation nor limitation repugnant to the fee. *Anderson v. Edwards*, 510.

§ 4a. Procedure.

A proceeding for partition of real or personal property is a special proceeding of which the clerk has jurisdiction under procedure in all respects the same as that prescribed by law in special proceedings except as modified by G.S. 46-1. *DuBose v. Harpe*, 672.

Venue for partition of either real or personal property in county wherein property is located, and not county of residence of either party. *Ibid.*

PARTNERSHIP.

§ 2. Firm Property and Business.

Partners have a fiduciary relationship to each other which imposes upon them the obligation to use the utmost good faith in dealing with one another in respect to partnership affairs, each being the confidential agent of the other with the right to know all that the other knows in regard to the partnership affairs. *Casey v. Grantham*, 121.

§ 9b. Dissolution by Sale of Assets to Copartner.

Evidence of total failure of consideration for notes given for net worth of partner's interest held for jury. *Mills v. Bonin*, 498.

§ 12. Settlement Between Partners.

Allegations of a partner that the other partner had usurped complete control and exclusive possession of the books, records and entire assets of the partnership and was squandering its earnings and assets, and had refused, after demand, to account to plaintiff for any share of the profits or earnings of the business, *is held* to state a cause of action for an accounting between the partners. *Casey v. Grantham*, 121.

§ 15. Dissolution—Application of Assets, Individual Liability.

Under the equitable principle of marshaling of assets, a partner is entitled to have the partnership property first applied to the payment or security of partnership debts before resort is had to his individual assets. *Casey v. Grantham*, 121.

Where partners and their wives execute a deed of trust on the entire partnership property and also the individual realty of the partners to secure a partnership debt, allegations of one of the partners that the partnership property is sufficient to discharge the debt in full without resort to his individual property states a cause of action in his favor to enjoin the foreclosure of the deed of trust *en masse* pending an accounting of the partnership assets. *Ibid.*

In partner's action against copartner for accounting he may enjoin lien-creditor from foreclosing deed of trust on partnership and individual property pending accounting. *Ibid.*

PAYMENT.

§ 2. Payment by Check.

In the absence of an agreement to the contrary, the delivery and acceptance of a check does not constitute payment of the item covered by it until the check itself is paid by the bank on which it is drawn. *Wilson v. Finance Co.*, 349.

PHYSICIANS AND SURGEONS.

§ 14. Malpractice—Duties and Liabilities of Physicians and Surgeons in General.

By undertaking to treat a patient, a physician implies that he has the degree of learning, skill and ability necessary to the practice of his profession which is ordinarily possessed by others similarly situated, that he will exercise reasonable and ordinary care and diligence in the use of his skill and the application of his knowledge to the patient's case, and that he will exert his best judgment in the treatment and care of the case. *Hawkins v. McCain*, 160.

A physician is not a warrantor of cures nor an insurer. *Ibid.*

PHYSICIANS AND SURGEONS—*Continued.*

§ 18½. Actions for Malpractice—Burden of Proof and Presumptions.

In an action for malpractice, the burden is upon plaintiff to prove by the greater weight of the evidence not only that defendant was negligent, but that such negligence was the proximate cause or one of the proximate causes of her injury. *Hawkins v. McCain*, 160.

Where certain treatment is approved and in general use by the medical profession for the treatment of a particular disease the mere fact that the patient has an unfavorable reaction therefrom does not support the application of the doctrine of *res ipsa loquitur*. *Ibid.*

§ 20. Actions for Malpractice—Sufficiency of Evidence and Nonsuit.

Evidence tending to show that plaintiff was suffering from a malignant and debilitating disease, that thereafter she went to defendant physician for a skin disorder, that he prescribed an arsenic solution, and that after using it for a short time plaintiff's legs became swollen and the side of her face broke out with yellow blisters, for which she went to a hospital for treatment by other physicians, without evidence that the treatment prescribed by defendant was not approved and in use by the medical profession generally in such cases or that defendant did not have the requisite degree of learning or skill or failed to use his best judgment in the treating of the case, together with defendant's evidence that her hospital treatment was for another disease, *is held* insufficient to be submitted to the jury in plaintiff's action for malpractice, there being no evidence that defendant's treatment caused the latter disease or aggravated her condition in respect to her former disease. *Hawkins v. McCain*, 160.

Upon motion for nonsuit in an action for malpractice, defendant's expert testimony is properly considered to ascertain the nature of the diseases the plaintiff had according to her evidence, both before and after the treatment by defendant. *Ibid.*

PILOTS.

§ 6. Licensing.

Plaintiff sought the reinstatement of his pilot's license under the provisions of G.S. 76-2, and the parties waived jury trial and agreed that the court might find the facts. *Held:* There being no finding or request for finding that plaintiff's license was revoked or his application for reinstatement refused on the ground that there was a sufficient number of pilots for the commerce on the river, or that the license was revoked or reinstatement refused without cause, *mandamus* will not lie to compel the issuance of license, since in such instance the writ would control the exercise of judgment by the licensing board. *St. George v. Hanson*, 259.

PLEADINGS.

§ 2. Joinder of Actions.

In partner's action against copartner for accounting, plaintiff may enjoin lien creditor from foreclosing deed of trust on partnership and individual property pending the accounting. *Casey v. Grantham*, 121.

§ 3a. Statement of Cause of Action in General.

Ordinarily the complaint should state the material and ultimate facts upon which plaintiff's rights depend, and should not include allegation of evidentiary facts. *Foust v. Durham*, 306.

PLEADINGS—*Continued.*

§ 5. Prayer for Relief.

The facts alleged in a pleading and not the prayer for relief is determinative. *Dobias v. White,* 409.

§ 10. Counterclaims.

Where a creditor who has breached his agreement for an accord sues the debtor to enforce the original claim, the debtor may set up as a counterclaim either a demand for damages for the breach of the accord or a demand for its specific enforcement. *Dobias v. White,* 409.

§ 15. Office and Effect of Demurrer.

A demurrer admits the truth of the allegations of fact contained in the complaint and ordinarily relevant inferences of fact necessarily deducible therefrom, construing the complaint liberally, but the demurrer does not admit conclusions or inferences of law. *Daniels v. Yelverton,* 54; *Stribbling v. Lamm,* 529.

A demurrer admits the truth of the allegations of fact contained in the pleading for the purpose of testing the sufficiency of the complaint. *Hill v. Erwin Mills,* 437.

Upon demurrer, the factual allegations of the complaint are to be taken as true and the pleader given the benefit of every reasonable intendment therefrom, and the pleading liberally construed with a view to substantial justice between the parties. *Casey v. Grantham,* 121.

A demurrer does not admit conclusions of law of the pleader. *Newton v. Highway Comm.,* 433.

In passing upon a demurrer, the court is confined to a consideration of the complaint without reference to any fact not alleged therein. *Foust v. Durham,* 306.

§ 16. Time of Demurring and Waiver of Right to Demur.

Failure to demur for failure of complaint to state cause of action does not waive the defect, but Supreme Court may take notice of such defect *ex mero motu. Dulin v. Williams,* 33; *Daniels v. Yelverton,* 54; *Fuquay Springs v. Rowland,* 299.

Objection of want of jurisdiction may be taken at any time. *Spaugh v. Charlotte,* 149.

§ 19f. Demurrer—Aider by Answer.

The want of allegations in the complaint necessary to state a cause of action against one defendant cannot be supplied by allegation in the cross action of a codefendant. *Dulin v. Williams,* 33.

§ 22b. Amendment of Pleadings.

The trial court has authority to permit an amendment to the pleadings which does not change substantially the claim or defense, G.S. 1-163. *Brown v. Estates Corp.,* 595.

The trial court may permit an amendment to the pleadings before or after verdict and judgment so that the pleadings will conform to the evidence offered, provided the amendment does not change substantially the claim or defense. G.S. 1-163. *Wheeler v. Wheeler,* 646.

PLEADINGS—*Continued.*

Independent of statute, the trial court may allow an amendment to the pleadings in its inherent discretion within the limitation that an amendment must not, in effect, add a new cause of action or change the subject matter of the original action. *Ibid.*

Where plaintiff alleges that defendants agree to convey to him a small tract of land upon which plaintiff had built a residence, but the testimony is that defendants agreed to give plaintiff notes for the amount expended by plaintiff in erecting the residence, *held,* the trial court may allow plaintiff to amend to make the allegation conform to the proof. *Ibid.*

§ 24. Allegation, Proof and Variance.

Plaintiffs must make out their case *secundum allegata.* *Lyda v. Marion,* 265.

Both allegation and proof are necessary and must substantially correspond with each other, and the absence of either constitutes a fatal variance which requires dismissal. *Bank v. Caudle,* 270.

§ 25½. Admissions or Denials and Necessity for Proof.

The admission in the answer of a material fact specifically alleged in the complaint which constitutes the basis of one of the issues, establishes such fact for the purposes of the trial, and therefore the introduction in evidence of the admission is not required. *Hartley v. Smith,* 170.

When each basic fact upon which the conclusions of law are predicated are admitted in the pleadings or stipulated by the parties in an agreed statement of facts, no issue of fact is raised for the determination of a jury. *Jamison v. Charlotte,* 682.

§ 28. Motions for Judgment on Pleadings.

Plaintiffs' motion for judgment on the pleadings should be allowed only if the answer admits every material averment in the complaint and fails to set up any defense or new matter sufficient in law to avoid or defeat the plaintiffs' claim. *Dobias v. White,* 409.

A motion for judgment on the pleadings admits for its purposes the truth of the allegations in the pleading of the adverse party. *Ibid.*

In proceedings by the administrator to sell lands to make assets to pay debts of the estate, allegations of respondents denying the existence of any debt of the estate which would warrant the relief, *is held* to raise issues of fact precluding judgment on the pleadings in favor of petitioner. *Alexander v. Galloway,* 554.

§ 30. Motions to Strike.

Upon plaintiff's motion to strike, allegations in the answer setting out a parol agreement in conflict with the writing declared on by plaintiff as well as allegations setting forth erroneous conclusions of law based thereon and allegations not pertinent to any valid defense, are properly stricken on motion. *Neal v. Marrone,* 73.

A person who is made a party to an action but who is an unnecessary party thereto may have his name stricken from the pleadings on motion. *Hayes v. Wilmington,* 238.

PRINCIPAL AND AGENT

§ 7a. Power and Authority of Agent to Bind Principal.

In order for defendant to show that the contract in suit had been modified by plaintiff's agent, he must show that such person was in fact the agent of plaintiff, and also that the agent was clothed with actual authority to vary the terms of the contract, or apparent authority to do so, as being within the scope of his duties. *Edgewood Knoll Apts. v. Braswell*, 560.

PRINCIPAL AND SURETY.

§ 8. Bonds for Private Construction.

A contractor's performance bond must be read in the light of the contract it is given to secure, and the extent of the engagement entered into by the surety is to be measured by the terms of the principal's agreement. *Edgewood Knoll Apts. v. Braswell*, 560.

A provision in a subcontractor's performance bond that suit thereon should not be maintained unless brought within 12 months from the completion of the contract relates to the full performance of the contract by both parties and not to the date of the completion of the work, and the contract being bilateral, it is not completed until the project has been completed and approved, and final payment made thereunder, and action brought within 12 months thereafter is not barred. *Ibid.*

Where the surety's answer admits that plaintiff owner forwarded to the surety a copy of a letter to the subcontractor alleging certain defaults by the subcontractor in the performance of the work, the surety's motion to nonsuit on the ground that the owner did not give it written notice of default is properly denied. *Ibid.*

Where the performance bond of a subcontractor provides that it should not be assignable without the written consent of the surety, the introduction in evidence of the bond with a written assignment by the owner of all its right, title and interest in the bond to the bank as security, together with testimony of an officer of the bank that the bank handled the construction loan but that it had no interest in the bond, and that the surety had not consented to the assignment, *is held* to disclose that the assignment was not completed, and the surety's motion to nonsuit the owner's action on the ground that it was not the real party in interest is properly denied. *Ibid.*

RECEIVING STOLEN GOODS.

§ 3. Consolidation of Indictments for Trial.

Where two persons are charged in separate bills of indictment with receiving stolen goods knowing them to have been stolen, and there is no evidence tending to show there was a conspiracy between them, or between them and other parties, but the indictments relate to the receiving of goods separately by each defendant at different times and places, the consolidation of indictments for trial over objection of appealing defendant must be *held* for prejudicial error. *S. v. Dyer*, 713.

REGISTRATION.

§ 4. Rights of Parties as to Subseqently Registered or Unregistered Instruments.

Allegation that plaintiff had timber deed, unregistered, and that grantor thereafter conveyed fee to third person who had actual knowledge of plaintiff's timber rights, fails to state cause of action against subsequent grantee, since he had right to deal with land as though no timber rights had been conveyed. *Dulin v. Williams*, 33.

SALES.

§ 11, 12. Transfer of Title as Between Parties and Rights of Third Persons.

Under contract for cash sale, title does not pass if check given in payment is dishonored, and owner may recover same from *bona fide* purchaser or mortgagee of person obtaining possession by the worthless check, in absence of estoppel. *Wilson v. Finance Co.*, 349.

SCHOOLS.

§ 6c. Title and Right to Property.

Held: Municipality dedicated land for school purposes and its use could not be diverted from this purpose without compensation to school authorities. *Spaugh v. Charlotte*, 149.

SEARCHES AND SEIZURES.

§ 1. Necessity for Warrant.

Evidence of the finding of nontax-paid liquor near defendant's premises but actually on the land of another is not rendered incompetent because not discovered under authority of a search warrant, since a warrant is not necessary for its seizure. *S. v. Harrison*, 659.

Testimony of officers that while looking through a window of defendant's house on their way to serve a search warrant, they heard and saw incriminating matter, *held* not incompetent merely because the information was obtained before serving the warrant. *Ibid.*

STATUTES.

§ 13. Repeal by Implication and Construction.

Repeal of statutes by implication is not favored, and in order for a later statute to repeal a former statute by implication the statutes must be irreconcilable, or the intent to effect a repeal must be clearly apparent. *Spaugh v. Charlotte*, 149.

TAXATION.

§ ½. Tax as Distinguished from Assessment.

A tax levied in a hospital district for a public hospital is a general tax levied for a special purpose as distinguished from a special assessment. *Williamson v. Snow*, 493.

§ 1a. Uniform Rule and Discrimination.

Uniformity in taxation on real and personal property is effected when a tax is levied equally and uniformly on all property in the same class. *Jamison v. Charlotte*, 682.

TAXATION—*Continued.*

The rule of uniformity in taxation does not apply to the expenditure of the funds derived from a tax. *Ibid.*

§ 4. Necessity for Vote and Election for Bonds Not for Necessary Expenses.

Only a single proposition may be placed on the ballot for submission to the voters in a bond election, since the submission of dual propositions would defeat the right of the voters to express their choice. *Jamison v. Charlotte*, 682.

In a bond election in a county and a city situate therein, the submission to the voters of the question of the issuance of county bonds in a stipulated sum and city bonds in a stipulated sum for the purpose of providing funds for erecting and equipping public libraries for the city and for the county, and the imposition of a tax within the city for the payment of the city bonds and a tax in the entire county, including the city, for the payment of the county bonds, as a single question, *is held* the submission of but a single proposition so related and united as to form a rounded whole and does not violate the Constitution of North Carolina. Article V, Sec. 4, or Article VII, Sec. 7.

§ 5. Public Purpose.

While a municipal swimming pool is not a necessary expense of government within the purview of Art. VII, sec. 7, of the Constitution of North Carolina, and a tax therefor may not be levied without the approval of its voters, such a facility is a public purpose for which the municipality may expend unallocated municipal liquor store profits without a vote, Ch. 394, Session Laws 1951. *Greensboro v. Smith*, 138.

The expenditure of tax funds for a general county hospital is for a public purpose, and, when authorized by statute, a county has authority, with the approval of its voters, to issue bonds to provide hospital facilities for those able to pay for the services rendered them as well as for the sick and afflicted poor. *Rex Hospital v. Comrs. of Wake*, 312.

While bonds for public library purposes are not for a necessary county or municipal expense, they are for a public purpose and may be issued by the county and by a municipality therein upon statutory authority with the approval of the qualified voters of the respective taxing units. Constitution of North Carolina, Article IX, Sec. 1; Chapter 1034, Session Laws of 1949. *Jamison v. Charlotte*, 682.

§ 9. Tax on One Community for Benefit of Another and Double Taxation.

A tax levied pursuant to the approval of the voters in a hospital district for the purpose of establishing and maintaining a public hospital in the district is a general tax levied for a special purpose as distinguished from a special assessment, and therefore a hearing on the benefits to be conferred upon the property within the district and the exclusion from the tax of property not benefited, is not required, Constitution of North Carolina, Article I, Sec. 17; G.S., Article 13C, Chapter 131. *Williamson v. Snow*, 493.

The imposition of a tax on county property, including property within a city situate therein, to provide funds for county library purposes, and the imposition of a tax within the city to provide funds for municipal library purposes, does not violate the rule prescribing uniformity in taxation, notwithstanding that a greater burden of taxation will be placed on the taxpayers of

TAXATION—*Continued.*

the municipality, nor does it constitute double taxation, since one tax will be imposed by the city for municipal purposes and the other by the county for county purposes. Further, double taxation is prohibited by neither the State nor Federal Constitutions. Constitution of North Carolina, Article V, Sec. 3; Chapter 1034, Session Laws of 1949. *Jamison v. Charlotte,* 682.

§ 10½. Application of Proceeds of Tax or Bond Funds.

The fact that a municipality levies a special tax for recreational purposes with the approval of its voters does not deprive the municipality of the right to supplement such special tax funds with moneys derived from the operation of municipal liquor control stores, there being no stipulation, express or implied, in the issue submitted to the voters for the special tax that the amount spent for recreational purposes should be limited to funds raised by such special tax. *Greensboro v. Smith,* 138.

§ 38a. Remedies of Taxpayer—Enjoining Issuance of Bonds.

A taxpayer may maintain an action to enjoin on constitutional grounds the proposed issuance of bonds approved in an election irrespective of whether the action is instituted within the statutory period of thirty days after the publication of the result of the election. *Jamison v. Charlotte,* 682.

§ 38b. Remedies of Taxpayer to Prevent Levy and Collection of Taxes.

Ordinarily, neither the State nor its political subdivisions may be denied or delayed in the enforcement of the right to collect revenue, and if a tax is levied which the taxpayer deems unauthorized, he must pay same under protest and then sue for its recovery, G.S. 105-406. The Declaratory Judgment Act does not supersede this rule or provide an additional or concurrent remedy. *Development Co. v. Braxton,* 427.

§ 39. Sale of Personalty.

Execution on certificate of Commissioner of Revenue, docketed in Superior Court, must be issued by clerk and may not be issued by Commissioner of Revenue. *Daniels v. Yelverton,* 54.

§ 40b. Foreclosure of Tax Sale Certificates.

Where the purchaser of tax sale certificates has himself made substitute plaintiff in lieu of the county which had brought action to foreclose the certificates, but files no complaint or amendment to the original complaint alleging facts which would entitle him to the relief originally sought by the county, nor, upon his death, does his personal representative file any pleadings, nonsuit should be allowed for fatal variance. Motions and orders entered in the cause stating that the individual had purchased the tax sale certificates and had succeeded to the rights of the county cannot supply the deficiency, since a cause must be tried on the pleadings filed therein. *Bank v. Caudle,* 270.

TELEPHONE AND TELEGRAPH COMPANIES.

§ 1c. Rates.

Rules to be followed by Utilities Commission in ascertaining value of property of utility for rate-making purposes. *Utilities Com. v. Telegraph Co.,* 333.

TORTS.

§ 6. Right to Joinder of Additional Defendants for Contribution.

Answer of carriers *held* to state cause of action against shipper for contribution in action by employee of consignee to recover for injuries received in unloading defective box car. *Yandell v. Fireproofing Corp.*, 1.

Adjudication that plaintiff had failed to state a cause of action against one defendant as a joint tort-feasor does not preclude the other defendant from asserting a cross action against such defendant for contribution. *Ibid.*

Right of one defendant to have another defendant joined for the purpose of contribution is purely statutory and must be enforced in accordance with the provisions of the statute. *Hayes v. Wilmington*, 238.

In order for one defendant to join another as additional defendant for the purpose of contribution he must show by his allegations facts sufficient to make them both liable to the plaintiff as joint tort-feasors, and allegations showing only a cause of action which would entitle the plaintiff to recover of such additional party are not sufficient. *Ibid.*

Where one defendant seeks to have another defendant retained in the action as a joint tort-feasor, the original defendant must allege facts which, if proven, render such other defendant liable to him for contribution in the event plaintiff recovers, and in so doing he cannot rely upon the allegations of the complaint. *Ibid.*

In action against contractor to recover for explosion of gas resulting when excavating machine struck pipe, contractor *held* not entitled to joinder of gas company for contribution. *Ibid.*

TRESPASS.

§ 1e. Trespass by Discharge of Surface Waters.

A cause of action against a municipality to recover for the diversion of surface waters upon plaintiff's lots incident to the paving of the street and the construction of gutters, without allegation of negligence, is a cause of action to recover for a continuing trespass. *Lyda v. Marion*, 265.

TRIAL.

§ 6. Argument of Counsel.

Where there is evidence that the mortgagee took his mortgage immediately after the mortgagor obtained possession, applied a large part of the proceeds of the loan to a pre-existing debt of the mortgagor, and falsely denied possession of the chattel when the true owner sought information after the disappearance of the mortgagor, *held* argument of counsel that the mortgagee attempted to practice a fraud upon the true owner is not beyond the bounds of propriety. *Wilson v. Finance Co.*, 349.

Upon defendant's objection to remarks of plaintiff's counsel to the effect that the jury need not worry "about where the money comes from" and that a defendant who could have four lawyers "must have some money somewhere," the court, in the exercise of his discretionary control over the conduct of the trial, categorically instructed the jury not to consider the remark, and repeated the caution in his instructions to the jury. *Held:* The exception to the denial of defendant's motion to withdraw a juror and order a mistrial cannot be sustained, it appearing that the court took proper precaution to prevent prejudice. *Hamilton v. Henry*, 664.

TRIAL—*Continued.*

§ 14. Objections and Exceptions to Admission or Exclusion of Evidence and Motions to Strike.

While G.S. 1-206 (3) obviates necessity for exception to admission of evidence over objection, it does not relieve party of necessity of objecting and excepting to exclusion of evidence on objection of adverse party. *S. v. Howell*, 78.

Where an answer is not responsive to the question the adverse party must request that it be stricken or the jury instructed not to consider it, and an objection to the question alone is insufficient. *Highway Commission v. Black*, 198.

§ 17. Admission of Evidence Competent for Restricted Purpose.

The general admission of evidence competent only for the purpose of corroboration will not be held for error in the absence of a request by defendant at the time of its admission that its purpose be restricted. *S. v. Turberville*, 25.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to her. *Hawkins v. McCain*, 160.

On motion to nonsuit, all the evidence, whether introduced by plaintiff or defendant, which tends to support plaintiff's claim will be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference that can legitimately be drawn therefrom and resolving any contradictions or discrepancies in his favor. *Cozart v. Hudson*, 279; *Singletary v. Nixon*, 634.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

Upon motion to nonsuit, defendant's evidence may be considered to the extent that it is not in conflict with plaintiff's evidence, but tends to explain or make clear that which has been offered by plaintiff. *Hawkins v. McCain*, 160; *Singletary v. Nixon*, 634.

On motion to nonsuit, defendant's evidence in conflict with that of plaintiff is to be ignored. *Cozart v. Hudson*, 279; *Singletary v. Nixon*, 634.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

There must be legal evidence of every material fact necessary to support the verdict, and if there be no evidence of each such fact or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury. *Smith v. Oil Corp.*, 360.

When the evidence relating to a particular question or issue is so clear that only a single conclusion can reasonably be drawn therefrom, such conclusion should be declared by the court as a matter of law. *Wrenn v. Graham*, 462.

§ 23f. Nonsuit for Variance.

Nonsuit is proper when there is a fatal variance between allegation and proof. *Bank v. Caudle*, 270.

§ 24a. Nonsuit on Affirmative Defense.

Where plaintiff's evidence establishes as a matter of law an affirmative defense set up by defendant, nonsuit is proper. *Jarman v. Offutt*, 468; *Johnson v. Winston-Salem*, 697.

TRIAL—*Continued.*

§ 29. Directed Verdict in Favor of Party Having Burden of Proof.

In an action for malicious prosecution an instruction to the effect that all the evidence tended to show that defendant had knowledge of facts negating probable cause and that the jury should answer the issue as to want of probable cause in the affirmative must be held for reversible error, since the instruction is tantamount to a directed verdict on the issue in favor of plaintiff upon whom rested the burden of proof. *Bryant v. Murray*, 18.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

Charge held for error in failing to instruct jury on material aspect presented by evidence. *Medlin v. Spurrier & Co.*, 48.

An erroneous statement of the law, even though made in stating a contention of a party, constitutes prejudicial error. *Hartley v. Smith*, 170; *S. v. Grayson*, 453.

An erroneous statement of the law, even though made in the form of stating a contention of a party, must be held for reversible error when the court does not charge the jury as to the erroneous nature of the contention or give the jury the correct rule to be followed by them in arriving at their verdict. *McKinney v. High Point*, 232.

§ 31c. Instructions—Conformity to Pleadings and Evidence.

Instruction held for error in failing to conform to pleadings and evidence. *Wheeler v. Wheeler*, 646.

§ 31e. Instructions—Expression of Opinion by Court on Evidence.

The mere fact that the court takes longer in stating the contentions of plaintiff than those of defendants is not ground for new trial, the test being whether the court gives equal stress to the contentions of the respective parties. *Edgewood Knoll Apts. v. Braswell*, 560.

§ 31g. Instructions on Credibility of Witnesses.

The charge of the court as to the credibility of the witnesses *held* without error on authority of *Herndon v. R. R.*, 162 N.C. 317. *Styers v. Bottling Co.*, 504.

§ 36. Form and Sufficiency of Issues.

The court is not required to adopt any particular form of issues except to see that those which are submitted embrace all essential questions in controversy. *O'Briant v. O'Briant*, 101.

It is the duty of the court either of its own motion or at the suggestion of counsel, to submit to the jury the issues raised by the pleadings and supported by the evidence which are necessary to settle the material controversies, G.S. 1-200. *Wheeler v. Wheeler*, 646.

§ 48½. Jurisdiction to Hear Motions to Set Aside Verdict in General.

Where plaintiff fails to prosecute her appeal from judgment against her, and her application for writ of *certiorari* has been denied, litigation involved in the action is at an end, and her motion thereafter made in the Superior Court to set aside the judgment and grant a new trial is properly denied, since one Superior Court judge may not modify, reverse or set aside judgment of another Superior Court judge. *Davis v. Jenkins*, 533.

TRIAL—*Continued.*

§ 49. Setting Aside Verdict as Against Weight of Evidence.

Held: The trial court did not abuse its discretion in refusing to set aside the verdict as being against the greater weight of the evidence. *Styers v. Bottling Co.*, 504.

§ 55. Trial by Court by Agreement—Findings of Fact. (Submission of controversy on facts agreed, see Controversy Without Action.)

Where the parties consent to trial by the court without a jury, the findings of the court are as conclusive as the verdict of a jury if they are supported by evidence. *Lovett v. Stone*, 206; *St. George v. Hanson*, 259; *Woody v. Barnett*, 420; *Little v. Sheets*, 430.

In a trial by the court under agreement of the parties, the court is required to find and state only the ultimate facts. *St. George v. Hanson*, 259.

Where a jury trial is waived under the provisions of G.S. 1-184, the judge must state his findings of fact and his conclusions of law separately. *Jamison v. Charlotte*, 423.

Where the parties waive trial by jury and agree that the judge consider the evidence, find the facts, and render judgment, but the court fails to find material facts necessary for the conclusions of law to be accurately and safely reviewed, the cause must be remanded. *Ibid.*

TRUSTS.

§ 3a. Written Trusts in General.

Where there is no uncertainty or vagueness in the provisions of the trust devising and bequeathing certain property to the trustee with direction that the net income thereof be paid to testator's widow during the term of her life or widowhood, *held* the trust will not be declared void for asserted uncertainty or vagueness in the final disposition of the property, since if the trust provisions are good in any respect or to any extent a broadside challenge thereto must fail. *Fuller v. Hedgpeth*, 370.

§ 3b. Active Trusts.

A devise and bequest of property to a named trustee to be managed by him, with direction that he pay the entire net income to testator's widow for life or widowhood, with further direction that the use of designated parcels of the residue be set over to named children or grandchildren of testator, and that upon the death of the life beneficiaries the trustee should convey to designated ultimate beneficiaries, *is held* to create an active trust. *Fuller v. Hedgpeth*, 370.

§ 20b. Power of Court of Equity to Modify Trust or Authorize Sale to Accomplish Purpose of Trust.

Equity may authorize conveyance of trust property to more fully utilize facilities to accomplish purpose of trust. *Rex Hospital v. Comrs. of Wake*, 312.

UTILITIES COMMISSION.

§ 1. Nature and Functions in General.

Utilities Commission has been delegated authority to fix rates for public utilities by statute prescribing adequate rules and regulations to govern the Commission in the exercise of this power. *Utilities Com. v. State*, 333.

UTILITIES COMMISSION—*Continued.*

§ 5. Appeals from Orders of Utilities Commission.

When the Utilities Commission fixes a schedule of rates under the standard prescribed by the Legislature, such schedule is binding upon the interested parties and the courts, provided it is within the bounds of reason. *Utilities Com. v. State*, 333.

The duty to fix rates is imposed by law upon the Utilities Commission, and where its order fixing a rate is erroneous because of misconstruction of the applicable law, the cause must be remanded to the Commission for further proceedings in accordance with the opinion of the Supreme Court. *Ibid.*

Where the Utilities Commission fails to find facts necessary to support its order, the cause will be remanded for appropriate findings. *Utilities Com. v. Tel. Co.*, 675.

VENDOR AND PURCHASER.

§ 25. Remedies of Purchaser—Damages for Breach.

Plaintiff purchased the timber rights on a part of a tract of land and received deed therefor. During the term of the agreement for the cutting of the timber, the vendor executed deed to the land in fee simple to third persons, who had their deed registered. The purchaser of the timber then had his timber deed registered. *Held:* In the absence of allegation that the vendor bound herself by contract to insert in the later deed recitals that it was made subject to plaintiff's timber rights, plaintiff is not entitled to recover of the vendor for breach of such agreement, nor may he hold such third persons liable on the theory that they wrongfully interfered with his contractual relations with the vendor. *Dulin v. Williams*, 33.

VENUE.

§ 2d. Actions for Possession of Property.

Venue for partition of either real or personal property is county wherein property is located. *Dubose v. Harpe*, 672.

WATERS AND WATER COURSES.

§ 5. Diversion, Obstruction or Alteration of Flow of Surface Waters.

A cause of action against a municipality to recover for the diversion of surface waters upon plaintiff's lots incident to the paving of the street and the construction of gutters, without allegation of negligence, is a cause of action to recover for a continuing trespass. *Lyda v. Marion*, 265.

Where there is an open drainway following a natural depression draining the surface waters, each upper proprietor has an easement in the lower estates for the surface waters to flow in their natural course or manner without obstruction or interruption, and each lower proprietor is required to receive and allow the passage of the natural flow of the surface waters from the higher land. *Johnson v. Winston-Salem*, 697.

Where upper proprietors have constructed a conduit to take care of the natural drainage of the waters along a depression, the lower proprietor at the mouth of the conduit may allow the surface waters to continue to flow across his land in the natural depression, but if for his own convenience and the better enjoyment of his property he continues the underground conduit across his land, the law imposes upon his ownership the burden of exercising

WATERS AND WATER COURSES—*Continued.*

ordinary care to keep the artificial drain open and in repair so as to accommodate the natural flow of surface waters from the upper tenements without injury to the lower tenements along the line of the drainway. *Ibid.*

Where the purchaser takes land with notice of a private underground conduit taking care of the natural flow of surface waters, he takes *cum onore*, and is under the duty to exercise ordinary care to keep the artificial underground drainage open and in repair. *Ibid.*

In this action against a landowner for negligent failure to maintain a conduit under his land to take care of the natural drainage of surface waters, plaintiff's evidence disclosed that the city widened the street and constructed catch basins along land draining into the conduit, but did not show that the city increased the volume of surface waters beyond the capacity of the private conduit as constructed or exercise any control or supervision over it. *Held:* The evidence does not justify nonsuit on the ground that plaintiff's evidence showed that the city and not defendant was under legal duty to maintain the conduit. *Ibid.*

Evidence of defendant's failure to exercise due care to keep private drain in repair held for jury. *Ibid.*

WILLS.

§ 31. General Rules of Construction.

Each will must be construed in the light of its own particular language. *Gatling v. Gatling*, 215.

The cardinal principle in the interpretation of wills is to discover the intent of the testator, looking at the instrument from its four corners, and such intent will be given effect unless contrary to some rule of law or at variance with public policy. *Ibid.*

The intent of testator is to be gathered from the will as a whole, and effect will be given to every clause and phrase and word, when possible, in accordance with the general purpose of the will. *Ibid.*

The intent of a testator is to be ascertained, if possible, from a consideration of his will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy. *Mewborn v. Mewborn*, 284.

In order to effectuate the intention of the testator, the court may disregard or supply punctuation, as well as transpose words, phrases, or clauses. Even words, phrases, or clauses will be supplied in the construction of a will when the sense of the phrase or clause in question, as collected from the context, manifestly requires it. *Ibid.*

When necessary to accomplish the testator's intent as ascertained from the context of the will, the court may disregard improper use of capital letters, punctuation, misspelling and grammatical inaccuracies, especially where the will is written by an unlearned person. *Clayton v. Burch*, 386.

Testator's intent must be given effect as it is set forth in his will, since the written and not the unexpressed intent must control. *Ibid.*

When the validity of an item in a will is challenged on the ground of uncertainty, it will be declared void on that ground only when its terms are so indefinite and uncertain that the court, in applying the usual rules of construction, is unable to declare the intention of the testator for the reason that

WILLS—*Continued.*

in legal contemplation there was no expression of intention on his part. *Fuller v. Hedgpeth*, 370.

The courts may construe the language of a will only when the language is so uncertain, vague, ambiguous, or conflicting that it creates a doubt as to the true intent of testator, but if the language used is clear and has a recognized legal meaning, there is no room for construction, and the recognized legal meaning of the language must be given effect. *Rhodes v. Hughes*, 534.

While the dispositive provisions of a will speak as of the death of the testator, G.S. 31-41, in ascertaining testator's intent the will must be considered in the light of the conditions and circumstances existing at the time it was made. *Trust Co. v. Green*, 612.

Where it is apparent from one portion of the will that testator gave a particular significance to a certain word or phrase, the same meaning will be presumed to have been intended in all other instances in which the same word or phrase is used in the will. *Ibid.*

If the intent of testator may be ascertained from the consideration of the will from its four corners, extrinsic evidence is not admissible for the purpose of overruling the intent therein expressed. *Ibid.*

§ 31½. Construction of Codicils.

Where a codicil makes a disposition of property at variance with provisions made in the will respecting the same property, the inconsistent provisions are not void for repugnancy since, even though the codicil does not in express language revoke the corresponding item of the will, it revokes such inconsistent provision of the will by implication. *Fuller v. Hedgpeth*, 370.

§ 33b. Rule in Shelley's Case.

A devise to a named grandson of testator for life and to his bodily heirs, but if he should die without heirs then to another named grandson, with further provision that if either one of these grandsons should die without leaving a bodily heir, a third named grandson should have their share, *is held* to devise a life estate only to the first named grandson, and not a fee defeasible upon his death without issue, it being apparent that testator used the words "bodily heirs" as *descriptio personarum* and not in the technical sense so that the words mean that if the first named grandson should die without "children" the land should be taken out of the first line of descent and then put back into the same line in a restricted manner and therefore the rule in *Shelley's case* does not apply. *Clayton v. Burch*, 386.

§ 33g. Construction of Wills—Life Estates and Remainders.

Testator devised his wife a life estate in the property and then provided that after her death the lands should go to two of his named children for the term of their natural lives, the lands to be equally divided between them, and after "the death" of the named children the lands should then "go to their children." *Held:* Upon the death of testator the named children became tenants in common for life in the lands subject to their mother's life estate, and the provision that upon their death the lands should go to their children will be construed "upon their respective deaths the lands should go to their respective children," so that upon the death of one of them without surviving issue his share must be divided *per stirpes* among testator's heirs. *Mewborn v. Mewborn*, 284.

WILLS—*Continued.*

§ 33h. Rule Against Perpetuities.

Under the rule against perpetuities, no devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not less than twenty-one years, plus the period of gestation, after some life or lives in being, at the time of the creation of the interest. *Fuller v. Hedgpeth*, 370.

The controlling factor in the application of the rule against perpetuities is the time when a future interest vests, rather than the time when it comes into enjoyment. *Ibid.*

Testator devised certain property to a named trustee with provision that the entire net income therefrom be paid to testator's widow during her life or widowhood, and that upon the termination of her estate, use of designated parcels of the residue should be set over to named children and grandchildren of testator for life, with further direction that upon the death of these life beneficiaries the property should be conveyed in fee simple to the children or heirs of named life tenants. *Held:* The trust does not violate the rule against perpetuities, since the fee simple title vests in the ultimate beneficiaries as at the time of the death of testator, with enjoyment postponed during the preceding life estates. *Ibid.*

A provision in a will that the land devised to a named person for life should go to the life tenant's heirs "to the Tenth Jenerration" is void as being within the rule against perpetuities. *Clayton v. Burch*, 386.

§ 33i. Restraint on Alienation.

A provision annexed to a devise that the land devised should not be sold for any purpose whatsoever is void, but such provision does not defeat the estate to which it is annexed. *Clayton v. Burch*, 386.

§ 34b. Designation of Beneficiaries in General.

Where there is no uncertainty or vagueness in the provisions of the trust devising and bequeathing certain property to the trustee with direction that the net income thereof be paid to testator's widow during the term of her life or widowhood, *held* the trust will not be declared void for asserted uncertainty or vagueness in the final disposition of the property, since if the trust provisions are good in any respect or to any extent a broadside challenge thereto must fail. *Fuller v. Hedgpeth*, 370.

§ 34c. Devises and Bequests to Class—Adopted Children.

The general rule is that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child if he so desired, such adopted child will be included in the word "children" when used to designate a class which is to take under the will. *Trust Co. v. Green*, 612.

Under the provisions of the will in suit, testator's niece and nephew and children "born" to them were made beneficiaries of the income from the trust estate therein created, with further provision that upon the death of the survivor of the niece and nephew the trust should terminate and the *corpus* paid share and share alike to the children of the niece and nephew then surviving. *Held:* Adopted children of the nephew were not entitled to share in the *corpus* of the estate, the word "children" as used in the provisions for

WILLS—*Continued.*

the disposition of the *corpus* being given the same meaning as in the provision for the distribution of the income, which was limited to children "born" to either the nephew or niece. *Ibid.*

§ 35. Conditions and Restrictions.

The will devised farm lands to testator's three children with provision that his widow take a dower right therein. By further provision testator stipulated that it was his will that the farms be operated jointly by the beneficiaries for a period of ten years after his death. *Held:* Testator's intent will be given effect, and none of the beneficiaries is entitled to partition of the lands during the ten-year period, the limitation not being an unlawful restraint on alienation nor limitation repugnant to the fee. *Anderson v. Edwards*, 510.

§ 36. Specific Devises.

Testator devised all of his property in trust for his wife for life with full power to her to sell or mortgage same, with remainder to his children and the representatives of deceased children, *per stirpes.* By later item he directed that certain lots facing the homeplace should not be subject to the provisions of the prior item during the life of his wife, and that in the final distribution of the lands, the lots be allotted to designated children and grandchildren, and accounted for in the division. It was apparent from the will as a whole that testator loved his home, which was then owned by one of his children, and wished it kept in the family, and was seeking to protect it from adverse surroundings by the provisions relating to the specified lots. *Held:* The lots specified were not subject to sale or mortgage by the wife, and in the event it is necessary to sell real estate to make assets, such lots do not stand on a parity with the other real estate for this purpose, but such other real estate should be first sold and the lots specified allotted to the devisees named, who should account to other devisees in order that there be an equal division among the beneficiaries. *Gatling v. Gatling*, 215.

§ 39. Actions to Construe Wills.

The courts will not consider questions relating to possible uncertainties as to who will take portions of testator's property upon the happening of certain events, since such questions are premature and speculative questions of interpretation to be determined if and when they arise in the future. *Fuller v. Hedgpeth*, 370.

§ 44. Election Under the Will.

Where it is apparent from the will that testator intended that a beneficiary thereunder should not enjoy the devise or bequest unless such beneficiary relinquished a right or claim of his own which would defeat the full effect and operation of the will, such person is put to his election. *Lovett v. Stone*, 206.

Defendant owned two-thirds interest in fee in a part of a certain tract of land which he had inherited from his father. Thereafter his grandfather died leaving a will devising to him a life estate in the entire tract with remainder to his children, with further provision that defendant's brother, in order for the brother to take other lands under the will, should convey to defendant the other one-third interest in the part of the tract. Defendant's brother conveyed to him the one-third interest in the part of the tract "in full compliance with

WILLS—*Continued.*

the terms . . . of the last will." Defendant manifested his election to take under the will by accepting and using the tract actually devised to him for life. *Held:* By his election to take under the will defendant's estate was limited to a life estate in the tract of land, which limitation was binding upon him and those claiming under him with notice. *Ibid.*

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G.S.

1-2; 1-3; 1-5. Inquisition of lunacy is neither criminal nor civil action nor special proceeding. *In re Dunn*, 378.

1-38. Grantee in deed conveying only life estate cannot hold adversely to remainderman until death of grantor and disability of remainderman at that time tolls statute. *Lovett v. Stone*, 206.

1-76 (4). Venue of proceeding for partition of personalty is county in which property is located. *DuBose v. Harpe*, 672.

1-123. In partner's action against copartner for accounting, he may join lien-creditor to enjoin foreclosure of mortgage on individual property. *Casey v. Grantham*, 121.

1-137. In creditor's action on debt, debtor may set up counterclaim for specific performance of accord and satisfaction or for damages for breach of agreement. *Dobias v. White*, 409.

1-153. Plaintiff's motion to strike incompetent and irrelevant matter held properly allowed. *Neal v. Marrone*, 73.

1-157. Private statute may be pleaded by reference to title or day of ratification. *Jamison v. Charlotte*, 423.

1-180. Charge *held* for error in failing to instruct jury on material aspect of case presented by evidence. *Medlin v. Spurrier & Co.*, 48.

Technical error *held* not prejudicial. *Hartley v. Smith*, 170.

1-183. On motion to nonsuit, all evidence must be taken in light most favorable to plaintiff. *Singletary v. Nixon*, 634.

1-185. Judge must state findings and conclusions of law separately. *Jamison v. Charlotte*, 423.

Court is required to state only ultimate facts. *St. George v. Hanson*, 259.

1-185; 1-172. Where cause is submitted upon agreed facts, trial court has no power to find additional facts. *Auto Co. v. Ins. Co.*, 416.

1-187. Exception to "each conclusion of law embodied in judgment" is "broadside" exception. *Jamison v. Charlotte*, 682.

1-200. Court must submit all issues raised by pleadings and supported by evidence which are necessary to settle material controversies. *Wheeler v. Wheeler*, 646.

Court is not required to adopt any particular form of issues but must see that issues submitted embrace all essential questions in controversy. *O'Briant v. O'Briant*, 101.

1-206 (3). While no exception need be taken to admission of evidence over objection; opposing party must object to exclusion of evidence upon objection. *S. v. Howell*, 78.

1-220. Findings of fact by trial court conclusive when supported by evidence; verified motion setting forth meritorious defense may support order even though order makes no particuluar finding thereof; judgment may be set aside for inexcusable neglect of attorney when client is not guilty of neglect; payment of judgment under protest will not preclude motion to set aside; judgment affirming clerk's

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

judgment by default does not preclude motion thereafter to set aside the judgment. *Moore v. Deal*, 224.

1-240. Right to joinder for contribution is solely statutory; allegations of cross-action *held* insufficient to show that defendant joined was liable to plaintiff as joint tort-feasor, and joinder was improper. *Hayes v. Wilmington*, 238.

1-250. Taxpayer may not have his liability for unlevied and uncollected tax adjudicated under Declaratory Judgment Act. *Development Co. v. Braxton*, 427.

1, Art. 26. Superior Court has no general power to oversee or direct officials of inferior court and action to direct taxing of costs in inferior court will not lie. *Fuquay Springs v. Rowland*, 299.

1-253; 1-254; 1-256. Right to close alley at *cul-de-sac* end may be determined under Declaratory Judgment Act. *Hine v. Blumenthal*, 537.

1-260. All persons who have or claim interest in subject matter should be made parties. *Hine v. Blumenthal*, 537.

1-277. Appeal from interlocutory order dismissed as premature. *Gardner v. Price*, 651.

1-281. Does not authorize clerk to enlarge time for service of statement of case on appeal even though judgment is rendered out of term. *Little v. Sheets*, 430.

1-282. When statement of case on appeal is not filed within time it is a nullity, and judgment will be affirmed in absence of error on face of record proper. *Little v. Sheets*, 430.

1-288. Failure to obtain order for appeal in *forma pauperis* is fatal. *Prevatte v. Prevatte*, 120.

1-340. Where grantee knows grantor had only life estate he cannot claim betterments as against remaindermen. *Lovett v. Stone*, 206.

1-409, *et seq.* In action to recover consideration for executory contract breached by defendant, execution against the person will not lie. *Brannon v. Wood*, 112.

1-440.10. Liabilities for wrongful attachment. *Brown v. Estates Corp.*, 595.

7-58; 7-65. In district of his residence, Special Judge has concurrent jurisdiction with Resident Judge of chambers matters. *Spaugh v. Charlotte*, 149; *Parker v. Underwood*, 308.

7-65; 7-74. Regular Judge has not chambers jurisdiction out of district and out of term. *Baker v. Varser*, 180.

9-14. Statement of prospective witness in hearing of jury *held* insufficient to justify order of mistrial. *S. v. Spencer*, 604.

15-27. Warrant not necessary to search of lands not within curtilage of home. *S. v. Harrison*, 659.

15-143; 15-144. Under indictment for murder in usual form, State is entitled to introduce evidence that homicide was committed in perpetration of rape, it being incumbent on defendant to ask for bill of particulars if he so desires. *S. v. Grayson*, 453.

15-152. Consolidation of indictment for murder for purpose of trial *held* proper. *S. v. Spencer*, 604.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

15-152. Consolidation of indictment for receiving stolen goods for purpose of trial *held* prejudicial error. *S. v. Dyer*, 713.

15-153. Bill *held* sufficiently definite to repel motion to quash. *S. v. Felton*, 575.

15-173. On motion to nonsuit, defendant's evidence may be considered only in so far as it is favorable to State, or tends to make clear the State's evidence. *S. v. Nall*, 60.

15-173. Where motion for compulsory nonsuit is sustained in Supreme Court, decision has force of verdict of not guilty. *S. v. Wooten*, 118.

16-1; 16-2; 14-292. Betting on races of any sort is illegal under general laws of State; Currituck Dog Track Statute unconstitutional. *S. v. Felton*, 576.

18-48. Evidence of nontax-paid liquor found in defendant's home *held* sufficient for jury, notwithstanding defendant's evidence that another occupied room. *S. v. Harrison*, 659.

19-1. Operation of Dog Racing Track *held* subject to abatement in suit of individual. *Summerell v. Racing Asso.*, 591.

20-16. Plea of *nolo contendere* is insufficient alone to support suspension of drivers license in proceeding under this section. *Winesett v. Scheidt, Comr.*, 190.

20-71.1. Statute does not relieve plaintiff of necessity of alleging facts supporting application of *respondeat superior*. *Parker v. Underwood*, 308.

20-71.1. Statute raises *prima facie* case sufficient to support but not to compel verdict on issue of *respondeat superior*. *Hartley v. Smith*, 170.

20-105. Facts agreed *held* insufficient to show violation of statute. *Auto Co. v. Ins. Co.*, 416.

20-138. Evidence *held* to show that defendant was driving in drunken condition or that car was driven by another under defendant's direction and control and that such other was drunk, and therefore evidence sustained conviction. *S. v. Nall*, 60.

20-138. Instruction defining under the influence of intoxicating liquor *held* not prejudicial. *S. v. Turberville*, 25.

20-140. Evidence *held* sufficient to sustain conviction of manslaughter. *S. v. Turberville*, 25.

20-141. Evidence *held* to show contributory negligence as matter of law on part of driver colliding with trailer blocking lane of travel. *Singletary v. Nixon*, 634.

20-141; 20-158. Evidence *held* for jury on question of concurrent negligence of drivers involved in collision at intersection. *Blalock v. Hart*, 475.

20-152 (a). Evidence *held* for jury in this action to recover for accident occurring when following vehicle collided with rear of plaintiff's car. *Cozart v. Hudson*, 279.

20-154. Failure to give hand signal *held* not proximate cause. *Cozart v. Hudson*, 279.

20-166 (c). Evidence of defendant's guilt of hit and run driving *held* sufficient. *S. v. Nall*, 60.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

28-5; 28-27; 28-172; 28-175. Collector of estate of deceased may be sued in his representative capacity for injury to personal property caused by tortious act of deceased. *McIntyre v. Josey*, 109.

28-105. Has no application when property subject to lien is not part of assets of estate (lands by entireties) even though estate is liable on notes secured by lien. *Underwood v. Ward*, 513.

31-41. While dispositive provisions speak as of time of testator's death, will must be construed as of circumstances prevailing when it was written. *Trust Co. v. Green*, 612.

38-1. Title is not in dispute in processioning proceeding, and wife is not necessary party establishing boundary to lands held by entireties. *Nesbitt v. Fairview Farms*, 481.

38-3 (3). After decision on appeal affirming judgment establishing dividing line, lower court has jurisdiction only for purpose of putting provision of statute in effect. *Nesbitt v. Fairview Farms*, 481.

43-11 (1), (2) and (3). Contested proceedings for registration of titles under Torrens Law are triable under rules applying to actions in ejectment. *Paper Co. v. Cedar Works*, 627.

44-38. Notice must specify in detail work done and materials furnished and be duly filed within six months after completion of work. *Lowery v. Haithcock*, 67.

44-43; 44-48 (4). Claimant must institute action to enforce lien within six months from date of filing notice. *Lowery v. Haithcock*, 67.

45-21.38. Mortgage on tract other than tract purchased is not purchase money mortgage. *Dobias v. White*, 409.

50-16. Merits are not before the court upon return of order to show cause for alimony *pendente lite*, and permanent alimony may not be awarded upon such hearing. *Hester v. Hester*, 97.

55-125; 55-131. In action to dissolve corporation, stockholders may not be represented by corporate officers. *Glod v. Shippers, Inc.*, 304.

59-68 (1). Partner is entitled to have partnership property first applied to partnership debts before resort to his individual property. *Casey v. Grantham*, 121.

58-153. Attorney *held* not liable to client for depending upon acceptance of process by Insurance Commissioner instead of serving out *alias* and *pluries* summonses. *Hodges v. Carter*, 517.

62-66; 62-124. General Assembly has delegated to Utilities Commission power to fix rates of public utilities; rules to guide Commission in fixing rates. *Utilities Com. v. S.*, 333.

62-121.5; 62-121.11. Utilities Commission may not promulgate and enforce rule which would have effect of denying carrier his rights under grandfather clause. *Utilities Com. v. Fox*, 253.

76, Art. I. Order *held* not to show that license was refused in violation of grandfather clause, and is affirmed. *St. George v. Hanson*, 259.

96-4 (m); 96-11; 96-8 (g). Findings *held* to support conclusion that shoeshine boy was employee of barbershop within coverage of act. *Employment Security Commission v. Coe*, 84.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

97-38. Death from heart disease aggravated by injury arising out of and in course of employment *held* compensable. *Wyatt v. Sharp*, 656.

97-57. Employer and carrier during last 30-day period employee is exposed to silicosis are liable. *Stewart v. Duncan*, 640.

97-65. Where disabled employee is suffering from tuberculosis as well as silicosis, whether award should be reduced one-sixth rests in discretion of Industrial Commission. *Stewart v. Duncan*, 640.

105-242 (3). In proceedings under this section, Commissioner of Revenue may not issue execution upon his certificate of tax due docketed by clerk. G.S. 1-307; 1-303. *Daniels v. Yelverton*, 54.

105-406. Taxpayer must pay tax under protest and sue to recover same and may not have his liability determined under Declaratory Judgment Act. *Development Co. v. Braxton*, 427.

122-43. Statement of physician sworn to before notary in lunacy proceeding is absolutely privileged. *Jarman v. Offutt*, 468.

122-79; 35-2. Allowances to attorney and guardian *ad litem* for services rendered in inquisition of lunacy may be made as for necessaries. *In re Dunn*, 378.

122-84. Person committed under this section may not procure release under G.S. 35-4, but must be returned for trial, G.S. 122-87; but may be discharged under writ of *habeas corpus*, G.S. 122-86. *In re Tate*, 94.

131. Statute delegating power to Medical Care Commission to create hospital district *held* constitutional. *Williamson v. Snow*, 493.

131-28.3; 131-28.4. County hospital is public purpose, and bonds may be issued therefor with approval of voters. *Rex Hospital v. Comrs. of Wake*, 312.

136-19. Compensation must be based on right of way acquired as of time of the taking. *Highway Com. v. Black*, 198.
Petition *held* demurrable for failure to allege facts showing how land was taken or damaged for highway purposes. *Newton v. Highway Com.*, 433.

136-67. Findings *held* to support conclusion that abandoned highway did not constitute neighborhood public road. *Woody v. Barnett*, 420.

136-96. Upon revocation of dedication, street and alleys shown on map are free from dedication except in so far as their use may be necessary to use of lots sold. *Hine v. Blumenthal*, 537.

SECTIONS OF CONSTITUTION OF NORTH CAROLINA CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 7. Currituck Dog Track Statute (Ch. 541, Sessions Laws of 1949) *held* unconstitutional. *S. v. Felton*, 575.

I, sec. 17. Findings of intoxication of jurors during night *held* insufficient to justify order of mistrial, and plea of former jeopardy at subsequent trial should have been allowed. *S. v. Crocker*, 446.
Tax levied for public hospital in district is a general tax and not special assessment and therefore need not benefit all property in district equally. *Williamson v. Snow*, 493.

I, sec. 31. Currituck Dog Track Statute (Ch. 541, Session Laws of 1949) *held* unconstitutional. *S. v. Felton*, 575.

IV, sec. 11. In district of his residence, Special Judge has concurrent jurisdiction with Resident Judge of chambers matters. *Spaugh v. Charlotte*, 149; *Parker v. Underwood*, 308. Regular judge has no chambers jurisdiction out of district and out of term. *Baker v. Varser*, 180.

V, sec. 3. County hospital is public purpose, and bonds may be issued therefor with approval of voters. *Rex Hospital v. Comrs. of Wake*, 312. County tax for libraries and city tax for libraries *held* not unconstitutional for placing heavier burden on city property. *Jamison v. Charlotte*, 682.

V, sec. 4; VII, sec. 7. Only single proposition may be placed on ballot for submission to voters in bond election; bonds for county and municipal libraries is but single proposition. *Jamison v. Charlotte*, 682.

VII, sec. 7. While swimming pool is not necessary municipal expense, it is for public purpose. *Greensboro v. Smith*, 138.

IX, sec. 1. Bonds for county and municipal libraries are for public purpose. *Jamison v. Charlotte*, 682.

SECTION OF CONSTITUTION OF THE UNITED STATES CONSTRUED.

(For convenience in annotating.)

VTH AMENDMENT. Findings of intoxication of jurors during night held insufficient to justify mistrial, and plea of former jeopardy at subsequent trial should have been allowed. *S. v. Crocker*, 446.