NORTH CAROLINA REPORTS
VOL. 240

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1954
FALL TERM, 1954

REPORTED BY
JOHN M. STRONG

RALEIGH
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PRINTERS TO THE SUPREME COURT
1955

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

Reports		N. C.
1 and 2 Martin, Taylor & Conf.	as	1 N. C.
1 Haywood	"	2 "
2 "	"	3 "
1 and 2 Car. Law Repository & N. C. Term	"	4 "
1 Murphey	"	5 "
2 "	"	6 "
3 "	"	7 "
1 Hawks	"	8 "
2 "	"	9 "
3 "	"	10 "
4 "	"	11 "
1 Devereux Law	"	12 "
2 " "	"	13 "
3 " "	"	14 "
4 " "	"	15 "
1 " Eq.	"	16 "
2 " "	"	17 "
1 Dev. & Bat. Law	"	18 "
2 " "	"	19 "
3 & 4 " "	"	20 "
1 Dev. & Bat. Eq.	"	21 "
2 " "	"	22 "
1 Iredell Law	"	23 "
2 " "	"	24 "
3 " "	"	25 "
4 " "	"	26 "
5 " "	"	27 "
6 " "	"	28 "
7 " "	"	29 "
8 " "	"	30 "
9 Iredell Law	as	31 N. C.
10 " "	"	32 "
11 " "	"	33 "
12 " "	"	34 "
13 " "	"	35 "
1 " Eq.	"	36 "
2 " "	"	37 "
3 " "	"	38 "
4 " "	"	39 "
5 " "	"	40 "
6 " "	"	41 "
7 " "	"	42 "
8 " "	"	43 "
Busbee Law	"	44 "
" Eq.	"	45 "
1 Jones Law	"	46 "
2 " "	"	47 "
3 " "	"	48 "
4 " "	"	49 "
5 " "	"	50 "
6 " "	"	51 "
7 " "	"	52 "
8 " "	"	53 "
1 " Eq.	"	54 "
2 " "	"	55 "
3 " "	"	56 "
4 " "	"	57 "
5 " "	"	58 "
6 " "	"	59 "
1 and 2 Winston	"	60 "
Phillips Law	"	61 "
" Eq.	"	62 "

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

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1954—FALL TERM, 1954.

CHIEF JUSTICE:

M. V. BARNHILL.

ASSOCIATE JUSTICES:

J. WALLACE WINBORNE,
EMERY B. DENNY,
S. J. ERVIN, JR.,[1]
JEFF. D. JOHNSON, JR.,
R. HUNT PARKER,
WILLIAM H. BOBBITT,
CARLISLE HIGGINS.[2]

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

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

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

MAX O. COGBURN.

[1]Resigned 11 June, 1954.
[2]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[1]	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
Walter E. Johnston	Eleventh	Winston-Salem.
H. Hoyle Sink	Twelfth	Greensboro.
F. Donald Phillips	Thirteenth	Rockingham.
Francis O. Clarkson	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	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]Deceased, succeeded by William Y. Bickett 24 November, 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[1]	Seventh	Raleigh.
John J. Burney, Jr.	Eighth	Wilmington.
Malcolm B. Seawell	Ninth	Lumberton.
William H. Murdock	Tenth	Durham.

WESTERN DIVISION

Harvey A. Lupton	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 7th Judicial District. Succeeded by Lester V. Chalmers 24 November, 1954.

SUPERIOR COURTS, FALL TERM, 1954

Revised through 27 May, 1954.

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

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Judge Nimocks

Beaufort—Sept. 20* (A); Sept. 27†; Oct. 11†; Nov. 8* (A); Dec. 6†.
Camden—Aug. 30.
Chowan—Sept. 13; Nov. 29.
Currituck—Sept. 6.
Dare—Oct. 25.
Gates—Nov. 22.
Hyde—Aug. 16†; Oct. 18.
Pasquotank—Sept. 20†; Oct. 11† (A) (2); Nov. 8†; Nov. 15*.
Perquimans—Nov. 1; Oct. 4† (A); Nov. 1.
Tyrrell—Oct. 4.

SECOND JUDICIAL DISTRICT

Judge Carr

Edgecombe—Sept. 13; Oct. 18; Nov. 15† (2).
Martin—July 5† (s); Sept. 20 (2); Nov. 22† (A) (2); Dec. 13.
Nash—Aug. 30; Sept. 20† (A) (2); Oct. 11†; Nov. 29*; Dec. 6†.
Washington—July 12; Oct. 25†.
Wilson—Sept. 6; Sept. 27* (A); Oct. 4†; Oct. 25* (A); Nov. 1† (2); Dec. 6 (A).

THIRD JUDICIAL DISTRICT

Judge Morris

Bertie—Aug. 30 (2); Nov. 15 (2).
Halifax—Aug. 16 (2); Oct. 4† (A) (2); Oct. 25* (A); Nov. 29 (2).
Hertford—July 26; Oct. 18 (2).
Northampton—Aug. 2; Nov. 1 (2).
Vance—Sept. 27*; Oct. 11†.
Warren—Sept. 13*; Oct. 4†.

FOURTH JUDICIAL DISTRICT

Judge Williams

Chatham—Aug. 2† (2); Oct. 25.
Harnett—Sept. 6* (A); Sept. 20†; Oct. 4† (A) (2); Nov. 15* (2).
Johnston—Aug. 16*; Sept. 27† (2); Oct. 18 (A); Nov. 8†; Nov. 15† (A); Dec. 13 (2).
Lee—July 19*; July 26†; Sept. 13†; Sept. 20† (A); Nov. 1*; Dec. 13† (A).
Wayne—Aug. 23; Aug. 30† (2); Oct. 11† (2); Nov. 29 (2).

FIFTH JUDICIAL DISTRICT

Judge Parker

Carteret—Oct. 18; Dec. 6†.
Craven—Sept. 6; Sept. 13 (A); Oct. 4† (2); Nov. 15 (A); Nov. 22† (2).
Greene—Dec. 6 (A); Dec. 13; Dec. 20.
Jones—Aug. 16†; Sept. 20; Dec. 6 (A).
Pamlico—Nov. 8 (2).
Pitt—Aug. 23†; Aug. 30; Sept. 13†; Sept. 27†; Oct. 4 (A); Oct. 11 (A); Oct. 25†; Nov. 1; Nov. 22† (A).

SIXTH JUDICIAL DISTRICT

Judge Williams

Duplin—Aug. 30; Sept. 6; Oct. 11; Oct. 18†; Dec. 6† (2).
Lenoir—Aug. 23*; Sept. 13 (A); Sept. 27†; Nov. 1 (A); Nov. 8†; Nov. 15†; Nov. 29 (A).
Sampson—Aug. 9 (2); Sept. 13† (2); Oct. 25; Nov. 1†.

SEVENTH JUDICIAL DISTRICT

Judge Frizzelle

Franklin—Sept. 20* (2); Oct. 11*; Nov. 29† (2).
Wake—July 12*; Sept. 6* (2); Sept. 20† (A) (2); Oct. 4*; Oct. 4† (A) (2); Oct. 18† (3); Nov. 8*; Nov. 15† (2); Nov. 29† (A); Dec. 6* (A); Dec. 6† (A) (2); Dec. 13*; Dec. 20†.

EIGHTH JUDICIAL DISTRICT

Judge Stevens

Brunswick—Sept. 20; Oct. 4† (A).
Columbus—Sept. 6* (2); Sept. 27† (2); Oct. 11* (A); Nov. 1† (A) (2); Nov. 22* (2).
New Hanover—July 26*; Aug. 16*; Aug. 23† (2); Oct. 4* (A); Oct. 11† (2); Nov 8* (A) (2); Dec. 6† (2).
Pender—Sept. 27 (A); Oct. 25† (2).

NINTH JUDICIAL DISTRICT

Judge Harris

Bladen—Aug. 9†; Sept. 20*.
Cumberland—Aug. 30*; Sept. 27† (2); Oct. 11* (A); Oct. 25† (2); Nov. 22* (2).
Hoke—Aug. 23; Nov. 15.
Robeson—July 12† (2); Aug. 16*; Aug. 30† (A); Sept. 6* (2); Sept. 27* (A); Oct. 11† (2); Oct. 25* (A); Nov. 8*; Nov. 15† (A); Dec. 6† (2); Dec. 20*.

TENTH JUDICIAL DISTRICT

Judge Moore

Alamance—Aug. 2* (A); Aug. 16*; Sept. 13†; Sept. 20† (A); Oct. 11† (A); Oct. 18* (A); Oct. 25* (A); Nov. 15† (A); Nov. 22† (A); Dec. 6* (A).
Durham—July 19*; Aug. 2 (2); Aug. 30* (A); Sept. 6*; Sept. 13* (A); Sept. 20† (2); Oct. 4 (A); Oct. 11*; Oct. 18† (A) (2); Nov. 1†; Nov. 8; Nov. 29*; Dec. 6*; Dec. 13* (A).
Granville—July 26 Oct. 25†; Nov. 15 (2).
Orange—Aug. 23; Aug. 30†; Oct. 4†; Dec. 13.
Person—Aug. 30 (A); Oct. 18.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Judge Phillips

Ashe—July 26† (2); Oct. 25*.
Alleghany—Aug. 16; Oct. 4.
Forsyth—July 12 (2); Sept. 6 (2); Sept. 20† (2); Oct. 4† (A); Oct. 11 (2); Oct. 25† (A); Nov. 1†; Nov. 8 (2); Nov. 22† (2); Dec. 6 (2); Dec. 20†.

TWELFTH JUDICIAL DISTRICT

Judge Gwyn

Davidson—Aug. 23; Sept. 13† (2); Oct. 4† (A) (2); Nov. 22 (A) (2).
Guilford, Greensboro Division—July 12*; July 12† (2) (A); July 26* (2); Aug. 30*; Sept. 13† (A) (2); Sept. 13* (A) (2); Sept. 27† (2); Oct. 11† (2); Oct. 11* (A) (2); Oct. 25† (A) (2); Nov. 8* (2); Nov. 22† (2); Dec. 6* (A); Dec. 20*.
Guilford, High Point Division—July 19*; Aug. 2; Sept. 27* (A) (2); Oct. 25* (2); Nov. 8† (A) (2); Dec. 6†; Dec. 13*.

THIRTEENTH JUDICIAL DISTRICT

Judge Clarkson

Anson—Sept. 13†; Sept. 27*; Nov. 15†.
Moore—Aug. 16*; Sept. 20†; Sept. 27† (A); Nov. 1† (A).
Richmond—July 19†; July 26*; Sept. 6†; Oct. 4*; Nov. 8†.
Scotland—Aug. 9; Nov. 1†; Nov. 29 (2).
Stanly—July 12; Sept. 6† (A) (2); Oct. 11†; Nov. 22.
Union—Aug. 23 (2); Oct. 18 (2).

FOURTEENTH JUDICIAL DISTRICT

Judge Armstrong

Gaston—July 26*; Aug. 2† (2); Sept. 13* (A); Sept. 20† (2); Oct. 25*; Nov. 1† (A); Nov. 29* (A); Dec. 6† (2).
Mecklenburg—July 12* (2); Aug. 2* (A); Aug. 9* (A); Aug. 16* (2); Aug. 30*; Sept. 6† (2); Sept. 6† (A) (2); Sept. 20† (A) (2); Sept. 20* (A) (2); Oct. 4† (A) (2); Oct. 4*; Oct. 11† (2); Oct. 18† (A) (2); Nov. 1† (A) (2); Nov. 1† (2); Nov. 15† (A) (2); Nov. 15*; Nov. 22† (2); Nov. 29† (A) (2); Dec. 6* (A) (2); Dec. 13† (A); Dec. 20†.

FIFTEENTH JUDICIAL DISTRICT

Judge Rudisill

Alexander—Sept. 27 (2).
Cabarrus—Aug. 23*; Aug. 30†; Oct. 18 (2); Nov. 15† (A); Dec. 6† (A).
Iredell—Aug. 2 (2); Nov. 8 (2).
Montgomery—July 12; Sept. 27† (A); Oct. 4 (A); Nov. 1†.
Randolph—July 19† (2); Sept. 6*; Oct. 25† (A) (2); Dec. 6 (2).
Rowan—Sept. 13 (2); Oct. 11†; Oct. 18† (A); Nov. 22 (2).

SIXTEENTH JUDICIAL DISTRICT

Judge Rousseau

Burke—Aug. 9 (2); Sept. 27 (3); Dec. 13 (2).
Caldwell—Aug. 23 (2); Sept. 6† (A) (2); Oct. 4† (A) (2); Nov. 29 (2).
Catawba—July 5 (2); Sept. 6† (2); Nov. 15 (2); Dec. 6† (A).
Cleveland—July 26 (2); Sept. 13† (A); Sept. 20† (A); Nov. 1 (2).
Lincoln—Oct. 18; Oct. 25†.
Watauga—Sept. 20*; Nov. 15† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT

Judge Pless

Avery—July 5 (2); Oct. 18 (2).
Davie—Aug. 30; Dec. 6†.
Mitchell—July 26† (2); Sept. 20 (2).
Wilkes—July 19†; Aug. 9 (3); Sept. 13†; Oct. 4† (2); Nov. 1† (2); Dec. 13 (2).
Yadkin—Sept. 6*; Nov. 15† (2); Nov. 29.

EIGHTEENTH JUDICIAL DISTRICT

Judge Nettles

Henderson—Oct. 11 (2); Nov. 22† (2).
McDowell—July 12† (2); Sept. 6 (2).
Polk—Aug. 23 (2).
Rutherford—Sept. 27† (2); Nov. 8 (2).
Transylvania—July 26 (2); Dec. 6 (2).
Yancey—Aug. 9 (2); Oct. 25† (2).

NINETEENTH JUDICIAL DISTRICT

Judge Moore

Buncombe—July 12†* (2); July 19 (A) (2); July 26*†; Aug. 2; Aug. 9†* (2); Aug. 23 (A) (2); Aug. 23*†; Sept. 6†* (2); Sept. 20*†; Sept. 20 (A); Sept. 27; Oct. 4†* (2); Oct. 18*†; Oct. 18 (A); Oct. 25; Nov. 1; Nov. 8†* (2); Nov. 22 (A) (2); Nov. 22*†; Dec. 6†* (2); Dec. 20*†; Dec. 20 (A).
Madison—Aug. 30; Oct. 4 (A) (2); Nov. 29.

TWENTIETH JUDICIAL DISTRICT

Judge Johnston

Cherokee—Aug. 9 (2); Nov. 8 (2).
Clay—Oct. 4.
Graham—Sept. 6 (2).
Haywood—July 12 (2); Sept. 20† (2); Nov. 22 (2).
Jackson—Oct. 11 (2).
Macon—Aug. 23 (2); Dec. 6 (2).
Swain—July 26 (2); Oct. 25 (2).

TWENTY FIRST JUDICIAL DISTRICT

Judge Sink

Caswell—Oct. 4† (A); Nov. 15*.
Rockingham—Aug. 9* (2); Sept. 6† (2); Oct. 25†; Nov. 1* (2); Nov. 29† (2); Dec. 13*.
Stokes—Aug. 23; Oct. 11*; Oct. 18†.
Surry—July 12 (2); Sept. 20; Sept. 27 (2); Nov. 22; Dec. 20.

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

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

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

Elizabeth City, third Monday after the second Monday in March and September. LLOYD S. SAWYER, 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.
LAWRENCE HARRIS, 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.

LICENSED ATTORNEYS

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed examinations of the Board of Law Examiners as of the 7th day of August, 1954:

Adams, Joseph Allen, Jr. .... Chapel Hill.
Anderson, Eugene Moore, Jr. .... Charlotte.
Ashley, Wallace, Jr. .... Smithfield.
Barham, Charles Dewey, Jr. .... Raleigh.
Bell, Deane Flanner .... Chapel Hill.
Bond, Lyn, Jr. .... Tarboro.
Brock, John Tabor .... Mocksville.
Brooks, Sidney Barclay .... Wilson.
Browder, Leslie Ephrium .... Winston-Salem.
Brown, Bruce Johnston .... Asheville.
Calloway, Vern Daniel, Jr. .... Durham.
Canady, Paul Truett .... St. Pauls.
Carruthers, Paul Matthew .... Greensboro.
Chandler, Gerald Reid .... Albemarle.
Compton, Joseph Blalock .... Monroe.
Davis, Claude David .... Asheville.
Dunn, Elwood McDonald, Jr. .... New Bern.
Ennis, Spencer Byron .... Salisbury.
Fadum, Nancy Fields .... Raleigh.
Faw, Thomas McLean .... North Wilkesboro.
Gibson, Boyce Grier, Jr. .... Mooresville.
Gordon, George Washington .... Greensboro.
Griffin, Kenneth Adolphus .... Concord.
Hamlin, Lewis Porter, Jr. .... Salisbury.
Harrell, Bernard Allen .... Ahoskie.
Hennessee, Joseph Pless .... Marion.
Henry, Everett Lawrence .... Lumberton.
Higgins, John Thomas .... Greensboro.
Hight, Robert Stubbs .... Henderson.
Hooper, John Orville .... Morganton.
Hutchens, John Grover .... High Point.
Hyde, Herbert Lee .... Franklin.
Ingram, John Randolph .... Asheboro.
Johnson, Clyde Bradley .... Benson.
Johnston, Hugh Wolfe .... Cramerton.
Jones, Durward Spencer .... Winston-Salem.
Kelly, Walter Richard, Jr. .... Cherryville.
Kennedy, Annie Brown .... Winston-Salem.
Kesiah, Sanford Perry, Jr. .... High Point.
Knott, William Allan .... Kinston.
Lane-Reticker, Edward Donald .... Chapel Hill.
Lassiter, James Leonard .... Durham.
Ledford, Ruby Daphene .... Ellenboro.
Lentz, DeVere Craven, Jr. .... Asheville.
Lewis, Harrison .... Cashiers.
Marcus, Harvey Wardmore .... Chapel Hill.

Mitchell, George Cree....Wake Forest.
Mitchell, Wiley Francis, Jr. ....Youngsville.
Mitchem, Wade Worth, Jr. ....Lowell.
Myren, Richard Albert....Chapel Hill.
Nicholson, William Moore, III....Charlotte.
Nicol, Roderick MacLatchie....Lexington.
Olive, Leon....Durham.
Orr, William Wallace....Asheville.
Owen, Frances Jeanne....Gibsonville.
Owen, Lester Warren....Durham.
Palmer, Horace William....Chapel Hill.
Preston, Edwin Smith, Jr. ....Raleigh.
Pridgen, Elton Claude....Selma.
Pullen, Lucius Wilson....Rocky Mount.
Ramseur, Donald Earl....Cherryville.
Ramsey, Earle Gene....Chapel Hill.
Ricks, Walter Edward....Durham.
Sanders, John Lassiter....Four Oaks.
Sansone, Joseph Anthony....Burlington.
Singleton, Rudolph Grantley, Jr. ....Fayetteville.
Steed, Thomas Warwick, Jr. ....Raleigh.
Sturges, William Watts....Charlotte.
Sutton, Nathan Edwin....La Grange.
Tate, Sarah Lindsay....Charlotte.
Thomas, Alvin Avelia....Winston-Salem.
Thornburg, Lacy Herman....Huntersville.
Tillman, Daniel Thomas....Wadesboro.
Waggoner, William Johnson....Salisbury.
Walden, Carroll Washington, Jr. ....Lumberton.
Ward, Kennedy Wooten....New Bern.
Wells, Dewey Wallace....Henderson.
White, William Wray, Jr. ....Wake Forest.
Williams, Charles Ellis, Jr. ....Lexington.
Wood, Charles Barnette....Roxboro.
Yarbrough, Jack Dixon....Hendersonville.
Young, Thomas Lee....Lexington.

BY COMITY:

Farmer, Matthew S. ....Hendersonville from Ohio.
Joyce, Patrick Cyril, Jr. ....Winston-Salem from New York.
Morgan, Robert B. ....Kipling from South Carolina.
Winger, Maurice, Jr. ....Asheville from New York.

Given over my hand and the Seal of The Board of Law Examiners this 2nd day of December, 1954.

Edward L. Cannon, *Secretary,*
Board of Law Examiners,
State of North Carolina.

(Official Seal)

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1954

JAMES E. McPHERSON, INDIVIDUALLY, AS MANAGING TRUSTEE, DONOR OR TRUSTOR, AND IN ALL OTHER CAPACITIES; THELMA P. McPHERSON, INDIVIDUALLY, AS DONOR OR TRUSTOR, AND IN ALL OTHER CAPACITIES; DORIS LUCILLE McPHERSON KIRKLAND AND HUSBAND, W. RUDOLPH KIRKLAND; MAUD CAMILLA McPHERSON HULL AND HUSBAND, RUSSELL M. HULL; JOSEPH EDWARD McPHERSON, APPEARING BY HIS NEXT FRIEND, RUSSELL M. HULL, AND MARGARET DIANA McPHERSON, APPEARING BY HER NEXT FRIEND, RUSSELL M. HULL, v. FIRST & CITIZENS NATIONAL BANK OF ELIZABETH CITY, N. C.; F. T. HORNER, ADMINISTRATOR OF THE ESTATE OF O. E. McPHERSON, DECEASED; ANNE G. McPHERSON, ADMINISTRATRIX OF THE ESTATE OF D. W. McPHERSON, DECEASED; ANN CATHERINE KIRKLAND, MARILYN McPHERSON KIRKLAND, R. M. HULL, JR., PATRICIA DEE HULL; AND KILLIAN BARWICK, GUARDIAN AD LITEM OF ANN CATHERINE KIRKLAND, MARILYN McPHERSON KIRKLAND, R. M. HULL, JR., AND PATRICIA DEE HULL; AND ALL OTHER PERSONS, FIRMS OR CORPORATIONS, IN ESSE OR NOT IN BEING, WHO ARE NOW OR MIGHT BY ANY CONTINGENCY BECOME BENEFICIARIES OF OR ENTITLED TO ANY RIGHT, TITLE OR INTEREST IN, OR AUTHORITY IN CONNECTION WITH THE JAMES E. McPHERSON TRUST CREATED BY INSTRUMENT RECORDED IN BOOK 111, PAGE 558, OFFICE OF THE REGISTER OF DEEDS OF PASQUOTANK COUNTY, AT ELIZABETH CITY, N. C.

(Filed 7 April, 1954.)

1. Wills § 33h: Trusts § 3a—

If there is a possibility that a devise or grant of a future interest may not vest within 21 years plus the period of gestation after some life or lives in being at the time of the creation of the interest, the devise or grant is void by operation of the rule against perpetuities.

2. Trusts § 3a—

A grant of property to the trustee in an irrevocable trust with provision that upon the death of trustor's last surviving grandchild the trust should terminate and assets thereof should be distributed equally to the legitimate heirs of trustor's grandchildren is void by operation of the rule against perpetuities, it appearing that grandchildren of trustor might be born at any time during the next 50 years or more after the execution of the trust.

3. Appeal and Error § 1: Infants § 1—

When it appears in an action for the interpretation or reformation of a trust instrument that the judgment below affects the interest of possible unborn children of trustor, the Supreme Court, in the exercise of its supervisory powers, will protect *ex mero motu* the interest of the persons *in posse*.

4. Infants § 12—

In the absence of statute, an unborn infant cannot be made a defendant in an action and be represented by a guardian *ad litem*. G.S. 41-11.1. relates to representation of infants in proceedings involving the sale, lease, or mortgage of property but not to actions adjudicating the interest taken by persons *in posse* under a trust instrument.

5. Same: Trusts § 3a: Wills § 39: Judgments § 29—

The principle of virtual representation is in derogation of the general rule that a judicial decree does not bind persons not before the court, and the principle must be applied with great caution.

6. Same—

The principle of virtual representation of persons *in posse* applies only when living persons who have a privity of estate, or a similar or common interest with the persons *in posse*, are before the court, and this fact should appear from the pleadings.

7. Same—Decree in this suit for construction and reformation of trust held not binding on persons in posse not having virtual representation.

Trustor executed an irrevocable trust for the benefit of his children *in esse* and *in posse*, and their children, with further provision for the termination of the trust and the distribution of the *corpus* upon the death of trustor's last surviving grandchild. In this action for the construction and reformation of the trust instrument, judgment was entered that the provision for the vesting of the *corpus* contravened the rule against perpetuities, and a modification of the trust so as to provide for the vesting of the *corpus* within the limits of the rule against perpetuities, but which excluded any benefits to possible unborn children of trustor, was approved. *Held:* Conceding that the modification was to the interest of the trustor's children *in esse* and trustor's grandchildren, the interest of the trustor's unborn children is repugnant to the interest of his children *in esse*, and therefore trustor's unborn children were not before the court by virtual representation, nor could they be represented by the guardian *ad litem*, and therefore the judgment is not binding on possible unborn children of trustor.

8. Evidence § 6—

Under the common law rule it is presumed that any person may have issue so long as he lives.

Appeal by Killian Barwick, guardian *ad litem*, from *Morris, J.*, Resident Judge and Judge holding the courts of the First Judicial District, at Chambers in the courthouse in Currituck, 30 December, 1953. From Pasquotank.

Civil action for interpretation and reformation of trust instrument, involving application of the rule against perpetuities.

On 26 December, 1944, the plaintiff James E. McPherson executed a declaration of trust which was duly registered three days later in the Public Registry of Pasquotank County. It is recorded in Deed Book 111, page 558 *et seq.* This instrument, hereinafter referred to as Exhibit A, is in summary as follows:

"This Declaration of Trust, Made . . . by James E. McPherson, of the County of Pasquotank, State of North Carolina, establishes and declares the following trust, to wit:

"1. The trust shall be called The James E. McPherson Trust.

"2. The beneficiaries shall be: Doris Lucille McPherson, Maud Camilla McPherson, Joseph Edward McPherson, Margaret Diana McPherson, all other legal children of the donor which may be hereafter born, or their survivors or children.

"3. The donor, in consideration of the premises and of other considerations, hereby passing, conveys, assigns, sets over and transfers to the trust and . . . the trustees thereof hereinafter named the following stocks which at the close of business as of this date had the following value: (Then follows description of stocks of the value of $30,000.00) and such other gifts as the donor or any other person may make to the trust from time to time.

"The donor does hereby irrevocably renounce forever any and all claims to ownership in and to the assets or gifts he has or may hereafter give or convey to said trust including the dividends or profits arising therefrom. . . .

"4. The First and Citizens National Bank of Elizabeth City, North Carolina, is hereby designated the depository for the funds and securities of this trust.

"5. It is hereby provided that as soon hereafter as . . . is propitious and advantageous so to do, the managing trustee . . . or the trustees shall invest fifty per cent of the assets of the trust in real estate, it being the intention of the donor that approximately fifty per cent of the assets of said trust shall consist of real estate.

"6. James E. McPherson is hereby named, designated and appointed as the managing trustee of this trust so long as he shall live or be capable

of handling the same. In case of the death or voluntary or involuntary relinquishment of his trusteeship by the said James E. McPherson, the management of the trust shall be vested in three trustees who shall be as follows: The First and Citizens National Bank of Elizabeth City, C. E. McPherson of the City of Elizabeth City, North Carolina, and D. W. McPherson of the Town of Littleton, North Carolina, who shall manage the trust jointly in accordance with the provisions of the same hereinafter set forth, . . ." This paragraph also provides for the perpetuation of the trust—filling vacancies and appointing successor trustees—and makes provision for compensation of the trustees.

"7. The beneficiaries shall share and share alike as to any and all income from the trust and any liquidations of its assets so that while there is only one trust the beneficiaries are several and each beneficiary is entitled to his or her aliquot part thereof whether it be the income arising from the trust or the *corpus* of the estate. The income from the assets of the trust shall be distributed as hereinafter provided and if there remain any surplus it shall become a part of the *corpus* of the estate or an additional distribution made thereof as in the judgment of the managing trustee . . . or . . . trustees shall seem best."

8. This paragraph gives the trustees discretionary authority to sell assets and make changes from time to time in investments.

"9. The trust shall be operated for the benefit of the children of the donor hereinbefore named and those legal children hereafter born, and their children (the donor's grandchildren) and at the death of the last child of the primary beneficiary (the last living grandchild of the donor) the trust shall be terminated and the assets thereof distributed equally to the legitimate heirs of the primary beneficiaries' children *per stirpes* and not *per capita*. Should one or more of the primary beneficiaries have no legitimate children then his or her part shall be equally divided between the survivors, however, *per stirpes* and not *per capita*, provided, however, that an adopted child shall inherit equally with a blood child."

10. This paragraph makes available for each of the donor's children and grandchildren moneys for each of them to complete his or her education through college and professional school. The trustees are also directed to make contributions to the beneficiaries when they marry, on birth of children, and when they "start working," the amounts of these contributions to be in accordance with a stated formula based on the amount each beneficiary (child or grandchild) earns from his own work or business. However, the trustees are given broad discretionary power to vary the formula "to the end . . . there may be no actual suffering or hardship or unequal distribution of this trust."

11. This paragraph authorizes the trustees to invade the *corpus* of the trust when income is insufficient to meet disbursement requirements.

"12. Having in mind that while this trust is singular but the primary beneficiaries are several, and that each primary beneficiary has his or her aliquot part therein, it is provided that the grandchildren provided for herein shall only share in the aliquot part of his or her parent, and that such allowance as may be drawn in accordance with the provisions of this trust shall be charged to the part originally set up as belonging to his or her parent."

13. This paragraph prescribes requirements as to fidelity bonds for the trustees.

Between 26 December, 1944, and 2 January, 1950, James E. McPherson and wife, Thelma P. McPherson, made further conveyances and gifts to the trust, consisting of cash, corporate stocks, and lands, of the aggregate value of $216,850.00, in addition to the initial $30,000.00.

On 3 January, 1950, the plaintiffs James E. McPherson and wife executed an instrument in writing, later registered in the Public Registry of Pasquotank County in Book 141, page 89, purporting to amend "The James E. McPherson Trust," and directing annual payments of $600.00 to the Elizabeth City Chapel of the Church of Jesus Christ of Latter Day Saints.

The plaintiffs instituted this action on 3 November, 1953, alleging in their complaint in pertinent part as follows:

"FIRST: That James E. McPherson, age 53, is the husband of Thelma P. McPherson, age 48, and that said parties are the parents of Doris Lucille McPherson Kirkland, age 28, the wife of W. Rudolph Kirkland, age 28, and Maud Camilla McPherson Hull, age 26, the wife of Russell M. Hull, age 29, and Joseph Edward McPherson, age 20, unmarried, and Margaret Diana McPherson, age 11. That Doris Lucille McPherson Kirkland, Maud Camilla McPherson Hull, Joseph Edward McPherson and Margaret Diana McPherson constitute all of the children of the said James E. McPherson and wife.

"SECOND: That Doris Lucille McPherson Kirkland and husband, W. Rudolph Kirkland are the parents of Ann Catherine Kirkland, age 4, and Marilyn McPherson Kirkland, age 2; that Maud Camilla McP. Hull and husband, Russell M. Hull, are the parents of R. M. Hull, Jr., age 2, and Patricia Dee Hull, age three months.

"THIRD: That on December 26, 1944, plaintiff James E. McPherson executed . . . that certain Declaration of Trust (herein referred to as Exhibit A) . . . That D. W. McPherson, named in paragraph six as one of the trustees of said trust, has since died, and Anne G. McPherson, his wife, is administratrix of his estate; that O. E. McPherson, named in said section as one of the trustees of said trust, has since died, and F. T. Horner, Jr., is the duly appointed and acting administrator of his estate.

"FOURTH: That neither the First & Citizens National Bank of Elizabeth City, . . . O. E. McPherson nor D. W. McPherson have ever qualified as trustee of said trust, or ever acted in said capacity. . . . That James E. McPherson, designated in paragraph sixth of said trust agreement as the managing Trustee of this trust, is one of the plaintiffs herein and has had the sole management and authority in connection with said trust throughout its existence."

"TWELFTH: That said donors (James E. McPherson and wife, Thelma P. McPherson) have heretofore irrevocably renounced any and all claims or right to ownership of or interest in any and all of the assets or gifts which he or she may have heretofore donated, transferred or conveyed to said trust, including all dividends, profits or other income arising therefrom. That it was the intention of said donors to make their four children, named in Exhibit A, the primary beneficiaries of said trust, and, in the event each child live to age 35, the sole beneficiaries thereof, with the unexpended benefits provided for each child descending to his or her issue, *per stirpes,* in the event of death prior to age 35. That by reason of the mistake of the draftsman, or the mutual mistake of the parties, the said instrument, Exhibit A, does not set out the true and real intent of said donors. That Section Nine of Exhibit A provides that said trust shall continue until the death of the last grandchild of donors, and thereby violates the rule against perpetuities, by reason of which the said provisions of said trust agreement are void in so far as they attempt to extend benefits in said trust fund beyond the primary beneficiaries, the children of donors.

"THIRTEENTH: That some provisions of the said original trust agreement, Exhibit A, are vague, uncertain, ambiguous, contradictory and require interpretation and clarification by this Honorable Court.

"FOURTEENTH: That it was the intention of said donors and particularly the said James E. McPherson to create and establish the . . . trust in accordance with that certain trust agreement, designated Exhibit H, dated the 30 day of October, 1953, a copy of which is attached to this complaint . . . That . . . Exhibit H, and the provisions thereof, are in accordance with the wishes and intentions of said donors, and plainly and clearly express the provisions of the original trust agreement which are legally valid and effective, and all parties having a valid interest in said trust have consented to the modification and amendment of the trust agreement as set out in Exhibit H. (The pertinent parts of Exhibit H are hereinafter set out.)

"FIFTEENTH: That James E. McPherson, managing trustee of said trust, who has been serving as such ever since said trust was created, desires, needs and requests the advice, and direction of this Court relating to the rights and interest of the beneficiaries thereunder in order that he,

or his successor as the trustee of said trust, may properly perform his duties thereunder. That, in equity and justice, the said declaration of trust should be reformed to speak the true intention of the parties, which intention was to make the children of the said James E. and Thelma P. McPherson the primary beneficiaries of said trust and entitled to the benefits and proceeds thereof as set out in Exhibit H.

"Sixteenth: That at the time of the execution of the original trust agreement, Exhibit A, the said James E. McPherson enjoyed good health and was physically able to serve as managing trustee of said trust. That the said James E. McPherson feels that he is now physically unable to perform the duties of managing trustee of said trust and, therefore, desires to resign as such, and requests that the Wachovia Bank & Trust Company, of Raleigh, North Carolina, be appointed as sole trustee of said trust. That the said Wachovia Bank & Trust Company, as trustee of said trust, shall be vested with title to all the property now held in said trust and shall have and possess all the powers, rights, discretions and responsibilities set forth in Exhibit H. That the said Wachovia Bank & Trust Company has a trained, experienced trust department, fully capable of administering said trust, and has indicated its willingness to accept the appointment as trustee of said trust. That all parties having a valid interest in said trust have consented to the appointment of said Wachovia Bank & Trust Company as the sole trustee of said trust.

"Wherefore, Plaintiffs pray that the said original trust agreement be reformed to speak the true intent of the parties; that the provisions of said trust agreement contrary to the rule against perpetuities be adjudged invalid and of no effect; . . . that the validity, force and effect of said trust agreement be adjudged and determined; that Exhibit H be adjudged . . . a correct and proper statement of the legal provisions of said trust agreement and . . . to be in full force and effect; . . ."

Exhibit H.

"This Indenture, Made this 30th day of October, 1953, by and between James E. McPherson of the County of Pasquotank, State of North Carolina, (hereinafter sometimes referred to as 'Settlor') the first party, and Wachovia Bank & Trust Company, a North Carolina corporation, having its principal office in the City of Winston-Salem, North Carolina, as Trustee, (hereinafter sometimes referred to as 'Trustee') the second party, Witnesseth:

"Whereas by an instrument bearing date on the 26th day of December, 1944, (hereinafter referred to as the 'trust instrument') the Settlor established a trust known as The James E. McPherson Trust, and

"Whereas by an instrument of like date Thelma P. McPherson, wife of the Settlor, declared her intent to, and did, become a donor to said

trust, and she has consented and agreed to the execution and delivery of this Indenture, as evidenced by her signature hereto subscribed; and

"WHEREAS the said James E. McPherson, who was designated and appointed in said trust instrument as the managing Trustee of said trust, has resigned as such, and O. E. McPherson and D. W. McPherson, two of the three trustees therein designated and appointed to succeed the said James E. McPherson as Trustee, are both deceased, and the First and Citizens National Bank of Elizabeth City, the third of said successor Trustees, has expressed its desire not to qualify as Trustee of said Trust, and it is therefore necessary to designate and appoint a successor trustee of said Trust, and the said Wachovia Bank and Trust Company has consented and agreed to serve as such; and

"WHEREAS in accordance with certain provisions of said trust instrument, payments are to be made under certain conditions to the beneficiaries therein designated for their education, acquisition of homes, entering into business, having children, etc., but in paragraph 7 of said trust instrument it is specifically provided that such beneficiaries shall share and share alike as to any and all income from the trust and any liquidations of its assets, and the provisions of said trust are accordingly conflicting and ambiguous and require clarification and modification; and

"WHEREAS the Settlor has recently been advised that said trust instrument violates the rule against perpetuities, and it is believed that the interests of the beneficiaries of said trust will be promoted and that no one will be deprived of any valid interest under said trust instrument through the modification and amendment thereof as herein provided, and

"WHEREAS all the primary beneficiaries of said trust have consented and agreed to the modification of said trust instrument as herein set forth, as evidenced by their signatures hereto subscribed; and

"WHEREAS it is intended that this indenture shall not become effective unless and until the execution and delivery hereof shall have been duly authorized or approved by a court of competent jurisdiction of the State of North Carolina;

NOW, THEREFORE, in consideration of the premises, it is stipulated and agreed that said trust instrument shall be, and the same is hereby modified and amended so that the same will read and provide as follows (all the provisions of said trust instrument being hereby superseded):

"For and in consideration of the love and affection which the Settlor bears toward the beneficiaries hereunder, the Settlor has transferred, assigned, conveyed, set over and delivered, and does hereby transfer, assign, convey, set over and deliver, unto the Trustee the securities and property described in "Schedule A" hereto attached, (showing the net assets of the trust to be $380,923.71 as of 31 December, 1952) . . ., but

in trust, nevertheless, for the uses and purposes and subject to the terms, conditions and provisions hereinafter set forth.

ARTICLE I.

"The Trustee shall divide the trust property into four separate trusts of equal value, and shall hold, manage, control, invest and reinvest the property in each trust, and shall collect all the income therefrom, and shall pay, out of such income, all proper expenses, charges and taxes connected with the ownership, management, administration and upkeep of the property in such trust, and shall use and distribute the remaining or net income and the principal thereof as hereinafter provided,

"(a) The Trustee shall, from time to time during the term of one of said trusts, pay to, or expend for, the benefit of, the Settlor's son, Joseph Edward McPherson, if he is living at the time of the respective income distributions and has not previously attained the age of twenty-one years, so much of the net income . . . or principal of said trust as the Trustee, in its discretion may deem necessary or advisable in order to provide for his suitable support, care, maintenance and education, and any unexpended balance of said income shall be added to the principal of said trust. If the said Joseph Edward McPherson is living at the time of the respective distributions, and has previously attained the age of twenty-one years, the Trustee shall pay to him, quarter-annually (or more frequently if the Trustee deems it advisable), the entire net income of said trust. If and when the said Joseph Edward McPherson lives to attain the age of twenty-five years, the Trustee shall pay over and distribute to him, free and clear of all trusts, one-third of the then existing principal of said trust. If and when the said Joseph Edward McPherson lives to attain the age of thirty-five years, said trust shall fully and finally terminate, and the Trustee shall pay over and distribute to him, free and clear of all trusts, the balance of the principal of said trust, together with any undistributed income thereof. In the event of the death of the said Joseph Edward McPherson prior to his attaining the age of thirty-five years, the Trustee shall, from time to time during the remaining term of said trust, pay to or expend for the benefit of, such of the said Joseph Edward McPherson's issue (to the exclusion of any one or more of such issues) as the Trustee, in its discretion, may determine, so much of the net income . . . or principal of said trust as the Trustee, in its discretion, may determine, in order to provide for the suitable support, maintenance, care and education of such issue, and any unexpended balance of said net income shall be added to the principal of said trust. Said trust shall fully and finally terminate when (1) the property in said trust shall have been fully distributed as hereinabove provided, or (2) the said Joseph Edward McPherson shall have died, and all his issue, if any, shall

have each died or lived to attain the age of twenty-one years, or (3) twenty-one years shall have elapsed after the death of the said Joseph Edward McPherson, whichever of said events shall first occur; and unless the termination of said trust is occasioned by the full distribution of the trust property, any property then remaining in said trust (principal or income) shall be forthwith distributed, free and clear of all trusts, to the then living issue of the said Joseph Edward McPherson, *per stirpes,* and if there is no such issue, and any other issue of the Settlor is then living, to such other issue of the Settlor, *per stirpes,* provided, however, that if any other trust or trusts is then existing hereunder for the benefit of such other issue of the Settlor, the property which, except for this proviso, would be distributed to such other issue, shall be added to and be administered and distributed as a part of such other trust or trusts, income to be treated as income and principal as principal; and if no issue of the Settlor is living at the time of such termination, said property shall be distributed to such person or persons (including any body politic) as would be entitled to take personal property from the Settlor in accordance with, and in the proportions provided by, the laws of the State of North Carolina in effect at the time of execution of this Indenture were the Settlor to die at said time owning said property, and being intestate, unmarried and without issue, it being the Settlor's intention and direction that in no event shall any part of the principal or income of said trust revert to the Settlor or to his estate.

"(b) The Trustee shall, quarter-annually (or more frequently if the Trustee deems it advisable), pay to the Settlor's daughter, Doris McPherson Kirkland, if she is living at the time of the respective distributions, the entire net income of one of said trusts. If and when the said Doris McPherson Kirkland lives to attain the age of twenty-five years, the Trustee shall pay over and distribute to her, free and clear of all trusts, one-third of the then existing principal of said trust. If and when the said Doris McPherson Kirkland lives to attain the age of thirty-five years, said trust shall fully and finally terminate, and the trustee shall pay over and distribute to her, free and clear of all trusts, the balance of the principal of said trust, together with any undistributed income thereof. In the event of the death of said Doris McPherson Kirkland prior to her attaining the age of thirty-five years, the Trustee shall, from time to time during the remaining term of said trust, pay to, or expend for the benefit of, such of the said Doris McPherson Kirkland's issue (to the exclusion of any one or more of such issue) as the trustee, in its discretion, may determine, so much of the net income . . . or principal of said trust as the Trustee, in its discretion, may determine, in order to provide for the suitable support, maintenance, care and education of such issue, and any unexpended balance of said net income shall be added to the principal of

said trust. Said trust shall fully and finally terminate when (1) the property in said trust shall have been fully distributed as hereinabove provided, or (2) the said Doris McPherson Kirkland shall have died, and all her issue shall have each died or lived to attain the age of twenty-one years, or (3) twenty-one years shall have elapsed after the death of . . . Doris McPherson Kirkland, whichever of said events shall first occur; and unless the termination of said trust is occasioned by the full distribution of the trust property, any property then remaining in said trust (principal or income) shall be forthwith distributed, free and clear of all trusts, to the then living issue of the said Doris McPherson Kirkland, *per stirpes,* and if there is no such other issue and any other issue of the Settlor is then living, to such other issue of the Settlor, *per stirpes,* provided, however, that if any other trust or trusts is then existing hereunder for the benefit of such other issue of the Settlor, the property which, except for this proviso, would be distributed to such other issue, shall be added to and be administered and distributed as a part of such other trust or trusts, income to be treated as income and principal as principal; and if no issue of the Settlor is living at the time of said termination, said property shall be distributed to such person or persons (including any body politic) as would be entitled to take personal property from the Settlor in accordance with, and in the proportions provided by, the laws of the State of North Carolina in effect at the time of the execution of this indenture were the Settlor to die at said time owning said property, and being intestate, unmarried and without issue, it being the Settlor's intention and direction that in no event shall any part of the principal or income of said trust revert to the Settlor or to his estate."

(c) This section makes the same provisions for the Settlor's daughter Maud McPherson Hull and her issue as section "(b)" makes for his daughter Doris McPherson Kirkland.

(d) This section makes the same provisions for the Settlor's daughter Margaret Diana McPherson and her issue as section "(a)" makes for his son, Joseph Edward McPherson.

"(e) Any payment or payments of income . . . or principal made by the Trustee pursuant to the broad discretionary powers granted the Trustee in the next four preceding paragraphs, designated (a), (b), (c) and (d), shall not be construed as an advance and, accordingly, shall not be taken into account in any other distribution or distributions of income or principal made under this Indenture.

"(f) In dividing the trust property into four separate trusts, as hereinabove provided, the trustee may assign to the several trusts any property in kind, or any undivided interest therein; and the trustee may make joint investments of funds in the several trusts; and so long as it can be advantageously done, the trustee may hold the several trusts as a common fund,

and divide the net income therefrom among the several trusts proportionately."

Articles II, III, IV, V, and VI of Exhibit H, covering six pages of the record, contain provisions which relate in the main to the administration of the trust. These Articles are omitted as not being essential to decision.

On 30 November, 1953, an order was entered by the court appointing Killian Barwick guardian *ad litem* for the minor defendants Ann Catherine Kirkland, Marilyn McPherson Kirkland, Russell M. Hull, Jr., and Patricia Dee Hull, "and as guardian *ad litem* for all other persons, firms or corporations, *in esse* or not in being, who are now or might by any contingency become beneficiaries of or entitled to any right, title or interest in, or authority in connection with, the James E. McPherson Trust created by instrument recorded in Book 111, page 558, office of the Register of Deeds of Pasquotank County, . . ."

In apt time Killian Barwick, guardian *ad litem,* after duly accepting service of summons, filed answer denying that the declaration of trust, Exhibit A, was executed by mistake or that it violates the rule against perpetuities and specifically averring that the intent of the donors is to be gathered from the language of the declaration of trust, rather than from Exhibit H.

The defendants First and Citizens National Bank, F. T. Horner, Jr., administrator, and Annie G. McPherson, administratrix, although duly served with process, did not file answer or demurrer or otherwise appear.

After the time for answering had expired, a jury trial was waived by the plaintiffs and the answering defendant, and it was agreed that Judge Morris might hear the cause out of term and out of the county, find the facts and render judgment thereon. The cause came on for hearing and was heard at the courthouse in Currituck on 30 December, 1953. At the conclusion of the hearing Judge Morris found facts, made conclusions of law, and entered judgment, the gist of which follows:

FINDINGS OF FACT.

"3. . . . That Doris Lucille McPherson Kirkland, Maud Camilla McPherson Hull, Joseph Edward McPherson and Margaret Diana McPherson constitute all of the children of James E. McPherson and wife (Thelma P. McPherson).

"4. That Doris Lucille McPherson Kirkland and husband, W. Rudolph Kirkland, are the parents of Ann Catherine Kirkland, age 4, and Marilyn McPherson Kirkland, age 2; that Maud Camilla McPherson Hull and husband, Russell M. Hull, are the parents of R. M. Hull, Jr., age 2, and Patricia Dee Hull, age 3 months. That the aforesaid four grandchildren

constitute all of the grandchildren of . . . James E. McPherson and wife at this time.

"5. That on December 26, 1944, the plaintiff James E. McPherson executed . . . that certain declaration of trust, designated as 'Exhibit A,' copy of which is attached to the complaint, said instrument being registered on December 29, 1944, in the Pasquotank Register's office, Book 111, p. 558.

"6. That the facts set out in Sections Third and Fourth of the complaint are true and correct and are hereby found as facts as if repeated verbatim herein."

7. In this paragraph the court found in substance that between 26 December, 1944, and 2 January, 1950, James E. McPherson and wife made additional gifts to the trust of the aggregate value of $216,850.00.

"8. That the annual donation of $600.00 to the Elizabeth City Chapel of the Church of Jesus Christ of Latter Day Saints, attempted to be made (by instrument recorded in the Public Registry of Pasquotank County in Book 141, page 89) is invalid and has no legal effect. That the said church, through its proper presiding officers, has filed a written statement herein releasing said trust from any such claim to said annual donation. That the . . . church . . . is, therefore, neither a necessary or proper party to this proceeding, and has no claim to any funds in said trust nor any rights under any agreement connected therewith."

"10. That on December 29, 1944, the time of filing said declaration of trust, Exhibit A, none of the grandchildren of said donors or settlors, now parties to this proceeding, were *in esse*. That there is a probability of additional grandchildren over a period extending for 30 years or more. That the provisions of said Exhibit A attempting to confer benefits or rights upon the grandchildren of James E. McPherson and wife violated the rule against perpetuities and are, therefore, void and of no legal effect, and ineffective to convey any rights or interests in said trust funds to any grandchild of the said James E. McPherson and wife. That the provisions of said trust agreement relating to said grandchildren are distinct and severable from the provisions thereof relating to the children of the said James E. McPherson and wife.

"11. That a proper interpretation of said trust agreement indicates that the children of the said James E. McPherson and wife, as named in Exhibit A, are the primary beneficiaries of said trust, with an equal share to each. That the provisions of said trust agreement as to said children are valid and legally effective. That the provisions of said trust agreement relating to said grandchildren are not material to its other terms and provisions relating to the said children, nor inconsistent with the trustors' paramount intention as revealed by the . . . trust agreement."

"13. That Exhibit H, dated October 30, 1953, with Schedule A, partially describing the properties included in said trust, thereto attached, has been executed by all of the plaintiffs to this proceeding as a proper statement of the intention of James E. McPherson and wife in creating said trust, and a proper interpretation of said trust agreement, and . . . Exhibit H has been executed by the Wachovia Bank and Trust Company, of Raleigh, N. C., through the proper and appropriate officers of its Trust Department, indicating its willingness to accept the position of trustee under said trust agreement. That James E. McPherson is physically unable to continue serving as managing trustee or otherwise in connection with said trust, and has resigned as such. That all parties having valid interest in said trust have consented to the appointment of the . . . Wachovia Bank and Trust Company as the sole trustee of said trust.

"14. That this Court does hereby find as a fact from the evidence, which the Court regards as strong, cogent and convincing, that Exhibit A does not reflect the true intention of the donors to this trust; that the failure of said Exhibit A to reflect the true intention of donors is due to a mistake of the draftsman; that the true intention of the donors is reflected by the terms and provisions of Exhibit H, which has been duly executed by all of the interested plaintiffs, and the Wachovia Bank and Trust Company; that Exhibit A should be reformed to speak the true intention of the donors, as set out in Exhibit H, all of which is hereby found as a fact from the evidence before the Court.

"15. That this Court does hereby find as a fact that Exhibit H, produced in Court in triplicate originals, all executed by the plaintiffs herein and the Wachovia Bank & Trust Company, as reformed, constitutes a proper statement of the valid provisions of Exhibit A and the other trust documents concerned in this proceeding, and is a proper interpretation and clarification of said trust indentures, and represents the real intention of . . . James E. McPherson and wife. . . .

"16. That the Wachovia Bank & Trust Company, through its Trust Department, is a proper, fit and suitable trustee for the management of said estate.

"17. That from the evidence before the Court, the Court finds as a fact that it is physically impossible for the said James E. McPherson to have additional children.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

"18. That the provisions of the original trust agreement, Exhibit A, relating to and attempting to provide benefits for the grandchildren of James E. McPherson and wife violate the rule against perpetuities, and are therefore void and legally ineffective. That said provisions are severable from and not inconsistent with the provisions of said trust agreement

relating to the children of James E. McPherson, the primary beneficiaries named therein;

"19. That the children of James E. McPherson and wife, plaintiffs herein, named in said Exhibit A, are the primary beneficiaries of said trust and entitled to all benefits thereof;

"20. That Exhibit H correctly represents the intention of the donors or trustors and the said original trust agreement, Exhibit A, is hereby reformed in accord with and in the exact language of Exhibit H, which the Court finds is the true agreement and intention of the parties.

"21. That Exhibit H, attached to the complaint, and executed by all of the plaintiffs herein, is a correct statement of the valid and legally effective provisions of said trust agreement, and a proper interpretation and clarification of the same, and is hereby adopted by this Court as such;

"22. That James E. McPherson, managing trustee, is hereby released from any duties and activities in connection with said trust;

"23. That Wachovia Bank & Trust Company, Raleigh, N. C., is hereby appointed as trustee of the . . . James E. McPherson Trust with the duties, power and authority provided in said Exhibit H and prescribed by law. Said trustee is not required to inquire into any acts or failure to act of the prior trustees, nor shall the . . . Wachovia Bank & Trust Company, as trustee, be responsible for any acts or failure to act of the . . . prior trustees, nor is the said trustee required or under obligation to attempt to hold the trustee liable for any breach of trust duties which he may have committed, unless the same shall be specifically required by a subsequent order of this Court;

"24. That the defendants recover nothing in this proceeding.

"25. That the costs of this proceeding, including all costs of this appeal in the Supreme Court of North Carolina, shall be paid by the said trustee out of trust funds;

"26. That this cause is retained for further orders not inconsistent herewith."

From the judgment entered, the defendant Killian Barwick, guardian *ad litem,* appealed.

Chas. L. Kaufman and LeRoy & Goodwin for plaintiffs, appellees.
John H. Hall for defendant guardian ad litem, appellant.

Johnson, J. The initial question presented by this appeal is whether the provisions of the trust instrument relating to the grandchildren violate the rule against perpetuities. This rule prescribes the time within which title to a future interest must vest. Under the rule, "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. If there is a possibility such future interest may not vest within the time prescribed, the gift or grant is void." *McQueen v. Trust Co.*, 234 N.C. 737, 741, 68 S.E. 2d 831. See also *Fuller v. Hedgpeth*, 239 N.C. 370, 80 S.E. 2d 18; Gray, The Rule Against Perpetuities, Fourth Ed., Sec. 201, p. 191.

In 1944, the effective date of the declaration of trust, Exhibit A, James E. McPherson had four children. They were eighteen, sixteen, ten, and one years of age, respectively. The crucial section of the trust instrument is paragraph 9. It provides: ". . . at the death of the last child of the primary beneficiary (the last living grandchild of the donor) the trust shall be terminated and the assets thereof distributed equally to the legitimate heirs of the primary beneficiaries' children *per stirpes* and not *per capita* . . ."

By the terms of paragraph 9, it thus appears that the assets of this trust could not vest until the death of the last surviving grandchild, unborn on the effective date of the trust instrument, but who might be born at any time during the next fifty years or more. Should he live out his normal life expectancy, it is quite likely that to give effect to the trust instrument, the trust might continue for more than one hundred years, with the ultimate beneficiaries unknown and with the greater portion of the estate not vested. It is manifest that the provisions of the trust instrument relating to the grandchildren violate the rule against perpetuities. *McQueen v. Trust Co., supra,* and cases cited; Gray, The Rule Against Perpetuities, Fourth Ed., Sec. 201; 41 Am. Jur., Perpetuities and Restraints on Alienation, Sections 7, 14, 19, and 24.

The appealing guardian *ad litem* challenges the judgment below only in respect to the question whether the original trust instrument is violative of the rule against perpetuities. The guardian *ad litem* concedes in his brief that if the question of perpetuity be resolved against him, then it is to the advantage of those parties represented by him that the judgment below take effect as entered. It is noted that the judgment as entered interprets the provisions of the trust relating to the grandchildren of James E. McPherson as being the parts of the instrument which violate the rule against perpetuities. These provisions are treated by the judgment as being distinct and severable from the provisions relating to the children of James E. McPherson. Upon this premise the court below interpreted the portions which provide for the grandchildren as being stricken down by application of the rule against perpetuities, while holding that the parts which provide for the children of the trustor McPherson were salvageable and subject to reformation in accordance with the provisions of Exhibit H.

Necessarily, then, if the rule against perpetuities applies, obviously it is for the best interest of the children of James E. McPherson that its application be limited to the parts which relate to the grandchildren, with the portions which make provision for the children being treated as severable and subject to reformation.

Similarly, if the rule against perpetuities applies, it is to the advantage of the grandchildren that the trust be preserved for the children of the donor. This is so for the reason that if any or all of them should die, their children would likely succeed to beneficial interests. But not so if the trust instrument should fall *in toto* because of perpetuity. (On the questions of severability and reformation see: 41 Am. Jur., Perpetuities and Restraints on Alienation, Sections 55 through 65; American Law Institute Restatement, Property, Vol. IV, Sections 373 to 376; 45 Am. Jur., Reformation of Instruments, Sec. 6; *Trust Co. v. Williamson,* 228 N.C. 458, 46 S.E. 2d 104.)

It thus appears that the position taken by the guardian *ad litem* in limiting the scope of his appeal so as to desist from further challenging the judgment below in the event the question of perpetuity be resolved against him is entirely consistent with the best interests of the grandchildren of the donor. And the judgment as entered below, reforming the trust instrument in accordance with Exhibit H so as to confer all the primary benefits of the trust on the four living children of the McPherson donors, to the exclusion of possible unborn children, is manifestly conducive to the best interest of the children *in esse.*

But there is more to the case than that. This Court, in the exercise of its supervisory powers over the lower courts (Const. of N. C., Art. IV, Sec. 8; *Elledge v. Welch,* 238 N.C. 61, 68, 76 S.E. 2d 340), is necessarily concerned with the judgment below as it affects the interests of possible unborn children of James E. McPherson. As to this, it is noted that the original trust instrument in providing benefits for the four children of James E. McPherson then born also makes provision for "all other legal children . . . which may be hereafter born" to him. The court below found and concluded in substance that the donor's dominant intent was to provide for his children, as distinguished from his grandchildren, and upon the basis of such finding and conclusion adjudged that the trust instrument be reformed in accordance with the provisions of Exhibit H. This instrument makes no provision whatsoever for "other legal children . . . which may be hereafter born" to James E. McPherson.

This exclusion of possible after born children of James E. McPherson, age now 53 years, may not be sustained on the theory that such unborn children are before the court and represented by the guardian *ad litem.* As to this, while the record indicates the order appointing the guardian *ad litem* recites that he is to represent, in addition to certain named

grandchildren of James E. McPherson, "all other persons, . . . *in esse* or not in being, who are now or might by any contingency become beneficiaries of . . . the James E. McPherson trust . . .," nevertheless, the record indicates that the guardian *ad litem* never presumed to represent the possible unborn children of James E. McPherson. The record and brief show that he limits his representation to the grandchildren. Indeed, no such direct representation by guardian *ad litem* is sanctioned by law. The rule is that, in the absence of statute, the capacity to be sued exists only in persons in being. 67 C.J.S., Parties, Sec. 30; McIntosh, North Carolina Practice and Procedure, pp. 228, 230, and 235. With us, in the absence of statute, an unborn infant cannot be made a defendant in an action and be represented by a guardian *ad litem*. *Deal v. Sexton,* 144 N.C. 157, 56 S.E. 691. No statute has been called to our attention, and our investigation discloses none, authorizing the joinder of possible unborn children in an action like this one. Chapter 811, Session Laws of 1949, now codified as G.S. 41-11.1, appears to be limited to actions or proceedings involving the sale, lease, or mortgage of property. See 27 N.C.L.R. 415; *Cole v. Cole,* 229 N.C. 757, 51 S.E. 2d 491; McIntosh, North Carolina Practice and Procedure, Sec. 251, pp. 234 and 235.

As bearing further on the question of reformation, the general rule is that an instrument cannot be reformed against unborn persons unless they are before the court through the doctrine of virtual representation; that is, where living persons who have a privity of estate with them are before the court. 45 Am. Jur., Reformation of Instruments, Sec. 72; Annotations: 8 L.R.A. (N.S.) 66. This doctrine, resting as it does on principles of convenience and necessity in the administration of justice and being in derogation of the general rule that a judicial decree does not bind persons not before the court, is applied with great caution. And ordinarily, the principle of virtual representation may be invoked only when it is made to appear, and the pleadings should so show, that the persons not before the court have an interest in common—an interest similar—to that of the parties who sue or defend on behalf of others. In short, to bind unborn persons, it must be made to appear that the rights or interests asserted by the parties before the court are identical with those that might reasonably be expected to be asserted by the unborn persons if they were *in esse* and before the court. See 39 Am. Jur., Parties, Sections 44 to 53; 30 Am. Jur., Judgments, Sec. 228; G.S. 1-70; *Ex Parte Yancey,* 124 N.C. 151, 32 S.E. 491; *Beam v. Gilkey,* 225 N.C. 520, 35 S.E. 2d 641, and cases cited. See also *Downey v. Seib,* 185 N.Y. 427, 78 N.E. 66.

In the case at hand the judgment excludes the possible unborn children of James E. McPherson from any benefits whatsoever in the trust. It thus appears that the McPherson children *in esse* assert, and by the terms

of the judgment are allowed, rights and benefits wholly inconsistent with the interests of possible unborn children. This being so, it is manifest that the children *in esse* do not represent those *in posse*. Accordingly, the judgment below is no bar to the rights of possible unborn children of James E. McPherson under application of the doctrine of virtual representation.

Nor have we overlooked Finding of Fact No. 17, wherein the court below found "that it is physically impossible for . . . James E. McPherson to have additional children." On the basis of this finding, without further elaboration or supporting allegation, the court decreed in effect that the living children of James E. McPherson are entitled to all the benefits of the McPherson trust. This decree may not be treated as conclusive in view of the presumption indulged by the law that so long as a man lives he is capable of procreation. 20 Am. Jur., Evidence, Sec. 213; 31 C.J.S., Evidence, Sec. 149; 57 Am. Jur., Wills, Sec. 1249. Indeed, by the ancient rule of the common law, to which this Court adheres (*Shuford v. Brady,* 169 N.C. 224, 85 S.E. 303), it is irrebuttably presumed that any person—man or woman—may have issue so long as life lasts. 2 Blackstone *125. While in many jurisdictions, including England, the question whether the possibility of issue is ever extinct, has been re-examined in the light of exact processes of medical science by which in given cases sterility or impotency may be shown as matters of scientific certainty, nevertheless, thus far this Court has not been presented with a situation sufficiently compelling to warrant relaxation of the common law rule. *Shuford v. Brady, supra; Smith v. Moore,* 178 N.C. 370, 100 S.E. 702; *Prince v. Barnes,* 224 N.C. 702, 32 S.E. 2d 224. But see Annotation: 67 A.L.R. 538.

Conceding, without deciding, that the parts of the trust instrument which make provision for the children of James E. McPherson as a class are severable from other parts of the instrument and subject to salvage by reformation, even so, the judgment below, reforming the trust instrument in accordance with the provisions of Exhibit H, may not upon the record as presented be upheld as binding upon the possible unborn children of James E. McPherson. For the reasons indicated, the judgment below is inconclusive as to the interests of such unborn children and must be held for error in so far as it purports to exclude them from benefits of the trust estate.

The cause will be remanded to the court below to the end that further proceedings may be had and judgment entered in accordance with this opinion.

Error and remanded.

LAURA CROWELL *v.* EASTERN AIR LINES, INC., AND CITY OF CHARLOTTE.

(Filed 7 April, 1954.)

1. Carriers § 3—

Interstate air transportation is regulated in accordance with the provisions of the Civil Aeronautics Act. 49 U.S.C., Sec. 401, *et seq.*

2. Carriers §§ 4, 21c—

An interstate Air Line is required to file with the Civil Aeronautics Board only such rules, regulations and practices as affect rates or services under such rates, 49 U.S.C., Sec. 483 (a), and a time limitation as to filing notice of claim and institution of action for negligent injury to a passenger relates to an act of the passenger and not to service of the carrier and is neither required nor authorized to be filed with the Board by the statute.

3. Carriers § 21c—

A statement printed on the ticket folder that the carrier had set forth in its tariffs notice of time limits for filing claim and institution of suit for personal injury will not bar a passenger's action instituted within the limitation of G.S. 1-52 (5) when it appears that the carrier had actual notice of the injury at the time it occurred, that the tariffs were filed only with the Civil Aeronautics Board, and that the passenger, though a habitual traveler by air, had never read on any ticket sold her such limitation, it being necessary that such limitation be distinctly declared and deliberately accepted in order to be effective.

4. Carriers § 21c—

While an air line is not an insurer of the safety of its passengers, it is under duty to furnish a passenger with a reasonably safe passageway from the waiting room of the airport to its airplane, and this irrespective of any terms in the lease of the airport.

5. Same—

Evidence tending to show that a passenger on her way to board a plane had the heel of her shoe caught by a worn and loose threshold board of the door leading to the loading platform, *held* sufficient to overrule the carrier's motion to nonsuit, both on the issue of negligence and the issue of contributory negligence.

6. Appeal and Error § 6c (5)—

Assignments of error to the charge which do not point out the alleged error are ineffectual.

7. Trial § 36—

Where the issues submitted are sufficient to support the judgment disposing of the whole case, the refusal of the court to submit issues tendered will not be held for error.

8. Contracts § 7e—

Contracts indemnifying one against his own negligence are strictly construed.

9. Carriers § 21c: Municipal Corporations § 8c—

Stipulation in a lease concerning a municipal airport that the municipality should keep the airport facilities in good repair does not excuse a lessee air line from its duty to provide passengers with a reasonably safe passageway to its planes, and such provision will not support an air line's claim for indemnity against the city for injury to a passenger caused by a fall when the passenger's heel was caught by a worn and loose threshold board while she was on her way to board a plane.

10. Appeal and Error § 8—

An appeal and appellant's exceptions will be considered in the light of the theory of trial in the lower court.

11. Appeal and Error § 6c (5½)—

Where a defendant tenders no issue as to primary and secondary liability and the cause is not tried upon this theory in the lower court, appellant may not object to the failure of the court to submit such issue.

12. Negligence § 8—

The doctrine of primary and secondary liability is based upon a contract implied by law from the fact that a passively negligent tort-feasor has discharged an obligation for which the actively negligent tort-feasor was primarily liable.

13. Quasi-Contracts § 1—

There can be no implied contract where there is an express contract between the parties in reference to the matter.

14. Carriers § 21c: Municipal Corporations § 8c—

Where the lease of a municipal airport requires the city to keep the facilities in repair, but expressly provides that the lessee air line should indemnify and save the city harmless from any liability arising from the negligence of the air line or its agents and employees, *held*, the air line may not assert the defense of primary and secondary liability for an injury resulting to a passenger from a fall over a loose and worn threshold board while the passenger was on her way to board a plane, since the duty to provide a reasonably safe passageway for its passengers rests upon the carrier, and therefore the injury resulted from negligence of the carrier in failing to perform this duty.

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

APPEAL by Eastern Air Lines, Inc., from *Pless, J.*, Regular May Civil Term 1953 of MECKLENBURG.

Civil action to recover damages for personal injuries suffered by the plaintiff, when in attempting to pass through a door of the waiting room of the Municipal Airport at Charlotte to go onto the loading ramp to board as a passenger an airplane of the Eastern Air Lines, Inc., she fell by reason of the heel of her left foot being caught on the threshold board, which was in an allegedly dangerous, loose and badly worn condition. The plaintiff alleged in her complaint the condition of the threshold board was

due to the joint and concurring negligence of the defendant Eastern Air Lines, Inc., and of the defendant the City of Charlotte.

The plaintiff offered evidence tending to show these material facts. In stating these facts Eastern Air Lines, Inc. will be called Air Lines, and the City of Charlotte the City.

On 29 June 1950 the plaintiff, a lady 63 years old, was a dietitian and food supervisor for the S. & W. Cafeterias. Her duties as such employee included traveling at all times to their cafeterias located in eight cities from Washington, D. C., to Atlanta, Georgia. On 29 June 1950 the plaintiff went to the City's Municipal Airport to take the 8:05 a.m. flight of Air Lines for Roanoke, Virginia, where there is an S. & W. Cafeteria. The plaintiff lived in Charlotte. For 5 years prior to June 1950 the plaintiff, as dietitian of the S. & W. Cafeterias, has traveled to the seven cafeterias of her employer located in other cities than Charlotte by air, averaging six, eight or nine trips a month. Each time she left from the City's Municipal Airport, using the same waiting room and the same door to the loading ramp to the airplanes where she fell on 29 June 1950.

On 29 June 1950 Air Lines was a common carrier for hire, carrying passengers in interstate and intrastate commerce. Plaintiff had bought a ticket from Air Lines for transportation to Roanoke, Virginia. She checked her baggage on her ticket and waited in the lobby for the flight to be called.

When the flight was called, the plaintiff started out the west door of the lobby leading to the ramp, where the airplane was waiting. This door is customarily used to go to the Air Lines' airplanes. The plaintiff knew of no other door provided by Air Lines for passengers to board their planes. This door had screen doors, which opened outside toward the ramp, and had to be held open by a person going through. The level of the lobby floor and the ramp is different. A person going over the threshold steps down on a little platform, takes a step or two on that, and then steps down another step on the concrete. The lobby floor is 18 or 20 inches, or maybe two feet, above the concrete platform outside.

The plaintiff had a hatbox on her arm and also a pocketbook. She pushed both screen doors open to make a wide exit, then stepped down with her right foot, and started to step over with her left foot, when the heel of her left foot caught on the threshold. She testified: "I tried to get it loose, and some way it slipped, then went right on down to the edge of the doorsill there and hung practically straight down like that. I couldn't get it loose at all. I realized I couldn't get it loose, and I tried to find something to hold on to. When my heel caught on the threshold, it carried me off my balance. I couldn't get straightened up, couldn't get my foot loose of whatever it was on, then it did slip and that heel caught. The back of my heel was up against the edge of the sill, the door. When

I stepped down with my right foot, my left foot was resting on the threshold board, and my heel got caught in that position. When I tried to step down with my left foot, my foot slipped and then hung tight. It slipped forward and then went off the edge of the sill. I fell on down that little platform, and then rolled on down to the concrete." The threshold board was raised above the floor level some fraction of an inch—located several inches in or toward the inside of the waiting room from the door-sill which protruded out beyond that. There was no handrail, nor anything one could reach as one steps out of the waiting room door, if one were falling, to break the fall. When the screen doors are closed, there is not a very good view of the threshold board. Plaintiff testified also: "After my foot first became caught on this threshold board, I tried to pull it loose. I was very conscious of trying to get it off. I tried to raise it up, and pull it forward. I tried everything. After I got it loose, it just slipped further down, slipped on down. I don't know about how far it slipped further down; probably a couple of inches—it was some fraction of a foot." Plaintiff admitted on cross-examination that she testified on a pre-trial examination that she was not looking down when she went out the door.

O. C. Taylor, a witness for the plaintiff, gave testimony tending to show these facts: In June 1950 he was a dispatcher at the airport, and had been working there two years. The threshold board at the door where plaintiff fell was old. It was less than an inch thick. This board in the middle and each end was all right, but in the center at the middle of each door it was worn down. At one place the board was warped and real narrow. If one stepped on the board, it would not stay firm. It would raise up. He did not see the plaintiff fall. He saw the board afterwards during the day she fell. It was not fastened down, and he had the board tacked down. When one looked at the board, its loose or wobbly condition was not necessarily apparent. The board had been getting worse and worse, thinner and thinner, ever since he had worked there, though he couldn't say how long the looseness of the board had existed. This board puckered up where it was worn.

Alphonse Kearns, a witness for the plaintiff, gave testimony tending to show these facts. On 29 June 1950 he was a janitor at the airport; he did not see plaintiff fall; but when she was in the ambulance there, he went to the door. The threshold board was raised up in the middle of each door about a quarter of an inch—the part that was setting up was the edge of the board fronting the inside floor of the terminal. The board was loose. The linoleum or asphalt or other covering on the floor beside the threshold board was chipped out, worn out and ragged. When plaintiff was carried away in the ambulance, he nailed the threshold board down. Over the defendants' objections and exceptions, he testified that

about two months before he saw a lady fall out of this door onto the platform. When she fell, her shoe heel was torn off, and fell inside the waiting room about 15 inches from the threshold board. He looked then at the threshold board, and it was sticking up. If a person was walking out of this door and set his foot on the threshold board, and then shifted his weight forward to go out, it would tilt forward. He told Mr. Smith, an employee of the City, whose duties included taking care of repairs, about this lady having her heel torn off and falling, and that the threshold board was worn out, had raised up, and he had nailed it down one time. Smith said he would put a new one in, but did not. When this board was lying flat, an ordinary glance would not disclose it was loose. He nailed this board down twice. The board was about four and a half feet long.

The plaintiff's evidence further tended to show the following. Air Lines called an ambulance, refunded her ticket money, and then put her in the ambulance. The plaintiff received serious injuries. She offered in evidence a stipulation of medical, hospital and other expenses, and compensation paid by American Mutual Liability Insurance Co., showing medical expenses paid in the amount of $5,526.15, and compensation paid her for 73 weeks at $24.00 per week amounting to $1,752.00. At the time of her injury her salary was about $61.00 a week.

The defendant Air Lines offered evidence tending to show these facts: That the threshold board and the doorway had nothing wrong with them; that the threshold board was not loose; there was no separation between the carpet strip and the door; that plaintiff admitted in her pleadings she did not present in writing notice of the claim upon which her action is based to the Air Lines within ninety days after the alleged injury, nor formal notice of her claim within six months after 29 June 1950; plaintiff's action was commenced 13 October 1951; that plaintiff admitted in her pleadings that she and her employer were subject to and bound by the North Carolina Workmen's Compensation Act, and that the American Mutual Liability Insurance Company was compensation insurance carrier for the S. & W. Cafeterias on 29 June 1950; that plaintiff admitted in her pleadings that neither plaintiff nor the insurance carrier for S. & W. Cafeterias instituted any action against Air Lines until the present action was filed. Air Lines introduced in evidence certification of true copy on a form of the Civil Aeronautics Board, dated 22 January 1952, containing a certificate of B. R. Gillespie, Chief of the Tariff Section of said Board, and a further certificate of F. A. Toombs, Ass't. Secretary of said Board, and read this part of it: "General Rules, Paragraph 17, Claims, (A) Personal Injury and Death—Time Limitations. No action shall be maintained for any injury to or the death of any passenger unless notice of the claim is presented in writing to the general offices of the participating carrier alleged to be responsible therefor

within ninety days after the alleged occurrence of the events giving rise to the claim and unless the action is commenced within one year after such alleged occurrence." Air Lines then read Paragraph 8 from the ticket folder "The time limits for giving notice of claims and the institution of suit are set forth in Carrier's tariffs." The form and conditions of the ticket plaintiff bought on 29 June 1950 were identical with the tickets she bought from 1947 or 1948 on. Air Lines offered in evidence the lease concerning the Municipal Airport between the City and itself, which lease was in effect the day plaintiff fell.

The defendant Air Lines in its answer alleged that in the event the plaintiff recovers any judgment against it, then it, under the contract of lease concerning the Municipal Airport to it by the City, is entitled to be indemnified by the City.

The City offered no evidence.

At the conclusion of all the evidence the City moved for judgment of nonsuit.

At a pre-trial hearing before Sharp, Special J., an order was entered that the burden of proof is upon the plaintiff to show compliance with Section 59 of the Charter of the City that no action for damages against the City shall be instituted against the City, unless within ninety days after the happening of the injury complained of, the complainant, his administrators or executors shall have given written notice to its city council of such injury, or to prove any legally sufficient excuse for noncompliance with this charter provision. At this hearing the plaintiff admitted, that she had this burden of proof. Air Lines filed no exception to this ruling. The presiding judge at the jury trial "being of the opinion that the plaintiff has failed to repel the plea of the City with regard to notice," allowed the motion of nonsuit, and signed judgment accordingly.

The City replied to the cross-action of Air Lines that if the plaintiff recovered any judgment against it, it is entitled to be indemnified by the City, by pleading as a defense the failure of Air Lines to give notice to the City under its charter provisions. At a pre-trial hearing before Sharp, Special J., upon motion of Air Lines, this defense of the City was ordered stricken out, and the City excepted.

The City moved for judgment of nonsuit as to the cross-action of Air Lines against it for indemnification both at the conclusion of Air Lines' evidence, and at the conclusion of all the evidence. The court's ruling on this motion was deferred until after the verdict, and then the motion was granted.

The court submitted three issues to the jury: One, was the plaintiff injured by the negligence of Eastern Air Lines, Inc., as alleged?; Two, did the plaintiff, by her own negligence, contribute to her injury, as alleged?; Three, what damages, if any, is the plaintiff entitled to recover?

The jury answered the first issue "Yes"; the second issue "No"; and the third issue "$25,000.00."

From the judgment signed Air Lines appealed, assigning error.

Jones & Small for Eastern Air Lines, Inc., Appellant.

Helms & Mulliss, James B. McMillan, and W. H. Bobbitt, Jr., for Laura Crowell, Appellee.

John D. Shaw and Robinson & Jones for City of Charlotte, Appellee.

PARKER, J. The Air Lines appellant assigns as error the failure of the trial court to grant its motion for judgment of nonsuit, made at the close of plaintiff's evidence, and renewed at the close of all the evidence.

Its first contention in support of such motion is that plaintiff's action is barred for failure to file claim and bring suit in apt time as set forth in "General Rules, Paragraph 17, Claims, (A) Personal Injury and Death—Time Limitations."

The first question presented for our decision is whether under the Civil Aeronautics Act, and the Regulations of the Civil Aeronautics Board, Air Lines was required to file such a tariff rule.

Interstate air transportation is regulated in accordance with the provisions of the Civil Aeronautics Act, 49 U.S.C.A., Sec. 401, *et seq.* and Sec. 483, 49 U.S.C.A., which is entitled "Tariffs of Air Carriers" and which provides:

"(a) Every air carrier . . . shall file with the Board, (*i.e.* the Civil Aeronautics Board) . . . tariffs showing all rates, fares, and charges for air transportation between points served by it, . . . and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation (parenthesis ours). Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe . . ." It would seem that these portions of the Civil Aeronautics Act mean that classifications, rules, regulations, practices and services shall be filed with the Civil Aeronautics Board only to the extent required by regulations of the Board.

The regulations issued by the Board pertaining to tariffs of air carriers are contained in Parts 221 to 224, both inclusive, of the Economic Regulations of the Civil Aeronautics Board, Code of Federal Regulations. Part 221.1 in subsection (d) says: "Tariff means a publication containing rates applicable to the transportation of persons or property, and rules relating to or affecting such rates or transportation . . ." Part 221.4, entitled "Contents," sets forth matters which shall be included in tariffs filed by air carriers. This part or section provides in part: "Tariffs shall contain in the order named: (g) General rules which gov-

ern the tariff, *i.e.,* state conditions which in any way affect the rates named in the tariff, or the service under such rates."

It would appear that the time limitation as to filing notice of claim and institution of action is required to be filed only if this rule in any way affects the rates established by air carriers or the service under such rates. Therefore, it would seem that the sole justification for this time limitation is that it affects the services under such rates.

Webster's New International Dictionary defines "service" as "13. Act or means of supplying some general demand; as, railway service, telephone service, etc."

The Regulations of the Civil Aeronautics Board relating to tariffs apparently indicate their opinion of what the term "service" means. Subsection (h) of Part 221.4 of the said Economic Regulations provides that tariffs shall contain "a statement of charges for excess baggage, sleeper-service, and any other like services . . ." Subsection (c) of Part 221.5 refers to "ground transportation to or from airports or for pick-up and delivery service."

49 U.S.C.A., Sec. 483 (b) of the Civil Aeronautics Act speaks of service in connection with air transportation.

A number of cases decided under the Interstate Commerce Act indicate that the term "service" as used in the field of transportation is related to the transportation operations of a carrier. See *Cleveland, C. C. & St. Louis Ry. v. Dettlebach,* 239 U.S. 588, 60 L. Ed. 453; *Folmer & Co. v. Great Northern Ry. Co.,* 15 I.C.C. 33; *Berg Industrial Alcohol Co. v. Reading Co.,* 142 I.C.C. 161, 163; *Schultz-Hansen Co. v. Southern Pacific Co.,* 18 I.C.C. 234; *Wasie Common Carrier Application,* 4 M.C.C. 726, 729; *Union Transfer Co., Common Carrier Application,* 11 M.C.C. 194, 198; *Hughes, Contract Carrier Application,* 23 M.C.C. 563; *Jack Cole, Inc., Common Carrier Application,* 32 M.C.C. 199; *Lubbock-El Paso Motor Freight, Inc., Common Carrier Application,* 27 M.C.C. 585, 591.

The term "service" carries with it the concept of performance and supplying some general demand. The regulation as to time limitation to file notice of claim and to commence action requires the carrier to do nothing. The burden of this regulation rests entirely upon the passenger, and does not seem to be related to the transportation activities of the carrier or to the services it performs.

It would seem that the Civil Aeronautics Act does not require or authorize in the filed tariff the time limitation as to filing notice of claim and commencement of suit pleaded as a defense by Air Lines in this action and that such a provision is ineffective. It has been so decided in *Shortley v. Northwestern Air Lines,* D.C.D.C., 1952, 104 F. Supp. 152; *Thomas v. American Air Lines,* D.C.E.D. Ark., 1952, 104 F. Supp. 650;

Toman v. Mid-Continental Airlines, Inc., D.C.W.D. Missouri, 1952, 107 F. Supp. 345. See also *Glenn v. Compania Cubana de Aviacion,* S.A. D.C.S.D. Fla., 1952, 102 F. Supp. 631. A very excellent and helpful discussion of the character of the tariff provision as a bar to actions here involved appears in an article "Airline Tariff Provisions As a Bar to Actions for Personal Injuries" by James C. McKay, published in Vol. 18, The George Washington Law Review 160 (1950). A different decision was reached in *State (Brandt) v. Eastern Airlines* (1948), D.C.S.D. N.Y.U.S. Av. Rep. 637; *Wilhelmy (now Stinech) v. N. W. Airlines,* D.C.W.D. Wash. 1949, 86 F. Supp. 565, and in *Herman v. Capitol Air Lines,* D.C.S.D.N.Y., 1951, 104 F. Supp. 955. See also *Meredith v. United Air Lines,* U.S.D.C. Cal.—1950, 1951, U.S. Av. Rep. 103; *Indemnity Ins. Co. of North America v. Pan American Airways* (1944), D.C.S.D.N.Y., 59 F. Supp. 338; *Sheldon v. Pan American Airways, Inc.,* 272 App. Div. 1000, 74 N.Y.S. 2d 267; 190 N.Y. Misc. Rep. 537, 74 N.Y. 2d 578 (1947).

Air Lines relies heavily upon the case of *Lichten v. Eastern Airlines, Inc.,* 189 Fed. 2d 939, and in its brief quotes from the opinion at length. The facts are different. The sixth headnote states: "In absence of a provision in Civil Aeronautics Act prohibiting exemption for any loss or damage to baggage caused by air carrier, such an exemption was not forbidden to air carrier, and Civil Aeronautics Board, being vested with authority to determine reasonableness of tariff, could properly accept such a tariff." *Frank, C. J.,* filed a vigorous dissenting opinion in which he stated that he thought the Board had no authority to accept, and legalize such a tariff.

Air Lines cites in its brief *Jones v. Northwest Airlines, Inc.* (1945), 22 Wash. 2d 863, 157 Pac. 2d 278; *Mack v. Eastern Airlines* (1949), 87 F. Supp. 113; and *Furrow & Co. v. American Air Lines* (1951), 102 F. Supp. 808. In these cases the claims arose out of delays in flight or canceled and rescheduled flights—entirely different facts. The plaintiff in her brief states "in these cases the regulations were correctly held to be binding as a matter of law as the regulations pertained directly to the operation of the airline."

The Bill of Lading Cases cited in appellant's brief are not in point, because 49 U.S.C.A., Sec. 20 (11), provides that carriers may insert in their bill of lading limitations as to the time of filing claims and instituting suit.

The Insurance Cases cited in appellant's brief are not in point. For instance, in the fire insurance cases G.S.N.C. 58-176 expressly authorizes the insertion of time limitations to file notice of claims and to commence suit.

The next question presented for our decision is, whether the plaintiff is bound by a tariff rule which is not required, or authorized to be filed by the Civil Aeronautics Act.

The evidence is uncontradicted that at the airport, after plaintiff fell and before she was carried away in an ambulance, her ticket was taken up, and Air Lines refunded to her its purchase price. Air Lines then and there had actual knowledge of her injury. The ticket she had bought was not introduced in evidence. Air Lines introduced in evidence Paragraph 8 from the ticket folder reading, "The time limits for giving notice of claims and the institution of suit are set forth in Carrier's tariffs." So far as the Record before us discloses, the Air Lines' tariffs are filed only with the Civil Aeronautics Board. Air Lines alleged in its answer, and the plaintiff admitted in her reply, that neither she, nor the American Mutual Liability Insurance Co., gave Air Lines any notice of claim for personal injuries of plaintiff within 90 days after 29 June 1950, and that neither commenced action within one year after that date.

In *Boston & M. R. Co. v. Hooker,* 233 U.S. 97, 58 L. Ed. 868, at p. 876, the Court says: "It follows, therefore, from the previous decisions in this Court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation," and the Court made express reference to the notice which follows from the filed and published regulations "as required by the statute and the order of the Interstate Commerce Commission." The Court in *Pacific S. S. Co. v. Cackette,* 8 F. 2d 259 (*cert.* denied 269 U.S. 586, 70 L. Ed. 426), says that the clear purport of the Hooker decision "is that a passenger or shipper is not chargeable with notice of any regulation filed and published which is not contemplated or required by the Interstate Commerce Act or the amendments thereto." The second headnote in the *Cackette case* reads: "Provision in tariff, published under Shipping Act, Sec. 18 (Comp. St. Sec. 8146ii), requiring passenger's claims for loss or damage during voyage to be filed within 10 days, held not binding on passenger, though ticket was sold 'subject to conditions of lawfully published tariff'; the provision having no relation to rates and charges, and not being such as was required to be inserted in published tariff." In its opinion the Court said: "No provision is found in the Interstate Commerce Act which relates to rights of action against carriers for damage or injuries from negligence or assault. Notice of claims for such damages has no perceptible relation to rates and charges for transportation."

The paragraph on the ticket folder does not state what the time limit is for giving notice of claims and the institution of suit, except it refers to what is set forth in its tariffs. Plaintiff's testimony is uncontradicted that she had never read on any ticket sold to her by Air Lines the state-

ment as to the time for giving notice and institution of suit, and did not know that the tickets contained such language.

The first headnote in The Majestic, 166 U.S. 375, 41 L. Ed. 1039, is: "A notice containing conditions, on the back of a steamship passenger's contract ticket, but not referred to therein, except by the words 'See back' printed on the face of the ticket, does not form a part of the contract binding on the passenger as to the liability of the steamship company for baggage or otherwise, where the passenger's attention is not called to the conditions, and there is no proof that he ever read or assented to them." In that case *Fuller, C. J.*, speaking for the Court says: "We quite agree with *Lord O'Hagan* in *Henderson v. Stevenson,* L.R. 2 H. L. Sc. 470, that 'when a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared, and deliberately accepted.' "

In *Southern Pacific Co. v. U. S.,* 272 U.S. 445, 71 L. Ed. 343, the Court said: "Nor were the representatives of the War Department chargeable as a matter of law with knowledge, which they did not in fact possess, of a tariff which was not required to be filed. The ordinary consequences that attend the filing of a schedule of rates with the Interstate Commerce Commission, as demanded or permitted by statute (quoting authorities), cannot be invoked by the carrier merely because it lodged a special tariff with the commission without statutory authorization."

The 11th headnote in *New York, N. H. & H. R. Co. v. Nothnagle,* 346 U.S. 128, 97 L. Ed. 1500 (decided 8 June 1953) reads: "A railroad may not exonerate itself from the consequences of its own wrongful acts by binding a passenger who has entrusted her baggage to a railroad employee to a liability limitation which the passenger has no reasonable opportunity to discover." This case was heard on Writ of *Certiorari* to the Supreme Court of Errors of Connecticut to review a judgment holding a carrier liable for loss of a passenger's baggage. The Connecticut Court, where a recovery was had in excess of liability limitation, was affirmed.

We conclude that the plaintiff is not barred by the time limitation to file claim and commence action as contended by Air Lines.

Mr. McKay in his article "Airline Tariff Provisions as a Bar to Actions for Personal Injuries," *supra,* after reviewing the Civil Aeronautics Act and numerous authorities, states: "Because Congress has not indicated an intention to occupy the field of liability of air carriers for personal injuries, it is concluded that a tariff provision, which attempts to place limitations on notice of claims for personal injuries and the time for bringing actions therefor, must yield to a conflicting state law."

G.S.N.C. 1-52, subsection 5, provides that actions for personal injuries, not arising from contract and not hereafter enumerated, must be brought

within three years. The instances hereafter enumerated in our statutes have no application to the instant case.

The trial court was correct in not nonsuiting the case on the ground that plaintiff's action was barred for failure to file claim and bring action in apt time.

Air Lines' second contention, as to the failure to nonsuit, is taking the evidence in the light most favorable to the plaintiff Air Lines was not guilty of actionable negligence, and if so, the plaintiff was guilty of contributory negligence.

A careful study of the evidence in this case shows that the plaintiff has offered sufficient evidence to require submission of her case to the jury under the law laid down in many decisions of this Court, and other courts, and further that she was not guilty of contributory negligence that bars her recovery as a matter of law. We deem it sufficient to cite cases in point: *Mangum v. R. R.,* 145 N.C. 152, 58 S.E. 913; *Leggett v. R. R.,* 168 N.C. 366, 84 S.E. 357; *Goodman v. Queen City Lines,* 208 N.C. 323, 180 S.E. 661; *Humphries v. Coach Co.,* 228 N.C. 399, 45 S.E. 2d 546; *Sears, Roebuck & Co. v. Copeland,* 110 F. 2d. 947; *Finn v. Terminal R. R. Ass'n. of St. Louis* (Mo. App. 1936), 97 S.W. 2d 890. The plaintiff was at the Airport to board as a passenger an airplane of the Air Lines; it was the duty of Air Lines to furnish her with a reasonably safe passageway from the waiting room of the Airport to its airplane she had bought a ticket to board; and this is true irrespective of any rights between the City and Air Lines under the lease of the Airport. *Horelick v. Penn. R. Co.* (1953), 13 N.J. 349, 99 A. 2d 652; *Schurman v. American Stores Co.,* 145 F. 2d 721; *Payne v. Simmons,* 201 Ky. 33, 255 S.W. 863, 33 A.L.R. 814; 10 Am. Jur., Carriers, Sec. 1288; 13 C.J.S., Carriers, Sec. 708 and Sec. 717b (1). Air Lines is not an insurer of the safety of its passengers; any liability of Air Lines must be based on negligence. *Humphries v. Coach Co., supra.*

The assignment of error for failure to nonsuit is overruled.

The appellant has fourteen assignments of error in respect to the trial court's rulings upon the evidence. In reference to these assignments of error in its brief, appellant cites as its sole authorities three general references to paragraphs in American Jurisprudence without quoting a word from that work. Without regard to whether this is a compliance with Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562, we have considered these assignments of error, and prejudicial error is not shown to exist.

The appellant has eight assignments of error as to the charge. In respect to some of these assignments of error, appellant's brief is a "pass brief," such as is condemned in *Jones v. R. R.,* 164 N.C. 392, 80 S.E. 408.

However, after a careful reading of the charge as a whole, we conclude that these assignments of error are without substantial merit.

There was no error in the failure of the court to submit the issues tendered by Air Lines, as the issues submitted were sufficient to support a judgment disposing of the whole case. *Griffin v. Ins. Co.,* 225 N.C. 684, 36 S.E. 2d 225.

The appellant assigns as error the granting by the trial court of the motion of the City for a nonsuit as to the cross-action of the Air Lines against it.

In the lease between them it is stated that the City, called the lessor, is the owner and operator of the Charlotte Municipal Airport, and Air Lines, called the lessee, desires to hire and obtain certain premises and facilities on said Airport, together with certain rights, licenses and privileges thereon, whereupon the lease was entered into. In Art. IV of this lease the lessor agreed that it will keep in good repair the Airport and Administration Building, and the facilities and services now or hereafter connected therewith. In Art. I, Sec. C, of the lease, Air Lines was granted exclusive space of about 2,736 square feet in the Administration Building. In Art. I, Sec. B, the Air Lines was granted the right to use the Airport for the operation of its transportation system of aircraft for the carriage of persons, property and mail.

Art. XV of the lease is as follows: "INDEMNIFICATION: The Lessee, under the terms of this agreement, will not be in control or possession of said Airport (except as to the parts thereof leased exclusively to Lessee), and Lessee does not assume responsibility for the conduct or operation of the said airport or for the physical or other conditions of the same. However, it is expressly understood and agreed by and between the parties hereto that the Lessee is and shall be an independent contractor and operator, responsible to all parties for all of its acts or omissions and the Lessor shall in no way be responsible therefore. It is further agreed that in its use and enjoyment of the field, premises and facilities herein referred to, the Lessee will indemnify and save harmless the Lessor from any and all claims or losses that may proximately result to the Lessor from any negligence on the part of the Lessee, its duly authorized agents or representatives, and shall in all ways hold the Lessor harmless from same, provided the Lessor shall give to the Lessee prompt notice of any claim, damage or loss, or action in respect thereto, and an opportunity seasonably to investigate and defend against any claim or action based upon alleged negligent conduct of the Lessee or its duly authorized agents or representatives."

In support of this assignment of error Air Lines makes two contentions: First, the City contracted to indemnify Air Lines; second, regardless of

the contract, Air Lines is entitled to indemnity from the City under the equitable doctrine of primary-secondary liability.

The City and Air Lines in the lease between them have set forth in express written terms their agreement as to indemnification between themselves in Art. XV. The first sentence of this article states that Air Lines (except as to the parts thereof leased exclusively to Air Lines) does not assume responsibility for the physical or other conditions of the Airport. This sentence has no application to the duty owed by Air Lines in this case to plaintiff to furnish her, one of its passengers, a reasonably safe passage-way to its airplane she was to board. The second sentence of this article reads: "However, it is expressly understood and agreed by and between the parties hereto that the lessee (*i.e.* Air Lines) is, and shall be, an independent contractor and operator, responsible to all parties for all of its acts or omissions, and the lessor (*i.e.* the City) shall in no way be responsible therefor." The third and last sentence of this article states that it is agreed that in its use and enjoyment of the premises the lessee will indemnify and save harmless the lessor from any and all claims or losses that may proximately result to the lessor from any negligence on the part of the lessee, and shall in all ways hold the lessor harmless from same.

Nowhere in the lease is there any language that the City will indemnify Air Lines; the agreement in the lease is that under certain conditions Air Lines will indemnify the City.

From the standpoint of plaintiff the agreement of the City with Air Lines to keep in good repair the Airport and Administration Building and the facilities in connection therewith did not excuse Air Lines' neglect to provide a reasonably safe passageway for the plaintiff to its airplane. *Horelick v. Penn. R. Co.* (1953), *supra; Schurman v. American Stores Co., supra; Payne v. Simmons, supra;* 10 Am. Jur., Carriers, Sec. 1288; 13 C.J.S., Carriers, Sec. 708 and Sec. 717b (1).

The jury has found Air Lines guilty of actionable negligence. Air Lines did not except to the ruling of the court nonsuiting the plaintiff as to the City. Now Air Lines contends that under its lease with the City, the City has contracted with it to indemnify it for its own negligence. Contracts indemnifying one against his own negligence are strictly construed. *Hill v. Freight Carriers Corp.*, 235 N.C. 705, 71 S.E. 2d 133, where the cases are cited; *Southern Ry. Co. v. Coca-Cola Bottling Co.*, 145 F. 2d 304. In *Hill v. Freight Carriers Corp., supra, Barnhill, J.* (now *C.J.*), says for the Court an exculpatory clause "will never be so construed as to exempt the indemnitee from liability for his own negligence or the negligence of his employees in the absence of explicit language clearly indicating that such was the intent of the parties."

It seems clear from studying the lease that the City has not contracted to indemnify Air Lines, as contended by appellant. To hold otherwise would be to read into the lease words that are not there.

It is familiar learning that the theory upon which a case is tried in the lower court prevails in considering the appeal and the exceptions. *Walker v. Burt,* 182 N.C. 325, 109 S.E. 43; *Leggett v. College,* 234 N.C. 595, 68 S.E. 2d 263; *Parrish v. Bryant,* 237 N.C. 256, 74 S.E. 2d 726.

The appellant tendered no issue as to primary-secondary liability though he tendered two sets of issues. Nor did Air Lines tender an issue as to indemnity. Appellant requested the court to give certain instructions to the jury, but this request made no mention of primary-secondary liability or of indemnity. That would seem to preclude appellant from taking a different position in this Court.

However that may be, in Art. XV of the lease, Air Lines agreed in writing that Air Lines is, and shall be, an independent contractor or operator, responsible to all persons for all of its acts or omissions and the City shall in no way be responsible therefor. The doctrine of primary-secondary liability is based upon a contract implied by law. *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768. There can be no implied contract where there is an express contract between the parties in reference to the same subject matter. *Winstead v. Reid,* 44 N.C. 76; *Mfg. Co. v. Andrews,* 165 N.C. 285, 81 S.E. 418; *Sams v. Cochran,* 188 N.C. 731, 125 S.E. 626; *McLean v. Keith,* 236 N.C. 59, 72 S.E. 2d 44. Under the lease the doctrine of primary-secondary liability does not arise.

The evidence does not support the contention of Air Lines, that if there is any liability on the part of Air Lines, the negligence of Air Lines in relation to that of the City was passive, and that of the City active, for Air Lines was as culpable as the City, and the agreement of the City to make repairs did not exculpate Air Lines' neglect to provide plaintiff a reasonably safe passage-way to board as a passenger its airplane. Therefore, the question of primary-secondary liability does not arise, for that doctrine is based upon a contract implied in law from the fact that a passively negligent tort-feasor has discharged an obligation for which the actively negligent tort-feasor was primarily liable. *Taylor v. Construction Co.,* 195 N.C. 30, 141 S.E. 492; *Hunsucker v. Chair Co., supra.* See also *Schurman v. American Stores Co., supra.*

Appellant's assignment of error to the court's nonsuiting its cross-action against the City is overruled.

The other assignments of error have been examined, and prejudicial error is not made to appear.

No error.

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

J. C. LAMM v. JUNE A. CRUMPLER, T. R. HUMPHREY AND BROOKWOOD GARDEN APARTMENTS, INC.

(Filed 7 April, 1954.)

1. Pleadings § 15—

An action based on agreement to suppress bidding at a public sale was terminated by demurrer on the ground that the contract was unenforceable as *contra bonos mores.* In a subsequent action, the complaint alleged another agreement respecting the same property, but made no reference to the former action. *Held:* Upon demurrer in the second action, whether the complaint therein set up a new contract which was not tainted with the unlawful agreement alleged in the first, is not presented, since extraneous matters *dehors* a pleading may not be considered on demurrer.

2. Same—

Upon demurrer a pleading will be liberally construed in favor of the pleader, giving him every reasonable intendment in his favor, and the pleading will not be overthrown unless it is fatally defective.

3. Fraud § 1—

Fraud is a material representation relating to a past or existing fact, which is false, made with knowledge of its falsity or in reckless disregard of the truth, with intention that the other party should act thereon, and which is reasonably relied and acted upon by the other party to his damage.

4. Fraud § 3—

A misrepresentation as to promissor's intent which is made for the purpose of inducing the other party to act or refrain from acting in reliance thereon will support an action for fraud even though it be promissory in nature, since the state of a person's mind at a particular time is as much a fact as any other fact.

5. Fraud § 9—Complaint held sufficient to state cause of action for fraud.

Plaintiff alleged that he was the last and highest bidder at a judicial sale, that he was induced to join in the commissioner's deed conveying the property to defendants by representations that defendants needed a part of said land to obtain approval by the Federal Housing Administration of a housing project, that defendants promised to reconvey to plaintiff that part of the land not needed for this purpose as soon as the amount of land needed could be ascertained, when in fact defendants at the time of making the representations knew the small amount of the land necessary for their housing project, and that defendants thereafter failed and refused to reconvey to plaintiff the part of the land not needed. *Held:* The complaint is sufficient to state a cause of action for fraud.

6. Trusts § 4c—Grantor may engraft parol trust on deed executed by him in reliance on fraudulent misrepresentations.

While, ordinarily, a grantor may not engraft a parol trust upon his own deed, allegations to the effect that plaintiff was the last and highest bidder at a judicial sale, that defendants represented that they needed a part of the property for their housing development and would reconvey to plaintiff the part of the land not needed for this purpose as soon as the amount

needed could be ascertained, that defendants, at the time, knew that only a small part of the land would be needed for the housing project, and induced plaintiff by reason of such false representations to join in the commissioner's deed to defendants merely as the most expeditious method of assigning this bid, and that thereafter defendants refused to reconvey to plaintiff that part of the land not needed for the housing development, *is held* sufficient to bring plaintiff's action within the exception to the general rule.

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

APPEAL by defendants from *Burgwyn, Emergency Judge,* at August Term, 1953, of ALAMANCE, as No. 743, to Fall Term, 1953, of Supreme Court, carried over to Spring Term, 1954.

Civil action (1) to declare that individual defendants Crumpler and Humphrey hold title to certain lands in trust for benefit of plaintiff, in respect of which *lis pendens* has been filed; (2) to require defendants to effectually convey title to said land to plaintiff as the rightful owner thereof; (3) to recover compensatory damages for breach of trust and agreement, in the event defendants are unable to effectually convey said title; (4) to recover of individual defendants punitive damages because of fraud alleged; and (5) for such other and further relief to which he may be entitled,—heard in Superior Court of Alamance County upon demurrer filed by defendants to the complaint of plaintiff.

The case is sequel to *Lamm v. Crumpler,* 233 N.C. 717, 65 S.E. 2d 336.

Here the complaint as amended contains allegations substantially as follows:

1 and 2. That plaintiff and the individual defendants are residents of Alamance County, North Carolina, and defendant Brookwood Garden Apartments, Inc., is a corporation created, organized and existing under the laws of the State of North Carolina, with principal office and place of business in the city of Burlington in said county.

"3. That on or about June 22, 1949, certain real estate situate in the city of Burlington, Alamance County, North Carolina, known as the R. G. Hornaday Estate, was offered for sale at public auction by Commissioners of the Superior Court of Alamance County; that at said sale the plaintiff became the highest bidder for Tract No. 35 of said estate for the sum of $16,800, and the defendants, June A. Crumpler and T. R. Humphrey, became the highest bidders for Tract No. 34 . . . for the sum of $15,025.

"4. That for some time prior to the sale of said lands . . . the defendants, June A. Crumpler and T. R. Humphrey, were engaged in the acquisition of real estate and the making of plans for the construction of a housing development, including the construction of a number of apartments and residential units under plans which they represented to the

plaintiff would have to meet approval of the Federal Housing Administration before they could obtain the necessary financing therefor . . .

"5. That on July 2, 1949, the defendant Crumpler, acting for himself and his co-partner or co-promoter, the defendant T. R. Humphrey insisted that the plaintiff meet with him and his attorney for the purpose of discussing and, if possible, reaching some mutually satisfactory agreement with respect to a division of said Tract No. 35 of the R. G. Hornaday Estate. After much urging and coaxing the plaintiff . . . did meet him and his attorney at a late hour on the night of July 2, 1949, . . .; that at said time and place the defendant Crumpler represented to the plaintiff and his attorney that he and his co-partner or co-promoter, . . ., were obliged to acquire Tract No. 34 of the R. G. Hornaday Estate and a part of Tract No. 35 . . . for the housing development, and that unless they did acquire said property their plans would not be approved by the Federal Housing Administration; that for those reasons they wanted to make an agreement with the plaintiff to the effect that if the plaintiff would assign his bid on Tract No. 35 to the defendant Crumpler, the defendants Crumpler and Humphrey would agree to advance the purchase price of Tract No. 35 and thereafter hold in trust and re-convey to the plaintiff so much of the west side of Tract No. 35 that they would not be required to own in order to obtain approval of their housing development, at the purchase price per acre for which the plaintiff was then the final and preferred bidder for Tract No. 35, as by law provided. . . . That said defendant Crumpler, on said occasion, represented to the plaintiff that it was necessary and essential for him to advise the Federal Housing Administration immediately of the availability of the lands required for said housing project, or the project would be abandoned; that the defendant Crumpler was known to the plaintiff as an experienced real estate operator who had promoted other housing projects in a successful and profitable manner, and the plaintiff agreed to assign his bid on Tract No. 35 . . . to the defendant Crumpler upon condition that said Crumpler would thereafter hold in trust and reconvey to the plaintiff so much of the west side of Tract No. 35 not required in order to obtain approval of said housing development.

"6. That thereafter the Superior Court of Alamance County on or about July 6, 1949 confirmed the sale of Tract No. 34 to the defendants Crumpler and Humphrey as the last and highest bidders therefor, and confirmed the sale of Tract No. 35 to the plaintiff as the last and highest bidder therefor and directed the Commissioners to execute and deliver deeds upon the payment of the purchase prices; that about said time the defendant Crumpler represented to the plaintiff that they could simplify the performance of the agreement between them on July 2, 1949, as hereinbefore alleged, and save the expense of additional conveyances, by

agreeing upon a temporary division of Tract No. 35 and have the Commissioners and the plaintiff join in a deed to the remaining part of Tract No. 35 to the defendants Crumpler and Humphrey, subject to the terms of their agreement and that when the defendants Crumpler and Humphrey had procured approval of their housing development by the appropriate authorities and had thereby ascertained exactly how much of the part of Tract No. 35 to which they were taking title was required for the housing development, they would promptly reconvey the remainder to the plaintiff. Relying upon the representations so made by the defendant Crumpler, acting for himself and his co-partner or co-promoter Humphrey, and relying upon the agreement heretofore made to hold in trust and reconvey to the plaintiff so much of the west side of Tract No. 35 not required in order to obtain approval of said housing development, the plaintiff agreed to said suggestion and the defendants Crumpler and Humphrey caused a line to be surveyed through Tract No. 35 dividing said tract into two parts, one containing 8.38 acres, and the other containing 9.30 acres and caused a deed to be prepared conveying the western portion of said Tract No. 35, containing 9.30 acres, by the said Commissioners to the plaintiff and his mother, and a deed from the said Commissioners and the plaintiff conveyed the remainder or eastern portion of Tract No. 35, containing 8.28 acres, to the defendants Crumpler and Humphrey (which latter deed is recorded in Book of Deeds 182 page 174 in office of Register of Deeds of Alamance County, and by reference made a part hereof). Prior to and as a condition of the delivery of said deeds, the defendants Crumpler and Humphrey represented to the plaintiff that they had not yet ascertained how much of that portion of Tract No. 35 so conveyed to them that would be required to use in obtaining approval by the appropriate authorities of their housing development and that they would hold the title to said portion of Tract No. 35, so conveyed to them, subject to the right of the plaintiff to receive a conveyance from them of all of the said tract which was not actually used by the defendants Crumpler and Humphrey, in their housing development.

"7. That plaintiff is informed and believes and so avers that the representations made by the defendants Crumpler and Humphrey to the plaintiff in certain particulars heretofore set forth and more particularly set forth in this paragraph of the complaint, were made as statements of fact, which were untrue and known to be untrue by the defendants, or else recklessly made; that they were made with the intent to deceive, and for the purpose of inducing the plaintiff to act upon them; and plaintiff did in fact rely upon them and was induced thereby to act to his injury or damage as hereinafter set forth, in that:

"(a) On July 2, 1949 the defendant Crumpler represented to the plaintiff that he, Crumpler, and his co-partner or co-promoter, . . . were

obliged to acquire approximately 8 acres of Tract No. 35 for their housing development, when the defendants Crumpler and Humphrey knew, or had reasonable grounds to believe, that only a small part of Tract No. 35 might be required for their housing development.

"(b) On July 2, 1949 the defendant Crumpler represented to the plaintiff that it was necessary and essential for the defendant Crumpler to advise the Federal Housing Administration immediately of the availability of such part of Tract No. 35, or the project would be abandoned, when the defendant Crumpler then knew, or had reasonable grounds to believe, that the defendants Crumpler and Humphrey would not need anything like 8 acres of Tract No. 35 for said housing development.

"(c) On or before July 20, 1949 the defendants Crumpler and Humphrey represented to the plaintiff that they had not yet ascertained how much of that portion of Tract No. 35, being conveyed to them by the deed hereinbefore referred to, they would be required to use in obtaining approval by the appropriate authorities of their housing development, when the defendants, Crumpler and Humphrey, then knew that they would not be required to have and use for said development project more than a small strip of Tract No. 35 with a width of 38.4 ft. extending the entire length of Tract No. 35 along the east side thereof and containing approximately .76 of an acre.

"8. That on or about September 8, 1949 the defendants Crumpler and Humphrey and their respective wives, executed and delivered a deed to the defendant Brookwood Garden Apartments, Inc., conveying all of Tract No. 34 of the Hornaday Estate and said strip 38.4 ft. in width from the east side of Tract No. 35, which said deed is duly recorded in the office of the Register of Deeds for Alamance County. Plaintiff alleges that the land so conveyed to Brookwood Garden Apartments, Inc., has been used for the housing development hereinbefore referred to and constituted all of the land required by the housing authorities for approval of said housing project; plaintiff further alleges, upon information and belief, that all of the stock issued by the defendant Brookwood Garden Apartments, Inc., is in fact and truth owned and paid for by the defendants Crumpler and Humphrey; that said individual defendants have at all times complained of dominated and controlled the actions of said corporation and that the legal entity of said corporation should be disregarded because of the matters and things herein set forth.

"9. That sometime after September 8, 1949 the plaintiff ascertained how much of Tract No. 35 the defendants Crumpler and Humphrey had used in said housing development and had conveyed to Brookwood Garden Apartments, Inc., and thereupon the plaintiff requested the defendants Crumpler and Humphrey to reconvey the remainder of Tract No. 35 to

him in accordance with the agreement made and hereinbefore alleged. That at said time the defendants Crumpler and Humphrey promised to make such conveyance as soon as they could conveniently do so, that upon failure of the said defendants to reconvey the remainder of Tract No. 35, the plaintiff made additional request for such conveyance and advised said defendants he was ready, able and willing to pay the amount agreed to be paid for such conveyance, and finally, after several months had elapsed, the defendants Crumpler and Humphrey advised the plaintiff that they would convey the remainder of Tract No. 35 to him only upon the payment by him to them of a very large amount of money greatly in excess of the cost of said property to the defendants Crumpler and Humphrey the amount agreed upon for conveyance of such remainder to the plaintiff.

"10. That subsequent developments have more clearly demonstrated the deceit, craft, and stratagem of the defendants Crumpler and Humphrey, as practiced upon the plaintiff Lamm, in that they have now divided the said 8.28 acres of Tract No. 35 by a paved street or roadway and laid out building lots on each side thereof and have since attempted to have said property zoned for business purposes (the application being denied by the City of Burlington authorities), all in furtherance and continuation of their original design and plan to cheat and defraud the plaintiff Lamm, and secure title to said property from him by the false and fraudulent representations hereinbefore set out.

"11. The plaintiff alleges that the defendants Crumpler and Humphrey have wrongfully refused to reconvey to him the remaining portion of Tract No. 35 not required for the housing development for the reason that said defendants have determined that the part of Tract No. 35 which they have not used for their housing development has a current market value greatly in excess of the investment cost and they have attempted and are still attempting to evade their responsibility and legal obligations made with the plaintiff. Plaintiff alleges that the defendants Crumpler and Humphrey now hold title to 8.28 acres of Tract No. 35, less .76 acres heretofore conveyed by them to Brookwood Garden Apartments, Inc. . . . in trust for the plaintiff Lamm, and that the defendants Crumpler and Humphrey have no beneficial interest therein; that the plaintiff has repeatedly offered to reimburse said defendants for their investment costs in acquiring the said remaining portion of Tract No. 35 and he is ready, willing and able to pay said investment costs upon the execution and delivery to him of the proper deed of conveyance.

"12. The plaintiff alleges that under the facts and circumstances hereinbefore recited, it is unconscionable and inequitable for the defendants Crumpler and Humphrey to retain title to the land in question and to refuse to convey the same to the plaintiff, and that the plaintiff Lamm is,

therefore, entitled to have said land in question impressed with a parol trust and is entitled to have the defendants Crumpler and Humphrey specifically perform the agreement to reconvey that part of Tract No. 35 which has not been used for said housing development and has not been conveyed by said defendants to Brookwood Garden Apartments, Inc., and described as follows:" (Here follows specific description of the remaining 7.52 acres more or less.)

"13. The plaintiff is advised, informed and alleges that the lands described in the next preceding paragraph have a reasonably fair market value of $40,000.

"14. The plaintiff is informed, advised and therefore alleges that the defendants Crumpler and Humphrey, in continuation of their purpose and design to cheat the plaintiff and cement the fraud originally perpetrated by them and to circumvent and delay the plaintiff in obtaining proper relief, and to place a further cloud upon the title to that part of Tract No. 35 to which the plaintiff is entitled, have caused to be executed and delivered a deed of conveyance to the defendant, Brookwood Garden Apartments, Inc., for such property containing 7.52 acres, more or less; that the defendant, Brookwood Garden Apartments, Inc., is not and cannot be a purchaser for value and in good faith and without notice of the fraud and deceit perpetrated upon plaintiff, for that at all times herein complained of the individual defendants Crumpler and Humphrey were the owners and holders, either directly or beneficially, of the entire outstanding capital stock of Brookwood Garden Apartments, Inc., and were at all times the dominant officers and directors thereof.

(NOTE: The deed from the Commissioners and plaintiff J. C. Lamm to J. A. Crumpler and T. R. Humphrey, the defendants, by reference made a part of paragraph 6 of the complaint, recites that J. C. Lamm became the last and highest bidder for Tract 35, and that sale to him was confirmed by the court on July 6, 1949, "and the said Commissioners, parties of the first part, were authorized and directed to convey the property to J. C. Lamm or such other person as he should direct," and that he has directed the Commissioners "to convey that portion of Tract 35 herein described to J. A. Crumpler and T. R. Humphrey, and he . . . joins in this deed to confirm the transfer of the said bid to the parties of the second part and to release and quitclaim any and all interests which he has or can have in and to the said real property on account of the same having been confirmed to the said J. C. Lamm . . .")

And by further amendment, pursuant to order of court, "plaintiff states that the alleged agreement by which plaintiff is alleged to have assigned his bid on Tract No. 35 . . . to the defendant June A. Crumpler, and by which the defendants June A. Crumpler and T. R. Humphrey are alleged

to have agreed to reconvey to plaintiff all of Tract No. 35 not necessary for the housing development, was not wholly in writing."

Defendants demur to the complaint, and as it is amended, upon these grounds:

"1. That plaintiff's complaint, and complaint as amended, does not state facts sufficient to constitute a cause of action in that it appears from the face of the complaint that the facts stated are not sufficient to constitute a cause of action for the conveyance of real property or for damages for the breach of contract or for any other cause.

"2. That the cause of action attempted to be stated in the complaint and the complaint as amended purports to be founded upon an alleged fraud, and the paragraphs with reference to such fraud are as follows: (Here sub-paragraphs (a), (b) and (c) of paragraph 7 of the complaint are copied *verbatim* and are here inserted by reference.)

"3. That the said allegations attempting to set forth fraud are not sufficient in law to amount to an allegation or to allegations of fraud.

"4. For that the plaintiff endeavors to set up a parol trust based on alleged fraud and for damages resulting from fraud practiced by the defendants when in fact and in law the representations set forth do not constitute actionable fraud.

"5. That the said complaint shows upon its face that the real property asked by the plaintiff to be conveyed was in fact conveyed to the defendants Crumpler and Humphrey for a valuable consideration by the plaintiff as grantor by written deed executed and acknowledged and delivered to the said defendants by the plaintiff, and that the plaintiff is not entitled to and cannot engraft upon the said property a parol trust or any trust, and the said complaint shows upon its face as amended that the plaintiff released all prior rights of the plaintiff in the property involved in the complaint and described in the complaint and shows that the said deed was executed and delivered after the alleged agreement set forth in the complaint as plaintiff's cause of action."

When the cause came on for hearing in Superior Court at term time, the presiding judge, being of opinion that the demurrer should be overruled, entered judgment to that effect.

Defendants excepted thereto and appeal to Supreme Court and assign error.

Cooper, Long, Latham & Cooper for plaintiff, appellee.

Young, Young & Gordon, Long & Ross, and Allen & Allen for defendants, appellants.

WINBORNE, J. Taking the facts alleged in the complaint to be true, as is done in this State when considering the sufficiency of a pleading in

a civil action to withstand the challenge of demurrer, and applying applicable principles of law, this Court is of opinion and holds that the action of the judge of Superior Court in overruling the demurrer filed by defendants was proper.

At the outset it is appropriate to say that in the light of the allegations of the complaint now before the Court, the decision in the former action of *Lamm v. Crumpler,* 233 N.C. 717, 65 S.E. 2d 336, has no bearing on the decision now made.

The former action had for its purpose the reformation of a written agreement of date 2 July, 1949. It was heard in Superior Court upon written demurrer to the complaint. But in this Court defendants interposed demurrer *ore tenus* on the ground that the contract sought to be reformed had as its purpose the suppression of bidding at a public sale. And decision of this Court rested solely on the point so made. Among the cases cited in support of the principle applied is *Owens v. Wright,* 161 N.C. 127, 76 S.E. 735.

In *Owens v. Wright, supra,* after stating that the enforcement of an agreement by which bidding at public sale is suppressed "is *contra bonos mores,* and the law will not assist either party to enforce such an agreement, the Court, quoting from opinion of *Chief Justice Marshall* in *Armstrong v. Toler,* 24 U.S. 257, said: 'A new contract founded on a new consideration, although in relation to property respecting which there has been unlawful transaction between the parties, is not of itself unlawful.' "

No such point was made in the hearing on the appeal in the former action.

However, plaintiff, in brief filed presently, invokes the principle just stated,—contending that the transactions between plaintiff and defendants reveal a second contract which is not tainted with the unlawful phase of the transaction relating to suppression of bidding at a public sale. But the complaint now before the Court does not contain the language of the contract then considered. Nor does the complaint make any reference to the former action. It merely declares that the contract is "not wholly in writing." Hence the matter of new contract is not presented in this action. "Extraneous matter *dehors* the pleading may not be considered . . . on demurrer," *Barnhill, J.,* in *Towery v. Dairy,* 237 N.C. 544, 75 S.E. 2d 534, and cases cited.

And it is provided by statute, G.S. 1-151, that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with the view to substantial justice between the parties." And decisions of this Court interpreting and applying the provisions of this statute require that every reasonable intendment must be in favor of the pleader. The pleading must be fatally defective before

it will be rejected as insufficient. See *Ins. Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369; *Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32.

Therefore, do the facts alleged, liberally construed in favor of the pleader, constitute a cause of action for fraud? This Court holds that they do.

In this connection the essential elements of fraud, as recently restated in *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131, in opinion by *Ervin, J.,* are these: "(1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation and acted upon it; and (6) that plaintiff thereby suffered injury."

Indeed, in *Roberson v. Swain,* 235 N.C. 50, 69 S.E. 2d 15, in opinion by *Valentine, J.,* we find it said that in this jurisdiction it is well established "that parol evidence may be used to show that an obligation is assumed only upon certain contingencies"; that "this is certainly true when the delivery of a paper writing is induced by fraudulent representations." And the Court, continuing, declared: "When a representation contains all the elements of fraud except that it is not a representation of an existing fact but is promissory in nature, the 'state of mind' of the promissor is material. If he made the promissory representations merely to mislead the promisee with no intent to comply with the promise, and the other elements of fraud all made to appear, such representations will support an action in fraud notwithstanding the promissory nature of the representations, for the 'state of mind' of the promissor is a subsisting fact. What his condition of mind was at the time and his intent in respect to the fulfillment of the promise presents a question for the jury."

And in the *Cofield case, supra,* it is stated that "The state of any person's mind at a given moment is as much a fact as the existence of any other thing. . . . As a consequence, it may be fraudulent to misrepresent the present intention of a third person to do a future act . . . One who fraudulently makes a misrepresentation to another that a third person intends to do or not to do a particular thing for the purpose of inducing the other to act or refrain from acting in reliance thereon in a business transaction is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation."

In the light of these principles, and liberally construing the allegations contained in paragraphs 5, 6 and 7, culminating in 7 (c) as hereinabove related, it appears plaintiff has stated a cause of action sufficient to repel a demurrer.

On the other hand, appellants contend that plaintiff, having joined with the Commissioner in the execution of the deed to the defendants, may not engraft a parol trust in favor of himself. *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028; *Davis v. Davis,* 223 N.C. 36, 25 S.E. 2d 181; *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418; *Loftin v. Kornegay,* 225 N.C. 490, 35 S.E. 2d 607.

These decisions hold that a grantor, in a deed, except in cases of fraud, mistake or undue influence, will not be permitted to contradict the terms of his written deed.

It would seem, however, that the allegations of the complaint are sufficient to bring the instant case within the exception.

The defendants may answer, and issues be drawn upon the pleadings and the factual situation may be fully developed upon the trial in Superior Court. Then the court may consider the case in the light of the evidence offered. And such consideration will not be foreclosed by decision now made on the demurrer. See *Bumgardner v. Fence Co., supra; Montgomery v. Blades,* 222 N.C. 463, at page 469, 23 S.E. 2d 844; *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320, and cases therein cited.

Hence, judgment overruling the demurrer of defendants is

Affirmed.

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

J. E. LINDSAY v. FRANK CARSWELL, GILBERT CARSWELL, WILL RECTOR, ROY BUTLER AND JOHN BEAM.

(Filed 7 April, 1954.)

1. **Trespass to Try Title § 3—**

Where defendants fail to show that the grantee in the original deed in their chain of title ever conveyed the land to them or to any of the defendants' predecessors in title, or that they acquired the land by inheritance from such grantee, there is a *hiatus,* and the evidence is insufficient to support a finding to the effect that defendants had established title by *mesne* conveyances from the original grantee.

2. **Adverse Possession § 3—**

Adverse possession under known and visible lines and boundaries must be not only continuous, but also adverse or hostile.

3. **Adverse Possession § 19—Evidence held insufficient to show adverse possession under color.**

This action involved title to lappage in the respective deeds of the parties. Evidence to the effect that defendants' predecessors in title cut

timber from time to time from their land, without evidence that the timber was cut from the lappage in dispute, and that their predecessors in title sold timber from their land, including the lappage, on two separate occasions, without evidence that any of defendants' predecessors in title lived on that part of the land within the lappage, and without sufficient evidence showing that the original deed in their chain of title antedated that of the adverse party, *is held* insufficient to ripen title in defendants to the lappage by adverse possession under color.

4. Adverse Possession § 1—

Adverse possession means actual possession, with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser.

5. Adverse Possession § 8—

Where there is a lappage in the deeds of the respective parties, and neither is in actual possession of the lappage, the party having the better paper title has presumptive possession of the lappage.

APPEAL by plaintiff from *Nettles, J.*, September-October Term, 1953, of BURKE.

This is an action for trespass instituted to recover damages against the defendants for the cutting and removal of timber.

It is alleged in the complaint that Roy Butler attempted to sell timber growing on plaintiff's premises to the defendant John Beam, and that the defendants Frank Carswell, Gilbert Carswell and Will Rector are his agents, servants, and employees. These defendants in their answer allege that they made a *bona fide* purchase of the timber in question from their codefendant, Roy Butler, and pray that the restraining order issued against them be dissolved.

The defendant Roy Butler filed a separate answer in which his wife purports to join although she is not a party to the action. In this answer they allege that they are the owners of 86 acres of land, and describe it by metes and bounds, which description is identical with that contained in the conveyance to Florence Ethel Butler from Minda Butler and others, referred to hereinafter, and further allege that they and those under whom they claim have been in adverse possession thereof for more than seven, twenty, and thirty years.

This controversy involves what appears to be a lappage of some six acres or more contained in the description in plaintiff's deed and in the deed to Florence Ethel Butler, wife of the defendant Roy Butler.

The plaintiff offered in evidence an unbroken recorded chain of title to his tract of land containing 98 acres, more or less, beginning with a

grant from the State of North Carolina, entered on 31 January, 1880, and recorded on 5 December, 1885, in Book 1, page 214, in the office of the Register of Deeds of Burke County.

The plaintiff's evidence is to the effect that he bought this tract of land in 1938; that it is timber land and that is what he bought it for. That, "it is just mountain land . . ." That when he bought it in 1938 he cultivated an orchard thereon for five or six years, spraying it and gathering fruit from it. A part of this orchard, according to evidence offered in behalf of the plaintiff and the defendants, was within the disputed area.

The defendants offered in evidence a deed executed in 1866 by R. R. Carswell to Angeline Carswell and filed for registration in the office of the Register of Deeds for Burke County, in Book G, page 219, on 8 February, 1879. This deed, after describing the land conveyed by metes and bounds, contains this statement: ". . . containing 31 acres, more or less, granted to Angeline Carswell and her heirs, by Robert R. Carswell, a part of the land on which he now resides."

The defendants also offered in evidence a deed dated 6 October, 1900, from Joseph England and wife, Emily, to Alexander Butler, which instrument was filed for registration on 1 July, 1918, and duly recorded in Book G-4, page 243. The only description given in connection with this instrument is as follows: ". . . 'adjoining the land,' old homeplace of Robert Carswell." They also offered a deed dated 21 February, 1901, executed by G. N. Carswell and wife, Eliza, to Alexander Butler, filed for registration on 1 July, 1918, and registered in Book G-4, page 244, being his one-sixth interest in the homeplace of Robert Carswell.

An unrecorded deed dated 12 December, 1892, purporting to be a quitclaim deed from J. T. Carswell to Alexander Butler, for all the right, title, and interest of J. T. Carswell in 32 acres of land was offered by the defendants. This deed was held to be competent only as against the grantor.

The next deed offered in defendants' chain of title was one executed on 4 March, 1936, by J. K. Butler and others to Julius and P. A. Butler (containing the same description set out in the answer of Roy Butler and his wife, Florence Ethel Butler), which deed was duly recorded on 10 March, 1936, and in addition to the description, contains the following: "This being a tract of land conveyed by R. R. Carswell to Angeline Carswell, deed dated 1866, Book G, page 219." The final deed offered by the defendants was executed by Minda Butler, widow, Neely B. Cody and others, to Florence Ethel Butler, and contains the identical description set forth in the deed from J. K. Butler and others to Julius and P. A. Butler. This deed was recorded in Book 57, page 10, on 1 May, 1943, in the office of the Register of Deeds for Burke County.

The defendants' evidence as to title and adverse possession, in sum and substance, is as follows:

1. Roy Butler, 45 years of age, testified that Alexander Butler was his uncle and the father of Julius and Pink Butler; that he did not remember Pink Butler having ever lived on the premises in question. ". . . his father moved off when he was small . . . I do not remember his living there." As to adverse possession, this witness further testified, "Since 1943, I got wood anywhere on this property that I wanted to, and I lived on it. . . . before I lived there a fellow named Childers lived in an old shack, and I lived in it too a couple of years before I built. . . . I helped Pink Butler cut timber on this tract (including the disputed area) . . . either in 1936 or 1937. . . . My wife and I sold some timber to Frank Carswell, and that timber was approximately the same as where it was cut over in 1936 . . ."

2. Joshua Carswell, a 78-year-old grandson of Robert R. Carswell, testified that Alexander Butler married Lucetta Carswell, the daughter of Robert R. Carswell; that Alexander Butler cut pine timber for shingle blocks off of this tract of land for some ten or fifteen years, "just a few at a time." That Alexander Butler lived on the land but left it fifty years ago; that there has never been an orchard on any part of the disputed area. That he heard Alexander Butler tell his father that he was going to buy the land in dispute from the heirs of Robert R. Carswell; that Robert R. Carswell was dead at the time; that when he was living he lived on the right of the road on Highway No. 18, of this Butler property.

3. Schuyler Huffman testified that he was familiar with the lands in dispute; that he was 60 years old and lived within 400 yards of the Roy Butler property; that Pink Butler had timber cut off the land in the disputed area in 1936; that S. S. Carswell and J. R. Carswell had an orchard and made a business of selling fruit; that "a piece of orchard half as big as the Court Square" was within the disputed area.

The essential parts of the court's findings of fact are set out below:

(a) The plaintiff claims title to the lands in the disputed area as set forth on the map prepared by James A. Harbison, County Surveyor, and shown within the blue lines thereon, under the grant from the State as set out hereinabove; that the title and *mesne* conveyances therein embrace the same boundaries and lands as specifically described in the plaintiff's complaint.

(b) That the defendants claim title to the lands conveyed by Robert R. Carswell by deed dated 1866, to Angeline Carswell, and by *mesne* conveyances to the *feme* defendant, Mrs. Florence Ethel Butler.

(c) That the defendants' title and each *mesne* conveyance therein embraces the same boundaries and lands specifically described in a separate answer of the defendants, Florence Ethel Butler and Roy Butler, and

shown on the map prepared by the above surveyor, within the red lines thereon. Exception No. 14.

(d) That the land described in the separate answer of Florence Ethel Butler and Roy Butler has been in the continuous and active possession and occupancy of the defendants and their predecessors in title since 1866, under known and visible lines and boundaries, as set forth in the said separate answer of the defendants and as designated within the red lines on said map. Exception No. 15.

(e) That the property in dispute is covered by both deeds for the plaintiff and for the defendants; (that the deeds of the defendants predated those of the plaintiff and that the land has been in the possession of the defendants and their predecessors since 1866). Exception No. 18 is to that portion of the above finding of fact within the parentheses.

Judgment was accordingly entered adjudging the defendants, Florence Ethel Butler and Roy Butler, to be the sole owners of the land described in their answer; directing that the injunction theretofore issued be dismissed and that the defendants have and recover the timber cut from the premises or the money obtained therefor. The plaintiff appeals, assigning error.

Mull, Patton & Craven for plaintiff, appellant.
O. Lee Horton and Russell Berry for defendants, appellees.

DENNY, J. The plaintiff has preserved twelve of his nineteen exceptions and assignments of error based thereon. However, in disposing of this appeal we deem it necessary to consider only exceptions Nos. 14, 15, and 18.

Exception No. 14 is to the finding of fact set out in paragraph (c) hereinabove to the effect that the defendants' title and each *mesne* conveyance therein embraces the same boundaries and lands specifically described in the answer of Florence Ethel Butler and Roy Butler. The fallacy in this finding of fact is that the deeds offered by the defendants in an effort to show adverse possession by themselves and those under whom they claim since 1866, do not make out an unbroken chain of title to the 86 acres of land described in the deed to Florence Ethel Butler. There is not a scintilla of evidence in the record tending to show that Angeline Carswell conveyed the 31 acres of land she acquired from R. R. Carswell in 1866 to any of the predecessors in title of Florence Ethel Butler, or that any of them inherited the property from her. On the contrary, the defendants offered testimony to the effect that Alexander Butler purchased his land from the heirs of R. R. Carswell. Then who were those heirs? He obtained one deed from Joseph England and wife, Emily. Was Emily a daughter of R. R. Carswell? Apparently not, because the deed executed

by these parties refer to the lands described therein as "adjoining the land, old homeplace of Robert Carswell." The other recorded deed executed by G. N. Carswell and wife, Eliza, to Alexander Butler, offered by the defendants as a source of their title, recites that it is for a "one-sixth interest in the homeplace of Robert Carswell." While the unrecorded deed from J. T. Carswell (a son of Robert R. Carswell, according to the record) to Alexander Butler simply purports to quitclaim all the right, title, and interest of J. T. Carswell in 32 acres of land, no evidence was offered to identify this tract of land as being a part of the lands of Robert R. Carswell or Angeline Carswell.

Furthermore, were J. K. Butler and others, who executed a conveyance to Julius and P. A. Butler (which deed was offered as a link in the defendants' chain of title) the other heirs of Alexander Butler? The evidence discloses that Julius and Pink Butler were sons of Alexander Butler, but there is no evidence from which we can ascertain from what source J. K. Butler and others obtained their interest, if any, in the land conveyed. Was P. A. Butler and Pink Butler one and the same person? If so, how and when did he acquire the one-half interest in the land conveyed to Julius Butler? The record is silent as to this information. Moreover, the record is also silent as to whose widow Minda Butler is, and how Neely Butler Cody and others acquired an interest, if any, in the land which they conveyed to Florence Ethel Butler.

It is true that the deed from J. K. Butler and others to Julius and P. A. Butler, and the deed from Minda Butler, widow, and others, to Florence Ethel Butler, each contains the following statement: "This being a tract of land conveyed by R. R. Carswell to Angeline Carswell, deed dated 1866, Book G, page 219." Each of these deeds, however, describes the tract of land conveyed as containing 86 acres, more or less, while the deed from R. R. Carswell to Angeline Carswell dated in 1866 and recorded in 1879, describes certain land by metes and bounds, and then states, "containing 31 acres, more or less." A comparison of the description in the deed from J. K. Butler and others to Julius and P. A. Butler, and from Minda Butler, widow, and others, to Florence Ethel Butler, with the description contained in the deed from R. R. Carswell to Angeline Carswell, leads to the conclusion that the 31-acre tract described in the deed to Angeline Carswell is included within the description contained in the above deeds. However, the evidence disclosed on the record does not support the finding complained of herein to the effect that the defendants' title and each *mesne* conveyance therein embraces the same boundaries and lands specifically described in the separate answer of Florence Ethel Butler and Roy Butler. Or to put it another way, the evidence is not sufficient to support the finding that the defendant Florence Ethel Butler has an unbroken chain of title to the 83 acres of land claimed by her back to 1866.

We will discuss exceptions Nos. 15 and 18 together. While the court found that the defendants (Florence Ethel Butler and Roy Butler) and their predecessors in title have been in the continuous and active possession and occupancy of the premises described in their answer since 1866, under known and visible lines and boundaries, the possession is not found to have been either adverse or hostile. Moreover, we do not think the evidence as to adverse possession, with respect to the disputed area, is sufficient to have ripened title in Florence Ethel Butler under color thereto or in any of her predecessors in title. What does the evidence disclose in this respect? (1) Whatever lands Alexander Butler purchased under the deeds dated in 1900 and 1901, which deeds were offered in evidence by the defendants to make out Florence Ethel Butler's chain of title, he did not live on such premises more than two or three years, for he moved therefrom fifty years ago, according to the defendants' evidence adduced in the trial below. (2) There is no evidence that any person claiming title to the premises under consideration, under color, ever resided thereon after Alexander Butler moved therefrom until Roy Butler lived on it. (3) The only acts offered to show adverse possession were these: (a) Alexander Butler, for ten or fifteen years, cut pine timber off of this land for shingle blocks, "just a few at a time." But there is no evidence that he cut any shingle blocks in the disputed area. (b) Pink Butler, who never lived on the premises while he held the paper title thereto, sold the timber thereon including the disputed area, in 1936. (c) Roy Butler and his wife sold the timber on the premises including the disputed area, in 1953. He testified that he lived on the premises, but not in the disputed area, for two years (but when is not stated), and that "since 1943 I cut wood anywhere on the property that I wanted to . . ." How much wood he cut, or how often he cut it, or from what part of the premises he obtained it is not made to appear.

Adverse possession means actual possession, with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. *Price v. Whisnant,* 236 N.C. 381, 72 S.E. 2d 851; *Perry v. Alford,* 225 N.C. 146, 33 S.E. 2d 665; *Berry v. Coppersmith,* 212 N.C. 50, 193 S.E. 3; *Alexander v. Cedar Works,* 177 N.C. 137, 98 S.E. 312; *Land Co. v. Floyd,* 167 N.C. 686, 83 S.E. 687; *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347; *Monk v. Wilmington,* 137 N.C. 322, 49 S.E. 345; *Williams v. Wallace,* 78 N.C. 354; *Bartlett v. Simmons,* 49 N.C. 295; *Loftin v. Cobb,* 46 N.C. 406, 62 Am. Dec. 173.

The law with respect to title of a disputed area covered by a lappage in deeds, was stated by *Stacy, C. J.,* in *Vance v. Guy,* 224 N.C. 607, 31 S.E.

2d 766, in the following language: "Where the title deeds of two rival claimants to land lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title," citing *Penny v. Battle,* 191 N.C. 220, 131 S.E. 627. See also *Bostic v. Blanton,* 232 N.C. 441, 61 S.E. 2d 443; *Whiteheart v. Grubbs,* 232 N.C. 236, 60 S.E. 2d 101; *Ownbey v. Parkway Properties,* 222 N.C. 54, 21 S.E. 2d 900.

The plaintiff is entitled to a new trial and it is so ordered. In the meantime, Florence Ethel Butler, who is a necessary party to this action, should be formally made a party defendant.

New trial.

SAMUEL L. LAWSON v. LOUISE BENNETT, GUARDIAN AD LITEM FOR PEARL T. LAWSON.

(Filed 7 April, 1954.)

1. Divorce and Alimony § 2a—

Divorce on the grounds of two years' separation under G.S. 50-6 cannot be maintained when the separation is due to the insanity or mental incapacity of defendant spouse, the sole remedy in such instance being under G.S. 50-5 (6).

2. Administrative Law § 4—

Where a statute provides a valid remedy, such remedy is exclusive.

3. Divorce and Alimony § 5e—

While ordinarily a defendant wife may not attack a deed of separation by cross-action in her husband's suit for divorce, where the husband, in reply to the wife's cross-action for subsistence pending the trial and subsequent thereto, sets up a deed of separation as a bar to the cross-action, the court may allow defendant to amend so as to allege that the deed of separation was invalid because of her mental incapacity.

4. Husband and Wife § 12d (3): Insane Persons § 12—Mental incapacity renders contract voidable but not void.

The mere fact that at the time of the execution of the deed of separation the wife was mentally incompetent does not support a judgment declaring that the deed of separation is void, since in such circumstances the contract is voidable and should not be annulled unless the husband is unable to show that he was ignorant of the wife's incapacity and had no notice thereof sufficient to put a reasonably prudent person upon inquiry, paid a fair and full consideration, took no unfair advantage of the wife, and that the wife has not restored or is unable to restore the consideration or make adequate compensation therefor.

APPEAL by plaintiff from *Gwyn, J.,* at October Term, 1953, of ROCKINGHAM.

Civil action for absolute divorce of bonds of matrimony existing between plaintiff and defendant on the ground of two years separation.

The record discloses these facts:

1. Plaintiff in his complaint filed 23 October, 1952, alleges, briefly stated: (1) That he is and has been a resident of Rockingham County in North Carolina for more than six months next preceding the commencement of this action; (2) that he and defendant were lawfully married to each other on 23 December, 1919, and to them four children were born, all of whom are more than 21 years of age; (3) that they separated from each other on 20 October, 1950, and have lived separate and apart continuously since that date,—the separation being for more than two years next preceding the commencement of this action, and (4) that defendant is not in the military service of the United States Government. Upon these allegations plaintiff prays that he be granted an absolute divorce from defendant.

2. On 5 November, 1952, it being made to appear to the court by verified petition and motion of Louise Bennett, a daughter of defendant, that defendant Pearl T. Lawson was then mentally incompetent and had no general or testamentary guardian within this State, the Clerk of Superior Court thereupon finding Louise Bennett to be a fit person therefor, appointed her guardian *ad litem* for defendant.

3. Thereafter on 7 November, 1952, defendant, through her guardian *ad litem,* filed answer to the complaint. And in answer filed the allegations of the complaint were admitted, except those pertaining to separation of plaintiff and defendant, and those were denied.

Defendant, through her guardian *ad litem,* for further answer, and by way of cross-action for alimony *pendente lite* and counsel fees, also averred, among other things not now pertinent, that she was a good and dutiful wife to plaintiff at all times, and provided a home for him until on or about 20 October, 1950, when she was forced out of the home occupied by them, and, due to his treatment of her, she had become mentally incompetent, and did not know the nature and consequences of her acts, and was induced to sign a deed of separation between her and plaintiff which was not fair or reasonable to her; and that she continues mentally ill. And she prays judgment (1) dismissing "complaint of plaintiff," (2) awarding to her subsistence pending the trial and subsequent thereto, and (3) awarding counsel fees.

Thereafter, on 20 November, 1952, plaintiff, replying to defendant's further answer and cross-action, as above set forth, in pertinent part, admits that he and defendant were married and lived together until sometime prior to 20 October, 1950, on which date he and she entered into a final agreement or deed of separation, which he pleads as a full and complete bar to defendant's right to recover on her cross-action. He

also alleges "that defendant is now and has always been of sound mind"; that at the time of the execution of the said deed of separation defendant was of sound mind and understood thoroughly all matters in connection with said settlement, and accepted the same, and the terms of it,—and has not raised any question about the settlement until this action was instituted. Thereupon plaintiff prays that relief asked by defendant be denied, and that he have the relief originally sought.

Thereafter on 27 October, 1953, upon the entering of the case for trial, and immediately preceding the selection of jury, defendant, over objection and exception by plaintiff, was allowed to amend her answer by adding a paragraph reading as follows: "That at the time the deed of separation was executed by Pearl T. Lawson on the 20th day of October, 1950, the said Pearl T. Lawson was mentally ill and was mentally incompetent to understand the consequences of her act and that because of her mental illness her act of executing said deed of separation was null and void and is voidable and should be set aside by the court because of her mental incompetency." Thereupon, "defendant, as an additional prayer for relief, prays that said deed of separation be declared null and void and be set aside by the court."

Plaintiff on same day, without waiving or relinquishing any of his rights under this objection and exception to the order allowing the above amendment, filed reply, denying the averments of the above amendment, and saying that he "reiterates and repeats and relies upon all the facts, circumstances and conditions, before, and at the time of the execution and acknowledgement of said deed of separation," etc., "as fully set forth at length under plaintiff's reply filed . . . 7 November, 1952, in bar of defendant's rights in the premises and in complete bar of defendant's right to set up and seek to declare and have said deed of separation declared null and void by the court and to have same set aside . . .," etc.

Upon the trial in the Superior Court, as disclosed by the case on appeal, it was not controverted: (1) that plaintiff and defendant were married to each other on 19 December, 1919; (2) that they lived together as husband and wife until 20 October, 1950, when a separation took place, and a deed of separation was signed by them; (3) that thereafter they have lived separate and apart from each other; (4) that both have resided in North Carolina more than six months next prior to the institution of this action and the filing of complaint herein; and (5) that the action was begun on 23 October, 1952, more than two years after the separation.

The case on appeal also discloses that plaintiff offered in evidence separation agreement entered into 20 October, 1950, between plaintiff and defendant, acknowledged and registered, and that the trial judge gave peremptory instructions to the jury in respect to each of the first three

issues hereinafter shown, and the record shows that in accordance therewith those issues were answered in the affirmative.

And the case on appeal further reveals that the battle before the jury was waged around the issue as to whether or not at the time of the separation and the signing of the deed of separation, the defendant had sufficient mental capacity to understand what she was engaged in doing, and the nature and consequences of her act. The trial judge put the burden of this issue upon defendant, and so instructed the jury.

All the evidence tends to show that plaintiff and defendant enjoyed a happy home,—rearing four children to maturity, in wholesome Christian atmosphere, until defendant became emotional, nervous and violent sometime prior to the year 1947.

Plaintiff testified in his own behalf, and offered testimony of many others. And, under cross-examination, plaintiff said: That he had defendant examined by a local doctor, and by another at Winston-Salem, on whose recommendation he took her to St. Albans Sanitarium at Radford, Virginia, where she was treated for two months; that when she came home she appeared to be physically and mentally all right, but that same things again arose; that at one time she left home and stayed away for two weeks, and when she came back she became violent and threatened him; that negotiations for separation agreement followed—culminating in a deed of separation being signed by them on 20 October, 1950; and that he has not been back since. Plaintiff also offered testimony bearing upon his contention that defendant was mentally sound.

On the other hand, testimony offered in behalf of defendant tends to show: That defendant had become unmanageable when on 16 April, 1948, she was taken by plaintiff to the St. Albans Sanitarium; that Dr. Morrow, of the medical staff there, told plaintiff what defendant's mental condition was,—he called it "maniac-depressive psychosis," for which she was given electric shock treatment, and was discharged from the Sanitarium on 21 June, 1948; that later she became deeply depressed,—requiring someone to stay with her, but she would not let her own children stay; that her condition became such that two of her children took her back to St. Albans on 1 January, 1951, and she was kept there three months,—receiving electric treatment while there; that she was then taken by her daughter to Greensboro, where she was under the care of a doctor, who also gave her electric shock treatment; that on 4 June, 1953, the doctor sent her to Camp Butner, at first as a voluntary patient, and on 30 July, 1953, she was changed to legal commitment under Chapter 122 of General Statutes, and that she is still at Butner.

Deposition of Dr. James K. Morrow was offered by defendant. He testified that as a member of the medical staff of St. Albans Sanitarium at Radford, Virginia, he had occasion to examine Mrs. Lawson, the de-

fendant, on 16 April, 1948, at the sanitarium where she was treated from that date to 21 June, 1948; that the diagnosis in her case was maniac-depressive psychosis,—the illness was mental; that at time of her discharge on 21 June, 1948, her condition was considerably improved but the probability of future attacks is rather great in this disorder; that he did not believe that she was at that time in a completely recovered condition; that later, 1 January, 1951, she was seen by him as a patient in a relapse of her previous condition; and at that time on her readmission she was in a state of excitement again, but much worse than before; that at this time electric shock was the principal treatment used; that such treatment is considered drastic and is used only in the treatment of severe mental disorders; that "manic-depressive psychosis is a type of mental disorder . . . characterized by periods of excitement or periods of depression with recurrent episodes throughout life and very often with periods of normality between times"; that it does not affect the individual's intelligence at all, but does affect the emotions to such an extent that a person might be either wildly excited or deeply depressed; and that the judgment of a person with this disorder is badly affected. And the doctor, in résumé, said: "I would not have a positive opinion as to whether her illness is incurable or whether she will eventually recover because of the nature of her illness; I would think that the prospect for a cure is not very good in her particular case because the history seems to indicate that she had never reached a normal level between attacks."

And Dr. Jas. Wilson Murdock, a medical practitioner trained in psychiatry, admitted to be an expert as such, as witness for defendant, testified: That on 4 June, 1953, Mrs. Lawson was admitted as a patient at Butner; that at that time she was "in a very excited condition,—a condition we know as mania"; that "she was very irritable, showed a lot of hostility, very noisy"; that her condition was known as maniacal-depressive psychosis; that on this particular occasion she suffered from mania; that the symptoms of this mental illness is a feeling of elation, great excitement, constant movement, very often associated with irritability, inability to sleep, and during the acute stages of the attack, because of the elation, judgment is very severely impaired; that if a person is suffering from that mental illness in the acute stage the judgment would be very defective because of the accompanying emotional condition; that they are very liable to make mistakes in judgment in anything, any business matter, any matter affecting the general life. And the doctor stated that he doesn't think Mrs. Lawson when suffering from one of these acute stages, would have sufficient mental capacity and understanding to understand the consequences of her act, that is when she is suffiering from mania; and that she has been maniac and excited the whole time she's been in Butner.

And there was testimony that just prior to and at the deed of separation the defendant, Mrs. Lawson, did not have sufficient mental capacity to understand what she was doing and to understand the nature and consequences of her act.

These issues were submitted to, and answered by the jury as indicated:

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

"2. Has the plaintiff been a resident of the State of North Carolina for six months next prior to the institution of this action and the filing of the complaint herein, as alleged in the complaint? Answer: Yes.

"3. Did the plaintiff and the defendant separate from each other and have they lived separate and apart from each other continuously for two years next prior to the institution of this action and the filing of the complaint herein? Answer: Yes.

"4. At the time of the separation and the signing of the deed of separation, did the defendant have sufficient mental capacity to understand what she was engaged in doing and the nature and consequences of her act? Answer: No."

Plaintiff tendered the first three issues, and excepted to the submission of the fourth. Exception No. 2. Plaintiff moved to set aside the verdict as to the fourth issue. Motion was denied. Exception No. 3. Plaintiff also tendered judgment for absolute divorce on the verdict as to the first three issues. To the refusal of the court to sign same, plaintiff excepted. Exception No. 6.

On the verdict rendered, the trial court entered judgment:

"1. That the plaintiff's action for divorce be dismissed.

"2. That the deed of separation between the parties referred to in the pleadings be, and the same is hereby declared null and void, and it is ordered that the same be set aside.

"3. That the cost of this action be taxed by the Clerk and paid by the plaintiff."

Plaintiff excepted to the signing of the judgment, and to the judgment itself (Exception No. 5), and appeals to Supreme Court, and assigns error.

Wm. Reid Dalton and A. D. Folger, Jr., for plaintiff, appellant.
Brown, Scurry & McMichael for defendant, appellee.

WINBORNE, J. The foremost question here is this: Where a spouse, the wife in the instant case, has suffered impairment of mind to such an extent that she does not have sufficient mental capacity to understand what she is engaged in doing, and the nature and consequences of her act, may the other spouse, the husband here, maintain an action against her

for divorce on the ground of two years' separation, that is, under the provisions of G.S. 50-6? The trial judge held that he did not have such right, and, upon careful consideration of the question, this Court affirms.

In this connection, the General Assembly has seen fit to legislate specifically and specially in respect to the granting of absolute divorce in all cases where a husband and wife have lived separate and apart by reason of the incurable insanity of one of them, upon the petition of the same spouse. G.S. 50-5, subsection 6, as amended.

Therefore, in keeping with well established principle the remedy provided is exclusive. In *Bar Asso. v. Strickland,* 200 N.C. 630, 158 S.E. 110, in opinion by *Brogden, J.,* this Court said: "The courts everywhere are in accord upon the proposition that if a valid statutory method of determining a disputed question has been established, such remedy so provided is exclusive and must be first resorted to and in the manner specified therein." This principle has been quoted and applied in many decisions of this Court, among which are these: *Maxwell, Comr., v. Hinsdale,* 207 N.C. 37, 175 S.E. 847; *Rigsbee v. Brogden,* 209 N.C. 510, 184 S.E. 24; *Wilkinson v. Boomer,* 217 N.C. 217, 7 S.E. 2d 491; *Riddick v. Davis,* 220 N.C. 120, 16 S.E. 2d 662; *Worley v. Pipes,* 229 N.C. 465, 50 S.E. 2d 504.

Hence, the jury having answered the fourth issue in the negative, and the provisions of G.S. 50-5 (6) not having been invoked, the trial court properly held that plaintiff cannot maintain an action upon the grounds alleged in his complaint.

Appellant, the plaintiff, also excepts to and assigns as error the ruling of the trial court in permitting defendant to amend her further answer to plead affirmatively the invalidity of the separation agreement of 20 October, 1950, by reason of her mental incompetency, as hereinabove set forth.

As to this, ordinarily, such plea is not permitted in an action for absolute divorce on the ground of two years' separation. *Jenkins v. Jenkins,* 225 N.C. 681, 36 S.E. 2d 233. But here the pleadings present a different, and particular situation created by plaintiff.

Defendant, answering the complaint in respect to the alleged separation, sets up as a defense that she was mentally incompetent. Thereupon plaintiff, in reply thereto, alleges that the deed of separation of 20 October, 1950, was a full and complete settlement between plaintiff and defendant, and sets up the deed of separation "as a full and complete bar to the defendant's right to recover on her cross-action in this cause." And it was in answer thereto that defendant, by permission of the court, was permitted to amend her answer. Under these circumstances the fourth issue was proper, and plaintiff having initiated it, may not now complain.

However, the assignment of error based upon exception to the judgment is well taken. *Carawan v. Clark,* 219 N.C. 214, 13 S.E. 2d 237. The principle applied to the factual situation there is applicable to case in hand. Defendant here occupies the position of plaintiff there. And the Court in opinion by *Barnhill, J.,* now *C. J.,* had this to say:

"A contract entered into by a person who is mentally incompetent is voidable and not void. . . . At the election of the incompetent and upon the return of the consideration and the restoration of the *status quo,* it will be annulled by a court of equity.

"Under certain conditions such a contract may be avoided by the incompetent even when he is unable to place the other party to the contract *in statu quo,* but the greater weight of authority supports the rule that where a contract with an insane person has been entered into in good faith, without fraud or imposition, for a fair consideration, of which the incompetent has received the benefit, without notice of the infirmity, and before an adjudication of insanity, and has been executed in whole or in part, it will not be set aside unless the parties can be restored to their original position. . . .

"Thus, in an action to rescind a contract, as here, for that the plaintiff was, at the time, mentally incompetent, the plaintiff must show insanity or mental incompetency at the time the contract was entered into. Upon such showing the contract will be annulled unless it is made to appear—the burden being on the defendant—that the defendant (1) was ignorant of the mental incapacity; (2) had no notice thereof such as would put a reasonably prudent person upon inquiry; (3) paid a fair and full consideration; (4) took no unfair advantage of plaintiff; and (5) that the plaintiff has not restored and is not able to restore the consideration or to make adequate compensation therefor."

Applying these principles to case in hand: The verdict of the jury on the fourth issue establishes the mental incompetency of defendant at the time the deed of separation of 20 October, 1950, was entered into. Upon such showing the deed of separation will be annulled unless plaintiff is able to carry the burden imposed upon him as indicated in the *Carawan case, supra.*

However, in the event it becomes necessary for the court to make an allowance for subsistence, the court should take into consideration the property received by defendant under the deed of separation and now in her possession and unused for her past subsistence.

Therefore, for these reasons, even though plaintiff, on the verdict rendered, is not entitled to a decree of divorce, the action will not be dismissed, but will be retained for further proceedings as to right and justice appertains and the law provides.

Error and remanded.

STATE v. EUGENE CANIPE.

(Filed 7 April, 1954.)

1. Constitutional Law § 34a—

Every person charged with crime has an absolute right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.

2. Criminal Law §§ 51, 53d: Trial § 18—

It is the duty of the judge alone to decide the legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case.

3. Criminal Law § 51: Trial § 19—

It is the task of the jury alone to determine the facts of the case from the evidence adduced.

4. Criminal Law § 50d: Trial § 6: Jury § 4—

The judge is forbidden to convey to the jury in any way at any stage of the trial his opinion on the facts involved in the case, and the trial begins within the purview of this rule when the prospective jurors are called to be examined touching their fitness to serve on the trial jury. G.S. 1-180.

5. Same—

Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not the motive of the judge.

6. Same—

Where the court, in interrogating prospective jurors in regard to their scruples against capital punishment, refers to several celebrated cases and asks them, in the presence of those immediately thereafter impaneled to try the case, whether they would not render a verdict calling for the death sentence in such cases, defendant must be awarded a new trial notwithstanding that the court thereafter cautions them that he did not mean to compare the case at issue with the other cases.

7. Criminal Law § 81c (7)—

Error committed by the court in inadvertently expressing an opinion on the facts is virtually impossible to cure, and certainly is not rendered harmless by a statement of the court that if any juror had the impression that the court had expressed such an opinion the court would release him from the jury.

INDICTMENT charging the prisoner Eugene Canipe with the first degree murder of his wife Delores Hamrick Canipe tried by *Pless, J.*, and a jury, at the January Term, 1954, of CLEVELAND.

The trial jury was chosen from the regular panel and a special venire. After one of the trial jurors had been selected and sworn, George L. Willis, a prospective juror, stated on his *voir dire* that he had conscien-

tious scruples against capital punishment, and was challenged by the State for cause. Before allowing the challenge, the trial judge had this colloquy with Willis in the presence of the trial juror and the other prospective jurors:

"Q. You do not think the death penalty ought to be inflicted for any crime under any conditions? A. I will not say that.

"Q. It is not what you prefer. The law says there are four offenses for which the penalty shall be death. Would you find him guilty of the charge of first degree murder when it meant that he would be put to death? A. I am afraid to say.

"Q. You told the Solicitor that your religion was against it, and you tell me that you cannot say that you are against it; would you be willing to follow the law of your State? A. Yes, Sir.

"Q. And if you found the defendant to be guilty of first degree murder, would you render that verdict? A. If that would be the law, and if I agreed I would have to do it, but it would still be against my religion.

"Q. Would you feel that you had been guilty of doing something wrong yourself if you voted for it? A. According to the Bible, I would.

"Q. Did you read about the Greenlease case? A. Yes, Sir.

"Q. Do you think they ought not to have been put to death? A. I did not take any thought as to that.

"Q. You are not saying this just to get off the jury, are you? A. No, Sir."

After three of the trial jurors had been selected and sworn, Mrs. Zella Blanche Gantt, a prospective juror, stated on her *voir dire* that she had conscientious scruples against capital punishment, and was challenged by the State for cause. Before allowing the challenge, the trial judge had this colloquy with Mrs. Gantt in the presence of the three trial jurors and the other prospective jurors:

"Q. Are you against capital punishment in every case? A. Yes.

"Q. I'm not comparing that case with this one, but do you mean to say that you would not have put the defendants to death in the Greenlease kidnapping case that happened lately where they had planned to kill the child and had dug his grave before kidnapping him? A. I wouldn't be in favor of capital punishment there.

"Q. What about this case that happened in Germany during the war where a German officer lined up 50 American boys facing the wall and shot them in the back in cold blood? The officer was tried after the war and given the death sentence. Could you have participated in such a verdict? Do you mean to say that you wouldn't give him death? A. I wouldn't.

"Q. What punishment would you give in such a case? A. I think life imprisonment would be a more severe punishment."

After three of the trial jurors had been selected and sworn, Miss Eva P. Moore, a prospective juror, stated on her *voir dire* that she had conscientious scruples against capital punishment, and was challenged by the State for cause. Before allowing the challenge, the trial judge had this colloquy with Miss Moore in the presence of the three trial jurors and the other prospective jurors:

"Q. You have told the Solicitor you did not believe this defendant should be put to death. Is that because you do not believe in capital punishment, or because you do not think he is guilty? A. Yes, Sir, he's guilty because he said he was, but I don't think he should pay for it with his life.

"Q. Do you think that you would be committing a wrong to participate in a verdict that would result in the death sentence for this defendant regardless of what the evidence is? A. I think he should have punishment meted out to him, but I think it wrong to take life under those circumstances."

After seven of the trial jurors had been selected and sworn, David Dellavy, a prospective juror, stated on his *voir dire* that he had conscientious scruples against capital punishment, and was challenged by the State for cause. Before allowing the challenge, the trial judge had this colloquy with Dellavy in the presence of the seven trial jurors and the other prospective jurors:

"Q. You do not believe in capital punishment in the Greenlease case? A. They play up a lot of stuff and put in a lot of stuff in there."

After the twelve trial jurors were selected and sworn, but before they were impaneled, the trial judge made this statement to them: "Gentlemen of the Jury. In order to test the sincerity of the statements made by the jurors as they came to be questioned, I have asked questions as to the extent of their belief, and mentioned the Greenlease case and the case of the murderers of the 50 Americans in Germany. I do not have any idea that anybody could possibly believe that the court was comparing the Greenlease case and the case of the murder of the American soldiers with this case. I do not know anything as to the facts in this case; but in order to be sure that the defendant has not been prejudiced because of those questions, I would like for you to let me know now if anyone on the jury got the impression that the court was comparing this case to any other case. The defendant is entitled to a jury with no prejudice, and the mere fact that he is charged with a violation of the law which, under certain circumstances, would (require that he) be put to death, doesn't mean that his case is to be compared. Let me know that now so I can release you from serving on this jury."

The twelve trial jurors remained silent, and were thereupon impaneled to try the cause.

Both sides offered evidence. The trial judge charged the jury that it could return one of these verdicts: (1) guilty of murder in the first degree; (2) guilty of murder in the first degree with recommendation that the punishment be imprisonment for life in the State's prison; (3) guilty of murder in the second degree; (4) guilty of manslaughter; or (5) not guilty.

The jury returned a verdict finding the prisoner guilty of murder in the first degree, but did not recommend that his punishment should be imprisonment for life in the State's prison. The trial judge entered judgment that the prisoner suffer death by the administration of lethal gas, and the prisoner excepted and appealed, assigning errors.

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

Horn & West and A. A. Powell for the prisoner.

ERVIN, J. Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *S. v. Carter,* 233 N.C. 581, 65 S.E. 2d 9.

We are confronted at the threshold of this appeal by the assignments of error which assert, in essence, that the able and just presiding judge unintentionally impaired the fundamental right of the prisoner to have his cause determined by an unprejudiced jury in an atmosphere of judicial calm by the questions he put during the selection of the jury to prospective jurors who professed conscientious scruples against capital punishment. The questions were asked in the hearing of the twelve jurors who were immediately impaneled to pass between the State and the prisoner upon his life and death.

The founders of our legal system intended that the right of trial by jury should be a vital force rather than an empty form in the administration of justice. They realized that this could not be if the trial jury should become a mere unthinking echo of the judge's will. To forestall such eventuality, they clearly demarcated the respective functions of the judge and the jury in both civil and criminal trials in a familiar statute, which was enacted in 1796, and which originally bore this caption: "An act to secure the impartiality of trial by jury, and to direct the conduct of judges in charges to the petit jury." Potter's Revisal, Vol. 1, Ch. 452. This statute, which now appears as G.S. 1-180, establishes these basic propositions: (1) That it is the duty of the judge alone to decide the legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case; (2) that it is the task of the jury alone to determine the facts of the case from the evidence ad-

duced; and (3) that "no judge, in giving a charge to the petit jury, . . . shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury." This statute is designed to make effectual the right of every litigant to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury. *In re Will of Bartlett,* 235 N.C. 489, 70 S.E. 2d 482.

Although the statute refers in terms to the charge, it has always been construed to forbid the judge to convey to the trial jury in any way at any stage of the trial his opinion on the facts involved in the case. *In re Will of Bartlett, supra; S. v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568; *S. v. McNeil,* 231 N.C. 666, 58 S.E. 2d 366; *Bailey v. Hayman,* 220 N.C. 402, 17 S.E. 2d 520; *S. v. Oakley,* 210 N.C. 206, 186 S.E. 244; *S. v. Bryant,* 189 N.C. 112, 126 S.E. 107; *Morris v. Kramer,* 182 N.C. 87, 108 S.E. 381; *S. v. Rogers,* 173 N.C. 755, 91 S.E. 854, L.R.A. 1917E, 857; *S. v. Cook,* 162 N.C. 586, 77 S.E. 759; *Park v. Exum,* 156 N.C. 228, 72 S.E. 309; *S. v. Swink,* 151 N.C. 726, 66 S.E. 448, 19 Ann. Cas. 422; *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855; *S. v. Davis,* 136 N.C. 568, 49 S.E. 162; *Marcom v. Adams,* 122 N.C. 222, 29 S.E. 333; *S. v. Browning,* 78 N.C. 555.

The trial of a case begins within the purview of the statute when the prospective jurors are called to be examined touching their fitness to serve on the trial jury. *Lipscomb v. State,* 76 Miss. 223, 25 So. 158; *State v. Neal,* 350 Mo. 1002, 169 S.W. 2d 686; *Simmons v. State,* 4 Okl. Cr. 490, 114 P. 752. This being so, it is a violation of the statute for the judge to communicate his opinion on the facts in the case to the trial jury by his remarks or questions to prospective jurors during the selection of the trial jury. *State v. Diedtman,* 58 Mont. 13, 190 P. 117; *State v. Ferguson,* 48 S.D. 346, 204 N.W. 652. See, also, in this connection: *Manuel v. United States,* 254 F. 272; *People v. Wilson,* 334 Ill. 412, 166 N.E. 40; *State v. Smith,* 216 La. 1041, 45 So. 2d 617; *Phenizee v. State,* 180 Miss. 746, 178 So. 579.

The judge occupies an exalted station, and jurors entertain a profound respect for his opinion. *S. v. Carter, supra.* As a consequence, the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates the statute by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation. *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *Thompson v. Angel,* 214 N.C. 3, 197 S.E. 618; *S. v. Winckler,* 210 N.C. 556, 187 S.E. 792; *S. v. Oakley, supra; S. v. Bryant, supra; S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *Morris v. Kramer, supra; S. v. Rogers, supra; Bank v. McArthur,*

168 N.C. 48, 84 S.E. 39; *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176; *S. v. Harris,* 166 N.C. 243, 80 S.E. 1067; *S. v. Cook, supra; Withers v. Lane, supra; S. v. Caveness,* 78 N.C. 484; *S. v. Dick,* 60 N.C. 440.

Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge. *S. v. Oakley, supra; S. v. Bryant, supra; Morris v. Kramer, supra; S. v. Ownby,* 146 N.C. 677, 61 S.E. 630.

The law imposed upon the trial jury alone the function of determining the factual issue whether the prisoner was guilty of murder in the first degree. The law likewise imposed upon the trial jury alone the function of deciding whether it should exercise its discretionary power to fix the punishment of the prisoner at life imprisonment rather than death in the event it found him guilty of murder in the first degree. G.S. 14-17.

When the able and just presiding judge propounded his questions to the prospective jurors who professed conscientious scruples against capital punishment, he did not intend to influence the jury in the discharge of either of these functions by an expression of his opinion on the facts involved in the case. He was actuated by a salutary motive. He was endeavoring to ascertain the validity and the strength of the scruples professed by the prospective jurors with the sole object of determining whether they could approach the issue of capital punishment with the proper attitude.

But when his questions are read in the light of their probable meaning to the twelve persons who were immediately impaneled to serve as trial jurors, it is apparent that in legal contemplation the presiding judge inadvertently over-stepped his self-appointed bounds and unintentionally expressed an opinion on the facts adverse to the prisoner. This is true because the questions had a logical tendency to implant in the minds of the trial jurors the convictions that the presiding judge believed that the prisoner had killed his wife in an atrocious manner, that the prisoner was guilty of murder in the first degree, and that the prisoner ought to suffer death for his crime.

The Attorney-General contends, however, that the presiding judge made an explanatory statement just before the impanelment of the trial jury in which he offered to excuse from service on that body any of the trial jurors who might have been prejudiced against the prisoner by his questions, that none of the trial jurors accepted the offer, and that the non-acceptance of the offer by the trial jurors shows that the explanatory statement of the presiding judge removed from their minds any prejudicial impressions created by any expression of his opinion on the facts embodied in his questions.

We would be unable to accept as valid the Attorney-General's contention even if we were at liberty to ignore the numerous decisions holding that it is virtually impossible to erase from the minds of jurors prejudicial impressions resulting from the expression by the trial judge of his opinion on the facts. The Attorney-General overlooks the significant circumstance that the offer of the presiding judge was conditional and not absolute. When his explanatory statement is read aright, it appears that he offered to release prejudiced persons from service on the trial jury if, and only if, they first met two conditions. The first condition was, in essence, that they should make a confession in open court that their minds were prejudiced against the prisoner, and the second condition was, in substance, that they should make an accusation in open court that the presiding judge himself had instilled the prejudice in their minds. Each condition was sufficient in itself to deter the trial jurors from accepting the offer.

For the reasons given, we are compelled to sustain the assignments of error under scrutiny. This necessitates a new trial, and renders it unnecessary for us to discuss the remaining assignments of error. We deem it advisable to note, however, that we have examined the remaining assignments of error with care, and have found them to be untenable.

New trial.

S. P. HALL v. W. D. ODOM, E. R. EVANS AND W. M. ODOM, TRADING AND DOING BUSINESS AS FARMERS IRON WAREHOUSE.

(Filed 7 April, 1954.)

1. Agriculture § 1a—

The landlord's lien for rent attaches to the entire crop until the rent is paid regardless of whether the relationship is that of landlord and tenant or that of owner and cropper.

2. Same—

The landlord's lien for rent in agricultural tenancies exists solely by virtue of statute in this State, and the statute itself gives notice thereof so that no registration or written instrument is required or contemplated.

3. Agriculture § 5d—

Where the rent is payable in a fixed amount of money, the tenant owns the crop subject to the landlord's lien for rent and has the right to sell, but the purchaser takes subject to the landlord's lien, and when the crop is sold on the floor of a tobacco warehouse, the warehouseman, as selling agent, deals with the crop with statutory notice of the lien and may be held accountable by the landlord on the basis of money had and received up to the balance due as rent.

4. Same: Estoppel § 11b—

A landlord may waive his lien for rents by agreement, express or implied, or may be estopped from asserting his lien by acts and conduct constituting the tenant his agent to sell the crop for their joint benefit and account to the landlord for his share out of the proceeds of sale. Such waiver or estoppel is an affirmative defense which the purchaser must plead with certainty and particularity, and establish by the greater weight of the evidence.

5. Same—

In accordance with the custom in a county, quota marketing card was issued in the name of the tenant alone as the "operator" (7 Code of Federal Regulations, secs. 725-230, et seq.). There was no evidence that the landlord procured the card to be so issued or participated in any way in its issuance. Held: In the landlord's action against the warehousemen to recover the amount of his lien for rents on tobacco sold by the tenant and collected for by the tenant without accounting to the landlord, plaintiff's evidence being sufficient to make out a prima facie case, and the undisputed evidence being insufficient to establish the defense of waiver or estoppel as a matter of law, nonsuit was error.

APPEAL by plaintiff from *Hall, Special Judge,* December Term, 1953, of HERTFORD.

Civil action by plaintiff, a landlord, to recover from the defendants, operators of a tobacco sales warehouse, a balance of $209.15, alleged to be due as rent by one Thomas Booker, plaintiff's tenant, on account of the defendants' purchase from Booker of tobacco raised by him on plaintiff's farm and the payment to Booker by the defendants of the purchase price thereof, to wit, $223.96, no part of which was paid by Booker to the plaintiff.

The rental contract between the plaintiff and Booker was for the year 1951, the agreed rental was $500.00; and the plaintiff's cause of action is predicated upon his landlord's lien. The plaintiff alleges that upon such sale the defendants became indebted to him as lienholder for the purchase price up to the balance due on rent. It is further alleged that no portion of the crop remains from which the plaintiff can collect the balance of $209.15.

The defendants admit that on 21 August, 1951, they sold at auction tobacco placed on their warehouse floor by Booker; that the sale price was $223.96; and that the defendants deducted warehouse charges of $7.51 and paid the net amount of $216.45 by check to Booker. Otherwise, the material allegations of the complaint are denied.

The defendants further allege, as a plea in bar, that Booker exhibited the quota marketing card, No. C-459801, issued for farm #80, by the Hertford County P.M.A. office, Winton, N. C., in the name of Thomas Booker, and that the plaintiff "by permitting the said marketing card to

be issued in the name of Thomas Booker, placed him in position to produce it as his credentials for the receipt of the purchase price of said tobacco and that plaintiff thereby consented to the payment by the said defendant to the said Thomas Booker and thereby waived his lien, if any he had, and therefore the plaintiff is estopped and is thereby barred from asserting or claiming any lien or interest in same."

At the close of all the evidence the trial judge allowed the defendants' motion for judgment of involuntary nonsuit and dismissed the action. Plaintiff appealed.

Upon appeal, plaintiff assigns errors addressed to rulings of the trial judge relating to the admission and exclusion of evidence and to the judgment of involuntary nonsuit.

Jones, Jones & Jones and John R. Jenkins, Jr., for plaintiff, appellant.
J. Carlton Cherry and Pritchett & Cooke for defendants, appellees.

BOBBITT, J. The landlord's lien on crops for the payment of rent in agricultural tenancies is a statutory lien. The English law of distress and sale for nonpayment of rent did not become a part of the law of this State. *Dalgleish v. Grandy,* 1 N.C. 249. Until created by statute, a landlord had no lien on the crop of his tenant for the payment of rent. He (the lessor) stood on "no better footing" than other creditors of the lessee. *Deaver v. Rice,* 20 N.C. 567; *Howland v. Forlaw,* 108 N.C. 567, 13 S.E. 173; *Reynolds v. Taylor,* 144 N.C. 165, 56 S.E. 871.

Superseding prior statutes, the Landlord and Tenant Act of 1876-7 (1876-7, Ch. 283) was enacted; and, except in respect of matters not relevant here, this statute has continued in effect without modification, being G.S. 42-15 and providing, in pertinent part, as follows:

"When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops. . . .

"This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for delivery of personal property."

Harrison v. Ricks, 71 N.C. 7, was decided in 1874; and in that case *Justice Rodman* gives a clear analysis of the rules for determining whether under the special terms of various rental contracts the relationship created is that of landlord-tenant or that of owner-cropper. While difficulties often arise in making a determination as to the appropriate classification when the rent to be paid is a specified share of the crop, no difficulty is encountered when the rent is a fixed amount of money. As stated by *Rodman, J.:* "If the occupier is to pay a money rent, the title to the crop must necessarily be in him in order that he may convert it into money. He is, therefore, strictly a tenant."

In *Harrison v. Ricks, supra,* the rental contract was held to create the landlord-tenant relationship, albeit the rent to be paid was specified to be one-half of the crop. The tenant conveyed the crop to the plaintiff Harrison as security for advancements. The defendant (landlord) seized the crop, asserting the priority of his landlord's lien and alleging that the tenant had no right to convey the crop to the plaintiff. It was held: first, that the tenant was the owner of the crop and had the right to convey it subject to the lien, if any, of the landlord; and second, the landlord had no lien since under the Act of 1868-9, Ch. 64, then applicable, a written rental contract was a prerequisite to a landlord's lien. The Act of 1876-7 eliminated the necessity for a written rental contract as a prerequisite to a landlord's lien.

The Act of 1876-7 (G.S. 42-15) gives the landlord a preferred lien on the entire crop, regardless of whether the relationship is that of landlord-tenant or that of owner-cropper, *until the rent is paid.* The statute vests the possession of the crop in the landlord; and, under this right of possession, he has the right to use force, if necessary, to prevent unauthorized removal by the tenant. *S. v. Austin,* 123 N.C. 749, 31 S.E. 731. Moreover, if the tenant, without the consent of the landlord, willfully removes the crop without giving five days' notice of removal, before satisfying the landlord's lien, he is guilty of a misdemeanor. G.S. 42-22. In such case, the tenant is liable both civilly and criminally; for the constructive possession of the crop is in the landlord. *Jordan v. Bryan,* 103 N.C. 59, 9 S.E. 135.

The landlord's lien exists by virtue of the statute. G.S. 42-15. No written instrument is required or contemplated. The registration acts, which apply only to written instruments capable of registration, have no significance relative to a landlord's lien. See *Spence v. Pottery Co.,* 185 N.C. 218, 117 S.E. 32. The statute itself gives notice to all the world of the law relative to a landlord's lien.

While not always expressly stated, it is implicit throughout the many decisions of this Court that the landlord's lien remains intact until the rent is paid and all who deal with a tenant with reference to the crop are

charged with notice thereof. *Belcher v. Grimsley,* 88 N.C. 88; *Sugg v. Farrar,* 107 N.C. 123, 12 S.E. 236; *White v. Boyd,* 124 N.C. 177, 32 S.E. 495; *Burwell v. Warehouse Co.,* 172 N.C. 79, 89 S.E. 1064; *Rhodes v. Fertilizer Co.,* 220 N.C. 21, 16 S.E. 2d 408; *Adams v. Warehouse,* 230 N.C. 704, 55 S.E. 2d 331. As stated by *Ruffin, J.,* in *Belcher v. Grimsley, supra:* "Nothing short of an actual payment or a complete satisfaction of the lessor's demands, meets the words of the statute or will serve to determine his lien, or title. Neither can the fact that the defendants had no notice of the plaintiff's claim at all impair it, in the absence of any suggestion of fraud on his part. It is a question of title, and the tenant can convey no better right to the property than he himself was possessed of. The principle of *caveat emptor* applies with full force to the case."

The result is that the tenant, who owns the crop subject to the landlord's rights and lien, has the right to sell the crop but in the same plight in which he holds it, *i.e.,* the purchaser from the tenant takes subject to the landlord's lien and, where the crop remains on the land, the purchaser can remove the crop only by consent of the landlord until the rent is paid. A purchaser from the tenant, or an auction sales warehouse selling as his agent, is dealing with a crop with statutory notice of the lien outstanding thereon. Therefore, nothing else appearing, if the defendants purchased the tobacco from Booker, or sold the tobacco as agents for Booker, and paid Booker therefor, without regard to the landlord's lien of the plaintiff, they would be accountable to the plaintiff on the basis of money had and received for the proceeds of sale up to the balance due as rent. *White v. Boyd, supra.*

It is not to be understood that a landlord cannot by agreement, express or implied, waive his lien, or by his acts and conduct be estopped from asserting his lien. Without undertaking to mark out what would constitute a waiver or an estoppel, for such may occur in a variety of ways, the gist of such affirmative defense is allegation and proof of such facts and circumstances as will establish the proposition that the landlord in effect constituted the tenant his agent to sell the crop for *their joint benefit* and account to the landlord for his share out of the proceeds of sale.

It should be borne in mind that we are considering now an affirmative defense which must be pleaded with certainty and particularity and established by the greater weight of the evidence. *Porter v. Armstrong,* 134 N.C. 447, 46 S.E. 997; McIntosh, N.C.P.&P., p. 481, sec. 461.

The only fact pleaded by the defendants here as a plea in bar is that the quota marketing card, relating to the farm rented by the plaintiff to Booker, was issued to Booker, to the knowledge of the plaintiff, and that this enabled Booker to effectuate the sale in compliance with the Federal Act and regulations thereunder.

The procedure for marketing flue-cured tobacco under the Act of Congress and the market quota regulations adopted by the U. S. Department of Agriculture is set forth clearly by *Barnhill, J.* (now *C. J.*), in *Adams v. Warehouse, supra.* Certain of the regulations for marketing year 1951-52 (7 Code of Federal Regulations, secs. 725-230, *et seq.*) are pertinent here.

Sec. 725.231 (l) provides: " 'Operator' means the person who is in charge of the supervision and conduct of the farming operations on the entire farm."

Sec. 725.231 (o) provides: " 'Producer' means a person who, as owner, landlord, tenant, sharecropper, or laborer is entitled to share in the tobacco available for marketing from the farm or in the proceeds thereof."

Sec. 725.238 provides: "Rights of producers in marketing cards. Each producer having a share in the tobacco available for marketing from a farm shall be entitled to the use of the marketing card issued for the farm for marketing his proportionate share."

Thus, it appears that a landlord or owner of the farm who is entitled to *a share* in the tobacco available for marketing is entitled to the use of the marketing card for marketing his proportionate share. The evidence tends to show: that in Hertford County in 1951-52, one quota marketing card was issued for each farm; that, if the tenant was to pay as rent a share of the crop, or if the cropper was to receive a share of the crop as compensation for his efforts, the practice was to issue the card in the name of the landlord or owner of the farm; and that if the relationship was that of landlord and tenant, the rental to be paid in cash, the tenant was considered the "operator" of the farm and in recognition of this fact the quota marketing card was issued in the name of the tenant alone.

The quota marketing card was issued to Booker, the tenant, and the plaintiff was aware of this fact. However, there is no evidence that the plaintiff procured the card to be so issued or participated in any way in its issuance. This was done by the Hertford P.M.A. office. The card constituted the credentials for marketing the tobacco on farm #80 in so far as the Act of Congress and the marketing quota regulations issued in pursuance thereof are concerned. It is not clear whether under the regulations or the practice in Hertford County the landlord could have required or caused the Hertford P.M.A. office to enter on the card his status as landlord under the contract for payment of a fixed cash rental. It must be concluded that since the card only enabled the tenant to market in compliance with the federal law without incurring drastic penalties, this does not of itself destroy or supersede the landlord's lien. The facts in connection with the issuance of the card, the plaintiff's knowledge thereof, etc., are to be considered along with all other relevant circumstances, bearing upon the ultimate issue, namely: did the plaintiff authorize

Booker to sell the crop for their joint benefit and account to him for the proceeds of sale and thereby waive his landlord's lien in respect of the tobacco so sold?

In *Adams v. Warehouse, supra,* the plaintiff was the landlord and one Stancill was a share crop tenant. The quota marketing card was issued to the plaintiff. The plaintiff had the right to market the tobacco. However, he turned over to the tenant his card (issued in the name of the landlord alone) so that the tenant by the use thereof could market the tobacco. The tenant sold the tobacco on the defendants' warehouse floor. It was held that by reason of this conduct the plaintiff was estopped to deny that he had constituted the tenant his agent to sell the tobacco for their joint benefit and account to him out of the proceeds of sale.

It should be noted that the mere fact that the landlord consents to the removal of the crop by the tenant from the farm, or knowingly permits its removal, for a limited purpose, *e.g.,* in order to prepare it for market, or to store it safely, is not sufficient to establish a waiver of his lien. *Belcher v. Grimsley, supra; Sugg v. Farrar, supra;* 1 Jones on Liens, p. 549, sec. 579.

Upon the present record, the plaintiff's evidence is sufficient to make out a *prima facie* case, requiring submission to the jury on the issues raised by the complaint and answer; and the undisputed evidence fails to disclose either waiver or estoppel as a matter of law. Whether the defendants can allege and establish facts and circumstances sufficient to satisfy the jury by the greater weight of the evidence that the plaintiff has waived his landlord's lien is yet to be determined.

It should be noted that such a plea in bar does not depend upon whether the defendants were *bona fide* purchasers, that is, purchasers for a valuable consideration without actual notice of an outstanding lien. Rather, it must be upon the basis of waiver by the plaintiff of his landlord's lien or estoppel by plaintiff to assert his landlord's lien. Thus, the agreements and dealings as between the plaintiff and Booker in relation to the marketing of the crop are of great significance. In the record before us, the plaintiff's testimony is meager on this aspect of the matter. Booker, the tenant, did not testify.

Attention is called to the fact that, subsequent to the decision in *Adams v. Warehouse, supra,* the General Assembly enacted Ch. 193, Session Laws of 1949, now G.S. 42-22.1, providing that a tenant who sells under a quota marketing card and fails to account to the landlord for the amount due him out of the proceeds of sale is guilty of a misdemeanor.

We have considered the defendants' contention that the judgment of involuntary nonsuit was proper on the ground that the plaintiff's evidence was insufficient to identify the tobacco sold as tobacco grown on the plaintiff's farm. Since there must be a new trial, we refrain from an analysis

of the evidence relating to this issue. Suffice it to say, we are of the opinion that the evidence was sufficient to warrant the submission of this issue to the jury.

Since the assignments of error relating to the admission and exclusion of testimony would not affect the result reached upon this appeal and the questions as presently posed may not arise upon a new trial, we think it inappropriate to discuss them in this opinion.

For the reasons stated, the judgment of nonsuit is reversed. Prior to the new trial, it may be that the parties will want to ask leave to amend their respective pleadings in the light of the law as stated herein.

Reversed.

JOHN R. SCOTT v. STATESVILLE PLYWOOD AND VENEER COMPANY, INC.

(Filed 7 April, 1954.)

1. **Libel and Slander § 10—**

In an action for libel, the complaint ought to state the libel in the original language.

2. **Libel and Slander § 7c—**

Statements in pleadings or other papers filed in a judicial proceeding are absolutely privileged unless they are not relevant or pertinent to the subject matter, which presents a question of law to be determined on the basis of whether they are so palpably irrelevant and improper that no reasonable man could doubt that they could not become a proper subject of inquiry in the action or proceeding.

3. **Pleadings § 15—**

The office of a demurrer is to test the sufficiency of the pleading assailed for fatal defect appearing on its face, admitting for the purpose of the demurrer the truth of every fact alleged therein and all reasonable inferences of fact to be deduced therefrom.

4. **Pleadings § 19c—**

A complaint may be fatally defective in failing to state a cause of action either because of a want of averment of some essential element of the cause of action, which constitutes a defective statement of a good cause of action; or it may be defective by reason of a positive averment of some fact or combination of facts which affirmatively discloses that plaintiff's supposed grievance is not actionable, which constitutes a statement of a defective cause of action.

5. **Pleadings § 22b—**

A defective statement of a good cause of action may be cured by amendment; a statement of a defective cause of action may not.

6. Libel and Slander § 10: Pleadings § 19c—

In this action for libel it appeared on the face of the complaint that the words constituting the basis of the action were contained in pleadings and papers filed by defendant in a duly constituted civil action, and that they were relevant to that action. *Held:* The complaint sets forth a statement of a defective cause of action and defendant's demurrer was properly sustained, since upon the face of the complaint the alleged libelous words were absolutely privileged, and were not actionable.

APPEAL by plaintiff from *Rousseau, J.*, January Term 1954, IREDELL. Affirmed.

Civil action to recover damages for libel.

Plaintiff alleges in his complaint that this defendant, in September 1952, instituted a civil action against him and other individuals and corporations and "caused to be filed in the Superior Court of Caldwell County . . . complaint and affidavit" in which it is affirmatively alleged that the plaintiff "entered into a conspiracy with other persons to create a business front by making a show of property to obtain credit and the plan to divide any cash thus obtained among the said conspirators secretly . . . that this plaintiff was a 'straw figure'; that he and other persons created a fraudulent scheme to 'hoodwink' other persons and manufacturers for the purpose of building up their credit; that this plaintiff . . . in following up the plan of conspiracy caused 'Dummy Corporations' to be formed in order to hastily make the material so obtained into furniture, sell and collect for it with the purpose of going out of business;" accuses this plaintiff of having a scheme or plan for the purpose and intent of defrauding the defendant herein and others; "wrongfully, wilfully and maliciously accuses this plaintiff of the crime of embezzlement and fraud;" that on 23 September 1952, this defendant—plaintiff in said action—"caused a notice of summons and attachment to be printed and published in a newspaper of wide circulation in Caldwell County, alleging fraud and conspiracy on the part of this plaintiff . . .;" that the property wrongfully and wilfully attached was not the property of this plaintiff, and that the attachment has been vacated.

Plaintiff further alleges that said libelous statements and accusations of fraud, conspiracy to defraud, embezzlement, and deceit were false, malicious, "and done with the intent to embarrass, injure and harm the reputation and character" of this plaintiff, and have in fact damaged his reputation, his character, and his credit.

He prays recovery of $50,000 compensatory and $100,000 punitive damages.

There are other allegations in the complaint which are not material to the question presented by this appeal. A summary thereof would serve no useful purpose.

Defendant appeared and demurred to the complaint for that it affirmatively appears on the face of the complaint that said statements, allegations, and accusations were made in the complaint and other instruments filed in a duly constituted civil action then pending in the Superior Court of Caldwell County and therefore were privileged under the absolute privilege rule and cannot be made the basis of an action for damages for libel.

It likewise demurred to other allegations respecting the attachment upon the assumption they may constitute an attempt to allege a cause of action for wrongful attachment; and for that the allegations contained in paragraph 8 of the complaint do not constitute a cause of action if so intended by the plaintiff.

At the hearing in the court below judgment sustaining the demurrer and dismissing the action was duly entered.

Plaintiff excepted and appealed.

W. H. Childs and W. M. Nicholson for plaintiff appellant.
Hal B. Adams and Scott, Collier & Nash for defendant appellee.

BARNHILL, C. J. The plaintiff does not specify in his complaint the exact language used in the complaint in the Caldwell County case which he alleges constitutes the libelous statements of and concerning him. Nor does he set forth the substance thereof. It is apparent that, instead, he recites his conclusions as to the meaning, force, and effect of the words used by defendant in his complaint and affidavit and in the notice of summons published as substituted service of summons and notice of attachment. He alleges that this defendant in said instruments "accuses this plaintiff of the crime of embezzlement and fraud;" and "accuses this plaintiff of having a scheme . . ." etc. These and like allegations are patently plaintiff's description of the sense and substance of, or his conclusion as to, the imputations to be attributed to the language actually used.

The declaration or complaint ought to state the libel in the original language. *Whitaker v. Freeman,* 12 N.C. 271; *Burns v. Williams,* 88 N.C. 159; *Gudger v. Penland,* 108 N.C. 593.

Be that as it may, the demurrer is not directed to the form of the allegations. On the question here presented for decision the form of the allegations is immaterial. It is made to appear affirmatively on the face of the complaint that the language used by defendant was used in the pleadings and other papers directly connected with and forming a part of a duly constituted judicial proceeding. Therefore, whether the plaintiff pleads the exact language or the substance thereof or merely the innu-

endoes arising therefrom, the result is the same. The complaint fails to state an actionable wrong.

The controlling rule is stated by *Johnson, J.*, speaking for the Court, in *Jarman v. Offutt,* 239 N.C. 468, as follows:

"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." (authorities cited). See also Anno. 16 A.L.R. 746, 42 A.L.R. 878, 12 A.L.R. 1250; *Abbott v. National Bank,* 175 U.S. 409, 44 L. Ed. 217.

While statements in pleadings and other papers filed in a judicial proceeding are not privileged if they are not relevant or pertinent to the subject matter of the action, the question of relevancy or pertinency is a question of law for the courts, and the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety. If it is so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the trial, the rule of absolute privilege is controlling. 33 A.J. 146, sec. 150; A.L.I. Torts 233; *cf. Harshaw v. Harshaw,* 220 N.C. 145, 16 S.E. 2d 666.

But plaintiff stressfully contends that the plea of absolute privilege is an affirmative defense which must be taken advantage of by answer and not by demurrer. On this record his contention in this respect is untenable.

The office of a demurrer is to test the sufficiency of a complaint or other pleading. *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345; *Winston v. Lumber Co.,* 227 N.C. 339, 42 S.E. 2d 218; *McDowell v. Blythe Bros. Co.,* 236 N.C. 396, 72 S.E. 2d 860; *Insurance Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369; *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452; *Madry v. Scotland Neck,* 214 N.C. 461, 199 S.E. 618.

If it is asserted that the complaint is fatally defective and the defect appears on the face of the complaint, that is, that it is wholly insufficient to state a cause of action, the question should be raised by demurrer. *Kennerly v. Town of Dallas,* 215 N.C. 532, 2 S.E. 2d 538; *Poovey v. Hickory,* 210 N.C. 630, 188 S.E. 78; *Oldham v. Ross,* 214 N.C. 696, 200 S.E. 393; *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43; *In re York,* 231 N.C. 70, 55 S.E. 2d 791; *McDowell v. Blythe Bros. Co., supra.*

"A demurrer is designed to challenge the sufficiency of a complaint which contains the statement of a defective cause of action, McIntosh, N. C. P. & P. 399, 455, and is to be resorted to when the complaint is fatally defective in this respect." *Davis v. Rhodes, supra,* and cases cited.

In this connection we must bear in mind that a fatal defect in a complaint may consist either of (1) a want of averment of some essential element of plaintiff's alleged cause of action—a defective statement of a

good cause of action; or (2) the positive allegation of some fact or combination of facts which affirmatively discloses that plaintiff's supposed grievance is not actionable—a statement of a defective cause of action. *Sabine v. Gill, Comr. of Revenue,* 229 N.C. 599, 51 S.E. 2d 1.

The first may be cured by amendment; the second may not. *Davis v. Rhodes, supra.*

It comes to this: the plaintiff vouches for the truth of the allegations contained in his complaint. When the defendant demurs thereto, he admits the truth of each and every fact alleged therein and all reasonable factual inferences to be deduced therefrom. Thus, in effect, a demurrer constitutes the complaint a stipulation of facts. If the facts so agreed, liberally construed in favor of the pleader, constitute a cause of action, or if defendant must resort to facts *dehors* the complaint to make good his challenge, *Towery v. Dairy,* 237 N.C. 544, 75 S.E. 2d 534, *Lamm v. Crumpler, ante,* 35, the demurrer should be overruled. If the plaintiff has failed to allege some essential element of the cause of action upon which he relies, or has affirmatively alleged some particular fact which discloses that he has no maintainable cause of action, the demurrer should be sustained.

Here the plaintiff alleges written statements made by defendant which, nothing else appearing, are libelous in nature. But he also alleges that such statements were made in the complaint and other papers filed in a duly constituted action pending in Caldwell County, and it affirmatively appears on the face of the complaint that such allegations were relevant to the cause of action therein stated. Thus it appears upon the face of the complaint that the statements alleged therein, however defamatory in nature they may be, are protected by the rule of absolute privilege and cannot be made the subject of an action for damages on behalf of plaintiff and against the defendant.

Plaintiff cites and relies on *Foust v. Durham,* 239 N.C. 306. But that case is not authority for plaintiff's position here assumed. The complaint there under consideration contained no allegation that the water main described therein was constructed and maintained by the defendant in furtherance of a governmental function. Here the facts alleged do disclose, as a matter of law, that defendant is protected by the rule of absolute immunity. Hence, the alleged libelous statements may not be made the subject matter of an action for damages. The privilege is absolute and the defense is complete.

As the complaint constitutes a statement of a defective cause of action which cannot be made good by amendment, the court properly sustained the demurrer and dismissed the action. *Davis v. Rhodes, supra.* Therefore, the judgment entered in the court below is

Affirmed.

STATE OF NORTH CAROLINA EX REL. A. B. HAYES, ADMINISTRATOR OF THE ESTATE OF WILLIAM RALPH HAYES, v. C. E. BILLINGS, JR., SHERIFF AND CUSTODIAN OF THE WILKES COUNTY JAIL; THE COUNTY OF WILKES; AND THE TRAVELERS INDEMNITY COMPANY OF HARTFORD, CONN.

(Filed 7 April, 1954.)

1. Counties § 24—

The doctrine that a county is not liable for the negligence of its officers and agents in the exercise of governmental functions obtains in this jurisdiction.

2. Same—

A county acts in a purely governmental capacity in erecting and maintaining a jail, and in an action to recover for wrongful death allegely resulting from the negligence of the county in this respect, demurrer is properly sustained. The exception to the general rule of nonliability in such instances in regard to municipalities is not extended to counties.

3. Sheriffs § 6a—

Allegations to the effect that defendant sheriff took custody of a mental incompetent for the purpose of putting him in place of safety, but did not lock the incompetent in a room or cell, but permitted him to roam at large in the upstairs hallway of the jail, under circumstances from which injury should have been anticipated, resulting in the incompetent's falling down a fifteen foot well or open space to his death, *is held* sufficient to state a cause of action against the sheriff for negligence.

APPEAL by plaintiff from *Nettles, J.*, at January Term, 1954, of WILKES.

Civil action by plaintiff to recover damages for the alleged wrongful death of his intestate, William Ralph Hayes, who, while incarcerated in the Wilkes County jail, fell from an upstairs hallway to a concrete floor beneath, due to the alleged joint and concurrent negligence of the defendants, heard below on demurrer to the complaint.

The plaintiff's allegations may be summarized as follows:

1. The intestate, William Ralph Hayes, shortly prior to 25 April, 1953, suffered a nervous breakdown of a temporary nature and became mentally unbalanced, violent, unable to control his acts and movements, and "oblivious to danger with respect to his own bodily health or life." Due to this condition, the intestate's parents called the defendant C. E. Billings, Jr., Sheriff of Wilkes County and custodian of the county jail, and explained to him the condition of their son and requested that the "defendant Billings place intestate in a place of safety where he would not be in position to harm himself or . . . endanger his life."

2. ". . . with full knowledge . . . on the part of the defendant Billings that the . . . intestate was without his mental capacity and had no

knowledge as to his acts . . . and . . . was likely to do violence to himself because of his mental condition . . . the . . . defendant Billings took custody of the . . . intestate for the purpose of placing him in a place of safety, and . . . placed him in the county jail of Wilkes County."

3. When the defendant Billings placed intestate in the jail, he did not lock him in a room or cell "but negligently and carelessly permitted him to roam in the upstairs hallway of the jail; that the Wilkes County jail is negligently and carelessly constructed and maintained in that at the end of the upstairs hallway, there is a large well, or open space with a winding stairway permitting a drop of some 12 to 15 feet from the upstairs to a concrete floor on the downstairs portion of the jail; that said well or open space is negligently and carelessly maintained without adequate guardrails or other means of protection with respect to people falling from one floor to the other, especially persons under disability; that as the proximate cause (result) of the negligence and carelessness of the defendant Billings in permitting the . . . intestate to be free in the upstairs hallway of the jail and the negligence in the construction of the jail in the manner set out above, and the maintenance of the jail in the manner set out above, the . . . intestate fell from the upstairs hallway of the jail to the concrete floor below sustaining injuries from which he later died."

4. ". . . the defendant Billings was negligent, which negligence was one of the proximate causes of the death of the . . . intestate in the following respects, to-wit:

"(a) In that with full knowledge of the mental condition of the . . . intestate, he failed to lock the . . . intestate in a place of safety but permitted him to be free in a dangerous and hazardous place, knowing full well, or being in a position where he should have known full well, that the . . . intestate was likely to suffer death or great bodily harm.

"(b) In that, knowing the hazardous and dangerous condition with respect to said well or open space, he failed to take proper safeguards with respect to the same."

5. "That the defendant, County of Wilkes, was negligent, which negligence was one of the proximate causes of the death of the . . . intestate in the following respects, to-wit:

"(a) In that said jail was negligently and carelessly constructed for the reason that there was a deep well or open space from the first floor to the second floor built in said jail, which space was hazardous on its face and which dangerous and hazardous condition was known to the governing body of said defendant county.

"(b) In that said jail was maintained with the knowledge of the governing body of the defendant County with an open space or well of the depth of fifteen feet in the end of said jail, without said open space being

properly safeguarded to prevent injury and death to the inmates of said institution, especially those inmates with handicaps, mentally and physically."

The defendants Billings and Wilkes County demurred to the complaint for failure to state facts sufficient to constitute a cause of action. The defendant Indemnity Company, surety on the defendant Billings' performance bond, filed no demurrer, but its time for answering was extended by consent until after the final determination of the demurrer.

The trial court entered judgment sustaining the demurrer and dismissing the action as to Wilkes County, and sustaining the demurrer, with leave granted the plaintiff to amend, as to the defendant Billings.

From the judgment so entered the plaintiff appeals.

W. H. McElwee, Jr., and Trivette, Holshouser & Mitchell for plaintiff, appellant.

Whicker & Whicker and Hayes & Hayes for defendants, appellees.

JOHNSON, J. The doctrine of governmental immunity, which shields a county and its innocent taxpayers from liability for the negligence of its officers in the exercise of governmental (as distinguished from proprietary) functions, obtains with all its rigor in this jurisdiction. *Jones v. Commissioners,* 130 N.C. 451, 42 S.E. 144; *Keenan v. Commissioners,* 167 N.C. 356, 83 S.E. 556; *Rhodes v. Asheville,* 230 N.C. 134, 141, 52 S.E. 2d 371. Our decisions are in accord with the great weight of authority elsewhere: 14 Am. Jur., Counties, Sections 48, 49, and 50; 20 C.J.S., Counties, Sections 215 and 220.

A county acts in a purely governmental capacity in erecting and maintaining a jail, and is therefore not liable to a person imprisoned or locked up therein for injuries sustained by reason of its improper construction or negligent maintenance. See *Manuel v. Commissioners,* 98 N.C. 9, 3 S.E. 829; 41 Am. Jur., Prisons and Prisoners, Sec. 18; Annotations: 46 A.L.R. 94; 61 A.L.R. 569.

True, as an exception to the general rule that the State and its subordinate divisions of government are immune from tort liability, we have a line of decisions which recognizes the principle enunciated in *Lewis v. Raleigh,* 77 N.C. 229, to the effect that a municipality is liable for injuries proximately caused by its negligent construction or maintenance of a prison or lockup. See *Moffitt v. Asheville,* 103 N.C. 237, 9 S.E. 695; *Shields v. Durham,* 116 N.C. 394, 21 S.E. 402; *S. c.,* 118 N.C. 450, 24 S.E. 794; *Coley v. Statesville,* 121 N.C. 301, 28 S.E. 482; *Nichols v. Fountain,* 165 N.C. 166, 80 S.E. 1059; *Hobbs v. Washington,* 168 N.C. 293, 84 S.E. 391; *Parks v. Princeton,* 217 N.C. 361, 8 S.E. 2d 217; *Dixon*

v. Wake Forest, 224 N.C. 624, 31 S.E. 2d 853; *Gentry v. Hot Springs,* 227 N.C. 665, 44 S.E. 2d 85.

However, in *Manuel v. Commissioners, supra* (98 N.C. 9), this Court refused to extend the doctrine of *Lewis v. Raleigh* so as to make it applicable to counties, and we are not disposed in the instant case to so extend the scope of this exception to the general rule of nonliability, which according to the text writers obtains in no other jurisdiction. 41 Am. Jur., Prisons and Prisoners, Sec. 18; Annotation, 46 A.L.R. 94, 97 *et seq.* See also *Shaw v. Charleston,* 57 W. Va. 433, 50 S.E. 527.

The judgment sustaining the demurrer and dismissing the action as to Wilkes County will be upheld. *Scott v. Veneer Co., ante,* 73.

This brings us to a consideration of the sufficiency of the allegations as to the defendant Billings, Sheriff and custodian of the Wilkes County jail. Our study of the complaint leaves the impression that the allegations thereof when liberally construed in favor of the plaintiff, as is the rule on demurrer, are sufficient to state a cause of action for negligence against the defendant Sheriff and overthrow the demurrer as to him. See *Dunn v. Swanson,* 217 N.C. 279, 7 S.E. 2d 563; *Davis v. Moore,* 215 N.C. 449, 2 S.E. 2d 366; 47 Am. Jur., Sheriffs, Police, and Constables, Sections 26 and 42; G.S. 162-22; G.S. 109-34.

The results, then, are:

As to the defendant County of Wilkes: Affirmed.

As to the defendant Billings: Reversed.

GEORGE M. BRANNON v. H. A. ELLIS AND JOHNNY RUSSELL ELLIS, A MINOR, BY HIS GUARDIAN AD LITEM HENRY A. ELLIS,

and

MRS. LEOMA BRANNON v. H. A. ELLIS AND JOHNNY RUSSELL ELLIS, A MINOR, BY HIS GUARDIAN AD LITEM HENRY A. ELLIS.

(Filed 7 April, 1954.)

1. Trial § 31b—

Even when the parties waive a recapitulation of the evidence, it is the duty of the court to state the evidence to the extent necessary to explain the application of the law to every substantial and essential feature of the case without a request for special instructions. G.S. 1-180.

2. Same—

It is not sufficient for the court to read a statute or to state the applicable law bearing on an issue in controversy, and leave the jury unaided to apply the law to the facts.

3. Same—

Statement of the evidence solely in the form of contentions is insufficient to meet the requirements of G.S. 1-180.

4. Trial § 31f—

The court is not required by law to state the contentions of the parties to the jury, but when he states the contentions of one party he must state the pertinent contentions of the adverse party with equal stress. This rule does not require that the statement of the respective contentions of the parties be of equal length.

APPEAL by plaintiffs from *Williams, J.*, December Term, 1953, of LEE.

These are consolidated actions growing out of an automobile collision which occurred at the intersection of Hickory Avenue and Fourth Street in the City of Sanford, on 22 March, 1953.

The plaintiff George M. Brannon, whose car was damaged in the collision, is seeking to recover property damages from the defendants. The plaintiff Mrs. Leoma Brannon, the wife of George M. Brannon, who was driving her husband's car at the time of the collision with the automobile owned by the defendant H. A. Ellis and which was being driven by his son, the defendant Johnny Russell Ellis, is seeking to recover for personal injuries sustained as a result of said collision.

The plaintiffs allege in their respective complaints that the defendant Johnny Russell Ellis, the driver of the automobile of the defendant H. A. Ellis, operated said automobile in a careless, reckless, and negligent manner, which was the sole proximate cause of the damages to the automobile of the plaintiff George M. Brannon, and of the personal injuries sustained by the plaintiff Mrs. Leoma Brannon.

The defendants in their respective answers to the complaints denied the allegations of negligence on the part of the defendant Johnny Russell Ellis; alleged that the plaintiffs' damages and injuries resulted solely from the negligence of the driver of the Brannon car, to wit: Mrs. Leoma Brannon; pleaded contributory negligence on the part of Mrs. Brannon, and set up a counterclaim against the plaintiffs for $1,000.00 for damages to the car of H. A. Ellis.

The jury found on appropriate issues that the plaintiffs were not damaged and injured by the negligence of the defendants as alleged in the complaints, but that the automobile of H. A. Ellis was damaged by the negligence of the plaintiff Mrs. Leoma Brannon, as alleged in the answers, and awarded the defendant H. A. Ellis damages against the plaintiffs in the sum of $800.00.

Judgment was accordingly entered on the verdict and the plaintiffs appeal, assigning error.

Gavin, Jackson & Gavin and Hoyle & Hoyle for appellants.
Pittman & Staton and Edwin B. Hatch, Jr., for appellees.

DENNY, J. The plaintiffs entered forty-four exceptions to the court's charge to the jury, a number of which are meritorious. In addition thereto, they excepted to and assign as error the failure of the charge to comply with the requirements of G.S. 1-180, "in that the court did not state in a plain and correct manner the evidence of the plaintiffs and declare and explain the law arising thereon, and did not state the material facts and apply the law thereto, and failed to give the contentions of the plaintiffs with equal vigor and warmth, . . . although it gave a few in a narrative form and in a negative way, and arrayed elaborately and fully and clearly the contentions of the defendants, and instructed the jury according to defendants' contentions, and gave undue prominence and attention to the defendants' contentions as contrasted with . . . the plaintiffs' contention(s) . . ."

The parties waived a recapitulation of the evidence by the court, and the jury was so informed. However, such waiver did not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties. *Mack v. Marshall Field & Co.,* 218 N.C. 697, 12 S.E. 2d 235. It is not sufficient for the court to read a statute or to state the applicable law bearing on an issue in controversy, and leave the jury unaided to apply the law to the facts. *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484, and cited cases.

It is the duty of the court to state the evidence "to the extent necessary to explain the application of the law" arising thereon. G.S. 1-180. In both civil and criminal cases, it is imperative, in the charge to the jury, that the law be declared, explained and applied to the evidence bearing on the substantial and essential features of the case without any request for special instructions. *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331; *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323; *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558; *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522; *Chambers v. Allen, supra; Flying Service v. Martin,* 233 N.C. 17, 62 S.E. 2d 528; *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375; *Ryals v. Contracting Co.,* 219 N.C. 479, 14 S.E. 2d 531; *Mack v. Marshall Field & Co., supra; Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630; *Williams v. Coach Co.,* 197 N.C. 12, 147 S.E. 435.

The court in the charge under consideration did not state the evidence to the extent necessary to explain the application of the law arising thereon as required by G.S. 1-180. In fact, no evidence was stated except in the form of contentions, which does not meet the requirements of the statute. *Bank v. Phillips, supra; Howard v. Carman, supra; Mack v.*

Marshall Field & Co., supra. Neither did the court give equal stress to the contentions of the parties as required by G.S. 1-180. For example, on the issue as to whether the automobile of the defendant H. A. Ellis was damaged by the negligence of the plaintiff Mrs. Leoma Brannon, the charge of the court contains the contentions of the defendant H. A. Ellis to the effect that the plaintiff "failed to observe the duty imposed upon her by the statute which required her to yield the right of way to his vehicle approaching from the right as she approached from the left; that such failure on her part was negligence and that such negligence was the proximate cause of the collision; . . . that plaintiff failed to keep and maintain a proper and vigilant lookout to see and observe traffic approaching the intersection, when if she had done so she could have seen his automobile approaching . . . at a distance of 150 feet from the intersection"; and similar contentions. These contentions and the instructions given thereon cover two and one-half pages of the record, while the contentions of plaintiff on this issue are stated in eight lines. Notwithstanding the allegations in the complaint of Mrs. Leoma Brannon to the effect that she entered the intersection first, and the evidence in the trial tending to show that she was about three-fourths of the way through the intersection when the Ellis car struck the right front door of her car, the court gave no contention based on such evidence, but merely stated upon that issue, "plaintiff contends that you ought not to find that she was negligent; that she exercised that degree of care which a reasonably prudent person would have exercised, and contends that you ought not to find that she failed to keep her automobile under control or that she failed to keep a proper lookout and she contends that you should answer the . . . issue NO." This was not in compliance with G.S. 1-180, which provides that: "The judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action and to the State and defendant in a criminal action."

The equal stress, which the statute requires be given to the contentions of the plaintiff and defendant in a civil action, however, does not mean that the statement of contentions of the respective parties must be equal in length. *S. v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668. For instance, in a trial where the evidence of one party is very short, or he may have chosen not to introduce any evidence at all, his contentions will naturally be very few in contrast with the other party who may have introduced a great volume of testimony. A trial judge is not required by law to state the contentions of litigants to the jury. *S. v. Colson,* 222 N.C. 28, 21 S.E. 2d 808; *Trust Co. v. Insurance Co.,* 204 N.C. 282, 167 S.E. 854. When, however, a judge undertakes to state the contentions of one party, he must also give the equally pertinent contentions of the opposing party. *S. v. Colson, supra.*

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

New trial.

STATE v. ROBERT HAMER.

(Filed 7 April, 1954.)

1. Criminal Law § 33—

The extrajudicial statement of an accused is a confession if it admits defendant's guilt of the offense charged or even an essential part of the offense.

2. Same—

The extrajudicial confession of the accused in a criminal case is admissible if, and only if, it was in fact voluntarily made.

3. Same—

As a general rule, a confession is presumed to be voluntary, and the burden is on the accused to show the contrary.

4. Same—

Where an accused has made an involuntary confession, any subsequent confession is presumed to proceed from the same vitiating influence, and the burden is on the State to establish the voluntary character of the subsequent statement before it can be received in evidence.

5. Same—

The State offered in evidence two confessions by defendant. Upon the *voir dire* the trial judge ruled that the first confession was involuntary because wrung from defendant by threat of delivering him to a mob. The testimony disclosed that the second confession was made some 12 or 18 hours later, that defendant was told that he did not have to make a statement and was warned that whatever he said would be used for or against him. Defendant himself corroborated these facts. *Held:* The evidence supports the finding of the trial court that the second statement was voluntarily made.

6. Criminal Law §§ 48, 81c (3)—Irrelevant statements of witnesses held to have been rendered harmless by action of trial judge.

In this prosecution for rape one witness volunteered information to the effect that defendant was an escaped convict, and another witness made a statement to like effect in response to an indefinite question of the solicitor which did not foreshadow such response. Neither statement disclosed the nature of the offense for which the defendant was serving the sentence. In each instance the trial court immediately and emphatically withdrew the evidence from the consideration of the jurors and instructed them to disregard it. *Held:* The testimony was not admitted by the court and the incidents were rendered harmless by the prompt action of the trial judge.

INDICTMENT for the capital felony of rape tried by *Stevens, J.*, and a jury, at the September Special Term, 1953, of DUPLIN.

The only evidence at the trial relating to the merits was that of the State. When this evidence is interpreted in the light most favorable to the prosecution, it makes out this case:

On the morning of 25 March, 1953, the prisoner Robert Hamer, a Negro man, stealthily invaded the home of the prosecutrix and her husband, members of the white race, in a rural section of Duplin County while the husband was away at work. The prisoner grabbed the prosecutrix and hurled her to the floor, where he had carnal knowledge of her by force and against her will. The prisoner then fled the scene, leaving the prosecutrix in a battered and hysterical state. He was apprehended thirteen hours later by Deputy Sheriff R. M. Byrd and State Highway Patrolman C. C. Hester.

During the course of the trial the State proposed to introduce in evidence two extrajudicial statements made by the prisoner after his arrest. The first was made to Byrd, Hester, and three prison camp employees at the State prison camp in Duplin County about 1:00 a.m. on 26 March, 1953, and the second was made to James F. Bradshaw, Assistant Director of the State Bureau of Investigation, and Ralph Miller, Sheriff of Duplin County, at the common jail of Duplin County "between twelve and eighteen hours" later. The prisoner admitted, in essence, in his first statement that he assaulted the prosecutrix inside the dwelling with intent to rape her, but desisted and fled without accomplishing his purpose when she made outcry. He asserted, in substance, in his second statement that he hid in the house of the prosecutrix and her husband because he mistook it for a barn, that he assaulted the prosecutrix when he was suddenly discovered and surprised by her, and that he did not have sexual relations with her.

The prisoner challenged the admissibility of both of his extrajudicial statements on the ground that they were involuntary in character. The trial judge thereupon conducted a preliminary inquiry in the absence of the jury to determine the validity of the challenge. Both sides offered evidence on this inquiry.

The evidence of the opposing parties concerning the first statement was in sharp conflict. While Hester deposed to facts indicating that such statement was voluntarily made, the prisoner testified in person to the effect that it was wrung from him by Byrd, Hester, and the prison camp employees, who threatened to deliver him to a mob allegedly gathering near the scene of the supposed crime unless he confessed his guilt.

There was no substantial difference between the prosecution and the defense in respect to the circumstances attending the making of the second statement. According to the State's version, Bradshaw and Miller

made themselves known to the prisoner when they visited him at the Duplin County jail; they asked him to relate to them what had happened the previous day; they assured him, however, "that he didn't have to tell 'them' anything if he didn't want to"; and they cautioned him "that whatever he told 'them' would be used for or against him." The prisoner gave this account of the occurrence on his examination before the trial judge: "The S.B.I. Agent Bradshaw . . . said I could tell him the truth about it if I wanted to . . . He warned me of my rights and told me I didn't have to tell anything if I didn't want to. I told him because he wasn't going to do anything if I didn't . . . It all was the truth that I told him."

The trial judge adjudged the first extrajudicial statement to be involuntary, and excluded it. He found that the second extrajudicial statement was voluntarily made, and permitted it to be given in evidence over the prisoner's exception.

While he was testifying on the merits before the jury, State Highway Patrolman Hester volunteered the information that he had been hunting for the prisoner "from the time he broke from the prison camp." The trial judge sustained the objection of the prisoner to this testimony and admonished the jury to disregard it. Shortly thereafter the solicitor asked Hester what inquiry he put to the prisoner at the time of the arrest, and drew this response from him: "I asked him if he was the prisoner that escaped from the chaingang." The trial judge sustained the objection of the prisoner to the response, and gave the jury this instruction: "Gentlemen, you must not consider that statement."

The trial judge instructed the petit jury in a charge characterized by accuracy and clarity that it could return one of these verdicts: (1) guilty of rape; (2) guilty of rape with recommendation that the punishment be imprisonment for life in the State's prison; (3) guilty of an assault with intent to commit rape; (4) guilty of an assault upon a female person; and (5) not guilty.

The jury found the prisoner guilty of rape, but did not recommend that his punishment be imprisonment for life in the State's prison. The trial judge entered judgment that the prisoner suffer death by the administration of lethal gas, and the prisoner excepted and appealed, assigning errors.

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

Russell J. Lanier and Norwood Boney for the prisoner.

ERVIN, J. The prisoner insists initially that he is entitled to a new trial because the trial judge erred in admitting his second extrajudicial

statement in evidence. He bases this contention on the theory that all the evidence adduced on the preliminary inquiry showed this statement to be involuntary in character.

We accept as valid the definition of Dean Wigmore, the great master of the law of evidence, that "a confession is an acknowledgment in express words by the accused in a criminal case of the truth of the guilty fact charged or of some essential part of it." Wigmore on Evidence (3d Ed., 1940), Section 821. As a consequence, there is no occasion for us to debate the intriguing question whether the rule excluding involuntary confessions of guilt is applicable to involuntary admissions of incriminating facts which merely tend, in connection with other facts, to show guilt. 20 Am. Jur., Evidence, section 478; 22 C.J.S., Criminal Law, section 732. Although the prisoner did not acknowledge to Bradshaw and Miller his guilt of the crime of rape, he did acknowledge to them his guilt of an essential part of that offense, to wit, an assault and battery.

The extrajudicial confession of the accused in a criminal case is admissible against him if, and only if, it was in fact voluntarily made. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104. As a general rule, a confession is presumed to be voluntary, and the burden is on the accused to show the contrary. *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620; *S. v. Biggs,* 224 N.C. 23, 29 S.E. 2d 121; *S. v. Grass,* 223 N.C. 31, 25 S.E. 2d 193; *S. v. Murray,* 216 N.C. 681, 6 S.E. 2d 513; *S. v. Grier,* 203 N.C. 586, 166 S.E. 595; *S. v. Rodman,* 188 N.C. 720, 125 S.E. 486; *S. v. Christy,* 170 N.C. 772, 87 S.E. 499; *S. v. Sanders,* 84 N.C. 728. The general rule is subject to this exception: Where a confession has been obtained under circumstances rendering it involuntary, any subsequent confession is presumed to proceed from the same vitiating influence, and the burden is on the State to establish the voluntary character of the subsequent confession before it can be received in evidence. *S. v. Stevenson,* 212 N.C. 648, 194 S.E. 81; *S. v. Gibson,* 216 N.C. 535, 5 S.E. 2d 717; *S. v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347; *S. v. Moore,* 210 N.C. 686, 188 S.E. 421; *S. v. Fox,* 197 N.C. 478, 149 S.E. 735; *S. v. Brittain,* 117 N.C. 783, 23 S.E. 433; *S. v. Drake,* 113 N.C. 624, 18 S.E. 166; *S. v. Drake,* 82 N.C. 592; *S. v. Lowhorne,* 66 N.C. 638; *S. v. Roberts,* 12 N.C. 259. The finding of the trial judge that the subsequent confession was voluntarily made will not be disturbed on appeal if it is supported by evidence. *S. v. Godwin, supra; S. v. Moore, supra; S. v. Fox, supra; S. v. Lowry,* 170 N.C. 730, 87 S.E. 62; *S. v. Fisher,* 51 N.C. 478; *S. v. Scates,* 50 N.C. 420; *S. v. Gregory,* 50 N.C. 315.

When the case on appeal is read in the light of these rules, it is manifest that the trial judge did not err in admitting the second or subsequent extrajudicial statement in evidence. To be sure, the first or prior statement was extorted from the prisoner through fear engendered in his mind

by the threats of the arresting officers and the prison camp employees to surrender him to a mob allegedly gathering near the home of the prosecutrix, and the presumption arose that the second or subsequent statement proceeded from the same improper influence. The testimony of the State's witnesses Bradshaw and Miller was sufficient, however, to overcome the presumption and establish the voluntary character of the second or subsequent statement. Indeed, the evidence given by the prisoner himself on the preliminary inquiry amply supports the finding of the trial judge that the second or subsequent statement was voluntarily made.

The prisoner asserts secondarily that he is entitled to have the cause tried anew because the testimony of the State's witness Hester indicating that he was an escaped convict at the time named in the indictment substantially impaired his right to a fair trial. He predicates this contention on the theory that this incompetent evidence necessarily impressed itself so strongly on the minds of the jurors to his prejudice that its subsequent withdrawal by the trial judge did not remove its prejudicial effect.

This contention rests on pure speculation. As a matter of fact, the incompetent evidence was not admitted by the trial judge. It was volunteered in the first instance by the witness. It was elicited in the second instance by an indefinite question of the solicitor, which did not foreshadow its nature. Its validity as evidence was promptly and emphatically disavowed by the trial judge in both instances. The incompetent evidence did not disclose that at the time of his escape the prisoner was serving a sentence for a serious crime or for a crime involving sex. For these reasons, we are impelled to hold that this cause falls within the purview of the general rule relating to such matters and that the statement of the incompetent evidence by the witness was rendered harmless to the prisoner by the prompt and emphatic action of the trial judge in withdrawing the evidence from the consideration of the jurors and instructing them to disregard it. *S. v. Campo,* 233 N.C. 79, 62 S.E. 2d 500; *S. v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469; *S. v. Artis,* 227 N.C. 371, 42 S.E. 2d 409; *S. v. King,* 219 N.C. 667, 14 S.E. 2d 803.

Since the trial judge did not commit error in any matter of law or legal inference, the proceedings in the court below must be upheld.

No error.

L. H. WETHERINGTON, AIRLINE CAB COMPANY OF HAVELOCK, INC., HERBERT WILLIS AND BROAD STREET MOTORS, INC., v. WHITFORD MOTOR COMPANY, INCORPORATED.

(Filed 7 April, 1954.)

1. Pleadings § 19b—

Where the allegations of the complaint disclose that the individual plaintiffs acted solely in a representative capacity for their respective corporations, and the complaint prays no relief for them in their individual capacities, they are unnecessary parties and their joinder cannot warrant dismissal of the action upon demurrer.

2. Same—

In determining whether a complaint is demurrable as stating a cause of action for breach of two separate contracts not affecting all the parties, the complaint must be considered as a whole, giving due weight to each and every allegation which tends to limit or qualify one of the contracts or disclose that the action is predicated upon the breach of a single agreement.

3. Evidence § 5: Automobiles § 5—

The courts will take judicial notice as a fact within common knowledge that automobile manufacturers sell cars to ultimate purchasers solely through local authorized dealers.

4. Pleadings § 19b—Where no cause of action is stated in regard to one party, the joinder of such party cannot warrant dismissal upon demurrer.

The complaint alleged in substance that plaintiff corporation, which sold automobiles but was not an authorized dealer, procured plaintiff taxi company to purchase for it for resale cars from defendant authorized dealer and that the authorized dealer advised this subterfuge for purchase under a "fleet purchase plan" as the only method by which it could sell the cars at a discount. The complaint set forth the contract between the authorized dealer and the cab company for the purchase of the cars, and the contract between plaintiff cab company and plaintiff corporation for the delivery of the cars to plaintiff corporation, alleged breach by defendant, and prayed recovery by each of plaintiffs for loss of profits. *Held:* Upon the facts alleged, all the parties understood that plaintiff corporation was the actual purchaser and the real party in interest, and that the cab company was a mere agent for it in the purchase of the cars, and therefore the cab company is an unnecessary party, and its joinder cannot warrant dismissal of the action upon demurrer for misjoinder of parties and causes.

APPEAL by plaintiffs from *Frizzelle, J.*, October Term 1953, CRAVEN. Reversed.

Civil action to recover damages for breach of contract, heard on demurrer.

The allegations contained in the complaint may be summarized as follows:

(1) Plaintiff Airline Cab Company of Havelock, Inc., hereinafter referred to as Cab Company, is engaged in the operation of taxicabs, and plaintiff L. H. Wetherington is its president; plaintiff Broad Street Motors, Inc., is engaged in dealing in automobiles and automotive equipment for sale or exchange, and plaintiff Herbert Willis is its treasurer; and defendant Whitford Motor Company is the local Ford automobile dealer, engaged in the sale at retail of Ford automobiles.

(2) Broad Street Motors, desiring to purchase a large number of Ford automobiles as a part of its stock in trade for resale, approached defendant to make the purchase, and the defendant advised Broad Street Motors that it could purchase said automobiles on the "fleet purchase plan" only through someone having reasonable and ordinary use for a large number of Ford automobiles, and thus obtain the benefit of lower prices charged on a purchase under that plan.

(3) Broad Street Motors then approached Wetherington and requested him, through his company, to purchase fifty Ford automobiles from defendant for and in behalf of Broad Street Motors on the "fleet purchase plan;" and thereupon the Cab Company proposed or offered to purchase from defendant in its own behalf and in behalf of said Broad Street Motors fifty automobiles; and defendant, in turn, offered to sell to the plaintiffs sixty new Ford automobiles on the "fleet purchase plan."

(4) The Cab Company and defendant then entered into a contract under which defendant agreed to sell to the Cab Company, and the Cab Company agreed to purchase sixty new Ford automobiles of four different types, to be divided into designated colors, etc., and the Cab Company agreed to deposit $50 per car, or a total of $3,000, at the time of the execution of the contract, and the balance upon the delivery of said cars, delivery to be made ten in March 1953, twenty-five in April 1953, and twenty-five in May 1953; the purchase price to be the cost to defendant plus ten per cent on each car, plus $15 on each car for service charge, and $15 on each car for North Carolina sales tax.

(5) Contemporaneously the Cab Company and Broad Street Motors entered into a contract, a copy of which is attached to and made a part of the complaint.

(6) During the month of April 1953, defendant delivered to the Cab Company eleven of the sixty automobiles it had agreed to sell, but since that time, notwithstanding the demands of the plaintiffs, the defendant has failed and refused to deliver the remaining forty-nine automobiles purchased under said contract.

(7) Under the contract between the Cab Company and defendant, the profit to the Cab Company, had the contract been fulfilled, amounted to

about eight per cent of the cost price of each automobile, or $5,891.24 on the undelivered forty-nine automobiles, and Broad Street Motors under said contract would have made a profit on said forty-nine cars, had they been delivered, of $10,227.84.

(8) Notwithstanding defendant has refused and still refuses to deliver said forty-nine automobiles, it retains the $50 per car paid thereon at the time the contract was entered into, to wit, $2,450.

The contract between the Cab Company and Broad Street Motors recites that the Cab Company has ordered sixty Ford automobiles through defendant; the price to be paid therefor on delivery and the receipt by the Cab Company from Broad Street Motors of the $3,000 deposit which it "in turn has paid to" defendant. The Cab Company agrees that the sixty cars are to be delivered to Broad Street Motors to be paid for on delivery; and Broad Street Motors agrees to pay the Cab Company "for such services rendered . . . any excess over and above Whitford Motor Company's charge, such excess not to exceed 10% under the New Bern delivery retail price." The contract between the Cab Company and defendant is attached to and made a part of this contract.

Plaintiffs pray that the Cab Company have and recover of defendant $5,891.25, and that plaintiff Broad Street Motors have and recover of defendant $10,227.84.

The defendant demurred for that (1) there is a misjoinder of causes and parties, and (2) the complaint contains no allegations sufficient to constitute a cause of action in favor of L. H. Wetherington and Herbert Willis, the two individual plaintiffs.

The court below, being of the opinion that there is a misjoinder of causes of action and a misjoinder of parties, sustained the demurrer and entered judgment dismissing the action. Plaintiffs excepted and appealed.

W. B. R. Guion for plaintiff appellants.
Ward & Tucker for defendant appellee.

BARNHILL, C. J. It clearly appears from the allegations contained in the complaint that the individual plaintiffs, in respect to the subject matter of this action, were acting in a representative capacity as agents or officers of their respective corporations. As to them, no cause of action is stated, and they pray no relief. That their names appear in the caption as plaintiffs does not affect the question posed for decision. *Hayes v. Wilmington,* 239 N.C. 238; *Jordan v. Maynard,* 231 N.C. 101, 56 S.E. 2d 26.

What then about the Cab Company? Are two causes of action—one in behalf of the Cab Company and the other in behalf of Broad Street Motors—stated in the complaint? This is the question raised by the

demurrer. The court below, by sustaining the demurrer, answered in the affirmative. A careful study of the complaint leads us to the contrary view.

If we considered the contract between the Cab Company and defendant, and that alone, it would appear that the Cab Company has clearly stated a cause of action for breach of contract. But we may not so limit our consideration. We must, instead, view the complaint as a whole, giving due weight to each and every allegation which tends to limit or qualify the contract or explain the position of the Cab Company as one of the ostensible contracting parties.

It is a matter of common knowledge that automobile manufacturers market their products through local authorized dealers, and only such dealers may procure and sell to the ultimate purchaser new automobiles as such. Of this fact the courts may take judicial notice. *S. v. Vick,* 213 N.C. 235, 195 S.E. 779.

When we give due consideration to the contracts in connection with the allegations contained in the complaint in the light of the known fact that Broad Street Motors could not buy new Ford automobiles for resale, it is manifest that the complaint details one and only one transaction which the parties sought to camouflage as a purchase by the Cab Company and a resale to Broad Street Motors. The Cab Company was nothing more than the go-between or agent of Broad Street Motors. Its contract was made for the use and benefit of Broad Street Motors which in fact was to pay for and receive delivery of the vehicles purchased. And the Cab Company was to receive for its services in posing as the real purchaser the *quid pro quo* stipulated in the contract.

While it was intended that the contract with the defendant should appear to be a *bona fide* purchase by the Cab Company to whom defendant could make sale under the "fleet purchase plan," all parties knew and understood that Broad Street Motors was the actual purchaser and the real party in interest. As such it may maintain this action. *Rector v. Lyda,* 180 N.C. 577, 105 S.E. 170; *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566.

Should the Cab Company be permitted to pursue the cause to its final judgment, it would, on its own allegations, receive the amount recovered as agent for Broad Street Motors to which it would have to account and to which it would be compelled to look for its compensation for services rendered. It is, therefore, an unnecessary party plaintiff. *Roberson v. Swain,* 235 N.C. 50, 69 S.E. 2d 15; *Hayes v. Wilmington, supra.*

Considered in connection with the two contracts which are made a part of the complaint, the allegations made cannot reasonably be accorded any other meaning. So we construe the complaint.

It follows that since no cause of action is stated in behalf of the individual plaintiffs or the Cab Company, there is no misjoinder of parties or causes of action. *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295; *Jordan v. Maynard, supra.* For that reason the judgment entered in the court below must be

Reversed.

THE TURNAGE COMPANY, INC., v. W. Z. MORTON, T/A MORTON'S WAREHOUSE.

(Filed 7 April, 1954.)

1. Agriculture § 5d—

A warehouseman selling the crop of a tenant covered by a registered lien for advancements may be held liable by the lienholder for the amount paid to the tenant for the crop which the tenant fails to apply to the lien.

2. Warehousemen § 4—

A warehouseman may not deny liability to a lienholder on the ground that his business is affected with a public interest, or that he was agent neither for the buyer nor the seller.

3. Appeal and Error § 40d—

Where the parties waive a trial by jury and agree that the presiding judge find the facts under G.S. 1-184, the judgment will be reviewed in the light of the court's findings and not the facts alleged in the pleadings.

4. Appeal and Error § 6c (2)—

An exceptive assignment of error to the judgment presents the sole question whether the facts found are sufficient to support the judgment.

5. Waiver § 2—

Waiver is based upon an express or implied agreement.

6. Estoppel § 5—

Estoppel is based upon acts or conduct precluding a party from asserting a right.

7. Trial § 55—

Where different inferences can be drawn from the evidence in a trial by the judge under agreement of the parties the ultimate issue is for the court.

8. Estoppel § 11b—

Waiver or estoppel is an affirmative defense and the burden is upon defendant to establish sufficient facts to support the plea.

9. Estoppel § 11c: Agriculture § 5d—

In an action by the owner of a crop lien for advancements against the warehouseman selling the crop, findings that the crop was in the possession of the landlord, that the lienholder made no objection to the sale of the

crop by the landlord and the tenant but expected to be paid out of the proceeds of sale, and that the lienholder knew that the landlord and tenant had sold a quantity of tobacco at defendant's warehouse on a previous date during the same season, *are held* insufficient in law to constitute a waiver or estoppel of the lienholder.

10. Same—

In order for the owner of a registered crop lien for advancements to be estopped from asserting his rights as against the warehouseman selling the crop, it is necessary that the lienholder constitute the tenant, by express or implied agreement, his agent to sell the crop for their joint benefit and account to the lienholder for the amount due him out of the proceeds of sale.

APPEAL by defendant from *Frizzelle, J.*, heard at September Term, 1953, judgment signed 28 October, 1953, of PITT.

Civil action by plaintiff, owner of recorded agricultural liens and chattel mortgages executed by a tenant as security for advancements, against defendant, operator of a tobacco sales warehouse, to recover one-half of proceeds of sale of tobacco on which the plaintiff held said liens on account of defendant's sale thereof for tenant and payment of proceeds of sale to tenant.

Stipulations set forth in a pre-trial order entered at August Term, 1953, include the following:

1. "On or about January 2, 1952, one Jasper Hopkins executed and delivered to the plaintiff, The Turnage Company, Inc., an Agricultural Lien and Chattel Mortgage to secure advances in the amount of $1,085.00, under the terms of which he conveyed to the plaintiff all crops grown by him in the year 1952, on the lands of Mrs. Athleen Pruitt located in Pitt County, which Agricultural Lien and Chattel Mortgage was duly filed for registration on February 1, 1952, in the office of the Register of Deeds of Pitt County, North Carolina, in Book 86, at page 245."

2. "On or about July 30, 1952 the said Jasper Hopkins executed and delivered to the plaintiff an Agricultural Lien and Chattel Mortgage, under the terms of which he conveyed to the plaintiff all crops to be grown by him in the year 1952, on the lands of Mrs. Athleen Pruitt located in Beaver Dam Township, Pitt County, adjoining the lands of Charlie Sutton, Jimmy Sutton and Mack Smith, to secure advances not to exceed $300.00 and existing indebtedness in the amount of $1,322.17, which instrument was filed for registration on August 9, 1952, in Book 104 at page 924 of the Pitt County Public Registry."

3. "On September 12, 1952 Jasper Hopkins and Mrs. H. L. Pruitt sold jointly 1120 pounds of tobacco for the sum of $504.80 (before warehouse charges) at the defendant's warehouse. That payment for the tobacco

was made by the defendant, trading as Morton's Warehouse, one-half to Jasper Hopkins and one-half to Mrs. H. L. Pruitt."

At September Term, 1953, the parties, under G.S. 1-184, waived a jury trial, agreeing that Judge Frizzelle, then presiding, hear the evidence, state his findings of fact and conclusions of law and enter judgment out of term and at the convenience of the court. The findings of fact, conclusions of law and judgment were signed at Greenville, N. C., 28 October, 1953, during the October Term, 1953.

Incorporated in the findings of fact are the undisputed facts previously stipulated, and in addition the findings of fact include the following:

"5. That during the year 1952, Jasper Hopkins was a tenant on the lands of Mrs. Athleen Pruitt in Beaver Dam Township, Pitt County, near the Belle Arthur Community, and that Jasper Hopkins had a one-half interest in six (6) acres of tobacco which was raised jointly by Mrs. Pruitt and Jasper Hopkins in 1952."

"7. That the tobacco which was sold by Jasper Hopkins and Mrs. Pruitt at Morton's Warehouse on Sepetmber 12, 1952, was raised on Mrs. Pruitt's farm and was a portion of the tobacco described in the Agricultural Liens and Chattel Mortgages executed by Jasper Hopkins to the plaintiff.

"8. That the sale of the tobacco at Morton's Warehouse on September 12, 1952 was conducted by W. Z. Morton and his son.

"9. That Jasper Hopkins received the net sum of $244.75 for his share of the tobacco that was sold at Morton's Warehouse on September 12, 1952.

"10. That no part of his share in the sale of tobacco on September 12, 1952, was ever received by the plaintiff to be applied to his indebtedness to the plaintiff.

"11. That at the time of the sale on September 12, 1952, Jasper Hopkins was indebted to the plaintiff in the amount of $1,420.10 for advances which had been made by the plaintiff to said Hopkins, for the purpose of raising crops in 1952, and at the time this action was instituted, there remained due the plaintiff, the sum of $1,025.13."

The foregoing stipulations and findings of fact establish the matters alleged in the complaint.

The answer of the defendant denied for lack of knowledge or information sufficient to form a belief the material allegations of fact alleged in the complaint. In addition, the defendant pleaded nonliability for that he operated an auction sale warehouse, a business affected with a public interest, was not agent either for the seller or for the buyer, etc.

The record shows that at November Term, 1953, Judge Frizzelle, then presiding, in the exercise of his discretion, allowed the defendant to file

an amendment to his answer, which said amendment alleged, as a further defense, the following:

"That the plaintiff, by its acts and conduct in allowing the landlord Mrs. Pruitt and the mortgagor-tenant Hopkins to retain complete possession of the mortgaged tobacco at all times and to hold the mortgage (*sic*) out to the world as their own, and in allowing, consenting to and not forbidding the landlord and the mortgagor to make the sale of the mortgaged tobacco on 12 September 1952, at the defendant's warehouse, when plaintiff had actual knowledge that said landlord and mortgagor had made a prior sale of the mortgaged tobacco at defendant's warehouse on 29 August 1952, has waived its Agricultural Liens and Chattel Mortgages as against this defendant and is estopped to claim and assert said Agricultural Liens and Chattel Mortgages against this defendant; and such waiver and estoppel is specifically pleaded in bar of a recovery by the plaintiff."

Judgment was entered in favor of the plaintiff for $244.75 plus interest and costs. The defendant excepted to the judgment and appealed, assigning as error "the entry of the judgment in this case."

Lewis & Rouse for plaintiff, appellee.
James C. Lanier, Jr., and W. T. Joyner for defendant, appellant.

BOBBITT, J. Under the stipulations and findings of fact stated above, nothing else appearing, the plaintiff was entitled to judgment. *White v. Boyd,* 124 N.C. 177, 32 S.E. 495.

In *White v. Boyd, supra,* Crowder, a cropper on the land of plaintiff White, took the tobacco to the sales warehouse of the defendants where it was sold by them at public auction. The sale to the highest bidder was completed and the sale price paid to Crowder, less a commission to the defendants as compensation for their services. Crowder had given to the plaintiff Green a mortgage on the crop. In addition, the plaintiff White, owner of the farm and landlord of Crowder, had mortgaged the crop to the plaintiff Green. Plaintiffs' action to recover the amount the defendants received for the tobacco upon their sale thereof at the instance of Crowder was nonsuited, apparently upon the theory that the defendants were mere intermediaries and did not occupy the status of agent for Crowder. This Court reversed, the explicit holding being that the defendants sold the tobacco as agents for Crowder; that there was a wrongful conversion by the defendants; and that the plaintiffs could waive the tort and sue both Crowder and the defendants on the basis of money wrongfully had and received.

The facts alleged in the original answer are insufficient in law to constitute a defense to plaintiff's action. It was so held in *Credit Co. v.*

Satterfield, 218 N.C. 298, 10 S.E. 2d 914, where *Seawell, J.,* says: "The particular objection based on defendants' immunity as public warehousemen has been decided adversely to them by this Court in *White v. Boyd,* 124 N.C. 177, 32 S.E. 387. See, also, *Burwell v. Cooperative Co.,* 172 N.C. 79, 89 S.E. 1064; *Nowell v. Basnight,* 185 N.C. 142, 116 S.E. 87; *Roebuck v. Short,* 196 N.C. 61, 144 S.E. 515; *Furniture Co. v. Clark,* 191 N.C. 369, 131 S.E. 567."

The further defense alleged in the amendment to answer quoted above affords the basis for the position taken by the defendant upon this appeal. It is unnecessary to pass upon whether the facts as alleged are sufficient to constitute a waiver or estoppel, for, in our view, the findings of fact relative to this subject are insufficient to show that the plaintiff waived its liens or is estopped to assert them.

We look to the findings of fact. It has been held repeatedly that an exceptive assignment of error challenging the correctness of the judgment, where jury trial is waived under G.S. 1-184, presents one question, that is, whether facts found are sufficient to support the judgment. *Swink v. Horn,* 226 N.C. 713, 40 S.E. 2d 353, and cases cited.

The only finding of fact relative to the affirmative defense of waiver or estoppel is No. 12, viz.:

"12. That the tobacco crop remained in possession of the landlord, Mrs. Pruitt. The plaintiff expected the tobacco *to be sold* and to have its Agricultural Lien paid from the proceeds. Plaintiff made no objection to the sale of the tobacco by Mrs. Pruitt and Hopkins; however, *there was no agreement that Hopkins and Mrs. Pruitt should sell the tobacco.* (Emphasis added.)

"Where there is an Agricultural Lien securing advances, it is the customary procedure for the landlord and tenant to retain possession of the crops and to sell the tobacco at the various tobacco markets in the area. Plaintiff did not know where or when landlord or mortgagor would be selling the tobacco. After the tobacco market opened, and before the sale in question on 12 September 1952, the plaintiff knew that a quantity of the mortgaged tobacco had been sold at the warehouse of the defendant on a certain date, to-wit: 29 August 1952."

The trial judge held that these facts do not constitute a waiver or an estoppel. We agree. At most, they are evidential circumstances bearing upon the ultimate issue of fact, viz.: Did the plaintiff constitute Hopkins his agent to sell the tobacco for *their joint benefit* and account for the amount due him out of the proceeds of sale? The rule to be applied is analogous to that applied in respect of a landlord's lien in *Hall v. Odom, ante,* 66, decided at this term. Waiver embraces the idea that the lienholder by agreement, express or implied, has waived his lien. Estoppel embraces the idea that by his acts and conduct the lienholder is precluded

from asserting his lien. Where different inferences can be drawn from the evidence the ultimate issue is for the jury or, when jury trial is waived, for the trial judge. Where there is a valid recorded lien, as here, waiver or estoppel is an affirmative defense; and before the defendant can prevail he must prove facts sufficient to establish the ultimate issue raised by his plea. An affirmative finding of fact in his favor is required. No such finding of fact was made. The facts as found are insufficient in law to constitute a waiver or an estoppel. The failure of the defendant to establish the factual basis for such alleged affirmative defense necessitates decision affirming the judgment.

Affirmed.

STATE v. HOWARD S. SMITH.

(Filed 7 April, 1954.)

1. **Indictment and Warrant § 9: Criminal Law § 56—**

A warrant will not be quashed or a judgment arrested on the ground that such warrant is defective, if it charges the offense in a plain, intelligible and explicit manner and contains sufficient matter to enable the court to proceed to judgment. G.S. 15-153.

2. **Same—**

If a warrant is sufficient to inform the defendant of the charge against him and to enable him to prepare his defense, reference therein to the specific section of the General Statutes upon which the charge is laid, is not necessary to its validity.

3. **Same: Automobiles § 30d—**

A warrant charging that defendant at a specified time unlawfully and willfully operated a motor vehicle upon a public road while under the influence of intoxicating liquor is sufficient to charge the offense proscribed by G.S. 20-138 without a reference in the warrant to any statute, and the fact that the warrant refers to an inapplicable statute will be treated as surplusage, and is insufficient ground for arrest of the judgment.

4. **Automobiles § 30d—**

Evidence that defendant ran his automobile into the left rear of another car while attempting to pass it on a public highway, with testimony of patrolman, who reached the scene of the accident in about 10 minutes after the accident occurred, that in his opinion defendant was intoxicated, that defendant was staggering, and that he had a strong odor of alcohol about him, *is held* sufficient to overrule nonsuit in a prosecution under G.S. 20-138.

5. **Criminal Law § 50d: Trial § 6—**

G.S. 1-180 proscribes an expression of opinion by the court upon the evidence not only in the charge but at any time during the course of the trial.

6. Same—

While the trial court may propound competent questions to a witness in order to clarify his testimony or to bring out some fact that has been overlooked, the court may not cross-examine a witness or ask a witness questions for the purpose of impeaching him or casting doubt upon his testimony, and a new trial is awarded in this case for impeaching questions asked by the court.

APPEAL by defendant from *Frizzelle, J.*, November Term, 1953, of LENOIR.

The defendant was tried and convicted in the Municipal-County Court of Kinston and Lenoir County upon a warrant charging him with driving a motor vehicle on the public roads while under the influence of intoxicating liquor. He appealed from the conviction and judgment imposed to the Superior Court of Lenoir County where he was tried *de novo* on the original warrant and again convicted. He now appeals from the judgment entered in the Superior Court and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

White & Aycock for defendant, appellant.

DENNY, J. The defendant filed a motion in arrest of judgment in this Court. The motion is based upon the fact that the reference to the statute in the warrant upon which the defendant was tried is incorrect. The warrant charges that "on or about the 26th day of Sept., 1953, Howard S. Smith violated the following law, *to-wit: General Statutes of North Carolina, 1943, Section 20-139 as amended,* in that he did unlawfully and willfully operate a motor vehicle on the public roads while under the influence of intoxicating liquors, opiates or narcotic drugs, . . ." (Italics ours.)

A warrant will not be quashed or a judgment arrested on the ground that such warrant is defective, if it charges the offense in a plain, intelligible and explicit manner and contains sufficient matter to enable the court to proceed to judgment. G.S. 15-153; *S. v. Loesch,* 237 N.C. 611, 75 S.E. 2d 654; *S. v. Camel,* 230 N.C. 426, 53 S.E. 2d 313; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705.

The warrant under consideration clearly charges a violation of G.S. 20-138 and not G.S. 20-139. A reference, however, to the statute is not necessary to the validity of the warrant. Consequently, that portion of the warrant which we have italicized is surplusage and may be disregarded. *S. v. Tripp,* 236 N.C. 320, 72 S.E. 2d 660; *S. v. Daughtry,* 236 N.C. 316, 72 S.E. 2d 658; *People v. Adler,* 160 N.Y.S. 539. The warrant is sufficient to inform the defendant of the charge against him and to

enable him to prepare his defense without incorporating therein the specific section of the General Statutes upon which the charge is laid, and it sustains the judgment. The law requires no more. G.S. 15-153; *S. v. Sumner,* 232 N.C. 386, 61 S.E. 2d 84. The motion is denied.

The defendant excepts to and assigns as error the failure of his Honor to sustain his motion for judgment as of nonsuit.

In this connection the defendant admits that he ran his automobile into the left rear end of another car while attempting to pass it on a public highway; but denies that at that time he was under the influence of an intoxicating liquor or any other beverage, opiate or narcotic drug. However, the State offered the testimony of a State Highway patrolman who reached the scene of the accident about ten minutes after it occurred, who testified that in his opinion the defendant "was . . . intoxicated . . . to the extent that he was in a staggering condition. . . . I detected a strong odor of alcoholic beverage about him." This evidence made out a case for the jury. *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568. The motion for judgment as of nonsuit was properly overruled.

The defendant also assigns as error exceptions Nos. 4, 5, 6, and 8, which were taken to the court's examination of the defendant and two of his witnesses. Immediately after the solicitor for the State finished cross-examining the defendant, he was examined by the court as follows:

"THE COURT: Do you ever take a drink of hard liquor?

"WITNESS: Very seldom.

"THE COURT: How about on Thanksgiving and Christmas and those sort of occasions?

"WITNESS: Not on Christmas Day.

"THE COURT: Do you drink right much beer?

"WITNESS: No sir.

"THE COURT: It just happened that day that you drank two at once?

"WITNESS: I drank them with some sandwiches my wife made.

"THE COURT: Your wife was not at home?

"WITNESS: Yes sir, we had been tying tobacco.

"THE COURT: Do you drink a little liquor now and then?

"WITNESS: Very seldom. I take a drink once in a while."

"No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. . . ." G.S. 1-180. While in terms this statute refers to the charge, it has been uniformly construed as including the expression of any opinion or even an intimation by the judge, at any time during the course of the trial, which might be calculated to prejudice either party. *S. v. Bryant,*

189 N.C. 112, 126 S.E. 107; *S. v. Winckler,* 210 N.C. 556, 187 S.E. 792; *Morris v. Kramer,* 182 N.C. 87, 108 S.E. 381.

A trial judge in this jurisdiction is not permitted to cast doubt upon the testimony of a witness or to impeach his credibility. *S. v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29; *S. v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378, and cited cases.

It is improper for a trial judge to ask a witness questions for the purpose of impeaching him. Counsel may do so in cross-examining a witness, but this privilege does not extend to the trial judge. *In re Will of Bartlett,* 235 N.C. 489, 70 S.E. 2d 482; *S. v. Perry,* 231 N.C. 467, 57 S.E. 2d 774; *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *S. v. Owenby, supra; S. v. Bean,* 211 N.C. 59, 188 S.E. 610; *S. v. Winckler, supra.*

Certainly the able and conscientious judge who tried this case below did not intend to do anything to prejudice the rights of the defendant, but it is the probable effect or influence upon the jury as a result of what a judge does, and not his motive, that determines whether the right of defendant to a fair trial has been impaired to such an extent as to entitle him to a new trial. *S. v. Bryant, supra.*

It is true that frequently in the course of a trial it is proper for the judge to propound competent questions to a witness in order to obtain a proper understanding and clarification of his testimony, or to bring out some fact that has been overlooked. *S. v. Perry, supra; S. v. Kimrey,* 236 N.C. 313, 72 S.E. 2d 677. But, the interrogations of the court in the instant case fall squarely in the category of impeaching questions. *In re Will of Bartlett, supra; S. v. Winckler, supra; S. v. Cantrell, supra.* "Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855.

The defendant is entitled to a new trial and it is so ordered.

New trial.

MARY DELL SIDBURY SKIPPER AND HUSBAND, N. R. SKIPPER; K. C. SIDBURY, ELIJAH B. WILLIAMS AND WINSTON WILLIAMS, AND OTHERS, THE HEIRS AT LAW OF THE LATE ELIJAH B. WILLIAMS, PETITIONERS, v. E. L. YOW AND WIFE, MRS. E. L. YOW.

(Filed 7 April, 1954.)

1. Evidence § 43a—

A recital or declaration in a deed is competent as evidence only against the parties and their privies and not in their favor, and may not be used against strangers unless such recitals fall within the ancient document rule, since as to strangers they are *res inter alios acta.*

2. Ejectment § 17—

In an action in ejectment, nonsuit is properly entered when plaintiffs fail to fit the description contained in the deeds on which they rely to the land claimed by them.

3. Evidence § 6—

In the absence of evidence of a will, it is presumed that a deceased person died intestate.

On rehearing.

The essential facts are stated in the original opinion, *Skipper v. Yow,* 238 N.C. 659, 78 S.E. 2d 600.

Murray G. James, Nere E. Day, Jr., and Nere E. Day for plaintiff appellants.

Poisson, Campbell & Marshall, McClelland & Burney, Albert J. Ellis, and A. Turner Shaw for defendant appellees.

BARNHILL, C. J. This cause was not brought back to this Court for a rehearing on the merits but "only for the purpose of amplification of rules as to the extent to which recitals of fact in deeds are admissible as evidence of the facts recited, and as related to deeds involved on this appeal."

On the original appeal our decision affirming the judgment of nonsuit entered by the court below was made to rest primarily on the failure of plaintiffs to offer evidence tending to show that the land claimed by them lies within the bounds of the descriptions contained in, and was conveyed by, the deeds upon which they rely. However, the Court discussed the status of the record in respect to evidence that those through whom plaintiffs claim were collateral heirs of Elijah Williams and as such inherited the land of which he died seized and possessed.

In the course of that discussion we said:

"That Williams never married is recited in one or more of the deeds. But this is not evidence. It is nothing more than a self-serving declaration. Recitals contained in a trustee's or mortgagee's foreclosure deed are by statute made *prima facie* evidence of the truth thereof. We know of no rule, however, that gives the effect of evidence to the recitals in a fee simple deed."

We were then speaking of self-serving declarations. Even so, in view of its abbreviated form and the generality of the last sentence, the statements contained in the quoted paragraph might prove to be troublesome and misleading to counsel and the court should plaintiffs elect to bring a new action as they are privileged to do under G.S. 1-25.

The deeds relied on by plaintiffs were admitted in evidence without objection and there was no request that their admission as evidence be

limited to any particular purpose. While technically the right of plaintiffs to claim title as collateral heirs of certain predecessors in title was challenged by the motion to nonsuit, neither the admissibility nor the force and effect of the recitals contained in deeds offered in evidence was discussed in the briefs on the original appeal. And, furthermore, the recitals in the deeds were not material to the decision of the case. The insufficiency of the evidence to identify the land claimed as the land embraced within the bounds of the descriptions contained in the deeds offered in evidence required an affirmance of the judgment entered in the court below.

We therefore withdraw as immaterial the quoted paragraph of the original opinion and any and all other references to the admissibility as evidence of recitals in deeds and other written instruments without prejudice to either party.

Of course, certain recitals contained in deeds, wills, and other instruments are admissible in evidence. Others are not. The trial judge should, in the first instance, make his ruling as to the admissibility of any instrument for the purpose of proving recitals therein contained so that, if challenged, we may review the same on appeal. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488.

For the benefit of the court and counsel, we here make reference to some of the authorities on the subject.

The general rule as it prevails in this jurisdiction is stated in *Claywell v. McGimpsey,* 15 N.C. 89, as follows: "When it (a deed) is offered as evidence of the truth of matters recited, acknowledged, or declared in the deed it is then admissible only *against* parties and privies. When offered against others, it is opposed by one of the best established rules of law, founded on the principles of natural justice, that no one shall be prejudiced by *res inter alios acta*--by the acts, declarations or conduct of strangers."

"But there is no warrant of authority or reason for the position that a recital or description in a deed proves its own truth *in favor of* the party himself." *Ruffin, C. J.,* in *Crump v. Thompson,* 31 N.C. 491. *Freeman v. Ramsey,* 189 N.C. 790; *Fort v. Allen,* 110 N.C. 183; *Brinegar v. Chaffin,* 14 N.C. 108. See also *Hoyatt v. Phifer,* 15 N.C. 273; *Gaylord v. Respass,* 92 N.C. 553; *Sears v. Braswell,* 197 N.C. 515, 149 S.E. 846; *Ehrlich v. Mills,* 203 Ga. 600; *Tift v. Hardware Co.,* 204 Ga. 654; *Bruni v. Vidaurri,* 166 S.W. 2d 81; *Brown v. Connor,* 140 S.W. 2d 495; *In re Marsh,* 272 N.Y.S. 807 (recitals of intestacy and pedigree); *Soukup v. Union Inv. Co.,* 51 N.W. 167; *Carter v. Thompson,* 267 S.W. 790, 38 A.L.R. 1053 (recital that grantors were sole heirs); *Wrenn v. Howland,* 75 S.W. 894 (*contra* as to pedigree); II Mordecai's Law Lectures, 2d Ed.,

p. 805 *et seq.;* Stansbury, N. C. Evidence, sec. 152; 20 A.J. 792 *et seq.;* 32 C.J.S. 689; Thompson, Real Property, sec. 3186.

On recitals that grantor is unmarried see *Gorden v. Gorden,* 119 N.E. 312; *In re Hulett's Estate,* 69 N.W. 31; 20 A.J. 792.

There is, however, an exception to the general rule that recitals in a deed are not admissible in evidence as against strangers, commonly known as the ancient document rule. This rule was formulated long prior to the adoption of our registration statutes. Apparently it was first designed primarily to dispense with proof of the execution of ancient documents. *Plummer v. Baskerville,* 36 N.C. 252 (at p. 269). Even so, it has come to be considered an exception to the hearsay rule and under certain conditions renders recitals in deeds admissible even against strangers. *Sledge v. Elliott,* 116 N.C. 712.

The rule with all its limitations is stated and discussed in 20 A.J. 794, 786. See also Anno. 6 A.L.R. 1437; 32 C.J.S. 689; Stansbury, N. C. Evidence, sec. 152.

The judgment entered in the court below is reaffirmed for the reason plaintiffs failed to fit the descriptions contained in the deeds upon which they rely to the land claimed by them. That is, they have failed to offer evidence tending to show that the descriptions contained in such deeds embrace within their bounds the identical land in controversy.

Whether plaintiffs may prove by recitals in deeds upon which they rely, or otherwise, that certain of their predecessors acquired title to the *locus* by inheritance from the record owner is a question we leave open for future decision by the trial court if and when that question arises.

In this connection we do say, however, that in the absence of evidence of a will, it is presumed that a deceased person died intestate. *Barham v. Holland,* 178 N.C. 104, 100 S.E. 186.

Petition denied.

ROSANNA M. TAYLOR AND HUSBAND, GEORGE G. TAYLOR, v. J. J. HONEYCUTT.

(Filed 7 April, 1954.)

1. **Wills § 33b—When "heirs" is used in the sense of children, Rule in Shelley's case does not apply.**

   A devise to testator's wife and daughter for life, with further provision that if the daughter "has no heirs" the land should go to testator's son, for life, and upon his death to his heirs, *is held* to convey only a life estate to the daughter, the rule in *Shelley's case* not being applicable, since it is apparent that the word "heirs" was used to mean children or issue of the

daughter and was not used in its technical sense as importing a class of persons to take indefinitely in succession from generation to generation.

2. Same—

Whether the rule in *Shelley's case* applies depends upon whether the words "heirs" or "heirs of the body" are used to designate persons to take by purchase or are used in their technical sense to designate a class of persons to take indefinitely in succession under the canons of descent. This preliminary question is to be determined under the ordinary principles of construction, viewing the instrument from its four corners.

3. Judgments § 39—

A judgment is binding only on parties and those in privity.

APPEAL by plaintiffs from *Rousseau, J.*, Presiding Judge of the Fifteenth Judicial District, heard 16 February, 1954, in Chambers, of CABARRUS.

Controversy without action, submitted under G.S. 1-250 on an agreed statement of facts.

Plaintiffs, being under written contract to convey certain land to the defendant, executed and tendered a deed therefor and demanded payment of the purchase price. The defendant refused to accept the deed and to make payment for the land on the sole ground that the title offered was a life estate whereas the contract was for a conveyance in fee simple.

Upon the facts agreed, the court, being of the opinion that the deed tendered would convey only a life estate, gave judgment for the defendant; whereupon, the plaintiffs excepted and appealed.

C. P. Barringer for plaintiffs, appellants.
Kenneth B. Cruse for defendant, appellee.

BOBBITT, J. The *feme* plaintiff derives title to the land by devise from her father, George M. Misenheimer, and, on the facts agreed, the title offered was properly made to depend upon the construction of the following provisions of her father's will:

"I bequeath and give the balance of my land and other property except my mill property to my beloved wife Sarah and daughter Rosanna Misenheimer their lifetime. Provided Rosanna has no heirs. Then it shall go to C. W. Misenheimer, my son, his lifetime and then to go to his heirs at his death.

"My interest in the mill property with what he owes me goes to C. W. Misenheimer."

The George M. Misenheimer will bears no date. The record is silent as to the date of its execution, the date of the testator's death and the date of probate. The facts agreed include the following:

1. Sarah Misenheimer, widow of the testator, died some years ago.

2. When the will was probated, C. W. Misenheimer, the son, had two living children, Will and Henry. Afterwards, he had three more children, Roy, Glenn and George. Henry died, leaving two children. The other four children of C. W. Misenheimer are now living. C. W. Misenheimer is dead.

3. When the will was probated, the *feme* plaintiff, the daughter, had no children, being then unmarried. She married George C. Taylor, coplaintiff, about 29 April, 1914; and of this marriage there are today two living children, Grace Taylor McRorie and Elizabeth Taylor Burgess, each of whom has living children.

4. The mill property devised to C. W. Misenheimer and the debts due by him to the testator were approximately equal in value to the remainder of the lands, which remainder included the land here involved.

Upon these facts, the trial court entered judgment for the defendant, predicating judgment upon this interpretation of the George M. Misenheimer will, viz.:

"Under the terms of the will of the late George M. Misenheimer a contingent remainder vested in the children of C. W. Misenheimer subject to defeasance by contingency of the said Rosanna Misenheimer Taylor dying, living children or lineal descendants, but that upon the happening of the contingency, a legal title in fee simple will vest in the children or lineal descendants of the said Rosanna Misenheimer Taylor as implied remaindermen, but upon the failure of the contingency, the fee vests absolutely in the lineal descendants of C. W. Misenheimer, the ulterior remaindermen named in the will."

The appellee's position is that the quoted interpretation by the trial court is in accord with *Hauser v. Craft,* 134 N.C. 319, 46 S.E. 756, a leading case on the subject of implied remainders. However, for the reason stated below, we restrict our decision to the sole question upon which this controversy depends, viz.: Did the *feme* plaintiff under the devise acquire title to the land in fee simple or only a life estate therein?

The quoted provisions of the George M. Misenheimer will are to the effect that the devise is to his wife, Sarah, and to his daughter, the *feme* plaintiff, then unmarried, for life; provided, if Rosanna, the *feme* plaintiff, "has no heirs," the land in that event shall go to his son, C. W. Misenheimer, for life, and upon his death to his heirs.

Notwithstanding the devise to the *feme* plaintiff in express terms is for her lifetime, the appellants' position is that the word "heirs" is used in its technical sense; that the testator devised the land to the *feme* plaintiff for life, then (by implication) to her "heirs"; and that this vested the fee simple title in the *feme* plaintiff under the rule in *Shelley's case.* But the only authority cited by appellants, *Hampton v. Griggs,* 184 N.C.

13, 113 S.E. 501, speaks against their position. In the course of a restatement of the prerequisites for the application of the rule in *Shelley's case, Stacy, J.* (later *C. J.*), says: "The words 'heirs' or 'heirs of the body' must be used in their technical sense as importing a class of persons to take indefinitely in succession, from generation to generation, in the course marked out by the canons of descent." Later in the opinion, he continued: "The first question, then, to be decided is whether the words 'heirs' or 'heirs of the body' are used in their technical sense; and this is a preliminary question to be determined, in the first instance, under the ordinary principles of construction without regard to the rule in *Shelley's case.* Not until this has been ascertained by first viewing the instrument from its four corners (*Triplett v. Williams,* 149 N.C. 394), and determining whether the heirs take as descendants or purchasers, can it be known in a given case whether the facts presented call for an application of the rule."

In *Hampton v. Griggs, supra,* the devise was: "I give unto the lawful heirs of my son Nathaniel Pierce Hampton all of the lands . . ., and if my son should die without a bodily heir, then my property to go back into the Hampton family." The Court held that the words "lawful heirs of my son" were not used in their technical sense, but in the sense of children or issue, and that the son took only a life estate.

In *Puckett v. Morgan,* 158 N.C. 344, 74 S.E. 15, the devise was: "I leave Martha Morgan . . . the Rachel tract . . . during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters." The Court construed "bodily heirs" to mean children or issue living at her death, the devise therefore being outside the operation of the rule in *Shelley's case.*

In *Tynch v. Briggs,* 230 N.C. 603, 54 S.E. 2d 918, the pertinent part of the devise was worded as follows: "I give and bequeath . . . to my son James for the period of his natural life *in remainder* (*sic*) to his lawful heirs and in the event the said James should die without lawful heirs then in remainder to my daughter Sallie Ann," etc. As *Seawell, J.,* pointedly observed: "James could not die without heirs (in the general sense) as long as Sallie Ann, his sister, lived." It was held that the rule in *Shelley's case* did not apply, the words "lawful heirs" meaning children or issue. In support of this holding, *Justice Seawell* cites *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 *feme* plaintiff did not marry until after the death of her father and the probate of his will. Whether she would marry and have children could not be foreseen. Provision was made for her during her lifetime.

When the testator, after devising a life estate to the *feme* plaintiff, added, "provided Rosanna has no heirs," the land was to go to his son, C. W. Misenheimer, for life, etc., the word "heirs" referred plainly to children or issue of the *feme* plaintiff. To borrow the phraseology of *Justice Seawell,* quoted above, Rosanna could not die without heirs in a general sense as long as C. W. Misenheimer, her brother, or any of his lineal descendants, lived.

Our decision is that the *feme* plaintiff acquired and now owns a life estate in the land and that the judgment of the trial court must be affirmed.

We refrain from further interpretation. None of the children or grandchildren of the *feme* plaintiff, and none of the children or grandchildren of C. W. Misenheimer, is a party to the case agreed; and there is no representation of persons yet unborn who might acquire an interest in the property upon the death of the *feme* plaintiff. It is elementary that a judgment is binding only on parties and those in privity. McIntosh, N.C.P.&P., p. 180, sec. 202. Indeed, had we considered the appellants' position tenable, it would have been appropriate to have deferred decision until all interested parties were before the Court. For, unless all parties necessary to a final determination of the ownership of the land are before the Court, it would seem that no judgment should be entered against a defendant in a case presented in the manner adopted here.

Affirmed.

STATE v. ROBERT HALL.

(Filed 7 April, 1954.)

1. Constitutional Law § 32—

The Superior Court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the Superior Court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. Constitution of North Carolina, Article I, Secs. 12 and 13.

2. Same: Criminal Law §§ 14, 56—

Defendant was convicted in a recorder's court for possession of nontax-paid whiskey for the purpose of sale. On appeal, he was convicted in the Superior Court with having in his possession nontax-paid whiskey, and was found not guilty of possession of nontax-paid whiskey for the purpose of sale. *Held:* The judgment must be arrested, since defendant may not be prosecuted in the Superior Court on the original warrant except for an offense for which he was convicted in the inferior court.

3. Intoxicating Liquor § 9a—

The offense of possessing alcoholic beverages on which taxes have not been paid and the offense of possessing intoxicating liquor for the purpose of sale are separate misdemeanors of equal dignity created by separate statutory provisions, and neither includes the other as a lesser offense, and a defendant may not be convicted of possessing intoxicating liquor upon which taxes have not been paid under a warrant charging possession of intoxicating liquor for the purpose of sale even though the warrant specifies that the liquor was "non-taxpaid."

APPEAL by defendant from *Burgwyn, Emergency Judge,* and a jury, at January Term, 1954, of CRAVEN.

Criminal prosecution on the warrant of an inferior court charging the unlawful possession of intoxicating liquor.

These matters appear on the face of the record proper:

1. The prosecution had its genesis in a warrant of the Recorder's Court of the City of New Bern, an inferior court established under Article 24 of Chapter 7 of the General Statutes.

2. The warrant was based on a criminal complaint alleging, in pertinent part, that the defendant "Robert Hall did . . . unlawfully and wilfully have in his possession a quantity of non-tax paid whiskey, and did have said whiskey for the purpose of sale."

3. The defendant was tried, convicted, and sentenced in the Recorder's Court of the City of New Bern upon this charge and no other: "Possession of non-tax paid whiskey for the purpose of sale." He appealed to the Superior Court from the sentence of the Recorder's Court.

4. The case was tried in the Superior Court on the warrant of the Recorder's Court. The trial judge submitted the case to the jury in the Superior Court on the theory that the criminal complaint underlying the warrant contained two counts, one charging the defendant "with having in his possession non-tax paid whiskey" and the other charging him with "having in his possession . . . non-tax paid whiskey for the purpose of sale."

5. The jury found the defendant "guilty of possession of non-tax paid whiskey" and "not guilty of the possession of non-tax paid whiskey for the purpose of sale."

6. The trial judge pronounced sentence against the defendant for "having in his possession non-tax paid whiskey." The defendant excepted and appealed. His assignments of error are sufficient to raise the questions considered in the opinion.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Charles L. Abernethy, Jr., for defendant.

ERVIN, J. When the verdict of the jury is spelled out, it finds the defendant guilty of the misdemeanor of possessing alcoholic beverage on which Federal and State taxes have not been paid in violation of the statute codified as G.S. 18-48.

We take it for granted without so adjudging for the purpose of this particular appeal that the criminal complaint underlying the warrant contains a count charging possession of alcoholic beverages on which taxes have not been paid as well as a count charging possession of intoxicating liquor for the purpose of sale.

Despite this assumption, we are constrained to hold that the trial, conviction, and sentence of the defendant for possessing alcoholic beverages on which taxes have not been paid offends Sections 12 and 13 of Article I of the Constitution of North Carolina, which provide, in essence, that the Superior Court has no jurisdiction to try an accused for *a specific misdemeanor* on the warrant of an inferior court unless he is first tried and convicted for *such misdemeanor* in the inferior court and appeals to the Superior Court from the sentence pronounced against him by the inferior court on his conviction for *such misdemeanor. S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283. The defendant was not tried, convicted, and sentenced in the Recorder's Court of the City of New Bern for possessing alcoholic beverages on which taxes have not been paid.

The trial, conviction, and sentence cannot be upheld on the theory that possessing alcoholic beverages on which taxes have not been paid is a lesser offense included in the charge of possessing intoxicating liquor for the purpose of sale. Any such notion is incompatible with *S. v. Peterson,* 226 N.C. 255, 37 S.E. 2d 591, and *S. v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629, which hold that these two crimes are specific misdemeanors of equal dignity created by separate statutory provisions, that neither crime includes the other as a lesser offense, and that an accused cannot be convicted of possessing alcoholic beverages on which taxes have not been paid under a warrant charging him with possessing intoxicating liquor for the purpose of sale, even though the warrant specifies that the subject of the offense is "non-tax paid" liquor.

The authority of the *Peterson* and *McNeill cases* on this precise point is not impaired in any degree by *S. v. Hill,* 236 N.C. 704, 73 S.E. 2d 894, which overrules them to the extent, and only to the extent, that they hold that the *prima facie* evidence rule created by G.S. 18-11 is not applicable to prosecutions based on criminal accusations which employ the phraseology of G.S. 18-50 and charge in express terms that the intoxicating liquor allegedly possessed for the purpose of sale was of the "illicit" or "non-tax paid" variety.

For the reasons given, the judgment is arrested.

Judgment arrested.

IN THE MATTER OF LEVI BENTLEY.

STATE v. LEVI BENTLEY.

(Filed 7 April, 1954.)

Criminal Law § 62e—

A sentence to the common jail of a county upon conviction of one offense, and a subsequent sentence to the State Prison upon a conviction of another offense, in the absence of order in the judgment that the sentences should run concurrently, are consecutive and not concurrent sentences.

PETITION for *certiorari*.

At the 2 January Term, 1952, of the Recorder's Court of Caldwell County the respondent, Levi Bentley, hereinafter referred to as the defendant, upon a third conviction of public drunkenness within a twelve-months period, was sentenced, as provided by G.S. 14-335, subparagraph 10, to confinement "in the common jail of Caldwell County for a period of twelve months and assigned to work upon the roads under the control and supervision of the State Highway and Public Works Commission." While serving this sentence the defendant, at the February Term, 1952, of the Superior Court of Caldwell County, pleaded guilty to a bill of indictment charging him, among other things, with feloniously breaking and entering a store building with intent to steal merchandise in violation of G.S. 14-54. Upon this plea the defendant was sentenced to confinement "in the State Prison at Raleigh, N. C. for not less than two nor more than three years, to be assigned to hard labor as provided by law, under the State Highway and Public Works Commission."

The judgment of the Superior Court contained no directive that the penitentiary term should be served either concurrently or consecutively with the jail sentence previously imposed in Recorder's Court.

On 3 October, 1952, the defendant, with gained-time credit for good behavior, completed service of his jail sentence and was retained in custody by the authorities of the State Highway and Public Works Commission and entered upon service of the penitentiary sentence imposed by the Superior Court of Caldwell County.

Thereafter the defendant, alleging that the two sentences were in law concurrent prison terms and that both had been completed, sued out a writ of *habeas corpus* which was returned before Judge Zeb V. Nettles, Judge presiding at the August Term, 1953, of the Superior Court of Caldwell County. Upon return of the writ, Judge Nettles, being of the opinion that the sentences imposed concurrent prison terms, entered an order releasing the defendant from custody. To the entry of the order the State of North Carolina, acting through the Attorney-General and the Director of Prisons, excepted and petitioned this Court for Writ of

Certiorari for review of the order of release. By order entered 13 October, 1953, we allowed the petition and directed that *capias* issue for the defendant's re-arrest, with direction that he be allowed privilege of bail to await the decision of this Court.

The record discloses the defendant executed bond, with approved sureties, in the amount and conditioned as required by the Court. It also appears he was served in apt time with a copy of the brief filed here by the State.

Attorney-General McMullan, Assistant Attorney-General Moody, R. Brookes Peters, Laurence J. Beltman, and E. W. Hooper for petitioner.

No counsel contra.

JOHNSON, J. *In re Smith,* 235 N.C. 169, 69 S.E. 2d 174, is decisive of this case. The rule is that two sentences, in the absence of a directive as to time of commencement, in order to run concurrently, must be sentences to the same place of confinement. Sentences to different institutions, in the very nature of things, are consecutive and not concurrent. *In re Smith, supra.*

The decision in *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169, which no doubt influenced the court below in releasing the defendant, is distinguishable. There, the sentences were to be served at the same prison. Here, the defendant was sentenced in the first case to the common jail of Caldwell County, in the second to the State Prison. It necessarily follows that he must serve the rest of the prison sentence imposed in the latter case. Let *capias* and commitment issue accordingly.

Reversed and remanded.

STATE v. INEZ SAILOR.

(Filed 7 April, 1954.)

1. Perjury § 4—

Subornation of perjury consists in procuring another to commit the crime of perjury, and in a prosecution for subornation the State must prove the guilt of the suborned person of the offense of perjury as well as defendant's guilt of procuring him to commit the crime. G.S. 14-210.

2. Perjury § 1—

Perjury is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question.

3. Perjury § 7—

In a prosecution for perjury the falsity of the oath must be established by the testimony of two witnesses or by one witness and corroborating circumstances.

4. Same—

Where in a prosecution for subornation of perjury there is evidence that the suborned person made conflicting statements under oath in separate trials, but there is no evidence tending to show which of the statements was false, the evidence is insufficient to convict defendant of subornation of perjury in regard to one of such statements.

APPEAL by defendant from *Pless, J.*, at October Term, 1953, of CABARRUS.

Criminal prosecution upon bill of indictment charging defendant with the crime of subornation of perjury in manner and form alleged.

Defendant pleaded not guilty.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Confinement in the Women's Division of the State's Prison and assigned to do such work as she is capable of performing for not less than three nor more than five years.

Defendant excepted thereto and appeals therefrom to the Supreme Court and assigns error.

Attorney-General McMullan, Assistant Attorney-General Love, and William P. Mayo, Member of Staff, for the State.

M. B. Sherrin for defendant, appellant.

WINBORNE, J. Subornation of perjury, the crime of which defendant stands convicted, consists in procuring another to commit the crime of perjury. G.S. 14-210. *S. v. Chambers,* 180 N.C. 705, 104 S.E. 670; *S. v. Cannon,* 227 N.C. 336, 42 S.E. 2d 343; *Bell v. State,* 5 Ga. App. 701, 63 S.E. 860.

The principle is aptly stated by *Hill, C. J.*, in the *Bell case, supra,* in this manner: "The crime of subornation of perjury consists of two elements—the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury."

Perjury, as defined by common law and enlarged by statute in this State, G.S. 14-209, is "a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn,

as to some matter material to the issue or point in question." *S. v. Smith,* 230 N.C. 198, 52 S.E. 2d 348, and cases cited.

And in a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances,—adminicular circumstances, as the late *Chief Justice Stacy* was wont to say, if you please,—sufficient to turn the scales against the defendant's oath. *S. v. Rhinehart,* 209 N.C. 150, 183 S.E. 388; *S. v. Hill,* 223 N.C. 711, 28 S.E. 2d 100; *S. v. Webb,* 228 N.C. 304, 45 S.E. 2d 345. See also *S. v. Peters,* 107 N.C. 876, 12 S.E. 74; *S. v. Hawkins,* 115 N.C. 712, 20 S.E. 623; *S. v. Sinodis,* 205 N.C. 602, 172 S.E. 190.

In the *Hill case, supra,* this Court, in opinion by *Seawell, J.,* declared: "The requirement as to the strength of such evidence is variously expressed. Practically all of the opinions require it to be of direct and independent force." See Anno. 111 A.L.R. 825.

In the light of these principles and rules of evidence, applied to the evidence offered upon the trial in Superior Court, as shown in the record on this appeal, taken in the light most favorable to the State, the Court is constrained to hold, at the threshold, that proof of the falsity of the oath charged is lacking. All that the evidence tends to show is that the alleged suborned witness at one trial swore, and at another time stated, that she did not purchase from defendant the whiskey found in her possession, and that she, on another trial swore, and at other times stated, that she did purchase the whiskey from defendant. And while there is testimony of officers, admitted for the purpose of corroboration, and tending to corroborate her as to what she had testified and stated, there is no evidence of corroborating circumstances tending to show which statement was false. Indeed, the Attorney-General, in brief filed here, states: "It is true that all the evidence presented goes directly back to the State's witness . . . the alleged suborned perjurer." There is no evidence of any independent circumstance. Hence, motion of defendant for judgment as of nonsuit entered at the close of the State's evidence should have been sustained.

Therefore, the judgment below is

Reversed.

L. M. MACON v. MISS E. M. MURRAY, SAM MURRAY AND JOHN MURRAY.

(Filed 7 April, 1954.)

Appeal and Error § 19—

When the pleadings upon which the case was tried are not in the record, the appeal must be dismissed. Rule of Practice in the Supreme Court No. 19.

APPEAL by defendants from *Hall, S. J.*, at October Special Term, 1953, of RANDOLPH.

Civil action to recover compensation for work performed by plaintiff for defendants in cutting timber standing on their land, etc., heard in this Court on former appeals reported in 231 N.C. 61, 55 S.E. 2d 807, and 236 N.C. 484, 73 S.E. 2d 165, and heard, thereafter, in Superior Court, on motion of defendants to re-tax costs therein—when and where the judge presiding, "being of the opinion that no sufficient cause had been shown for granting said motion," ordered that the motion be disallowed. Defendants excepted thereto and appeal to Supreme Court, and assign error.

John L. Murray for defendants, appellants.
No counsel contra.

PER CURIAM. As the pleadings on which the case was tried have been omitted from the record, in violation of the requirements of Rule 19, Section 1 of the Rules of Practice in the Supreme Court, 221 N.C. 544, at page 553, the appeal must be dismissed in accordance with the uniform practice in such cases. See *S. v. Lumber Co.*, 207 N.C. 47, 175 S.E. 713, and cases cited. See also *Ins. Co. v. Bullard,* 207 N.C. 652, 178 S.E. 113; *Goodman v. Goodman,* 208 N.C. 416, 181 S.E. 328; *Bank v. McCullers,* 211 N.C. 327, 190 S.E. 217; *Washington County v. Land Co.*, 222 N.C. 637, 24 S.E. 2d 338; *Ericson v. Ericson,* 226 N.C. 474, 38 S.E. 2d 517; *S. v. Jenkins,* 234 N.C. 112, 66 S.E. 819; *Smoak v. Newton,* 234 N.C. 451, 67 S.E. 2d 462; *Allen v. Allen,* 235 N.C. 554, 70 S.E. 2d 505. "We can judicially know only what properly appears on the record," *Stacy, C. J.*, in *S. v. Lumber Co., supra.*

In the absence of agreement of parties, it is not now deemed expedient to supply the deficiency by reference to records on former appeals.

Appeal dismissed.

STATE v. DALTON TAYLOR.

(Filed 7 April, 1954.)

1. Criminal Law § 81c: Appeal and Error § 24—

As a general rule only assignments of errors supported by exceptions duly and timely noted will be considered on appeal.

2. Criminal Law § 81c (2): Appeal and Error § 39f—

Exceptions to the charge cannot be sustained when the charge construed contextually is without prejudicial error.

APPEAL by defendant from *Grady, Emergency Judge,* September Term, 1953, of LENOIR.

This defendant was tried and convicted in the Municipal-County Court of Kinston and Lenoir County upon a warrant charging him with driving a motor vehicle upon the public roads while under the influence of intoxicating liquors, opiates, or narcotic drugs. From the judgment imposed he appealed to the Superior Court where he was tried *de novo* on the original warrant, and again convicted. He now appeals from the judgment entered in the Superior Court, assigning error.

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

LaRoque, Allen & Parrott for defendant appellant.

PER CURIAM. The defendant assigns as error certain portions of the charge. However, no exceptions were taken to such portions of the charge upon which an assignment of error may rest.

It is the general rule that assignments of error not supported by exceptions duly and timely noted, will not be considered upon appeal. *S. v. Oliver,* 213 N.C. 386, 196 S.E. 325; *In re Will of Beard,* 202 N.C. 661, 163 S.E. 748; *Dixon v. Osborne,* 201 N.C. 489, 160 S.E. 579. For exceptions to this rule see *S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664, and *S. v. Parnell,* 214 N.C. 467, 199 S.E. 601.

The instant case, however, does not fall within an exception to the general rule. Even so, the charge, when considered contextually, as it must be, was in substantial compliance with our decisions in *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688; *S. v. Bowen,* 226 N.C. 601, 39 S.E. 2d 740, and *S. v. Lee,* 237 N.C. 263, 74 S.E. 2d 654.

No error.

BOARD OF EDUCATION OF ONSLOW COUNTY v. THE BOARD OF COUNTY COMMISSIONERS OF ONSLOW COUNTY.

(Filed 14 April, 1954.)

1. Estoppel § 3—

Where a county board of education submits to the jurisdiction of the Superior Court by excepting to and appealing from the decision of the arbitrator in proceedings under G.S. 115-160, the county board of education will not be heard on further appeal to the Supreme Court to challenge the findings of the Superior Court on the ground that there was no *bona fide* disagreement between the board of education and the board of county commissioners and that the county commissioners arbitrarily reduced the budget prepared and presented to it.

2. Appeal and Error § 40d: Schools § 9f—

Where the board of education and board of county commissioners are unable to agree on the amounts set up in the school budget to be provided by county funds, and the procedure prescribed by G.S. 115-160 is invoked, the findings of the Superior Court on appeal from the decision of the clerk of the Superior Court acting as arbitrator, are conclusive unless arbitrary or in abuse of statutory duty.

3. Same—

Where, on appeal to the Superior Court under the procedure prescribed under G.S. 115-160, the Superior Court makes findings of the amounts necessary for certain items of the capital outlay budget and the current expense budget in sums less than that requested by the county board of education, but there is no showing of present necessity for the amounts budgeted as compared with the amounts allowed, *held:* The record fails to show that the findings of the Superior Court are arbitrary and, therefore, such findings are conclusive, the estimates of the board of education not being determinative.

Semble: G.S. 115-160 and 115-161 are not superseded by the School Machinery Act, G.S., 115-347, *et seq.*, but the statutes must be construed *in pari materia* and G.S. 115-160 and 115-161 still obtain as to all items of the budget for which the county commissioners remain under duty to provide by taxation. The policy of the law in regard to the maintenance and support of the uniform system of public schools for the entire State, the items of the budget provided for by the State and the items for which the county commissioners must or may provide by *ad valorem* taxes, reconciliation of inconsistent provisions of the several statutes, and the repeal of repugnant provisions which may not be reconciled by the last enacted provision regardless of its position in the code, discussed by MR. JUSTICE BOBBITT.

APPEAL by Board of Education of Onslow County from *Stevens, J.*, October Term, 1953, of ONSLOW.

This is neither a civil action nor a special proceeding. The appeal is from judgment entered as the last step of the proceedings set out below:

Onslow County has only one administrative unit, the County Administrative Unit. The Board of Education prepared and adopted a Current Expense Budget and a Capital Outlay Budget for the 1953-54 school year. The Current Expense Budget was set up under the six captions set forth in G.S. 115-157 (a), to wit: (1) General Control; (2) Instructional Service; (3) Operation of Plant; (4) Maintenance of Plant; (5) Fixed Charges; and (6) Auxiliary Agencies. Items in the Capital Outlay Budget were grouped under four general headings, to wit: (1) New Buildings and Grounds; (2) Old Buildings and Grounds; (3) Books; and (4) Transportation Equipment and Facilities.

The total amounts requested were: For Current Expenses, $128,500.00; for Capital Outlay, $62,000.00. Upon submission to the County Commissioners, they eliminated and reduced items, approving: For Current Expenses, $97,700.00; for Capital Outlay, $34,000.00.

Being unable to compose their differences in joint session, the two boards followed the procedure set forth in G.S. 115-160. The Clerk of the Superior Court was called in as arbitrator. After hearing testimony, the arbitrator's decision was: For Current Expenses, $111,700.00; for Capital Outlay, $45,000.00. The Board of Education appealed to the Superior Court, specifically excepting in each instance where an item set up in its budget had been eliminated or reduced. Thereupon, a jury trial having been waived, the presiding judge heard the testimony of I. B. Hudson, County Superintendent, J. P. Brown, Chairman of the Board of Education, and Cameron P. West, Principal of the Jacksonville Schools, offered by the Board of Education, and the testimony of Harry B. Moore, Chairman of the Board of County Commissioners, offered by the County Commissioners, and upon this testimony, and the exhibits offered by the Board of Education, made findings of fact, wherein the amounts approved by the court were: For Current Expenses, $112,400.00; for Capital Outlay, $47,000.00. Thereupon, the court entered judgment that the County Commissioners of Onslow County *levy a tax* "sufficient in amount to provide a current fund in the amount of $112,400.00; a capital outlay fund in the amount of $47,000.00, and a debt service fund in the amount of $74,425.00, for the use and benefit of the Board of Education of Onslow County for the current fiscal year, beginning as of July 1, 1953, and to be used, expended and administered by the said Board of Education in the operation and maintenance of the said schools in the manner prescribed by law."

The Board of Education appealed, excepting to each finding of fact not in accord with the budget prepared and presented by it and to the court's failure to find that all items in the amounts set out in its budgets were necessary for the maintenance of the Onslow County Schools. An addendum to the record sets forth that the Board of County Commission-

ers assigns errors, viz.: (1) to the refusal of the court to dismiss the appeal of the Board of Education, (2) to the judgment, and (3) to the judgment referred to in the next paragraph hereof; but no entries of appeal by the County Commissioners appear in the record.

On account of the delay occasioned by the appeal, the court below, in accordance with G.S. 115-161, entered an order requiring the County Commissioners to provide funds for Debt Service in the amount of $74,425.00; and, in addition, $148,857.85 for use in the payment of the Current Expenses in the operation of the public schools of the County for the fiscal year beginning July 1, 1953, being the amount expended for this purpose during the preceding fiscal year.

Jones, Reed & Griffin for plaintiff, appellant.
Carl V. Venters and E. W. Summersill for defendant, appellee.

BOBBITT, J. The Board of Education, by exceptive assignments of error, challenges the court's findings of fact, insisting that the court should have found from the evidence that $128,500.00 was necessary as a Current Expense fund; that $62,000.00 was necessary as a Capital Outlay fund; and that each item in its budget and included in these totals was necessary for the maintenance of the public schools of the county for the fiscal year beginning July 1, 1953. The Board of Education, on exceptive assignments of error, contends further that there was no *bona fide* disagreement between the two Boards as contemplated by G.S. 115-160; that the County Commissioners arbitrarily reduced the budget presented; and that the only evidence before the court was that the budget as presented by the Board of Education represented the amounts necessary for the maintenance of the schools for said fiscal year.

It should be noted that the appeal presents no controversy relating to the amount provided as Debt Service funds.

The statutory procedure invoked, G.S. 115-160, expressly provides that when the Board of Education and the County Commissioners are unable to agree on the amounts set up in the budgets, "the clerk of the superior court shall act as arbitrator upon the issues arising between said two boards, and shall render his decision thereon within ten days. But either the county board of education or the board of county commissioners shall have the right to appeal to the superior court within thirty days from the date of the decision of the clerk of the superior court, and it shall be the duty of the judge hearing the case on appeal to find the facts as to the amount of the current expense fund, the capital outlay fund, and the debt service fund, *which findings shall be conclusive*, and shall give judgment requiring the county commissioners to levy the tax which will provide the amount of the current expense fund, the capital outlay fund and

the debt service fund, *which he finds necessary* to maintain the schools in every school district in the county." (Emphasis added.) Having invoked the jurisdiction of the Superior Court by exceptions to and appeal from the decision of the arbitrator, which in turn is the basis of the jurisdiction of this Court upon appeal, the Board of Education cannot be heard now to challenge the findings and judgment of the court below on the ground that there was no *bona fide* disagreement between the two Boards or on the ground that the County Commissioners arbitrarily reduced the budgets prepared and presented by it. Upon appeal, this Court is limited to a consideration of assigned errors of law in the proceedings in the Superior Court. *Worsley v. Rendering Co.,* 239 N.C. 547, and cases there cited. By the express terms of the statute, the findings of the Superior Court judge are *conclusive.* Hence, the findings of the court below must stand, the record failing to disclose that these findings were made arbitrarily or in abuse of statutory duty.

The Board of Education's budget for Current Expenses called for a total of $128,500.00 as compared with the findings of fact by the court below of $112,400.00, a difference of $16,100.00. The Board of Education's budget for Capital Outlay called for a total of $62,000.00 as compared with the findings of fact by the court below of $47,000.00, a difference of $15,000.00 Consideration of the individual items accountable for these differences in the totals will clarify the questions presented for consideration.

CAPITAL OUTLAY BUDGET

In this budget, three items make up the difference of $15,000.00. The court below did not allow an item of $10,000.00 for new buildings. The court below allowed $2,500.00 for new library books in lieu of the requested $5,000.00. The court below allowed $2,500.00 for new textbooks in lieu of the requested $5,000.00.

While the Board of Education deemed it advisable to have the $10,000.00 budgeted for new buildings, no present necessity therefor or intended use thereof was clearly shown. Conceding, without deciding, that the items for new library books and new textbooks were proper items in a Capital Outlay budget under G.S. 115-157 (b), (see G.S. 115-279), no present necessity for the amounts budgeted as compared with the amounts allowed was clearly shown.

CURRENT EXPENSE BUDGET

For reasons soon to be apparent, we consider the several items making up the difference of $16,000.00 with reference to the six captions of this budget.

General Control: The court below did not allow an item of $3,000.00 for Superintendent's Aide. However, the court below increased the item, Travel—Superintendent, from the budgeted amount of $500.00 to $600.00.

Instructional Service: The court below allowed for the item, Vocational Agent—Travel, $2,400.00 in lieu of the requested $2,700.00. The court below allowed for the item, Clerical Assistants, $9,300.00 in lieu of the requested $10,000.00. However, the court below increased the item, Home Economist—Travel, from the budgeted amount of $300.00 to $600.00.

Operation of Plant: All items under this caption were allowed by the court below in the amounts requested.

Maintenance of Plant: The court below allowed for the item, Repairs to Buildings and Grounds, $20,000.00 in lieu of the requested $25,000.00. The court below allowed for the item, Repairs and Replacements—Furniture and Instructional Apparatus, $7,500.00 in lieu of the requested $10,000.00. The court below allowed for the item, Repairs and Replacements—Heat, Light and Plumbing, $7,000.00 in lieu of the requested $10,000.00.

Fixed Charges: All items under this caption were allowed by the court below in the amounts requested.

Auxiliary Agencies: The court below allowed for the item, Libraries, $8,000.00 in lieu of the requested $10,000.00.

Except as indicated above, the court below allowed all items in the amounts requested.

The evidence offered by the Board of Education stresses generally the increase in the number of buildings and pupils in the schools of the Onslow County Administrative Unit. Emphasis is placed upon evidence to the effect that in the school year, 1952-53, much larger amounts were actually expended, particularly for the items for Maintenance of Plant, than the amounts set up for the corresponding items in its 1953-54 budget. It was explained that this was possible because of a balance of some $60,000.00 carried over from the preceding year and no substantial amount was available for 1953-54 other than that provided by the budget. The County Superintendent, Mr. Hudson, emphasized the desirability to North Carolina and to the local community of having a school system of which they could be proud, with a reputation for progressiveness, with improved equipment and facilities and suitably maintained. We appreciate fully his interest and his efforts looking to raising the standards of the Onslow schools. However, the evidence is vague, if existent, as to detail proposals in reference to the expenditure of the budgeted amounts for Maintenance of Plant. The larger expenditures for repairs and replacements during 1952-53, in the absence of detail as to present needs, is a fact from which the inference could be drawn that there was less need

for expenditures for these purposes in 1953-54. Be that as it may, no present necessity for the amounts budgeted as compared with the amounts allowed was clearly shown; and we cannot say that the court below made findings of fact arbitrarily or in abuse of statutory duty. Of course, it is the responsibility of the County Commissioners to provide the necessary funds for Maintenance of Plant and Fixed Charges as well as for Capital Outlay and Debt Service. But the estimates of the Board of Education are not determinative. Should actual deficiency be disclosed, the County Commissioners in the next year would be confronted by facts and conditions disclosing what was actually necessary rather than an estimate of needs.

Having concluded that the findings of fact by the court below must be regarded as conclusive in respect of these budgets for 1953-54, conceding that the procedure under G.S. 115-160 was in all respects appropriate, perhaps it would be well to refrain from further discussion. However, the County Commissioners, while not appealing from the judgment of the court below, contend in their brief that G.S. 115-160 and G.S. 115-161 are now obsolete, superseded by The School Machinery Act (G.S. 115-347, *et seq.*); and that the court below should have dismissed the Board of Education's exceptions to the decision of the arbitrator and its appeal from such decision. While not the basis of decision here, we call attention to the following matters.

It is an understatement to say that the manifold provisions of G.S., Vol. 3A, Ch. 115, present difficulties when an attempt is made to reconcile statutes apparently in conflict in relation to the same subject matter. Evidently, the General Assembly had this in mind when by Resolution 42, Session Laws of 1953, p. 1370, it provided for a commission to study the school laws with a view to making recommendations to the 1955 Session of the General Assembly as to revisions which will eliminate any repugnancies and in general clarify and revise existing laws on the subject. We are concerned here only with a possible "repugnance" relating to procedure relevant to the subject matter of this proceeding.

G.S. 115-157, G.S. 115-160 and G.S. 115-161 bring forward the provisions of Sections 175, 187 and 188, respectively, of Ch. 136, Public Laws of 1923, as amended by Sections 1, 12 and 14, respectively, of Ch. 239, Public Laws of 1927. Without question, these statutes were in force as the law of this State prior to the enactment of Ch. 562, Public Laws of 1933, entitled: "AN ACT TO PROMOTE EFFICIENCY IN THE ORGANIZATION AND ECONOMY IN THE ADMINISTRATION OF THE PUBLIC SCHOOLS OF THE STATE; TO PROVIDE FOR THE OPERATION OF A UNIFORM SYSTEM OF SCHOOLS IN THE WHOLE OF THE STATE, FOR A TERM OF EIGHT MONTHS, WITHOUT THE LEVY OF ANY AD VALOREM TAX THEREFOR."

Prior to the 1933 Act, Sections 187 and 188, Ch. 136, Public Laws of 1923, were discussed in *In re Board of Education*, 187 N.C. 710, 122 S.E. 760, and in *Rollins v. Rogers*, 204 N.C. 308, 168 S.E. 206; and reference thereto was made in *Board of Education v. Walter*, 198 N.C. 325, 151 S.E. 718, and in *Wilkinson v. Board of Education*, 199 N.C. 669, 155 S.E. 562. Since the 1933 Act, we find no case in which these sections are discussed.

Prior to the 1933 Act, each county, in the manner prescribed by Ch. 136, Public Laws of 1923, as amended, was required to provide the support for its schools in compliance with the constitutional mandate; and in so doing budgets were required for Current Expenses, Capital Outlay and Debt Service. The General Assembly appropriated money to constitute "The State Equalizing Fund," which the Board of Education was authorized to apportion so that the burden of counties less able to make the required provision would be to some extent equalized.

By the 1933 Act, an entirely new policy for the operation and support of schools was put into effect; and a uniform system of State-supported operation of public schools for the entire State was adopted. It repealed or subordinated all statutes relating to the public schools in conflict with its provisions. *Evans v. Mecklenburg*, 205 N.C. 560, 172 S.E. 323. One of its primary purposes was the elimination of *ad valorem* taxes as a source of revenue to provide for the operation of the public schools for the constitutional term. See dissenting opinion by *Barnhill, J.* (now *C. J.*), in *Fletcher v. Comrs. of Buncombe*, 218 N.C. 1, 9 S.E. 2d 606. The 1933 Act is the basis and forerunner of the later comprehensive statute, Ch. 358, Public Laws of 1939, which, as amended, is now codified as G.S. 115-347 through G.S. 115-382, being G.S. Ch. 115, Art. 50, entitled, "The School Machinery Act."

G.S. 115-356 provides for the use of State funds for the operation of the public schools as determined by the State Board of Education for items set forth under four headings: 1. General Control; 2. Instructional Service; 3. Operation of Plant; 4. Auxiliary Agencies. It provides further:

"The objects of expenditure designated as *maintenance of plant* and *fixed charges* shall be supplied from funds required by law to be placed to the credit of the public school funds of the county and derived from fines, forfeitures, penalties, dog taxes, and poll taxes, and from all other sources except State funds: Provided, that *when necessity* shall be shown, and *upon the approval* of the county board of education or the trustees of any city administrative unit, the State Board of Education *may approve* the use of *such funds* in any administrative unit to supplement any object or item of the current expense budget, including the supplementing of the teaching of vocational subjects; and in such cases the tax levying

authorities of the county administrative unit shall make a sufficient tax levy to provide the necessary funds for *maintenance of plant, fixed charges,* and *capital outlay:* Provided, further, that the tax levying authorities in any county administrative unit *may* levy taxes to provide necessary funds for teaching vocational agriculture and home economics and trades and industrial vocational subjects supported in part from federal vocational educational funds: Provided, further, that nothing in this sub-chapter shall prevent the use of federal and/or privately donated funds which may be made available for the operation of the public schools under such regulations as the State Board of Education may provide: Provided further, that the tax levying authorities in any county administrative unit *may* levy taxes to provide necessary funds for attendance enforcement, supervision of instruction, health and physical education, *clerical assistance,* and accident insurance for school children transported by school bus: Provided, that nothing in this section be interpreted as repealing the present statutes requiring the State Board of Education's approval of local unit budgets." (Emphasis added.)

In the current expense budget prepared and submitted by the Board of Education to the County Commissioners, the captions for items for which State support is provided are used; and in addition the other two captions set forth in G.S. 115-157 (a), namely, Maintenance of Plant and Fixed Charges. In respect of Fixed Charges, it is noted that the findings of the court are in accord with the Board of Education's budget, namely, $8,600.00. In respect of Maintenance of Plant, the Board of Education's budget called for a total of $45,000.00 as compared with the court's finding of $34,500.00. The testimony of the County Superintendent indicates that fines and forfeitures yield between $48,000.00 and $50,000.00 per year.

When authorized by the qualified voters in a county administrative unit, the supplemental funds made available may be used "in order to operate schools of a higher standard than that provided by State support;" and the procedure with reference to the approval of budgets relating to such local supplements is prescribed. G.S. 115-361, G.S. 115-363.

Nothing in the record indicates that the qualified voters have authorized a local supplement. Hence, the applicable statutory procedure is that set forth in G.S. 115-356. Had the County Board of Education and the State Board of Education approved the use of county school funds derived from fines, forfeitures, etc., for items of Current Expense, then and only then would the County Commissioners be required to levy taxes to provide fully for the items of Maintenance of Plant and Fixed Charges. So far as the record discloses, nothing was done by the Board of Education in conformity to this procedure. Rather, the parties elected to proceed in accordance with the provisions of G.S. 115-160 and G.S. 115-161.

What is the status of G.S. 115-160 and G.S. 115-161? To say that they are obsolete and superseded by the School Machinery Act or that they have been repealed in whole or in part ignores the fact that they were enacted or re-enacted as a part of our statutory law when the General Statutes of 1943 and later when G.S., Vol. 3A, were adopted. (Ch. 99, Session Laws of 1953.) The several sections are to be construed *in pari materia.* If possible, they are to be reconciled and harmonized. If and when confronted by inescapable conflicts and inconsistencies, these must be resolved by the Court as the occasion arises. *Parker v. Anson County,* 237 N.C. 78, 74 S.E. 2d 338. In ascertaining the legislative intent, the judicial approach is well stated in 82 C.J.S., p. 912, Statutes, Section 385 (b), as follows:

"The different sections should be regarded, not as prior and subsequent acts, but as simultaneous expressions of the legislative will; but, where every means of reconciling inconsistencies has been employed in vain, the section last adopted will prevail, regardless of their relative positions in the code or revision. An unnecessary implication arising from one section, inconsistent with the express terms of another on the same subject, yields to the expressed intent, and the two sections are not repugnant. Any rules contained in the code itself for determining which provision is to prevail should be followed in case of conflict. Form must give way to legislative intent in case of conflict."

See also, Sutherland, Statutory Construction, Section 3711; Anno., 12 A.L.R. 2d 423.

Undertaking the task of statutory construction, we note the radical change in the school policy of the State wrought by the 1933 Act. Since then, under The School Machinery Act, the State, rather than the county, has the responsibility for the school program. Under G.S. 115-356 State funds are provided for the items budgeted under the captions (1) General Control, (2) Instructional Service, (3) Operation of Plant, and (4) Auxiliary Agencies. The County Commissioners *are not required* to levy taxes for items under these four of the six captions set forth in G.S. 115-157 (a). True, under G.S. 115-356 the County Commissioners *may* levy taxes for additional *specified* purposes, *e.g.,* for teaching vocational agriculture and home economics and trades and industrial vocational subjects supported in part from federal vocational educational funds, and for attendance enforcement, supervision of instruction, health and physical education, clerical assistance, etc. Moreover, if and when the County Board of Education and the State Board of Education determine that necessity therefor exists, the funds derived from fines, forfeitures and other specified sources, belonging to the county public school fund and ordinarily for use in the payment of items under the captions Maintenance of Plant and Fixed Charges, may be directed for use in supplement-

ing an object or item of the Current Expense Budget for which State funds are provided. When this is done, the duty rests upon the County Commissioners to make a sufficient tax levy to provide the necessary funds for Maintenance of Plant and Fixed Charges.

It would seem, therefore, that whenever the positive duty rests upon the county tax levying authorities to provide the necessary funds the provisions and procedures of G.S. 115-157, G.S. 115-160 and G.S. 115-161 are applicable. No other procedure is indicated to determine differences between the County Board of Education and the County Commissioners. Specifically, this would seem to cover: (1) the Debt Service Budget; (2) the Capital Outlay Budget; (3) two items in the Current Expense Budget, namely, Maintenance of Plant and Fixed Charges, *i.e.,* the deficiency, if any, after application of the county school fund derived from fines, forfeitures, etc., to be provided by *ad valorem* taxation; and (4) the same two items in the Current Expense Budget, namely, Maintenance of Plant and Fixed Charges, whenever the county school fund derived from fines, forfeitures, etc., under the procedure indicated above, shall have been directed for use in supplementing items in the Current Expense Budget for which State funds are provided.

We appreciate the desire of the County Superintendent and of the Board of Education to provide for the operation of the schools of the county according to standards higher than is possible by the use of State funds alone for current expenses in the conduct of the school program. If the qualified voters share this desire, the procedure is provided whereby supplemental funds may be authorized for such purpose and provided through county *ad valorem* taxation. G.S. 115-361, G.S. 115-363.

The judgment of the court below requires that the County Commissioners levy a tax for the school year 1953-54 sufficient to provide a Current Expense fund in the amount of $112,400.00 and a Capital Outlay fund in the amount of $47,000.00. In view of what has been stated above, it would seem that the failure of the court below to add, "less such part of these amounts as is available for Maintenance of Plant and Fixed Charges in the county school fund, derived from fines, forfeitures and other sources, specified in G.S. 115-356," resulted in a judgment more favorable to the Board of Education than that to which it was entitled. In any event, no error of law prejudicial to the Board of Education has been made to appear. Therefore, the judgment of the court below will be

Affirmed.

STATE v. BEATRICE MONROE COLLINS.

(Filed 14 April, 1954.)

1. **Receiving Stolen Goods § 1a—**

The offense proscribed by G.S. 14-71 is the receiving with felonious intent the goods or property of another knowing at the time that the same had been feloniously stolen or taken away. If the property was not stolen or taken from the owner in violation of statute, as where the original taking was without felonious intent or was not against the owner's will or consent, the receiver is not guilty of receiving stolen property.

2. **Receiving Stolen Goods § 6—**

Defendant was charged with larceny and receiving. The State failed to prove her guilt of larceny of the goods, and while items of clothing which defendant possessed were identified as having come from two stores, or were of the brand and make carried by them respectively, there was no direct evidence that these items had been feloniously stolen from the stores, and the question was left in mere speculation or conjecture. *Held:* Defendant's motion for nonsuit should have been allowed.

APPEAL by defendant Beatrice Monroe Collins from *Grady, Emergency Judge,* January Term 1954 of ONSLOW. Reversed.

This is a criminal action in which the defendant and one Henrietta Monroe were tried upon two bills of indictment, which by consent were consolidated for trial. The first bill of indictment in the first count charged the defendant and Henrietta Monroe on 5 August 1953 with the larceny of several men's sweaters, ladies' gowns, infants' wear and other miscellaneous items of merchandise of the value of $250.00, the property of Belk's Department Store, Inc.; the second count in this bill of indictment charged them with receiving this property knowing it to have been feloniously stolen, taken and carried away. The second bill of indictment in the first count charged them on 5 August 1953 with the larceny of one Eagle suit, seven Holbrook sport shirts and seven children's dresses of the value of $250.00, the property of Margolis' Department Store; and the second count with receiving this property knowing it to have been feloniously stolen.

The State's evidence tended to show the following facts:

About 4:00 p. m. on 5 August 1953 the defendant and Henrietta Monroe stopped an automobile near a field about two miles from the Town of Newport, Carteret County. They got out of the car and carried three or four boxes into the field, leaving them there. In these boxes were a suit of clothes, several dresses, sweaters, baby clothes, shirts, pants, shoes and other things. These boxes were placed in an open field where there were beans 2½ or 3 feet high. Y. Z. Simmons, who saw these boxes put in his field, carried the boxes to his house, and notified the officers. The

goods shown to Simmons in court looked like the goods he carried from the field.

Sheriff Salter first saw these goods in the back seat of the car of the Chief of Police at Newport about 5:30 p. m. that afternoon. Douglas Monroe is the husband of Henrietta Monroe, and the brother of the defendant. In the presence of his wife and the defendant, he said he was supposed to pick up some things at Newport for the defendant; that he didn't know what he was to pick up. The defendant and Henrietta Monroe denied everything Douglas Monroe said. Before talking to Douglas Monroe, the Sheriff went to the field and concealed himself. He saw the defendant drive up in a car, get out, go into the field and walk about 30 feet, looking from side to side. When she returned to the car, the Sheriff asked her why she was there and she replied a call of nature. On several items were Margolis' tags and Belk's tags. Some of the merchandise had identification marks, and some did not.

Margolis' Department Store is in Jacksonville, and Belk has a department store in the same town. Belk's Store handles Parrott shoes. A Parrott shoe taken from the field had Belk's tag and code number on it. On the morning of 5 August 1953, Belk's Store put out in the store some shirts and Jansen sweaters. That afternoon a lot of them were missing. The sales tickets did not account for them. Lingerie found in the field was not identified, because it had no Belk's tags on it. Belk's Store handles the type sweater found in the field, though the only witness for Belk's Store couldn't say whether the sweater was one of Belk's or not. The defendant and Henrietta Monroe were in Belk's Store about 10:00 a.m. on 5 August 1953. An employee of the store watched them, but did not see them take anything. On cross-examination this witness said: "I wouldn't say these shoes came from our store. I only know we handle shoes of that brand and make."

The sole witness for Margolis' Department Store was Mr. Margolis. On or about 5 August 1953, he missed six Holbrook sport shirts, which he had received and marked the afternoon before, and had put out in the store the next morning. A shirt was shown to him by the Solicitor, and Mr. Margolis said: "That is one of the types of shirts we sell, and that same design we had just gotten in." He identified a box as having his cost mark written on it. He also identified some children's dresses that had his cost mark on them. The Solicitor showed him a man's suit, Eagle brand. His store is the only store in Jacksonville that handles such a brand. The labels had been ripped out of this suit; the other tags were still on it. On cross-examination he testified he didn't know whether one of his clerks had sold the suit or not—he did not know how long it had been out of the store. He was shown two pairs of pants, a shirt from the box with his code number on it, and other items, and on cross-examination

he said he didn't know how they got out of the store, and didn't know whether they were stolen or not. On redirect examination he said some shirts disappeared the morning they were put out, and so far as he knew there were no cash receipts for them.

The defendant and Henrietta Monroe offered no evidence.

Verdict: Not Guilty as to the defendant and Henrietta Monroe of larceny as charged in each indictment: Guilty as to the defendant and Henrietta Monroe of receiving stolen property, knowing it to have been stolen, as charged in both indictments.

Judgment: As to the defendant Beatrice Monroe Collins, imprisonment in the State's prison; as to Henrietta Monroe, imprisonment in the State's prison, which sentence was suspended and she was placed on probation.

Beatrice Monroe Collins alone appeals, assigning error.

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

Luther Hamilton and Luther Hamilton, Jr., for defendant, appellant.

PARKER, J. The offense of receiving stolen goods is set forth in G. S. N. C. 14-71. That statute in part reads: "If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made . . ."

To convict the State must prove that the defendant, with felonious intent, received the goods, the property of another, knowing at the time that the same had been previously stolen or taken from the owner in violation of G. S. N. C. 14-71. An essential element of the offense is that the goods had been previously stolen or taken from the owner in violation of the statute at the time of receipt by the defendant. If the property was not stolen or taken from the owner in violation of the statute, as where the original taking was without felonious intent, or was not against the owner's will or consent, the receiver is not guilty of receiving stolen property. *S. v. Brady*, 237 N.C. 675, 75 S.E. 2d 791; *S. v. Yow*, 227 N.C. 585, 42 S.E. 2d 661; *S. v. Oxendine*, 223 N.C. 659, 27 S.E. 2d 814; *S. v. Shoaf*, 68 N.C. 375; *Kirby v. U. S.*, 174 U.S. 47, 43 L. Ed. 890; 26 N. C. Law Review 192, *et seq.*; 76 C. J. S., Receiving Stolen Goods, Sec. 2a; 45 Am. Jur., Receiving Stolen Property, Sec. 5.

"Inasmuch as the statute defines the crime as one including both the fact of theft and the fact of knowledge of the theft, it follows that, if there was no theft, the buying of the property is not criminal, even if the buyer believes the property to have been stolen." *Le Fanti v. U. S.*, N. J., 259 F. 460, 170 C. C. A. 436.

Farzley v. State, 231 Ala. 60, 163 So. 394, is a case of receiving stolen property. The Court said: "But it is essential to the crime here charged that the goods received by defendant were stolen and retained that status until they were delivered to defendant."

The defendant assigns as error the refusal of the trial court to allow her motion for nonsuit as to each count in each indictment. The jury acquitted the defendant and Henrietta Monroe as to the larceny counts in both indictments.

Mr. Margolis testified that he did not know how the goods shown him got out of his store, and did not know whether they were stolen or not. The sole witness for Belk's Department Store said in respect to the shoes shown him "I wouldn't say these shoes came from our store; I only know we handle shoes of that brand and make"; and in respect to a sweater shown him, all he said was Belk's handles that type sweater, but he couldn't say whether the sweater was one of Belk's or not.

The evidence, considered in the light most favorable to the State, though it may give rise to speculation and conjecture, is not of sufficient probative force to be submitted to a jury under the second counts in each indictment because this essential element of the offense of receiving stolen property that the property put out in the field by the defendant and Henrietta Monroe had been previously stolen or taken from the owner or owners in violation of G. S. N. C. 14-71 is lacking. *S. v. Smith,* 236 N.C. 748, 73 S.E. 2d 901; *S. v. Gaddy,* 209 N.C. 34, 182 S.E. 667; *S. v. White,* 89 N.C. 462; *Wittkowsky v. Wasson,* 71 N.C. 451.

The State in its brief in discussing the counts of receiving stolen property relies upon *S. v. Holder,* 188 N.C. 561, 125 S.E. 113. The case is not in point. In the opinion the Court says: "It is the position of the defendants that they cannot be convicted of larceny, but only of forcible trespass, because of the open manner in which the property was taken."

It is ordered that the conviction under each indictment and the sentence of the appellant be vacated, as we sustain her motion for a compulsory nonsuit.

Probably the merchandise carried into the field by the defendant and Henrietta Monroe had in fact been previously stolen, but sufficient evidence of that does not appear in the Record, and we cannot go out of the case sent up.

Reversed.

STATE v. WILLIAM WORTHAM.

(Filed 14 April, 1954.)

1. Bastards § 6—Evidence held sufficient for jury in this prosecution for willful failure to support illegitimate child.

Testimony to the effect that defendant admitted he was the father of prosecutrix' child, that though he gave prosecutrix' mother a small sum of money for the child on one occasion, he had since refused to support it, that letters written by the Welfare Department relative to his responsibility for the child's support were mailed to him and not returned to the sender, and that he admitted having intercourse with prosecutrix on one occasion about eight months prior to the child's birth, *is held* sufficient to be submitted to the jury, notwithstanding defendant's testimony in defense that he was not the father of the child, that no demand had been made on him for support, that the money he had paid was not in discharge of any duty to support, and the introduction by him of a birth certificate stating the length of pregnancy so as to antedate the time he admitted having intercourse.

2. Criminal Law §§ 42a, 53i—

Where defendant testifies in his own behalf, his evidence of good character is competent to be considered both as substantive evidence on the issue of guilt or innocence and also as affecting his credibility as a witness, and an instruction which restricts such evidence to the question of credibility entitles him to a new trial.

APPEAL by defendant from *Harris, J.*, October Term, 1953, of FRANKLIN.

The defendant was tried and found guilty in the Recorder's Court of Franklin County 12 May, 1953, on a warrant issued out of that court, charging him with the willful failure and refusal, after demand, to support his illegitimate child, born 17 May, 1951, begotten by him upon the body of Mamie Lester. The defendant appealed from the judgment imposed in the Recorder's Court to the Superior Court of Franklin County where he was tried *de novo* on the warrant.

The prosecuting witness, Mamie Lester, testified that she is an unmarried woman; that she gave birth to a child on 17 May, 1951, and that the defendant William Wortham is the father of the child; that the defendant had sexual intercourse with her in September, 1950; that she has never had "intercourse with anybody besides William Wortham."

The mother of the prosecuting witness testified that she talked with the defendant after the child was born, when he was home on leave from the Army, about supporting the child; that he admitted that it was his child and gave her $50.00 to pay to the County and promised he would get more if he could when he went back to camp and would get papers through

the Army if he could to make an allotment for the child; that he has paid nothing further for the support of the child.

The evidence discloses that the illegitimate child is an epileptic; that the mother is of low mentality; that the Welfare Department of Franklin County took custody of the child on 23 May, 1951; that the mother of the prosecuting witness paid the hospital bills in connection with the birth of the child, which amounted to about $130.00, and paid to the County Welfare Department $50.00 to $55.00 per month from May, 1951, until the last of December, 1952. Since that time the County of Franklin has borne the expense in connection with the care and custody of the child.

The State's evidence also tends to show that the Superintendent of Public Welfare in Franklin County wrote the defendant on 8 July, 1952, at his overseas address, notifying him that Mamie Lester gave birth to a child on 17 May, 1951, and that she said he was the child's father. The letter further informed him that if he was the child's father he was responsible for its support, and requested an immediate reply "as to what he expected to do." The Superintendent of Public Welfare in the aforesaid county also wrote the defendant a letter addressed to him at his home in Henderson, informing him that she understood that he was home on a thirty-day leave, and requested him to come to the Welfare Department to discuss an important matter. The letters were not answered, neither were they returned, nor did the defendant visit the Welfare Department.

The defendant in his testimony denied that any demand has ever been made on him for the support of Mamie Lester's illegitimate child. That while the mother of the prosecutrix, who is his aunt, charged him with the paternity of the child, after he returned from Korea, he denied it; that the money he gave his aunt was to help her out and not for the support of the child. The defendant admitted that while he had sexual intercourse with the prosecutrix the latter part of September, 1950, he denied that he was the father of her child. In support of this contention he introduced the birth certificate of the child, which states that the length of pregnancy of the mother was forty weeks.

The jury returned a verdict of guilty, and from the judgment imposed he appeals to the Supreme Court, assigning error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Yarborough & Yarborough for appellant.

DENNY, J. The defendant assigns as error his exception to the failure of the court below to sustain his motion for judgment as of nonsuit interposed at the close of all the evidence. In our opinion, however, when the State's evidence is considered in the light most favorable to it, as it must

be on such motion, it is sufficient to carry the case to the jury. This assignment of error is overruled. *S. v. Smith,* 237 N.C. 1, 74 S.E. 2d 291; *S. v. Gordon,* 225 N.C. 757, 36 S.E. 2d 143.

The following excerpt from the charge forms the basis of one of defendant's additional assignments of error: "The defendant contends that he has offered evidence as to his good character, that he has never been in any trouble, that he went in the Army and came back and that he has never been in any trouble and he contends that he is worthy of your belief and that you ought to accept his word . . ."

In this jurisdiction a defendant in a criminal action may offer evidence of his good character and when he does so he is entitled to have such evidence considered as substantive testimony on the issue of guilt or innocence. And if in such case a defendant testifies in his own behalf, and evidence of his good character is introduced, such evidence may be considered both as affecting the credibility of his testimony and as substantive evidence on the question of guilt or innocence. *S. v. Moore,* 185 N.C. 637, 116 S.E. 161; *S. v. Nance,* 195 N.C. 47, 141 S.E. 468; *S. v. Davis,* 231 N.C. 664, 58 S.E. 2d 355.

The above portion of the charge to which the defendant excepts did not give the defendant, who testified in his own behalf, the benefit to which he was entitled in respect to the evidence as to his good character.

We deem it unnecessary to discuss the other assignments of error (although it would seem one or more of them have some merit), since they may not arise on another trial.

The defendant is entitled to a new trial and it is so ordered.

New trial.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF BENJAMIN FRANKLIN WOOD.

(Filed 14 April, 1954.)

1. Wills § 17½—

While the clerk has exclusive original jurisdiction for the probate of a will in common form even though the script is alleged to have been lost, since his jurisdiction to take proof of a will is not affected by its loss or destruction before probate; when answer is filed denying the averment that the script offered for probate is the last will and testament of the decedent, such denial raises the issue of *devisavit vel non,* conferring jurisdiction on the Superior Court in term to determine the entire matter in controversy, G.S. 1-273, G.S. 1-276.

2. Wills § 19—

Allegations to the effect that the decedent had testamentary capacity, had left a last will and testament which had been lost or destroyed by

some person other than testator, and alleging the terms of the instrument, the existence of property passing under it, and formal requisites of execution, the known heirs and next of kin, and persons interested in the will, together with allegations that testator did not revoke or destroy the instrument, are sufficient to state a cause of action for the probate of the instrument in solemn form.

3. Appeal and Error § 40f—

Refusal of a motion to strike portions of a pleading will not be disturbed on appeal when appellant fails to show he was prejudiced thereby.

4. Infants § 13: Process § 13—

Failure to show service of process on some of the interested parties and failure to show appointment of guardian *ad litem* for those parties under disability are not fatal defects warranting quashal of the proceeding.

APPEAL by respondents from *Bone, J.,* Resident Judge and Judge holding the courts of the Second Judicial District, at Chambers in Nashville, 21 December, 1953. From NASH.

Proceeding for the probate in solemn form of an alleged lost will.

David B. Wood, one of the parties who would benefit by the alleged will if probated, filed petition with the Clerk of the Superior Court of Nash County, alleging that Benjamin Franklin Wood, late of that county, died on or about 20 February, 1951, leaving a last will and testament by which he disposed of an estate in lands and personal property of the aggregate value of approximately half a million dollars. A copy of the alleged will is set out in the petition, with further allegations that it "was not revoked or destroyed by the . . . testator during his lifetime, but that the same has, subsequent to the death of Benjamin Franklin Wood, been lost, or destroyed by some person other than the testator, and cannot now be found, although diligent search and inquiry has been made."

The petitioner prays that the paper writing be admitted to probate in solemn form *per testes,* and that letters testamentary be issued to the executor named therein.

Thereafter, citations were issued from time to time and served upon numerous interested parties named in the petition, heirs at law and next of kin of the decedent, citing them "to see the proceedings relative to the establishment and probate" in solemn form of the alleged will.

Kirby S. Parrish and others, heirs at law and next of kin of the decedent, herein referred to as respondents, filed a motion, before the clerk, to strike certain portions of the petition. On the same day the respondents also filed answer, before the clerk, denying the material allegations of the petition.

Thereafter, the respondents applied to the Superior Court to quash the petition and dismiss the proceedings, calling their application a demurrer, and alleging as grounds therefor that (1) "the court has no jurisdiction

to hear and determine the matters and things in controversy in this proceeding" and (2) that the petition does not state facts sufficient to constitute a cause of action.

At the December Term, 1953, of Nash Superior Court, the cause came on for hearing before Judge Bone on the respondents' demurrer and motion to strike. By consent the cause was continued to be heard in Nashville on 21 December, 1953, at which time and place the hearing was had, after which Judge Bone entered judgment overruling the demurrer and denying the motion to strike.

From the judgment so entered, the respondents appeal.

Davenport & Davenport for respondents, appellants.

Charles P. Green, John F. Matthews, and Cooley & May for petitioner, appellee.

JOHNSON, J. The respondents insist that, in the absence of a prior ruling by the Clerk of the Superior Court, Judge Bone was without jurisdictional power to hear and determine their demurrer and motion. The contention is untenable. True, the Clerk had exclusive original jurisdiction of the proceeding; that is, nothing else appearing, it was within his sole province in the first instance to determine whether the decedent Wood died testate or intestate and, if he died testate, whether the script in dispute is his will. *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; G.S. 2-16 (14), 28-1, and 31-12 to 31-31.1. And this is so, notwithstanding the script is alleged to have been lost, the rule being that the jurisdiction of the Clerk to take proof of a will is not affected by its loss or destruction before probate. *Anderson v. Atkinson,* 234 N.C. 271, 66 S.E. 2d 886; *In re Hedgepeth's Will,* 150 N.C. 245, 63 S.E. 1025.

However, when the respondents filed answer denying the petitioner's averment that the script offered for probate is the last will and testament of the decedent, such denial raised an issue of *devisavit vel non* and necessitated transfer of the cause to the civil issue docket for trial by jury. *In re Ellis' Will,* 235 N.C. 27, 69 S.E. 2d 25, and cases cited; G.S. 1-273. This being so, jurisdiction to determine the whole matter in controversy, as well as the issue of *devisavit vel non,* passed to the Superior Court in term. G.S. 1-276; *Wright v. Ball,* 200 N.C. 620, 158 S.E. 192; *Faison v. Williams,* 121 N.C. 152, 28 S.E. 188. See also *In re Will of Hine,* 228 N.C. 405, 45 S.E. 2d 526.

Necessarily, then, Judge Bone had full jurisdictional power and authority to hear and determine in the first instance the respondents' demurrer and motion to strike. *In re Ellis' Will, supra; Collins v. Collins,* 125 N.C. 98, 34 S.E. 195.

Next, the respondents challenge the sufficiency of the petition to state a cause of action for the probate in solemn form of the alleged will. A perusal of the petition discloses allegations of these ultimate facts: the death of the testator, that he made and left a last will and testament, the terms of the instrument and existence of property passing under it, formal requisites of execution, testamentary capacity of the testator, lack of revocation or destruction *animo revocandi* by the testator, loss or destruction by some person other than the testator and that the instrument cannot be found after diligent search and inquiry, and the names and addresses of the persons interested in the alleged will, including known heirs at law and next of kin of the decedent. These allegations suffice to sustain the petition and overthrow the demurrer. *In re Hedgepeth's Will, supra.* See also *McCormick v. Jernigan,* 110 N.C. 406, 14 S.E. 971; *In re Will of Wall,* 223 N.C. 591, 27 S.E. 2d 728.

As to the respondents' motion to strike portions of the petition, the rule is that the denial of a motion to strike will not be disturbed when appellant is not prejudiced thereby. *Ledford v. Transportation Co.,* 237 N.C. 317, 74 S.E. 2d 653, and cases cited. Here our examination of the petition leaves the impression that no harm in law will come to the respondents from a reading in the presence of the jury of the portions of the petition sought to be stricken.

The respondents also point to the failure of the record to show (1) service of process on some of the interested persons and (2) appointment of guardian *ad litem* for those under disability, and urge that for these reasons the cause is not properly constituted. Be this as it may, the defects shown are not fatal and do not warrant quashal of the proceeding. The court below may, and no doubt will, see that these defects are remedied before the cause goes to trial.

The judgment below is
Affirmed.

ROBERT EDWARDS, SR., FATHER, AND BEATRICE EDWARDS, MOTHER, OF ROBERT EDWARDS, JR., DECEASED EMPLOYEE, v. CITY OF RALEIGH, EMPLOYER, SELF-INSURER.

(Filed 14 April, 1954.)

1. Controversy Without Action § 4: Master and Servant § 55d—

Where counsel for both parties sign an agreed statement of facts and submit same to the hearing commissioner, the cause must be determined on the facts agreed, and denial of motion before the full commission that movants be allowed to introduce newly discovered evidence is proper. On appeal, it is error for the Superior Court to remand the cause to the Industrial Commission for the reception of the newly discovered evidence, but

it should consider the appeal in respect of errors of law, if any, in relation to the facts agreed.

2. Appeal and Error §§ 1, 2—

An order of the Superior Court remanding the cause to the Industrial Commission is an interlocutory order, and an appeal therefrom to the Supreme Court is premature and is subject to dismissal. G.S. 1-277. However, the Supreme Court in the exercise of its supervisory jurisdiction may, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. Constitution of North Carolina, Article IV, Sec. 8.

APPEAL by defendant from *Harris, J.*, November, 1953 Civil Term, of WAKE.

Proceeding under Workmen's Compensation Act (G.S. ch. 97, Art. 1) wherein the plaintiffs claim compensation on account of the death of their son while employed by the defendant.

On 26 March 1953, before Chairman J. Frank Huskins, as hearing commissioner, the plaintiffs and the defendant, through their counsel of record, signed and submitted an agreed statement of facts. Additional stipulations, *e.g.*, that Robert Edwards, Jr., and the City of Raleigh, a duly qualified self-insurer, were subject to and bound by the provisions of the Workmen's Compensation Act, etc., were entered in the record. No testimony was offered. Upon the stipulated facts, the hearing commissioner concluded as a matter of law that the fatal injury of Robert Edwards, Jr., did not arise "out of" his employment by the defendant; and an award was entered denying the plaintiffs' claim. Thereupon, the plaintiffs appealed to the full Commission, assigning as error the aforesaid conclusion of law. Also, the plaintiffs moved before the full Commission that they be allowed to introduce newly discovered evidence. The full Commission denied the plaintiffs' said motion; and, upon the findings of fact made by the hearing Commissioner, to wit, the stipulated facts, adopted his conclusions of law and affirmed the award.

Upon plaintiffs' appeal from the full Commission to the Superior Court, the court below entered an order that "this cause be and the same is hereby remanded to the North Carolina Industrial Commission to the end that said Commission shall receive such newly discovered evidence as the plaintiffs may offer." To the said order remanding the cause to the Industrial Commission, the defendant excepted and appealed.

R. B. Templeton, Sr., and W. H. Yarborough for plaintiffs, appellees.

Paul F. Smith and William Joslin for defendant, appellant.

BOBBITT, J. Parties through their counsel may make stipulations of fact. *Harrill v. R. R.*, 144 N.C. 542, 57 S.E. 382; *Lumber Co. v. Lumber*

Co., 137 N.C. 431, 49 S.E. 946. Where a case is submitted upon an agreed statement of facts, the agreement as to the facts must stand unless set aside for fraud or mutual mistake. *Lumber Co. v. Lumber Co., supra; Hood v. Johnson*, 208 N.C. 77, 178 S.E. 855; *Hood v. Johnson*, 209 N.C. 112, 182 S.E. 709.

Such submission is in effect a request by the litigants that judgment be entered in accordance with the law as applied to the agreed facts. *Auto Co. v. Ins. Co.*, 239 N.C. 416, 80 S.E. 2d 35. "The court cannot, against the objection of one party to an agreed case, receive additional evidence touching the controversy, unless so authorized by stipulation in the agreement for submission." 2 Am. Jur., pp. 383-384, Agreed Case, sec. 22. As stated by *Winborne, J.*, in *Realty Corp. v. Koon*, 216 N.C. 295, 4 S.E. 2d 850: "The case is to be heard only upon the facts presented and the court cannot go outside of the statement of facts. McIntosh P. & P., 556. *McKethan v. Ray, supra; Overman v. Sims*, 96 N.C., 451, 2 S.E., 372; *Waters v. Boyd, supra; Wagoner v. Saintsing*, 184 N.C., 362, 114 S.E., 313; *Realty Corp. v. Koon*, 215 N.C., 459, 2 S.E. (2d), 360."

There being no allegation or suggestion of fraud or of mutual mistake in the submission of the agreed statement of facts, the court below should have considered the plaintiffs' appeal from the full Commission in respect of errors of law, if any, in relation to the agreed facts. The cause is remanded to the court below to the end that such hearing be conducted and adjudication made.

The defendant's appeal is from an order remanding the cause to the Industrial Commission, not from a final judgment. As stated by *Ervin, J.*: "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; *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377; *Emry v. Parker*, 111 N.C. 261, 16 S.E. 236." *Raleigh v. Edwards*, 234 N.C. 528, 67 S.E. 2d 669. However, since the plaintiffs cannot go outside of the agreed facts in the presentation of their cause, a further hearing by the Industrial Commission would be inconvenient, expensive and futile; and it would seem that this Court, under the facts of this case, in the exercise of its power "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts" (N. C. Const., Art. IV, sec. 8), should not require this wholly unnecessary and circuitous course of procedure.

Error and remanded.

STATE v. EARL DAVID BAKER, AND ROBERT CARLTON PARKER.

(Filed 14 April, 1954.)

Criminal Law § 67b—

On defendants' appeal from conviction in a recorder's court, they moved to quash the warrants on the ground that the recorder's court was established by local act in contravention of Article II, Sec. 29, of the State Constitution. The motion to quash was denied, and defendants appealed, although they had not been tried in the Superior Court. *Held:* The order was interlocutory and an appeal therefrom must be dismissed. G.S. 15-180.

APPEAL by defendants from *Fountain, Special Judge,* at November Term, 1953, of WAKE.

The defendants were tried, convicted, and sentenced in the Recorder's Court for Cary, Meredith, and House Creek Townships in Wake County upon separate warrants charging them with a joint violation of G.S. 20-138, which makes it a misdemeanor "for . . . any person who is under the influence of intoxicating liquor . . . to drive any (motor) vehicle upon the highways within this State." The defendants appealed from the sentences of the Recorder's Court to the Superior Court, where the separate warrants were ordered consolidated. The defendants then moved to quash the warrants, alleging as the basis of their motion that the Recorder's Court for Cary, Meredith, and House Creek Townships was established by a local act, to wit, Chapter 897 of the 1949 Session Laws of North Carolina, in contravention of Section 29 of Article II of the State Constitution. The presiding judge overruled the motion to quash, and the defendants, who have never been placed on trial in the Superior Court, appealed, assigning the ruling on the motion to quash as error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State.

Robert L. McMillan, Jr., and Thomas W. Ruffin for defendants.

ERVIN, J. Since such order is interlocutory and does not determine the cause, an appeal does not lie from an order overruling a motion to quash an indictment or warrant. *S. v. Burnett,* 173 N.C. 750, 91 S.E. 597; G.S. 15-180. For this reason, the appeal is dismissed.

Appeal dismissed.

STATE v. HARVEY EDWARD BOLLING.

(Filed 14 April, 1954.)

Automobiles § 30d—

The evidence in this case *is held* sufficient to be submitted to the jury on the charge of defendant's guilt of driving an automobile on the public highway while under the influence of intoxicating liquor.

APPEAL by the defendant from *Harris, J.*, September Criminal Term 1953 of WAKE. No error.

This is a criminal action in which the defendant was convicted by a jury of driving an automobile upon the public highways of the State, while under the influence of intoxicating liquor in violation of the State statute.

The State introduced evidence tending to show these facts. D. R. Emory, a State Highway Patrolman, was called to the scene of a collision of an automobile with the guy wire of a telephone pole on U. S. Highway No. 70, near Jones' Barbecue Cafe, about two miles east of Raleigh. Upon his arrival at the scene about 1:00 a. m., 8 August 1953, he saw the defendant staggering in the center of the highway; he had the odor of alcohol on his breath, and was intoxicated. The patrolman got him off the highway, and placed him under arrest. Jones' Cafe and house stood side by side. Defendant's automobile was in the yard of Jones' house up against the guy wire of a telephone pole. There were signs on its bumper it had struck something. A tree in the yard had had bark recently knocked off it. There were automobile tracks from the highway through the yard of the Cafe, into the yard of the house, to the tree, and guy wire of a telephone pole where the automobile had stopped. The defendant said he was driving the automobile about 30 miles per hour. On the way to jail he began crying, and begged the patrolman not to charge him with driving while under the influence, saying he had been up once before; that he was not driving; that someone else was driving; but he didn't know who was driving, nor where the driver was at the time. Upon arrival at the County Jail the defendant was very much upset, and wanted to plead guilty right then, and pay off. He was told he could not be tried then.

The defendant offered no evidence.

Sentence was pronounced on the verdict, and the defendant appealed, assigning error.

Harry McMullan, Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

Carl L. Gaddy, Jr., and George M. Anderson, for Defendant, Appellant.

PER CURIAM. The charge of the court is not brought forward.

The sole assignment of error argued in the defendant's brief is the failure of the trial court to grant his motion for judgment of nonsuit aptly made.

The evidence, considered in the light most favorable to the State, is sufficient in our opinion to carry the case to the jury. *S. v. Smith, ante,* 99, 81 S.E. 2d 263; *S. v. Holbrook,* 228 N.C. 620, 46 S.E. 2d 843; *Commonwealth v. Lyseth,* 250 Mass. 555, 146 N.E. 18; *S. v. De Hart,* 3 N.J., Misc. Reports 71, 129 A. 427.

The defendant says in his brief the case of *Bland v. City of Richmond,* 190 Va. 42, 55 S.E. 2d 289, "is factually similar." The case does not support such statement. In that case the defendant was not arrested at the scene of the collision; he did not beg not to be charged with driving while under the influence of intoxicating liquor; he did not want to plead guilty and pay off.

In the trial below we find

No error.

EMMITT W. LASSITER, ADMINISTRATOR OF JOHN MELVIN WOOD, DECEASED, v. CAROLINA COACH COMPANY AND W. C. SORRELL.

(Filed 14 April, 1954.)

Automobiles § 18h (3)—

Evidence tending to show that intestate drove his automobile from the yard of a rural filling station onto a highway directly in front of a bus, and that his car was struck before its rear wheels reached the hard surface of the highway, *is held* to show contributory negligence on the part of intestate, barring recovery as a matter of law.

APPEAL by plaintiff from *Stevens, J.,* January Term 1954, FRANKLIN. Affirmed.

Civil action for wrongful death resulting from automobile-bus collision.

Plaintiff's intestate, after making "a little bit of a stop" at or near the edge of the highway, drove his automobile from the yard of a rural filling station onto Highway 59, directly in front of the corporate defendant's approaching bus. His automobile was struck before its rear wheels reached the hard-surface portion of the highway. He died as a result of the injuries.

At the conclusion of plaintiff's evidence in chief, the court, on motion of defendants, entered judgment of involuntary nonsuit and plaintiff appealed.

H. Clay Hemric and Yarborough & Yarborough for plaintiff appellant.
Charles P. Green and Brassfield & Maupin for defendant appellees.

PER CURIAM. If this record contains any evidence tending to show that the individual defendant, driver of the bus, committed any act of negligence which could be said to be one of the proximate causes of the death of plaintiff's intestate, it has escaped our attention. In any event, the record clearly discloses, as a matter of law, that the negligence of the deceased, if not the sole proximate cause thereof, was at least a contributing cause of his injury and death. Therefore, the judgment entered in the court below is

Affirmed.

C. W. HOPKINS, ADMINISTRATOR OF THE ESTATE OF DON HOPKINS, DECEASED, v. A. F. COMER, TRADING AS A. F. COMER TRANSPORT SERVICE,

and

C. W. HOPKINS, ADMINISTRATOR OF THE ESTATE OF DUANE HOPKINS, DECEASED, v. A. F. COMER, TRADING AS A. F. COMER TRANSPORT SERVICE,

and

C. W. HOPKINS, ADMINISTRATOR OF THE ESTATE OF DEXTER HOPKINS, DECEASED, v. A. F. COMER, TRADING AS A. F. COMER TRANSPORT SERVICE.

(Filed 28 April, 1954.)

1. Evidence § 51—

A witness to be competent as an expert must be shown to be skilled or experienced in the business, profession or science to which the subject in question relates.

2. Same—

A physician, though an expert in his particular field, is not competent to testify as an expert as to the cause of an explosion of a gasoline tank truck, even though he studied chemistry in college.

3. Evidence § 48—

Ordinarily, a nonexpert is not competent to give his opinion on facts which are not within his personal knowledge, since the jury may be aided in forming an opinion from the facts only when additional light can be thrown on the question by a person of superior learning, knowledge or skill in the particular subject.

4. Trial § 22b—

On motion of nonsuit, defendant's evidence will be considered only in so far as it is favorable to plaintiff, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that of plaintiff.

5. **Evidence § 5—**

It is a matter of common knowledge that the firing of a cap pistol, or the explosion of a cap by such pistol, emits a spark, and that a spark will ignite gasoline fumes or vapors.

6. **Same—**

Judicial notice is not limited by the actual knowledge of any individual judge, but as to matters within the common knowledge, judges may refresh their memories, from standard works of reference.

7. **Trial § 23a—**

Cases cannot be submitted to a jury on speculations, guesses or conjectures.

8. **Negligence § 17—**

Negligence is not presumed from the mere fact of a fatal accident.

9. **Negligence § 3½—**

The doctrine of *res ipsa loquitur* does not apply to the explosion of the parked tank truck when more than one inference can be drawn from the evidence as to the cause of the explosion and the existence of negligent default is not the more reasonable probability, or when the cause of the accident is left in conjecture, or when the instrumentality is not under the exclusive control of the defendant.

10. **Negligence § 19b (1)—Evidence held insufficient to show that fatal injury from explosion of tank truck was proximate result of defendant's negligence.**

Plaintiff's intestates were killed by the explosion of a parked tank truck from which the gasoline had been drained. Plaintiff's evidence disclosed that his intestates, two small boys, had cap pistols and were playing in the yard where the truck was parked shortly before the accident. Plaintiff also introduced evidence that safety vents or valves were maintained in the domed cap of the truck for the automatic release of air from the tank when the pressure became too high and evidence of defendant's failure to inspect such devices. *Held:* The doctrine of *res ipsa loquitur* being inapplicable, the evidence is insufficient to be submitted to the jury on the question of whether any negligence of defendant in the maintenance and operation of the tank truck and its safety devices was a proximate cause of the accident.

APPEAL by plaintiff from *Paul, Special Judge*, September Term 1953 of NASH.

Three civil actions, by consent consolidated for trial, to recover damages for the deaths of three boys, aged 3, 7 and 13 years, the children of Oliver Hopkins, caused by the explosion of the tank of an automobile tank truck used in hauling petroleum products.

The plaintiff introduced evidence tending to show the following facts. The defendant was engaged in transporting for hire petroleum products

by automobile tank cars and trucks, with a plant in Rocky Mount. Oliver Hopkins had been a truck driver for the defendant hauling petroleum products about 3½ years prior to 2 December 1951; he had driven the tank truck of the defendant that exploded over a year, and had "put way over a hundred thousand miles on it." Hopkins with his wife and children lived in Nash County 28 miles from Rocky Mount. On Saturday 1 December 1951 Hopkins drove this truck with a load of gasoline to Nashville, unloaded the gas there—the tank was drained—and went to Rocky Mount, where the truck was washed, greased and gas was put in the truck for the operation of its engine—gas was not put in the tank for transportation and delivery. Hopkins got the truck about 1:00 p.m., and drove it to his home, parking it in his yard adjacent to his house. During the entire time Hopkins worked for the defendant, the defendant permitted him to drive the tank car to his home at night; on week-ends when the tank truck was not in use he frequently kept it there. This was mutually convenient for him and the defendant, because Hopkins would not have to drive 28 miles to Rocky Mount to get it. The defendant in paragraph seven in his answer in each of the three actions says: "No issue is raised as to the authority of Hopkins to have the tank in his yard on December 1st and December 2nd 1951."

Hopkins had never been given any instructions by the defendant with regard to safety valves, vents or anything else connected with the truck, except to be careful in driving it; nor had he been required to inspect, or have inspected the dome cap, vents or valves. During the time he drove this tank car, it had not been inspected to his knowledge. For the last 3 or 4 weeks Hopkins drove this truck, he noticed after unloading the gas, when he went to refill it by unlocking the dome cap and moving it around to raise the lid, the lid would jump up almost high enough to stand straight up, blown up from pressure inside. He knew nothing about the amount of pressure that would cause the fusible plugs in the cap to operate.

Late Sunday afternoon on 2 December 1951 Oliver Hopkins' three small boys, Dexter aged 3, Duane aged 7, Don aged 13, and their first cousin, a small boy named Harold Whitley, just prior to the explosion, were playing in the yard, but not near the tank truck. About 5:15 p. m. the same afternoon the tank truck suddenly exploded, tearing out the front and rear walls of the tank, but not disturbing at all the dome cap and safety devices installed thereon for the purpose of eliminating such an explosion. The three Hopkins boys and the Whitley boy were killed by the explosion. The bodies of Duane and Don Hopkins were found about 30 or 40 feet from the tank truck; the body of Dexter Hopkins was torn in two—half of his body was found about 100 yards from the tank

truck, and the other half about 200 yards from it. The tank truck was parked, just before it exploded, in the Hopkins yard 478 feet from the center of the highway. There were two small Pecan trees between the tank truck and the highway.

On cross-examination Oliver Hopkins testified he knew his son Don and Harold Whitley had cap pistols before the explosion; after the explosion someone found cap pistols, or some parts of them, out across the field; that afternoon his wife went to an airport just across the road, and found a cap pistol.

Plaintiff introduced in evidence from paragraph one of the further answer in the Don Hopkins Case several sentences which are summarized as follows: The dome cap on top of the tank, used to pour gasoline in the tank, has a hinged lid which can be closed, and fastened down. On top of the lid and leading through it were two fusible plugs, designed to meet requirements of the Interstate Commerce Commission and to melt in case of heat sufficiently high to produce danger of explosion. In the center of the dome cap there was a vent with valve to permit air or gas to go into or pass out of the tank. When gasoline was withdrawn, air would pass through the vent into the tank to replace the withdrawn gasoline. If gasoline in the tank expanded, as a result of heat, air would pass through the vent outward. Normal pressure within the tank would be released, when the pressure exceeded one pound to the square inch. If gases should be generated faster than the small vent could relieve them, as in case of fire, then the central plunger in the vent would open when the pressure reached six pounds per square inch, providing a larger opening for relief of pressure. In the midst of the part of the answer offered in evidence appears this sentence: "These plugs met the requirements of the Interstate Commerce Commission." The next sentence in the answer reading: "They played no part in the explosion," the plaintiff did not introduce in evidence.

The defendant's evidence tended to show these facts. Just before dark Earl M. Stevens passed by Oliver Hopkins' home in an automobile on the highway, saw the tank truck parked in the yard; "there were two children on top of the tank and one so small he couldn't quite get on the back, trying to climb on the back end of the truck." The larger boy had the dome lid on the tank truck open, and was kneeling down at the dome lid. The other boy was walking up to the dome lid. The defendant's name was on the door of the tank truck in large letters. Earl M. Stevens heard at Bailey of the explosion that afternoon, and went to the scene.

Van Matthews, Coroner of Nash County, arrived at the scene of the explosion between 7:00 and 8:00 p. m. that night. From his inspection with a flashlight he saw inside the exploded tank smudge—"it was more

or less oil soot—just a skim." At the scene of the explosion he found a cap within 5 feet of the tank, that had been fired from a cap pistol or some other instrument. He found a roll of caps in the pocket of the dead body of Duane Hopkins.

The next day an employee of the defendant looked at the exploded tank. The inside was dry and smutty. The tank truck or tank trailer that exploded was of approved type in general use in the oil transportation business. The rising of the lid, when the locking mechanism of the dome cap is released is normal—how far it rises depends on temperature, whether hot or cold.

Dr. Frederick Phillips Pike, who was held by the trial court to be an expert in chemical engineering, gave testimony for the defendant tending to show the following. In response to hypothetical questions describing the exploded tank as shown by the evidence he said it would be to him strong evidence of a detonation, which is an extremely violent explosion, separate and distinct from the small bursting of a tank of low pressure. A detonation must be caused by the oxidation of air, and cannot be caused by decomposition of gasoline alone; that any hot spark or any part of a cap explosion can cause a detonation. That in his opinion, if the jury found the tank exploded some 30 hours after it was drained blowing out the two ends of the tank with such violence that a child standing nearby was thrown a distance of 180 yards, such an explosion could not have been caused otherwise than by fire being brought in contact with the fumes in the tank. Gas alone itself will not detonate; there must always be oxygen. It is well known that fire will strike off gasoline and oxygen brought together. There is a tremendous difference between gasoline vapors by themselves and gasoline—air mixtures. He has seen gasoline by itself under pressure of 3000 pounds per square inch and 900 degrees F., which will make pipes containing it glow red at night, which did not detonate.

At the close of all the evidence the defendant renewed his motion for judgment of nonsuit in each case, which the court allowed.

From judgment signed in each case in accord therewith the plaintiff appealed assigning error.

Cooley & May and Arthur C. Bernard for Plaintiff, Appellant.
Battle, Winslow & Merrell for Defendant, Appellee.

PARKER, J. The plaintiff assigns as error, based on his exceptions Nos. 37 and 38, the trial court's sustaining the defendant's objections to two questions asked Dr. John Chamblee. Dr. Chamblee is health officer of Nash County; a doctor of medicine, licensed to practice his profession,

who had studied chemistry two years at college. Dr. Chamblee was offered by the plaintiff as a layman, who had studied chemistry, and not as an expert; and as a man who was familiar with the type of cargo tank truck such as exploded in the instant case. Dr. Chamblee was asked this hypothetical question in substance: assuming that the jury should find that the tank truck was unloaded of its gasoline around noon on Saturday, the tank drained, all the known openings closed and fastened; that it was taken to Rocky Mount, was washed and greased, and thereafter driven to the Hopkins' yard where it remained about 30 hours; that it was not exposed to any outside fire producing agency, and around 5:15 p. m. on the next day violently exploded, did he have an opinion satisfactory to himself as to what caused the explosion? The court sustained defendant's objection to the question, which is the basis of plaintiff's exception No. 37. Dr. Chamblee, if permitted to answer, would have replied: in his opinion the explosion would be caused from spontaneous combustion on the inside of the tank. Dr. Chamblee was then asked, considering his familiarity with this type tank, if he had an opinion as to what would cause an explosion of an empty tank recently emptied of gasoline, eliminating any external causes. If permitted to answer, over defendant's objection, he would have given the same answer he did to the hypothetical question. This is plaintiff's exception No. 38.

In both of these questions Dr. Chamblee was asked to give his opinion upon facts not within his personal knowledge—in other words to give expert testimony. These questions present this question: was Dr. Chamblee better qualified than the jury to form an opinion from these facts? This Court has said in *Patrick v. Treadwell,* 222 N.C. 1, 21 S.E. 2d 818: "it would seem that the proper test is whether additional light can be thrown on the question under investigation by a person of superior learning, knowledge or skill *in the particular subject,* one whose opinion as to the inferences to be drawn from the facts observed or assumed is deemed of assistance to the jury under the circumstances." (Italics ours).

A witness to be competent as an expert must be shown to be skilled or experienced in the business, profession or science to which the subject relates, though there is no exact requirement as to the mode by which such knowledge, skill or experience has been acquired. *S. v. Smith,* 221 N.C. 278, 20 S.E. 2d 313; 20 Am. Jur., Evidence, Sec. 784; Stansbury N. C. Evidence, Sec. 133; Wigmore on Evidence, Third Ed., Sec. 1923.

Dr. Chamblee by education, training and experience is well qualified as a physician to give an opinion which would be likely to aid a jury to a correct conclusion as to the diseases and ills constantly threatening and affecting humanity. However, it does not appear that Dr. Chamblee is qualified by education, training or experience to express an opinion as an

expert witness as to the cause of the explosion in this case. The rulings of the trial court as to this assignment of error were correct.

The plaintiff assigns as error the refusal of the trial court, over defendant's objection, to hold that Herman Baker had qualified as an expert witness for plaintiff, and the refusal of the trial court to permit him, over defendant's objection, to say where he kept his cargo tank trucks, how he loaded and unloaded them, and to express an opinion upon assumed facts. This assignment of error is based on his exceptions Nos. 39-43, both inclusive. Herman Baker has been an oil distributor 32 years, and is familiar with the equipment he uses. The record is bare of any evidence that Herman Baker by his business, knowledge, trade or experience is qualified to give an opinion as an expert witness as to the explosion in this case. The plaintiff contends Herman Baker's evidence was excluded under an erroneous view of the law, citing *Pridgen v. Gibson,* 194 N.C. 289, 139 S.E. 443. It is a far cry from the facts in that case and in this. In the Pridgen Case it was held error for the trial court to hold as a matter of law that a general practitioner of medicine could not qualify as an expert to give his opinion in a personal injury case for alleged malpractice, though he had not specialized as an oculist. This exceptive assignment of error is overruled.

This brings us to a consideration of plaintiff's assignment of error as to the trial court allowing defendant's motions for judgments of nonsuit in all three cases, made at the close of all the evidence. We do not consider the defendant's evidence on such a motion, unless favorable to the plaintiff, except when not in conflict with plaintiff's evidence, it may be used to explain, or make clear the evidence of the plaintiff. *Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598; *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543; *Polansky v. Ins. Asso.,* 238 N.C. 427, 78 S.E. 2d 213.

"Everybody knows that a lighted match will ignite kerosene or fuel oil." *Jennings v. Oil Co.,* 206 N.C. 261, 173 S.E. 582. It is common knowledge that gasoline is highly inflammable. *American Oil Co. v. Nicholas,* 156 Va. 1, 157 S.E. 754. "It is a matter of general knowledge that gasoline is highly volatile, and gives off fumes and vapors which readily ignite when in the proximity of a flame." *Bradley v. Fowler,* 210 S.C. 231, 42 S.E. 2d 234. Webster's New Collegiate Dictionary (1949) gives as one definition of the word *cap:* "a percussion cap; also a small piece of paper containing an explosive charge, used in toy pistols." It is common knowledge that the firing of a cap pistol, or the explosion of a cap by such pistol, emits a spark, and that a spark will ignite gasoline or gasoline fumes or vapors.

Judicial notice is not limited by the actual knowledge of any individual judge or court. Judges may inform themselves, or refresh their memo-

ries, from standard works of reference, though it is settled law that the mere appearance of facts therein does not entitle them to judicial notice, unless they are such as to be part of common knowledge. 20 Am. Jur., Evidence, sections 21 and 22; *Siemen's Estate,* 346 Pa. 610, 31 A. 2d 280, 153 A.L.R. 483, writ of *certiorari* denied in 320 U.S. 758, 88 L. Ed. 452.

The plaintiff contends in his brief: (a) there was no positive and direct evidence which indicated any definite explanation for the explosion, save what could be inferred from the evidence that the defendant was negligent, and failed to exercise due care in the operation and maintenance of the tank truck; (b) that the front and back ends of the tank truck were ripped out, but the dome cap was not dislodged, but was closed and securely fastened, and the evidence discloses that safety devices in the dome cap were defective in that the fusible plugs did not melt or blow out as it was intended they should to prevent explosion; (c) it is common knowledge that tank trucks do not ordinarily explode when properly inspected, supervised and operated, whether loaded or not, that this tank truck was in the sole control of defendant, "and, therefore, the evidence in this case discloses a typical background for the doctrine of *res ipsa loquitur":* the plaintiff cites in his brief *Howard v. Texas Co.,* 205 N.C. 20, 169 S.E. 832.

The plaintiff's uncontradicted evidence shows that the Hopkins boys, who were killed, and Harold Whitley shortly before the explosion were playing in the yard where the tank truck was, though not near it, when Oliver Hopkins went in his house. He was in the house at the time of the explosion. Don Hopkins and Harold Whitley had cap pistols before the explosion; after the explosion cap pistols, or some parts of them, were found out across the field; that afternoon his wife went to an airport just across the road, and found a cap pistol.

Without considering defendant's evidence that the Coroner of Nash County found a cap that had been fired from a cap pistol or some other instrument within 5 feet of the tank; that a roll of caps was in the pocket of the dead body of Duane Hopkins, it is our opinion that the evidence offered by plaintiff is not sufficient, when most liberally construed, and giving to him the benefit of every reasonable inference to be drawn therefrom, to carry the cases to the jury that the explosion was caused by any negligence of the defendant in the operation and maintenance of the tank truck, or that the safety devices on the tank truck were defective, and that the allowing of the motions for judgments of nonsuit in each case was proper, unless the doctrine of *res ipsa loquitur* applies. It is to be noted that plaintiff states in his brief there was no direct and positive proof which indicated any explanation for the explosion, except such as could be inferred from the evidence. There is an utter want of direct

proof that any safety devices on the tank truck were defective. Cases cannot be submitted to a jury on speculations, guesses or conjectures. Negligence is not presumed from the mere fact someone is killed. *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661.

Upon all the facts disclosed by the evidence "more than one inference can be drawn from the evidence as to the cause" of the explosion, and "the existence of negligent default is not the more reasonable probability, and the proof of the occurrence, without more, leaves the matter resting only in conjecture." Therefore the doctrine of *res ipsa loquitur* does not apply, because the cases fall within the exceptions pointed out in *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251; *Jennings v. Oil Co., supra; Boone v. Matheny,* 224 N.C. 250, p. 253, 29 S.E. 2d 687 (see also *Lamb v. Boyles,* 192 N.C. 542, 135 S.E. 464; *Dail v. Taylor,* 151 N.C. 284, 66 S.E. 135): rather than within the typical explosion cases, such as *Howard v. Texas Co., supra.*

Considering plaintiff's evidence, and defendant's evidence, which is not in conflict with it, but tends to explain and make clear plaintiff's evidence, it would seem that the tank truck was not under the exclusive control of the defendant, and the doctrine of *res ipsa loquitur* is not applicable, because the cases fall within another exception to the rule as set forth in *Springs v. Doll, supra;* see *Saunders v. R. R.,* 185 N.C. 289, 117 S.E. 4; *Smith v. Oil Co.,* 239 N.C. 360, 79 S.E. 2d 880. This would seem to be true, without considering at all defendant's evidence tending to show that two children were on top of the tank of the truck, and the larger boy had the dome lid on the tank truck open, and was kneeling down at it.

The remaining assignment of error discussed in plaintiff's brief relates to the exclusion of evidence as to funeral expenses. From what we have said above the exclusion of this evidence was harmless.

The untimely deaths of these four, fine young boys present a case of stark, heart breaking tragedy. We have the utmost sympathy for the bereaved parents, but it is our duty "to keep the law in calmness made."

The judgments entered in the Superior Court are

Affirmed.

TOMMIE A. BOONE, ADMINISTRATOR OF THE ESTATE OF ESTELLE A. BOONE, DECEASED, v. NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 28 April, 1954.)

1. Pleadings § 15—

Upon demurrer a pleading will be liberally construed with a view to substantial justice between the parties. G.S. 1-151.

2. Same—

A demurrer admits the facts alleged in the pleading and relevant inferences of fact deducible therefrom, but does not admit legal inferences or conclusions of law.

3. Negligence § 1—

Negligence is the failure to exercise proper care in the performance of some legal duty which defendant owes the injured party under the circumstances in which they are placed.

4. Negligence § 5—

In order to be actionable, negligence must be the proximate cause of injury, which is that cause which produces the injury in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that some injury or harm would probably result.

5. Same—

Foreseeability does not require that the particular injury should have been foreseeable.

6. Negligence § 9½—

A person is not required to anticipate negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, may assume, and act on the assumption, that others will exercise ordinary care for their own safety.

7. Same—

A party does not forfeit his right to assume that others will exercise ordinary care for their own safety because such party is not altogether free from negligence on his own part.

8. Railroads § 5—

The engineer of a train is entitled to assume, and act on the assumption even until the very moment of impact, that trespassers or licensees on the track will use their faculties for their own protection and leave the track in time to avoid injury in the absence of anything which gives or should give him notice that such trespassers or licensees are not in possession of their strength or faculties or are unable to extricate themselves from their dangerous position.

9. Same—

A trespasser or licensee on the track is under duty to look as well as listen for the approach of a train, and the fact that a train traveling in one

direction creates so much noise that a trespasser or licensee on the other track cannot hear a train approaching from the opposite direction does not place the duty upon the engineer of that train to anticipate that the trespasser or licensee will negligently fail to look and step off the track in time to avoid injury, in the absence of anything which gives or should give notice to the contrary.

10. Negligence § 10: Railroads § 5—

The doctrine of last clear chance does not apply to a trespasser or licensee struck upon the tracks of a railroad when there is nothing to put the engineer upon notice that such trespasser or licensee is not in the apparent possession of his faculties.

11. Railroads § 5—

A railroad company owes the duty of ordinary care to avoid injury to persons on highways or private premises near its tracks by objects thrown, projecting or falling from trains.

12. Railroads §§ 4, 5—Railroad company held not liable to person near track struck by body hurled through the air by impact with engine.

Plaintiff's allegations were to the effect that his intestate was standing near defendant's track where it crossed a street at grade, waiting with others for the passing of a freight train on the far track of the crossing, that another pedestrian was standing on the near track watching the passing train with his back toward a passenger train approaching from the opposite direction on the near track, that the noise of the freight drowned the noise of the approaching passenger train, and that the passenger train struck this pedestrian and hurled his body 25 feet through the air, so that it struck intestate, who was standing off the right of way, breaking her neck and causing instant death. *Held:* Demurrer was properly sustained, notwithstanding plaintiff's allegations of negligence on the part of the railroad company in regard to excessive speed of the passenger train and the failure of the engineer to keep a proper lookout, since upon the facts alleged, the engineer cannot be held to the duty of anticipating that the pedestrian, apparently in full possession of his faculties, would not look as well as listen, and see the approaching passenger train in time to leave the track before impact, and therefore the complaint fails to state facts upon which foreseeability as an essential element of proximate cause could be predicated.

13. Same—

The duty of an engineer to keep a proper lookout is germane only when the doctrine of last clear chance is applicable.

APPEAL by the plaintiff from *Pless, J.,* October Term 1953 of CABARRUS.

Civil action to recover damages for wrongful death, heard on demurrer.

The plaintiff in his complaint alleges in substance: *One,* plaintiff is the duly appointed, acting and qualified administrator of the estate of Estelle A. Boone, who was killed 27 November 1952; and this action was commenced 7 May 1953. *Two,* the North Carolina Railroad Company

(hereafter called Carolina R. R. Co.) and the Southern Railway Company (hereafter called the Southern) are railroad corporations. *Three,* Carolina R. R. Co. owns a railroad track from Goldsboro to Charlotte, which track passes through Concord, where plaintiff's intestate was killed; and in 1895 it leased this track with all its equipment, all its rights of transportation and all its property to the Southern for 99 years, which lease is duly recorded. *Four,* McGill Street, one of the main streets of Concord, crosses the railroad tracks of defendants at right angles; Gibson Mill, which at the time was in operation with several hundred employees working on three shifts, is located at the southwest intersection of this street with the railroad tracks. *Five,* where this street crosses the railroad tracks, the tracks are straight in each direction north and south for about one mile; the tracks approaching the crossing from the north are downgrade; at the crossing are double tracks—the track to the east for northbound trains, the one to the west for southbound trains; electrical signal devices to warn of approaching trains are placed at this crossing. *Six,* at the northwest intersection of this street and the railroad tracks is a small embankment obstructing the view to the north of a southbound train of a person standing outside of or near the yard gates of Gibson Mill; the embankment does not obstruct the view of the engineer of a southbound train as to the crossing and its surrounding area. *Seven,* about 11:05 p. m., 27 November 1952, a large number of employees of Gibson Mill finished the second shift, and left the plant, walking east on McGill Street to the crossing; at the time a freight train of the Southern was passing over the crossing going north, causing the electric signal device to signal "stop"; plaintiff's intestate stopped just outside of the gate at the Gibson Mill yard, and well to the west of the southbound track; the passing freight train and electric warning signal device "were making a terrific noise"; a large number of the mill employees were gathered on the west side of the southbound track waiting for the freight train to pass; Walter Nance stopped on the southbound track, while the freight train was passing, and was looking south at the end of the freight train with his back to the north. *Eight,* at this time a southbound passenger train of Southern, behind its schedule, running 75 to 90 miles an hour, with the engineer not keeping a proper lookout, not making noise sufficient to be heard above the noise of the freight train, without giving any warning signal, without reducing its speed and with the freight train passing over the crossing in an opposite direction proceeded into and over the crossing. *Nine,* the passenger train struck Walter Nance hurling his body upon plaintiff's intestate standing just outside of the mill gate, breaking her neck and causing instant death. *Ten,* the engineer could not stop his train until he reached the passenger station about one and one-half miles from the crossing.

The plaintiff alleges as negligence the acts of the engineer above set forth, and further alleges that the engineer of the passenger train failed to exercise due care in approaching the crossing with Walter Nance standing on the track with his back to the north "when to collide with said Walter Nance would imperil the lives of persons to the west of said track waiting to cross same"; that these acts were the proximate cause of his intestate's death.

The defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The court below sustained the demurrer, and the plaintiff excepted and appealed.

H. W. Calloway, Jr., and L. E. Barnhardt for Plaintiff, Appellant.

Hartsell & Hartsell and William L. Mills, Jr., for Defendants, Appellees.

PARKER, J. Plaintiff has based his right to recover solely on the ground of negligence. His complaint must be liberally construed with a view to substantial justice between the parties. G. S. N. C. 1-151; *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25. The demurrer admits the truth of factual averments well stated, and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440.

Actionable negligence in the instant case does not exist, unless "there has been a failure to exercise proper care in the performance of some legal duty which the defendants owed" plaintiff's intestate, "under the circumstances in which they were placed"; and unless "such negligent breach of duty was the proximate cause" of intestate's death—"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 reasonably foreseen that some injury or harm would probably result from his act or omission under all the facts as they existed. *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Hammett v. Miller,* 227 N.C. 10, 40 S.E. 2d 480; *Mikeal v. Pendleton,* 237 N.C. 690, 75 S.E. 2d 756; *Hart v. Curry,* 238 N.C. 448, 78 S.E. 2d 170.

Foreseeability does not require the negligent person should have been able to foresee the particular injury precisely as in fact it occurred, or to anticipate the particular consequences actually flowing from his act or omission. *Hart v. Curry, supra; Drum v. Miller,* 135 N.C. 204, 47 S.E. 421, 65 L.R.A. 890; 108 Am. St. Rep. 528; 38 Am. Jur., Negligence, Sec. 62.

When the result complained of is not reasonably foreseeable in the exercise of ordinary care under all the facts as they existed, an essential element of actionable negligence is lacking. *Roberson v. Taxi Service, Inc.,* 214 N.C. 624, 200 S.E. 363; *Newell v. Darnell,* 209 N.C. 254, 183 S.E. 374.

"One is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act on the assumption, that others will exercise ordinary care for their own safety, . . ." 65 C. J. S., Negligence, Sec. 15. The quoted words appear in 45 C. J., Negligence, Sec. 86, and are quoted from that work in *Tysinger v. Coble Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246; *Hobbs v. Queen City Coach Co., ibid,* p. 323, 34 S.E. 2d 211. See *Cox v. Freight Lines, supra,* where a large number of our cases are cited; 38 Am. Jur., Negligence, Sec. 192. A party does not forfeit his right to act on this assumption, be-
Ward v. R. R., 167 N.C. 148, 83 S.E. 326; *Treadwell v. R. R.,* 169 N.C.
supra.

It is well settled law in this jurisdiction that when an engineer of a train sees trespassers or licensees, who are in apparent possession of their strength and faculties, and who are not in such a position that they are unable to extricate themselves from a dangerous position, on the track ahead of him, the engineer of the train having no information to the contrary, he is not required to stop his train or even slacken its speed, for the reason that he may assume until the very moment of impact that the pedestrian will use his facilities for his own protection and leave the track in time to avoid injury. The trespasser or licensee must look, as well as listen. *Beach v. R. R.,* 148 N.C. 153, 61 S.E. 664; *Abernathy v. R. R.,* 164 N.C. 91, 80 S.E. 421; *Redmon v. R. R.,* 195 N.C. 764, p. 769, 143 S.E. 829; *Way v. R. R.,* 207 N.C. 799, 178 S.E. 571.

In *Syme v. R. R.,* 113 N.C. 558, 18 S.E. 114, the track of the defendant's railroad ran parallel and in a few feet of the track of another railroad company; the deceased was walking on defendant's track in front of an engine and tender backing in the same direction deceased was going; an engine drawing a long freight train on the neighboring track was "exhausting heavily" as it passed the deceased, and while it was passing deceased, defendant's engine ran over deceased killing him. Counsel for plaintiff did not contend plaintiff's intestate was deficient in any of his senses, or wanting in physical or mental powers; but they did contend that the engineer must have seen the long freight train, known that its engine was "exhausting heavily," so as to render intestate as insensible to the approach of the other train, as if he had been deaf. The court stated it was intestate's duty to look as well as listen, and the engineer was justified in assuming that intestate would clear the track to save himself from

harm, and said: "We are of the opinion that there was no evidence of want of ordinary care on the part of the defendant."

The speed of the on-coming train or the fact that an engine on another track is exhausting steam, or other disturbing noise is being made, which is calculated to drown the noise of an approaching train, does not put on the engineer of the approaching train the duty of anticipating that a person on the track in front of him will negligently fail to look and to step off the track in time to avoid injury, in the absence of anything which gives or should give notice to the contrary. *High v. R. R.*, 112 N.C. 385, 17 S.E. 79; *Beach v. R. R., supra; Abernathy v. R. R., supra; Ward v. R. R.*, 167 N.C. 148, 83 S.E. 326; *Treadwell v. R. R.*, 169 N.C. 694, p. 698, 86 S.E. 617.

In *Wyrick v. R. R.*, 172 N.C. 549, 90 S.E. 563, plaintiff's intestate was a school girl on her way to school with other girls on a dirt road alongside defendant's right-of-way, and seeing a train approach went upon the track in an intervening cut; the other girls climbed the side of the cut avoiding injury; intestate while leaving the track for a place of safety caught her foot on a switch rod, and was struck and killed by defendant's train. The court after stating that a person apparently in possession of his faculties and in no difficulty will leave the track to avoid harm, and that the engineer has a right to assume this until the last minute said: "There is no evidence in this case of any substantive negligence upon the part of the engineer, which would justify a verdict against the defendant on the first issue."

The doctrine of last clear chance does not apply to trespassers and licensees upon the tracks of a railroad who, at the time, are in apparent possession of their strength and faculties, and nothing to the contrary appearing, the engineer is under no duty under such circumstances of anticipating that such persons will negligently fail to seek a place of safety. *Redmon v. R. R., supra,* where the cases are cited.

In *Trinity & B. V. Ry. Co. v. Blackshear,* 106 Texas 515, 172 S.W. 544, L. R. A. 1915D, 278, the railroad was negligent in allowing spikes holding the rails to be loose or to lie on the ground, but the court held that the railroad could not foresee that a rapidly moving train would pick up a spike and hurl it 50 feet into a field striking Blackshear, who was there ploughing; that the railroad was not negligent, and not liable for the injury it caused.

In *Shaffer v. Minneapolis, St. P. & S. S. M. Ry. Co., et al,* 156 Wis. 485, 145 N.W. 1086, plaintiff was injured in her house 147 feet from a railroad crossing, by a piece of iron being hurled through a window of the house striking her caused by a collision at the crossing of a train and threshing and boiler outfit. The court held there must have been some lack of ordinary care on the railroad's part to subject it to liability, and

they found no such evidence in the record. See also *Welch v. L. & N. R. R. Co.,* 163 Ky. 100, 173 S.W. 338; *Cincinnati, H. & D. Ry. Co. v. Hahn,* 4 Ohio App. 327; *Clardy v. Southern Ry. Co.,* 112 Ga. 37, 37 S.E. 99.

A railroad company owes the duty to use ordinary care to avoid injuring persons on highways or private premises near its tracks. It appears that most of the cases involving this principle of law arise from objects thrown, projecting or falling from trains. However, before the railroad company can be held liable, there must have been actionable negligence on its part. 75 C. J. S., Railroads, Sec. 984; 112 A. L. R. Annotation 850, *et seq.; L. & N. R. R. Co. v. Eaden,* 122 Ky. 818, 93 S.W. 7, 6 L. R. A. (N.S.) 581 and case note p. 581.

Applying the law above stated to the facts alleged in the complaint and such relevant inferences as may be deduced therefrom, we reach this result. There is no allegation in the complaint that Walter Nance was not in full possession of his mental and physical faculties, or that he was in any difficulty on the track. The complaint alleges he was standing on the track. Under the facts alleged the engineer of defendant's train had the right to assume until the moment of impact that Walter Nance would look and step off the track to a place of safety, and the engineer did not forfeit this right because under the facts alleged in the complaint, and admitted to be true by the demurrer, he failed to give any signals of the train's approach—the complaint alleges that the electric warning signal device and the passing freight train were making a terrific noise that "would prevent the said Walter Nance and others from observing the approaching of said passenger train;" the train was travelling 75 to 90 miles per hour; that the engineer failed to keep a proper lookout. It would seem that the failure to keep a proper lookout subjects a railroad to liability only in those cases where the doctrine of last clear chance arises. *High v. R. R., supra.*

To take the position the defendants could foresee that Walter Nance, a man apparently in full possession of all his faculties, in no difficulty, and standing on a live railroad track would negligently fail to perform his duty of looking, and to exercise ordinary care for his own safety by stepping off the track to a place of safety; that Walter Nance would remain on the track until the train struck him, and that his body would be hurled through the air about 25 feet striking plaintiff's intestate well to the west of the southbound track and just outside of the gate to the mill, killing her instantly, would require of the defendants omniscience, and make the defendants insurers of the safety of those near their tracks.

We find in the complaint, most liberally construed, and with every factual averment therein, and all relevant inferences to be deduced therefrom admitted to be true by the demurrer, no allegations of any actionable

negligence against the defendants in the killing of Walter Nance and plaintiff's intestate.

The bizarre and tragic death of the intestate was proximately caused by the negligence of Walter Nance. The trial court was correct in sustaining the demurrer.

Affirmed.

LESLIE A. FARFOUR v. MIMOSA GOLF CLUB, INC., AND MORGANTON HOLDING COMPANY, INC.

(Filed 28 April, 1954.)

1. Games and Exhibitions § 3—

The owner and operator of a golf course are not insurers of the safety of their patrons, but like the owner or operator of any place of amusement for paying patrons, are under duty to exercise ordinary care to keep the premises safe for public use for the purpose for which designed, but are not liable for mishaps, accidents or misadventures not due to negligence.

2. Same—

The evidence disclosed that defendants maintained a hole for water hose connection between the green of the ninth hole and the ball washer on the near side of the tenth tee, that there was a private roadway or path between the ninth green and the tenth tee, but that the hole for water hose connection was not on this roadway or path but was on uncut land and was surrounded by long grass. *Held:* The owner and operator of the golf course were under no duty to anticipate that patrons would travel in the area of the water hose connection, and were under no duty to guard against possible injury to patrons by reason of the maintenance of the hole.

3. Same—

Plaintiff's evidence tended to show that he parked his "caddy cart" in the tall grass between the ninth green and the tenth tee, that after driving off the tenth tee he went over to get his caddy cart, and, while looking where his ball had gone, grabbed his car and stepped in a hole maintained for water hose connection. The evidence further tended to show that while there had been a cover over this hole, no cover was over it at the time, and that while the hole was partly obscured by tall grass, it could have been seen had plaintiff looked where he was going. *Held:* The evidence discloses contributory negligence on the part of plaintiff barring recovery as a matter of law.

ERVIN, J., dissents.

APPEAL by plaintiff from *Nettles, J.,* at September-October Term, 1953, of BURKE.

Civil action to recover for personal injury sustained by plaintiff on 1 October, 1952, in the course of playing a game of golf, when he stepped into a hole,—with bell-topped terra cotta pipe casings about twelve inches

in circumference, located on the right of the ninth green and to the right of the tenth tee ("as you play off the tees"), maintained by defendants as a part of the system for watering greens and tees of the Mimosa golf course, allegedly hidden in the grass, uncovered, and without guard rail, as result of concurrent negligence of defendants.

From the pleadings, portions of which were offered in evidence by plaintiff upon the trial in Superior Court, all as shown in the record on this appeal, it appears that these pertinent facts are admitted: 1. Each of defendants is a North Carolina corporation with principal office in the town of Morganton, N. C.

2. Pursuant to the objects and powers for which the defendant corporations were organized, the Morganton Holding Company, Inc., became the owner of a large tract of land including an 18-hole golf course, near Morganton, N. C., which it leased to the Mimosa Golf Club, Inc., for several years prior to and on 1 October, 1952, under the terms of which the lessor contracted and agreed to maintain said premises as a golf course consisting of 18 holes of play and other related facilities. Defendants maintained said premises as a public amusement, and same were used by lessee as a place of amusement for its invitees including club members paying fixed fees or dues, and the general public upon payment of green fees for each day of use. And lessor contracted with lessee to maintain the premises for such uses.

3. The lessee, for several years prior to and on 1 October, 1952, offered said premises for such use to such invitees upon the payment of the fees above mentioned, and in consequence of such offering, said premises were continuously so used.

The record on this appeal also discloses that upon the trial in Superior Court plaintiff offered evidence tending to show as of 1 October, 1952: That he was, and for three or more years had been a dues-paying member of the defendant Mimosa Golf Club, Inc., which entitled him to the privilege of playing golf on the Mimosa course; that he had played golf there about three years,—quit for a year, and had started again for about three or four months,—usually playing twice a week; that he was pretty familiar with the layout of the course, knew there were eighteen greens, and saw the grass and knew the necessity of the greens being watered, and knew that these greens were watered, but, quoting him, "it was not my business how they got watered"; and that he did not know there was a hole at each green for water hose connection, and, again quoting plaintiff, "did not see that hole in my life until I saw it afterwards."

And there is evidence that there were water connections there "at different places"; and that "they are not where you drive off, not on the greens, tees and fairway."

Plaintiff further offered evidence tending to show that on the right of the tenth tee there is a "ball washer" where players usually wash their golf balls; and that the water hole, referred to as being located on the right of the ninth green, and to the right of the tenth tee, as one witness stated, "sets out from the ball washer"—6, 8 or 10 feet away, in that portion of the land lying between the green and the tee,—"it is not in the front, it is not afairway; it is not in the rough," but had grass growing up and around the top of the exposed tile.

And plaintiff testified that "there is a private road and path leading up to the tee where the players usually walk"; that he was using a caddie cart (that is, a two-wheeled upright cart equipped with a holder for bag and clubs on the platform of it, and propelled by the player either pulling or pushing it as suits him); that he put his caddie cart where he usually put it,—out of the way.

Plaintiff, testifying, gave this narrative: "I was playing there October 1, 1952—playing golf with Dr. Hamer, Dr. Arney and Emory Benfield. We had proceeded to the ninth hole and had started driving off the tenth hole . . . From the time I left the ninth hole, I walked in between the ball washer and the hole, and left my caddie cart there and went on to the tenth tee . . . Emory Benfield had a caddie cart and the two doctors a caddie. We teed off—my ball going to the right as it usually does,—Emory Benfield to the left and the two doctors in the center . . . As we were finishing teeing off, Emory Benfield turned to the left and the two doctors down the center of the fairway. I went over to my caddie cart, I grabbed it and started with my right foot and stepped into this hole. I naturally looked down to see what I had gotten in there. When I stepped into it my knee popped. I did not fall—I only stepped into it, partially turning my foot . . . I went on ahead and found my ball . . . Immediately after I stepped into the hole, I looked around and looked into what I had stepped in. I saw a depression, a water hole covered with grass and a lot of dead leaves and bottles in the hole, and that was my first glance into the hole . . . the hole did not have a cover . . . there was not any fence or rail around the hole, or any warning."

Again, plaintiff testifying on cross-examination, said: "I came over from the tee where I had driven off and took hold of the cart,—started off with it. I grabbed it and was pulling it. I was looking where the ball was gone and where the doctors were."

And, on re-direct examination, plaintiff continued by saying: "Before I got hold of the cart I was looking where the ball went, first, and got the cart and started off to it. I was walking toward the cart before I got it. I grabbed the cart and turned and stepped right into the hole."

Plaintiff testified further that "the hole was not obvious." On the other hand, several of his witnesses testified that it was readily observable,

if one only looked,—"you would be bound to see it." And, in the language of the caddie master, "When going by you can see it if you look,—would pay attention."

Evidence offered by plaintiff also tends to show that there were covers for the water holes; that within 30 to 50 days prior to 1 October, 1952, the hole in question was seen to be open, no protection over it,—nothing except the grass to keep one from seeing it; that sometimes grass was over it, and sometimes not; that the height of grass about and prior to October 1952 would vary from two to four inches; that the "rough" is never at any particular height—that would depend on when it was mowed, and how much rain had occurred.

When plaintiff rested his case, defendants, and each of them, moved for judgment as of nonsuit. The motions were allowed, and judgment in accordance therewith was entered. Plaintiff excepted thereto, and appeals to Supreme Court, and assigns error.

Edw. M. Hairfield for plaintiff, appellant.
Mull, Patton & Craven for defendants, appellees.

WINBORNE, J. The principal assignment of error presented on this appeal is based upon exception to the ruling of the trial court in granting defendants' motion for judgment as of nonsuit.

While historians tell us that the game of golf was played in Scotland more than five hundred years ago, and while there have been actions at law to recover damages for injuries sustained by persons on or near golf courses when hit by golf balls in flight when driven in play, the attorneys for the parties to this appeal fail to point out, and our own search of digests and annotations of decided cases fails to reveal, any case where a patron of a golf course has sued to recover damages for injury sustained as result of stepping into any kind of hole on or about a golf course.

However, a quotation from the Scottish court, found in decisions in the United States, may provide a thoughtful reason (*Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 14 N.E. 2d 879). The quotation purports to come from *Andrew v. Stevenson*, 13 Scot. L. T. 581. It reads: "The risks of accident in golf are such, whether from those playing behind or from those meeting the player on crossing his line of play, that in my opinion no one is entitled to take part in a game without paying any attention to what is going on around and near him, and that when he receives an injury which by a little care and diligence on his part might have been escaped, he should not be entitled to claim damages for that injury."

But be that as it may, guidance may be had in our own decisions and in general principles of law in respect to the duty and liability of an

owner of a place of amusement to patrons thereof, and in respect to duty of a patron regarding his own safety.

As to the owner, the general rule is that he is not an insurer of the safety of patrons, but he owes to them only what, under particular circumstances, is "ordinary" or "reasonable" care. See Anno. 22 A.L.R. 610, citing among other cases, *Hallyburton v. Burke County Fair Asso.*, 119 N.C. 526, 26 S.E. 114, 38 A.L.R. 156, and *Smith v. Cumberland Agric. Society,* 163 N.C. 346, 79 S.E. 632, Ann. Cas. 1915 B, p. 544. See also *Everett v. Goodwin,* 201 N.C. 734, 161 S.E. 316; *Hiatt v. Ritter,* 223 N.C. 262, 25 S.E. 2d 756; *Patterson v. Lexington,* 229 N.C. 637, 50 S.E. 2d 900; *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652, and cases cited.

In *Smith v. Agricultural Society, supra,* the Court quotes this as the rule of liability: "The owner of a place of entertainment is charged with an affirmative, positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed." See 38 Cyc. 268. To like effect is the decision in *Hiatt v. Ritter, supra.*

And in *Everett v. Goodwin, supra, Brogden, J.,* for the Court, wrote that the duty imposed by law upon the owner of a golf course "to exercise ordinary care in promulgating reasonable rules for the protection of persons who rightfully use the course, and furthermore to exercise ordinary care in seeing that the rules so promulgated for the protection of players are enforced. The owner of a golf course is not an insurer, nor is such owner liable in damages for mishaps, accidents and misadventures not due to negligence."

Moreover, in *Patterson v. Lexington, supra,* an action in which plaintiff sought to recover damages sustained by her while attending a baseball game in the park owned by defendant city and used by defendant Baseball Club as result of a fall when she stepped in a hole on an embankment where she chose to sit, this Court in opinion by *Devin, J.,* later *C. J.,* had this to say: "Baseball is an outdoor game. Those who operate a park appropriate for playing this game for the entertainment of spectators, as shown by evidence in this case, would not be expected to maintain the grass-covered slopes of an embankment on which some spectators chose to sit entirely free from roughness or unevenness or slight depressions. Defendants were not insurers of the safety of those who entered their park but were only held to the obligation of exercising due care to prevent injury which reasonably could have been foreseen and to give warning of hidden perils or unsafe conditions ascertainable by reasonable inspection," citing cases.

In the light of these principles, applied to case in hand, the defendants owed the duty to plaintiff, and those who for pay enjoyed the privilege of playing golf on the Mimosa course to exercise ordinary care to see that the course is maintained in a reasonably safe condition for the purpose for which it is designed, that is, for playing golf.

The question then arises as to whether, under the evidence in this case, the place where the water hole here involved is located is a part of the course designed for the playing of golf.

Turning to a glossary of technical terms used in the game of golf found in Encyclopedia Britannica, Vol. 10, 14 Ed., p. 503, the "course" is "the terrain over which the game is played. All ground on which play is permitted, including fairway, rough, hazards and putting greens."

"Fairway" is "the expanse of ground, extending in whole or in part from the tee to the putting green, especially prepared for play with excellent turf on which the grass is kept out."

"Rough" is "the ground to left and right of the fairway; also at times intervening between the tee and fairway, on which vegetation is allowed to grow without being cut."

"Hazard" is "the limited space or area in which the privileges of play are restricted, including bunkers, water courses, ponds, sand, etc., also recognized roadways and path."

"Green" is the "putting green" around the holes. "The tee," also termed "teeing ground" is "the place marked as the limit, outside of which it is not permitted to drive the ball off."

In the Encyclopedia Americana, Vol. 13, at page 37, referring to "golf," it is said: "The object of the game is to knock the ball from an established starting point to a designated finishing point in the fewest possible strokes. Golf is played on a course or links, which consist usually of nine or eighteen holes. A hole, designating a unit of play, consists of a starting point, or teeing ground, a finishing place, or putting green, and the intervening area. Rules of the game recognize four-part division of the course: (1) Teeing ground, (2) through the green, (3) hazards, and (4) putting green. Markers placed on an area especially prepared for teeing, determine the limits of the teeing ground. Putting green is also a specially prepared area, in the surface of which is cut a hole four and one-fourth inches in diameter. The area within a radius of the hole of 60 feet, except hazards, is putting green. Hazards are ditches, creeks, ponds, roads and bunkers. A bunker, which is an artificial hazard, is a hole or depression . . . and is usually covered with sand. Bunkers are also called sand traps. Through the green is the whole area between the teeing ground and the putting green, except hazards. It includes both fairway and rough. The former applies to that part of the area on which

the turf is specially prepared for play. The balance, except hazards, is rough."

And the New Funk & Wagnall's Encyclopedia, p. 5870, states: "Golf, an outdoor game, played on a stretch of ground known as a course or links by two or more players, each player using a small, hard, white ball which he propels by means of specially designed clubs. The object of the game is to drive the ball around the course, using as few strokes as possible, and playing successively from the beginning or 'tee' to the end or 'cup' of each of the eighteen sections, known as 'holes' into which the course is divided . . . The players begin at the first 'tee,' a level area of turf or sand, generally raised slightly above the surrounding terrain, and each player successively drives his ball onto the 'fairway' or main part of the course, a strip of land on which the grass has been cut to provide a good lie for the ball. On either side of the fairway is an area left in its wild or natural state . . . At the far end of the fairway is the 'green,' an area of closely cropped grass surrounding the cup . . ."

Similar definitions to those in the encyclopedias may be found in Webster's International Dictionary.

Hence, in the light of these well established and generally recognized definitions of golf terms, and of the rules of the game of golf, applied to the evidence offered by plaintiff, as shown in the case on appeal, it appears that the place where the water hole here involved was located is no part of the terrain designed for playing the game of golf. Too, it was beyond the area of the ball washer. And elsewhere there was a private road and path leading from the ninth green to the tenth tee. Therefore, it would seem, and the Court holds that defendants, the owner and operator of the golf course, were under no duty to anticipate that patrons would travel in the area of the water hole and to guard against possible injury to them by reason of the hole.

But in any event, the evidence clearly indicates that plaintiff was negligent, and that his negligence, at least, contributed to the injury and damage of which he complains. He chose not to follow the road and path where players usually walk in going from the ninth green to the tenth tee. Rather, he chose to take a short cut from the ninth green to the tenth tee, and en route to park his caddie cart at a place in high grass. This necessitated his return to the cart, and that he take off from that point rather than from the front of the tee. Moreover, his own statement clearly indicates that he was intent upon locating the spot at which his ball was last seen. He says: "I was looking where the ball was gone." "Before I got hold of the cart I was looking where the ball went, first," that he "grabbed" the cart, turned and started with his right foot and stepped into the hole. Then it was that he first glanced into the hole.

Thus, in either aspect of the case, judgment as of nonsuit was properly entered.

Affirmed.

ERVIN, J., dissents.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. THURSTON MOTOR LINES, INC., WILSON, NORTH CAROLINA.

(Filed 28 April, 1954.)

1. **Utilities Commission § 2—**

The Utilities Commission is a creature of the Legislature with only that authority which is vested in it by statute, which authority it may exercise only in accord with the standards prescribed by law.

2. **Carriers § 4—**

Motor carriers of freight in intrastate commerce who exchange freight in the course of delivery are not only given authority but are required to establish joint rates, and may provide for the division of revenues derived from such shipments by contract, subject only to the limitation that the contract shall not unduly prefer or prejudice any of the participating carriers. G.S. 62-121.28 (2).

3. **Same: Utilities Commission § 2—Authority of Commission to interfere with contractual division of revenue from interchanged freight.**

The Utilities Commission is given authority to intervene and vacate a contract for division of revenue from interchanged freight between two intrastate motor carriers only upon its finding after hearing that the contractual agreement between the carriers for the division of revenue from such shipments is, or will be unjust, unreasonable and inequitable, or unduly preferential or prejudicial as between the contracting carriers, and when an order is entered by the Commission without such jurisdictional finding, the cause must be remanded. A finding merely that the Commission does not accept the contractual practice of the carriers as being equitable is insufficient. G.S. 62-121.28 (5). The provisions of G.S. 62-121.28 (2), giving the Commission discretionary power to prohibit the establishment of joint rates, is inapplicable.

4. **Contracts § 26—**

A contract executed by persons *sui juris* who have the legal right to contract may be vacated or annulled by a stranger thereto, even though the stranger be a State agency, only in the manner and method provided by law.

APPEAL by defendant from *Nimocks, J.*, December Term 1953, WAKE. Error and remanded.

Investigation of a controversy existing between Thurston Motor Lines, Inc., hereinafter referred to as Thurston, and Helms Motor Express, Inc.,

hereinafter referred to as Helms, as to the division of joint rates or charges for the transportation of freight interchanged between the two carriers, instituted by the Utilities Commission.

The controversy relates primarily to shipments transported by Helms from Charlotte, N. C., to Raleigh, N. C., where they are transferred to Thurston for delivery at points in northeastern North Carolina.

On 19 August 1946 Thurston and Helms entered into a written agreement for the division of freight charges collected on shipments of freight interchanged between the two carriers. Neither party has canceled the agreement as therein authorized, and it has remained in full force and effect since it was executed.

The parties also had an informal agreement relating to shipments originating at points served by both but to be delivered in territory served by only one of them. Under this agreement, when a shipment originates at a point served by both, but is to be delivered in territory served only by Thurston, and is "picked up" by Helms and interchanged with Thurston at a base point for final delivery, or *vice versa,* the delivering carrier receives all the freight charges.

In April 1951 the Utilities Commission granted Thurston a franchise to transport freight between Charlotte on the one hand and points and places on its line in eastern North Carolina east of U. S. Highway 1 (not including Raleigh) to the Virginia State line and on and north of U. S. Highway 70 from Raleigh to the Atlantic. Helms already held a franchise under which it originated shipments in Charlotte destined for points in said territory. It interchanged such shipments at Raleigh for delivery at the destination point. Since said franchise was granted to Thurston, Helms' customers in Charlotte deliver to its pick-up truck shipments to be delivered to points within Thurston's territory above described. Helms transports these shipments to Raleigh where it interchanges with Thurston for final delivery. Thurston has been insisting that the "delivering carrier takes all" agreement applies to these shipments. As much more freight moves east from Charlotte than from east to west to points served by Helms, but not by Thurston, Helms has been protesting and settlement between the two carriers has been delayed.

The Utilities Commission took note of the controversy and, being of the opinion the situation was against the public interest, instituted an investigation. Hearings were had which culminated in the order entered by it in this proceeding.

The Commission found certain facts including the following:

"The agreement as executed provides that it shall remain in full force and effect, beginning September 1, 1946, until cancelled by either party by giving thirty days' notice in writing to the other party. There is no evidence that the agreement has been cancelled. There is evidence, how-

ever, that the delivering carrier, which can originate the traffic and transport it directly to its destination, but does not, takes all the revenue even though it performed a service only from the interchange point to destination, a local point on the delivering carrier. This appears to be a general understanding between these lines; however, this Commission does not accept such a practice as being equitable."

"Upon consideration of the facts in this proceeding and of the manner of dividing revenues, the Commission finds that the divisions of joint rates, charges, and revenues on traffic transported by Helms Motor Express, Inc., and Thurston Motor Lines, Inc., based on first-class rate prorate, are just, reasonable and equitable, and are not unduly preferential or prejudicial as between Helms Motor Express, Inc. and Thurston Motor Lines, Inc."

It thereupon ordered: "that Helms Motor Express, Inc. and Thurston Motor Lines, Inc. divide joint rates, charges and revenues accruing on traffic transported jointly by said carriers on basis of a first-class rate prorate."

Thurston petitioned for a rehearing. The petition was denied and it appealed to the Superior Court. When the appeal came on for hearing in the court below, the judge presiding affirmed the order of the Commission. Thurston excepted and appealed.

Lucas, Rand & Rose and Ruark, Young & Moore for appellant.
J. Ruffin Bailey for Helms Motor Express, Inc.

BARNHILL, C. J. If the Utilities Commission possessed authority to enter the order which is the subject matter of this appeal, we might well affirm. The record discloses a controversy between Thurston and Helms that warranted the investigation instituted by the Commission. Its findings of fact—except as to whether the shipments involved in this controversy are subject to solicitation—are supported by competent evidence, and it is not made to appear that the Commission acted arbitrarily, capriciously, or in disregard of law in entering the order from which Thurston appealed.

But the state of the record is such that we must withhold decision on the merits and remand the cause for further findings of fact which are jurisdictional in nature.

The Utilities Commission is a creature of the Legislature. It may exercise only such authority as is vested in it by statute. And such authority must be exercised by it in accord with the standards prescribed by law. *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310; *Board of Trade v. Tobacco Co.*, 235 N.C. 737, 71 S.E. 2d 21; *S. v.*

Harris, 216 N.C. 746, 6 S.E. 2d 854; *Hospital v. Joint Committee,* 234 N.C. 673 (concurring opinion, p. 684), 68 S.E. 2d 862.

The rights of motor truck carriers of freight, and the power and authority of the Utilities Commission in respect to the division of charges made for the transportation of freight, where there has been an interchange of such freight between two carriers in the process of delivery, are prescribed in G.S. 62-121.28. The pertinent parts of said section read as follows:

"(2) Except under special conditions and for good cause shown every common carrier by motor vehicle authorized to transport general commodities over regular routes shall establish reasonable . . . joint rates, charges, and classifications with other common carriers by motor vehicle . . . In case of joint rates and charges between common carriers of any class or kind whatsoever, it shall be the duty of the carriers parties thereto to establish . . . just, reasonable, and equitable divisions thereof as between the carriers participating therein, which shall not unduly prefer or prejudice any of such participating carriers."

"(5) Whenever, after hearing, upon complaint or upon its own initiative the Commission is of the opinion that the divisions of joint rates or charges applicable to the transportation of property in intrastate commerce by common carriers by motor vehicle . . . are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or any of them or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable division thereof to be received by the several carriers; . . . The order of the Commission may require the adjustment of divisions between the carriers in accordance with the order from the date of filing the complaint or entry of order of investigation or such other dates subsequent as the Commission finds justified, and in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order."

Thus it appears that carriers of freight in intrastate commerce who exchange freight in the course of delivery not only *may* but they *"shall"* establish reasonable joint rates and "just, reasonable, and equitable divisions thereof as between the carriers participating therein . . ."

The practices, agreements and contracts thus authorized and required relate to the division of the revenue derived by carriers from shipments interchanged in the course of delivery. The one condition attached to the right to so contract is the provision that the contract "shall not unduly prefer or prejudice any of such participating carriers."

But common carriers are *quasi*-public corporations. A contract between two or more of them respecting the division of revenue might well

adversely affect the public interest by unduly preferring or prejudicing one of the parties to the contract, or in some other manner. Therefore, the Legislature vested in the Utilities Commission authority, either upon complaint filed or on its own initiative, to investigate contracts and agreements providing for the divisions of revenue; to vacate such agreements; and to establish reasonable and equitable divisions thereof.

The authority thus conferred upon the Commission, however, is not the unlimited blanket power to vacate and set aside agreements duly and lawfully made by parties possessing the capacity to contract.

When and only when, after hearing, it is made to appear to the satisfaction of the Commission, and it finds as a fact, that the agreed basis of division of revenue derived from interchanged shipments is or "will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto . . ." may it intervene, vacate the existing arrangement or agreement and substitute a reasonable and just basis for division of its own choosing.

This is the finding which vests it with the power to modify, vacate, or set aside the arrangement, agreement, or contract under attack. Common carriers and all other corporations and all persons *sui juris* have the legal right to contract, and a contract, once made, may be vacated or annulled by a stranger thereto, even though it be a State agency, only in the manner and method provided by law.

We are advertent to the fact the Commission found or concluded that it "does not accept such a practice as being equitable." But this anemic, negative finding is a far cry from the positive conclusion required by the statute and is wholly insufficient to vest the Commission with authority to vacate the existing agreement between Helms and Thurston and substitute its own plan of division. It could not accept. Neither did it reject. This will not suffice.

It follows that the order entered by the Commission and the judgment of the court below affirming the same must be vacated. The cause is remanded with direction that the proceeding be sent back to the Commission for further proceeding in accord with this opinion.

If the Commission finds as a fact that the written agreement and informal understanding or custom existing between Helms and Thurston is "unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto," it may vacate such contract and agreement and prescribe the rule for division contained in its former order or such other rule as may appear to it to be reasonable and just.

We are advertent to the provision contained in G.S. 62-121.28 (2) which reads as follows: "Upon investigation and for good cause, the Commission may, in its discretion, prohibit the establishment of joint rates or services." But that provision does not affect the question here

presented. In the first place it relates to the establishment of joint rates—not to the division of revenue. In the second place, the decision to prohibit such rates is to be made "in the discretion" of the Commission without any rule or standard to guide it. Whether this is an unlawful delegation of authority—for want of a standard prescribed by the Legislature—we do not decide. It must remain an open question until it is properly presented for decision.

For the reasons stated this cause is remanded for further proceedings in accord with this opinion.

Error and remanded.

STATE v. BETTY McCLAIN.

(Filed 28 April, 1954.)

1. Criminal Law § 29b—

The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense, even though the other offense is of the same nature as the crime charged.

2. Same—

Evidence disclosing the commission by the accused of a crime other than the one charged is admissible when the two crimes are parts of the same transaction, and by reason thereof are so connected in point of time or circumstance that one cannot be fully shown without proving the other.

3. Same—

Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused.

4. Same—

Where guilty knowledge is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, even though the evidence reveals the commission of another offense by the accused.

5. Same—

Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged.

6. Same—

Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though it discloses the commission of another offense by the accused.

7. Same—

Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.

8. Same—

In prosecutions for crimes involving illicit sexual acts of a consensual character between the same parties, it is permissible for the State to introduce evidence of both prior and subsequent acts of like nature as corroborative or explanatory proof tending to show the mutual disposition of the participants to engage in the act and rendering it more probable that the act relied on for conviction occurred.

9. Same—

In prosecutions for continuing offenses, evidence of other acts than that charged is generally admissible to corroborate or explain the evidence showing the act charged.

10. Same—

Since evidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial, the general rule of exclusion should be strictly enforced in all cases where it is applicable.

11. Prostitution § 2—

In this prosecution for prostitution and occupying a building for the purpose of prostitution, G.S. 14-204, the State introduced evidence that defendant engaged in illicit intercourse with prosecuting witness for hire at certain places, and was permitted to introduce evidence over defendant's objection that some hours after the last assignation, defendant surreptitiously invaded the hotel room of the prosecuting witness in another building and took from it by larceny a sum of money. *Held:* The introduction of evidence tending to show defendant's guilt of larceny constitutes prejudicial error entitling her to a new trial.

APPEAL by defendant from *Harris, J.*, and a jury, at December Term, 1953, of WAKE.

Criminal prosecution for engaging in prostitution and occupying a building for the purpose of prostitution contrary to G.S. 14-204.

The cause was tried *de novo* in the Superior Court on the appeal of the defendant from the City Court of Raleigh.

The State offered evidence tending to show that on two successive afternoons in October, 1953, the defendant Betty McClain made assignations with its witness Bolling, and engaged in sexual intercourse with him for hire at places in the City of Raleigh other than the hotel where he was

lodging; that Bolling terminated his last assignation with the defendant between 5:30 and 6:00 o'clock on the second afternoon, and repaired to his hotel room, where he soon took to his bed in a rather groggy state; and that about three hours later the defendant surreptitiously invaded Bolling's hotel room and took from it by larceny approximately $135.00.

The testimony relating to the supposed larcenous act of the defendant was admitted over her exception.

The defendant did not take the stand. She called other persons as witnesses, and elicited from them evidence challenging the validity of the State's case.

The jury returned a general verdict of guilty, and the trial judge entered a single judgment sentencing the defendant to imprisonment as a misdemeanant for twelve months. The defendant excepted and appealed, assigning the admission of the testimony relating to her supposed larcenous act and other rulings of the trial judge as error.

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

W. Brantley Womble, J. Allen Harrington, and McDermott & Cameron for defendant.

ERVIN, J. The defendant emphasizes the assignment of error based on the admission of the testimony indicating that she committed another distinct crime, to wit, larceny, several hours after her last assignation with the State's witness Bolling.

The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. *S. v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853; *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476; *S. v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609; *S. v. Wilson,* 217 N.C. 123, 7 S.E. 2d 11; *S. v. Lee,* 211 N.C. 326, 190 S.E. 234; *S. v. Jordan,* 207 N.C. 460, 177 S.E. 333; *S. v. Smith,* 204 N.C. 638, 169 S.E. 230; *S. v. Beam,* 184 N.C. 730, 115 S.E. 176; *S. v. Beam,* 179 N.C. 768, 103 S.E. 370; *S. v. Barrett,* 151 N.C. 665, 65 S.E. 894; *S. v. McCall,* 131 N.C. 798, 42 S.E. 894; *S. v. Graham,* 121 N.C. 623, 28 S.E. 409; *S. v. Frazier,* 118 N.C. 1257, 24 S.E. 520; *S. v. Lyon,* 89 N.C. 568; *S. v. Shuford,* 69 N.C. 486; *S. v. Vinson,* 63 N.C. 335; Stansbury on North Carolina Evidence, section 91. This is true even though the other offense is of the same nature as the crime charged. *S. v. Jeffries,* 117 N.C. 727, 23 S.E. 163; 20 Am. Jur., Evidence, section 309; 22 C.J.S., Criminal Law, section 682.

The general rule rests on these cogent reasons: (1) "Logically, the commission of an independent offense is not proof in itself of the commis-

sion of another crime." *Shaffner v. Commonwealth,* 72 Pa. 60, 13 Am. R. 649; *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193. (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose. *State v. Simborski,* 120 Conn. 624, 182 A. 221; *State v. Barton,* 198 Wash, 268, 88 P. 2d 385. (3) "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." *State v. Gregory,* 191 S.C. 212, 4 S.E. 2d 1. (4) "Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial." 20 Am. Jur., Evidence, section 309. See, also, in this connection these North Carolina cases: *S. v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853; *S. v. Beam,* 184 N.C. 730, 115 S.E. 176; *S. v. Fowler,* 172 N.C. 905, 90 S.E. 408.

The general rule excluding evidence of the commission of other offenses by the accused is subject to certain well recognized exceptions, which are said to be founded on as sound reasons as the rule itself. 22 C.J.S., Criminal Law, section 683. The exceptions are stated in the numbered paragraphs, which immediately follow.

1. Evidence disclosing the commission by the accused of a crime other than the one charged is admissible when the two crimes are parts of the same transaction, and by reason thereof are so connected in point of time or circumstance that one cannot be fully shown without proving the other. *S. v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590; *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *S. v. Leonard,* 195 N.C. 242, 141 S.E. 736; *S. v. Mitchell,* 193 N.C. 796, 138 S.E. 166; *S. v. Dail,* 191 N.C. 231, 131 S.E. 573; *S. v. O'Higgins,* 178 N.C. 708, 100 S.E. 438; *S. v. Davis,* 177 N.C. 573, 98 S.E. 785; *S. v. Wade,* 169 N.C. 306, 84 S.E. 768; *S. v. Adams,* 138 N.C. 688, 50 S.E. 765; *S. v. Hullen,* 133 N.C. 656, 45 S.E. 513; *S. v. Mace,* 118 N.C. 1244, 24 S.E. 798; *S. v. Weaver,* 104 N.C. 758, 10 S.E. 486; *S. v. Thompson,* 97 N.C. 496, 1 S.E. 921; *S. v. Gooch,* 94 N.C. 987; *S. v. Murphy,* 84 N.C. 742; Stansbury on North Carolina Evidence, section 92; 20 Am. Jur., Evidence, section 311; 22 C.J.S., Criminal Law, section 663.

2. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. *S. v. Smith,* 237 N.C. 1, 74 S.E. 2d 291; *S. v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5; *S. v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322; *S. v. Lowry,* 231 N.C. 414, 57 S.E. 2d 479; *S. v. Bryant,* 231 N.C. 106, 55 S.E. 2d 922; *S. v. Davis,* 229 N.C. 386, 50 S.E. 2d 37; *S. v. Edwards,* 224 N.C. 527, 31 S.E. 2d 516; *S. v. Colson,* 222 N.C. 28, 21 S.E. 2d 808; *S. v. Batson,* 220 N.C. 411, 17 S.E. 2d 511, 139 A.L.R. 614; *S. v. Smoak,* 213 N.C. 79, 195 S.E. 72; *S. v. Ray,* 212 N.C. 725, 194 S.E. 482; *S. v. Batts,* 210 N.C. 659, 188 S.E. 99; *S. v. Horne,* 209 N.C. 725, 184 S.E. 470; *S. v. Hardy,* 209 N.C. 83, 182 S.E. 831; *S. v. Ferrell,* 205 N.C. 640, 172 S.E. 186; *S. v. Miller,* 189 N.C. 695, 128 S.E. 1; *S. v. Pannil,* 182 N.C. 838, 109 S.E. 1; *S. v. Crouse,* 182 N.C. 835, 108 S.E. 911; *S. v. Haywood,* 182 N.C. 815, 108 S.E. 726; *S. v. Stancill,* 178 N.C. 683, 100 S.E. 241; *S. v. Simons,* 178 N.C. 679, 100 S.E. 239; *S. v. Leak,* 156 N.C. 643, 72 S.E. 567; *S. v. Boynton,* 155 N.C. 456, 71 S.E. 341; *S. v. Plyler,* 153 N.C. 630, 69 S.E. 269; *S. v. Hight,* 150 N.C. 817, 63 S.E. 1043; *S. v. Register,* 133 N.C. 746, 46 S.E. 21; *S. v. Walton,* 114 N.C. 783, 18 S.E. 945; *S. v. White,* 89 N.C. 462; *S. v. Murphy, supra; S. v. Gailor,* 71 N.C. 88, 17 Am. S. R. 3; Stansbury on North Carolina Evidence, section 92; 20 Am. Jur., Evidence, section 313; 22 C.J.S., Criminal Law, section 686.

3. Where guilty knowledge is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, even though the evidence reveals the commission of another offense by the accused. *S. v. Bryant, supra; S. v. Smoak, supra; S. v. Ray,* 209 N.C. 772, 184 S.E. 836; *S. v. Pannil, supra; S. v. Mincher,* 178 N.C. 698, 100 S.E. 339; *S. v. Winner,* 153 N.C. 602, 69 S.E. 9; *S. v. Murphy, supra; S. v. Twitty,* 9 N.C. 248; Stansbury on North Carolina Evidence, section 92; 20 Am. Jur., Evidence, section 313; 22 C.J.S., Criminal Law, section 685.

4. Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged. *S. v. Summerlin, supra; S. v. Biggs.* 224 N.C. 722. 32 S.E. 2d 352; *S. v. Tate,* 210 N.C. 613, 188 S.E. 91; *S. v. Flowers,* 211 N.C. 721, 192 S.E. 110; *S. v. Ferrell, supra; S. v. Miller, supra; S. v. Griffith,* 185 N.C. 756, 117 S.E. 586; *S. v. Spencer,* 176 N.C. 709, 97 S.E. 155; *S. v. Hullen, supra; S. v. Weaver, supra; S. v. Thompson, supra;* Stansbury on North Carolina Evidence, section 92; 20 Am. Jur., Evidence, section 312; 22 C.J.S., Criminal Law, section 684.

5. Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though it discloses the commission of another offense by the accused. *S. v. Birchfield, supra; S. v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648; *S. v. LeFevers,* 216 N.C. 494, 5 S.E. 2d 552; *S. v. Smoak, supra; S. v. Miller, supra; S. v. Griffith, supra; S. v. Brantley,* 84 N.C. 766; *S. v. Morris,* 84 N.C. 756; Stansbury on North Carolina Evidence, section 92; 20 Am. Jur., Evidence, section 313; 22 C.J.S., Criminal Law, section 687.

6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. *S. v. Smoak, supra; S. v. Batts, supra; S. v. Flowers, supra; S. v. Miller, supra; S. v. Pannil, supra; S. v. Stancill, supra; S. v. Boynton, supra;* Stansbury on North Carolina Evidence, section 92; 20 Am. Jur., section 314; 22 C.J.S., Criminal Law, section 688. Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.

7. In prosecutions for crimes involving illicit sexual acts of a consensual character between the same parties, it is permissible for the State to introduce evidence of both prior and subsequent acts of like nature as corroborative or explanatory proof tending to show the mutual disposition of the participants to engage in the act and rendering it more probable that the act relied on for conviction occurred. *S. v. Broadway,* 157 N.C. 598, 72 S.E. 987; *S. v. Raby,* 121 N.C. 682, 28 S.E. 490; *S. v. Dukes,* 119 N.C. 782, 25 S.E. 786; *S. v. Chancy,* 110 N.C. 507, 14 S.E. 780; *S. v. Stubbs,* 108 N.C. 774, 13 S.E. 90; *S. v. Parish,* 104 N.C. 679, 10 S.E. 457; *S. v. Guest,* 100 N.C. 410, 6 S.E. 253; *S. v. Pippin,* 88 N.C. 646; *S. v. Kemp,* 87 N.C. 538; 22 C.J.S., Criminal Law, section 691u.

8. In prosecutions for continuing offenses, evidence of other acts than that charged is generally admissible to corroborate or explain the evidence showing the act charged. *S. v. Hildebran,* 201 N.C. 780, 161 S.E. 488; 22 C.J.S., Criminal Law, Section 689.

Since evidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial, the general rule of exclusion should be strictly enforced in all cases where it is applicable. *S. v. Beam,* 184 N.C. 730, 115 S.E. 176; 22 C.J.S., Criminal Law, section 683.

The Supreme Court of South Carolina furnishes this illuminating criterion for determining whether evidence of an offense other than the one charged is to be excluded under the general rule or admitted under one of the exceptions: "Whether evidence of other distinct crimes prop-

erly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." *S. v. Gregory, supra; S. v. Lyle,* 125 S.C. 406, 118 S.E. 803.

The State did not see fit to charge the defendant with larceny. The State elected to put her on trial for engaging in prostitution and occupying a building for the purpose of prostitution. Despite these facts, the State was permitted to offer testimony at the trial for the avowed purpose of proving the defendant guilty of larceny. When the evidence at the trial is read as a whole, it is crystal clear that the supposed larcenous act of the defendant was separated in time, place, and circumstances from the crimes charged against her, and that it did not fall within any of the exceptions to the general rule excluding evidence of other offenses. It is likewise plain that the admission of the testimony relating to the supposed larcenous act was very prejudicial to the defendant's fundamental right to a fair trial of the charges against her. The testimony was calculated to inflame the minds of the jurors against her and to preclude that calm and impartial consideration of her case to which she was entitled. Its admission requires that the cause be tried anew.

New trial.

HUGH THOMAS TUCKER, PETITIONER, v. STATE OF NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL; T. W. ALLEN, S. B. ETHERIDGE, AND FRANK T. ERWIN, MEMBERS OF SAID BOARD; AND ROY L. DAVIS, SECRETARY OF THE SAID BOARD, RESPONDENTS.

(Filed 28 April, 1954.)

1. Elections § 1—

There is no inherent power in any governmental body to hold an election for any purpose, and an election held without affirmative constitutional or statutory authority is a nullity, no matter how fairly and honestly it may be conducted.

2. Elections § 9—

The fact that a municipal primary election is held less than sixty days subsequent to a local option election does not invalidate the local option election, G.S. 18-124 (f), if the municipal primary election is held without constitutional or statutory authority and is, therefore, a legal nullity.

3. Elections § 1—

Provision of a municipal charter authorizing the mayor and governing body of the city to provide for election of city officers, as provided in another section (Chapter 716, Session Laws of 1947, Sec. 11), and "any other election authorized for city purposes," *is held* to authorize the governing body to call the election of city officers and such other elections for city purposes as are affirmatively authorized by statute, but does not authorize the governing body to call a primary municipal election without any statutory authorization.

4. Same—

Statutory authority to a municipal governing body to call a quadrennial election for the election of city officers does not by implication authorize the governing body to call a primary election to select candidates to run in the municipal election. (Chapter 716, Session Laws of 1947, Sec. 16).

5. Elections § 24—

In the absence of a specific constitutional or legislative regulation on the subject, the law commits the nomination of candidates for political parties for public offices to party caucuses, party conventions, or such other unofficial procedures as party rules may establish.

APPEAL by petitioner from *Harris, J.*, at November Term, 1953, of WAKE.

Petition for judicial review of the final administrative decision of the State Board of Alcoholic Control denying the petitioner a permit to retail beer in Cabarrus County.

This proceeding arises out of the events and statutes mentioned in the numbered paragraphs set forth below.

1. On 21 February, 1949, a local option election was held in Cabarrus County in conformity to subsections (a), (b), (c), (d), and (e) of G.S. 18-124 for the purpose of determining whether or not both wine and beer should be legally sold within the county as a whole. A majority of the votes cast in such election was against the legal sale of both wine and beer.

2. On 3 March, 1949, the mayor and the governing body of the City of Concord, a municipality in Cabarrus County, adopted two resolutions. The first provided for the holding of a municipal primary on Tuesday, 12 April, 1949, to nominate candidates of the several political parties for the offices of mayor and aldermen; and the second provided for the holding of a municipal election on Tuesday, 3 May, 1949, to elect by means of an official ballot bearing the names of the primary nominees persons to serve as mayor and aldermen for the four years next ensuing.

3. The municipal primary and the municipal election were held on the days specified in the resolutions under the direction of the mayor and the governing body of the City of Concord by election officials appointed for the purpose. In calling and holding the municipal primary and the municipal election, the mayor and the governing body professed to act under the provisions of the Charter of the City of Concord embodied in Sections 11 and 16 of Chapter 716 of the 1947 Session Laws of North Carolina.

4. On 3 August, 1953, the petitioner Hugh Thomas Tucker applied to the respondent State Board of Alcoholic Control for a permit to retail beer at a particular place in Cabarrus County by a verified written application, which stated true facts showing that both he and the place in which he proposed to retail beer satisfied all the requirements of G.S. 18-130. The petitioner complied, moreover, with the provisions of G.S. 18-133 respecting the giving and posting of notice of his application.

5. Subsection (f) of G.S. 18-124 provides that no local option election on the question of the sale of wine and beer "shall be held . . . in any county within sixty . . . days of the holding of any general election, special election or primary election in said county or any municipality thereof." Since the local option election conducted in Cabarrus County on 21 February, 1949, was held within sixty days of the holding of the municipal primary conducted in the City of Concord on 12 April, 1949, the petitioner's application and all subsequent proceedings relating to it necessarily posed for decision the legal question whether the municipal primary of the City of Concord constituted a valid primary election within the purview of subsection (f) of G.S. 18-124.

6. On 9 September, 1953, the State Board of Alcoholic Control made its final administrative decision on the petitioner's application. In so doing, the Board made findings of fact conforming to the matters set out above, concluded as matter of law thereon that the municipal primary of 12 April, 1949, was void because not authorized by law, and refused to issue the requested permit to the petitioner solely upon the ground that the sale of beer had been outlawed in Cabarrus County by the local option election of 21 February, 1949.

7. Within the thirty days specified in the statute now codified as G.S. 143-309, the petitioner filed a petition in the Superior Court of Wake County to obtain a judicial review of the final administrative decision of the State Board of Alcoholic Control denying his application for a permit to retail beer in Cabarrus County. The Board and its members and secretary answered the petition. The pleadings of all the parties revealed the truth of the matters set forth in this statement of facts, and raised the single issue of law whether or not the municipal primary of 12 April,

1949, constituted a valid primary election within the purview of subsection (f) of G.S. 18-124.

8. The issue of law was tried by Judge W. C. Harris at the November Term, 1953, of the Superior Court of Wake County. Judge Harris adjudged that the municipal primary was void because it was not authorized by law, and entered a judgment affirming the final administrative decision of the State Board of Alcoholic Control. The petitioner excepted to the judgment and appealed, assigning the ruling on the issue of law and the resultant judgment as error.

Webster S. Medlin for petitioner, appellant.

Attorney-General McMullan, Assistant Attorney-General Love, and Max O. Cogburn, Member of Staff, for the respondents, appellees.

ERVIN, J. There is no inherent power in any governmental body to hold an election for any purpose. In consequence, an election held without affirmative constitutional or statutory authority is a nullity, no matter how fairly and honestly it may be conducted. *Corey v. Hardison,* 236 N.C. 147, 72 S.E. 2d 416; *Rodwell v. Harrison,* 132 N.C. 45, 43 S.E. 540; *Van Amringe v. Taylor,* 108 N.C. 196, 12 S.E. 1005, 12 L.R.A. 202, 23 Am. S. R. 51; 18 Am. Jur., Elections, Section 100; 29 C.J.S., Elections, Section 66.

In the very nature of things, the result of the local option election held in Cabarrus County on 21 February, 1949, was not invalidated under subsection (f) of G.S. 18-124 by the holding of the municipal primary in the City of Concord within the ensuing sixty days if the municipal primary was a legal nullity. This being so, the appeal poses this problem for solution: Did the mayor and the governing body of the City of Concord have affirmative constitutional or statutory authority to hold the municipal primary?

It is apparent that they had no constitutional warrant for their action. It is likewise apparent that they had no statutory authority for their action unless such authority can be found in the provisions of the Charter of the City of Concord embodied in Sections 11 and 16 of Chapter 716 of the 1947 Session Laws of North Carolina. We quote these sections in inverse numerical order.

"Sec. 16. On Tuesday after the first Monday in May, 1949, and on the corresponding Tuesday every four years thereafter, there shall be elected at large of and by the qualified voters of said city a mayor and one member of the board of aldermen, and in each of said wards there shall be elected separately of and by the qualified voters therein one alderman for each ward; and the aldermen so elected shall constitute the board of aldermen of said city, and each of said officers so elected shall hold office

for four years, or until his successor is duly elected and qualified: Provided, that no person shall have the right to vote at any election held in said city unless he shall have been a *bona fide* resident of the ward in which he proposes to register and vote, according to the requirements and provisions of the General Election Law of the State of North Carolina."

"Sec. 11. The elections herein provided for officers of said city, and any other election authorized for city purposes, shall be called, held, conducted and concluded under the direction of the mayor and governing body by election officials designated and appointed by them for that purpose, in manner and form in every respect and detail as nearly as may be and under the same provisions of law and practice as nearly as may be as elections for county officers are held and conducted, and under the general laws relating to such elections in North Carolina in force at the time of such city election, including all the penalties prescribed for the violation of such law: Provided, that when any certain duties are prescribed under the general election law to be done and performed by State or county officials unknown to municipal corporations, which are likewise required to be done and performed in such city election, then and in that case such duties shall be done and performed by the city officer or officers whose office and duties bear the greatest analogy to those of the officer named in the general election law for whom such duty is prescribed; for example, chief of police to sheriff, city clerk to Clerk of the Superior Court."

The petitioner advances a twofold argument to support his theory that these sections conferred statutory authority upon the mayor and the governing body of the City of Concord to hold the municipal primary.

His initial argument may be stated in this fashion: (1) Section 11 of Chapter 716 of the 1947 Session Laws vested in the mayor and the governing body of the City of Concord the authority to hold "the elections . . . provided for officers of said city, and any other election authorized for city purposes." (2) The municipal primary was authorized by the mayor and the governing body for a city purpose. (3) Hence, the municipal primary constituted an "election authorized for city purposes" within the meaning of section 11.

This argument is untenable because it rests on a misconstruction of section 11. When it enacted this section, the Legislature did not confer upon the mayor and the governing body of the City of Concord discretionary power to hold elections for city purposes in the absence of affirmative statutory warrant. It merely empowered them to hold the quadrennial election to fill municipal offices required by section 16, and such other elections for such other city purposes as were affirmatively authorized by other statutory provisions.

The petitioner's other argument may be summarized in this way: (1) The power to hold the quadrennial election to fill the municipal offices was granted to the mayor and the governing body of the City of Concord in express terms by section 16. (2) A municipal primary to make prior party nominations of candidates for the municipal offices was necessary to enable the mayor and the governing body to hold the quadrennial election. (3) Hence, the power to hold the municipal primary was necessarily implied in law from the express power to hold the quadrennial election.

This argument cannot be reconciled with the historical circumstances that elections were employed to fill public offices for many generations before nominating primaries were devised, and that nominating primaries had their genesis in express legislative enactments of a comparatively recent date. *U. S. v. Gradwell, R. I. & W. Va.,* 243 U.S. 476, 37 S. Ct. 407, 61 L. Ed. 857; *U. S. v. O'Toole,* 236 F. 993; *State v. Bienstock,* 78 N.J.L. 256, 73 A. 530.

The argument is fallacious in other respects. The language of section 16 and contemporary statutory provisions did not disclose any legislative intent that the quadrennial election of 1949 should be a partisan contest between opposing political parties. The argument would be without validity, however, even if the language had been susceptible of that construction. This is true for this simple reason: In the absence of a specific constitutional or legislative regulation on the subject, the law commits the nomination of candidates of political parties for public offices to party caucuses, party conventions, or such other unofficial procedures as party rules may establish. 29 C.J.S., Elections, section 89.

What has been said compels the conclusion that the mayor and the governing body of the City of Concord had no statutory authority to hold the municipal primary of 12 April, 1949, and requires an affirmance of the judgment.

Since the occurrences culminating in this proceeding the Legislature has made express provision for the future holding of nominating municipal primaries in the City of Concord. 1953 Session Laws, Ch. 1297.

Affirmed.

MILLERS MUTUAL INSURANCE ASSOCIATION OF ILLINOIS AND CENTRAL MUTUAL INSURANCE COMPANY v. ATKINSON MOTORS, INC.

(Filed 28 April, 1954.)

1. Bailment § 1—

Where the purchaser of an automobile returns it to the dealer for the five-hundred-mile checkup to which he is entitled under the contract of sale, such delivery constitutes a bailment for the mutual benefit of the bailor and the bailee.

2. Bailment § 4—

A bailee for hire is not an insurer, but is under legal duty imposed by law, irrespective of the contract, to exercise due care to protect the subject of the bailment from loss, damage or destruction, and may be held liable for damages resulting from negligent failure to perform this duty.

3. Bailment § 7—

The bailor makes out a *prima facie* case of actionable negligence of a bailee for hire upon showing that he delivered the property in good condition to the bailee, that the bailee accepted it and thereafter had exclusive possession and control of the property, and failed to return it, or returned it in a damaged condition.

4. Same—

Plaintiff's evidence tended to show that the purchaser of an automobile delivered it to the dealer for the five-hundred-mile checkup, that the purchaser did not again see the car until the next day when it had been damaged by fire, although the cars on either side of it were not burned, and that in the interim the car was in the exclusive possession and control of the dealer. *Held:* Under the rule applicable to bailments, plaintiff made out a *prima facie* case sufficient to be submitted to the jury, notwithstanding the absence of any evidence of any facts or circumstances relating to the fire or tending to show any particular acts of negligence.

5. Evidence § 7e—

A *prima facie* case does not relieve plaintiff of the burden of proof nor create any presumption in his favor, but merely entitles him to have the issue submitted to the jury, and defendant, upon such showing by plaintiff, may elect to introduce no evidence, in which event he admits nothing but simply takes the risk of an adverse verdict, or he may offer evidence in explanation or exoneration.

APPEAL by plaintiffs from *Rudisill, J.*, 1 March, 1954, Regular Term, of MECKLENBURG.

In October, 1952, Charles W. Connelly purchased from defendant a new 1953 Dodge Coronet Coupe. The defendant was and is engaged in business in Charlotte, N. C., selling, repairing and servicing automobiles. On 12 November, 1952, Connelly took his new car to defendant's service department and left it with defendant's authorized agents for the 500 mile general check-up and for repairs and servicing. Defendant accepted

the automobile for these purposes, thereby obtaining full possession and control thereof and of specified articles of personal property owned by Connelly and then kept in the trunk compartment. When Connelly returned the next morning, 13 November, 1952, he found that his automobile and personal property had been damaged by fire. These facts are admitted in the pleadings.

Evidence of plaintiffs, predicated upon sufficient allegations, tends to show that the purchase price of Connelly's car was around $3,300.00; that its reasonable market value immediately before the fire was $2,988.43; that its reasonable market value immediately after the fire was $1,000.00; that the plaintiff, Millers Mutual Insurance Association of Illinois, which had insured the car against loss by fire, took over the damaged car and paid $2,988.43 to Connelly in discharge of its obligation as insurer; and that the plaintiff, Central Mutual Insurance Company, which had insured the contents of the car against loss by fire, paid Connelly $285.00 in discharge of its obligation as insurer.

The plaintiffs sue for damages in the amount of $1,988.43 and $285.00, respectively, under the doctrine of subrogation. In addition to the facts stated above, the plaintiffs allege in general terms that the defendant negligently allowed the car to be burned, failed to watch and safeguard it, and failed to exercise due care to guard, properly repair and deliver it to Connelly in as good or better condition than when delivered to defendant. No facts are alleged bearing upon what happened on the occasion of the fire or bearing upon the cause of the fire.

At the close of the plaintiffs' evidence, the trial judge, upon the defendant's motion, entered judgment of involuntary nonsuit, dismissing the action. Plaintiffs excepted and appealed.

William H. Booe for plaintiffs, appellants.

Pierce & Blakeney, R. E. Wardlow, and C. W. Bundy for defendant, appellee.

BOBBITT, J. The testimony of Connelly tends to show that when he delivered his car to defendant for the general 500 mile check-up, he called attention to a number of specific items, *e.g.,* the cigarette lighter was out, the radio had a hum in it, etc.; also, that defendant was to make such repairs as part of the consideration for the purchase price paid by him.

Under these circumstances, the defendant's possession and control was that of bailee, under a bailment for the mutual benefit of the bailor and the bailee; and in such case the duty of the bailee is to exercise due care and his liability depends upon the presence or absence of ordinary negligence. *Hanes v. Shapiro,* 168 N.C. 24, 84 S.E. 33; *Hutchins v. Taylor-Buick Co.,* 198 N.C. 777, 153 S.E. 397; 8 C.J.S. p. 269, Bailments, sec.

27; 6 Am. Jur., p. 361, Bailments, sec. 248. Ordinarily, unless made so by statute or by express contract, the bailee is not an insurer. He is liable only for negligent loss or damage to property. *Beck v. Wilkins,* 179 N.C. 231, 102 S.E. 313; 8 C.J.S. 262, Bailments, sec. 26; 6 Am. Jur. 345, Bailments, sec. 242; Anno. 16 A.L.R. 2d 802. The bailee's obligation to exercise due care to protect the subject of the bailment from loss, damage or destruction arises from the relationship so created by the contract of bailment. While the relationship so created is basic, the legal duty is not a term of the contract; rather, it is imposed by law. *Insurance Asso. v. Parker,* 234 N.C. 20, 65 S.E. 2d 341.

A *prima facie* case of actionable negligence, requiring submission of the issue to the jury, is made when the bailor offers evidence tending to show that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition. *Hanes v. Shapiro, supra; Perry v. R. R.,* 171 N.C. 158, 88 S.E. 156, L.R.A. 1916E 478; *Beck v. Wilkins, supra; Trustees v. Banking Co.,* 182 N.C. 298, 109 S.E. 6, 17 A.L.R. 1205; *Morgan v. Bank,* 190 N.C. 209, 129 S.E. 585; *Hutchins v. Taylor-Buick Co., supra; Swain v. Motor Co.,* 207 N.C. 755, 178 S.E. 560; *Oil Co. v. Iron Works,* 211 N.C. 668, 191 S.E. 508; *Falls v. Goforth,* 216 N.C. 501, 5 S.E. 2d 554; *Wellington-Sears Co. v. Finishing Works,* 231 N.C. 96, 56 S.E. 2d 24; *Bennett v. R. R.,* 232 N.C. 144, 59 S.E. 2d 598; 16 A.L.R. 2d p. 805, *et seq.*

However, judgments of involuntary nonsuit were held proper in *Morgan v. Bank, supra,* and *Swain v. Motor Co., supra.* For in *Morgan v. Bank, supra,* it appeared affirmatively from undisputed evidence that plaintiff's bonds had been stolen by burglars, who blew open the vault with high explosives and broke into the safety deposit boxes by use of a sledge hammer and cold chisel, there being no evidence of negligence on the part of the defendant. And in *Swain v. Motor Co., supra,* it appeared affirmatively from undisputed evidence that a third party had stolen plaintiff's car under circumstances which negatived negligence on the part of defendant. *Kelley v. Capital Motors,* 28 S.E. 2d 836, a South Carolina decision cited by defendant, is distinguishable on like grounds.

Here, the plaintiffs' evidence does not disclose the facts and circumstances relating to the burning of his car and its contents. Connelly testified that the defendant's building was of cement and steel construction, fire resistant, equipped with sprinkler system, etc., and that the garage was modern, up-to-date, safe and first-class. In his opinion, the fire came from the inside of the car. Also, upon cross-examination, he stated that he did not know of anything the defendant failed to do with respect to proper care of his car. While this evidence is favorable to defendant, the fact remains that Connelly left the car with defendant about 8:30 a.m. on

the morning of 12 November, 1952, and did not see it again until the morning of 13 November, 1952, after the fire. In the meantime, it had been in the exclusive possession and control of defendant. The record is silent as to what was done to or with the car during this period. Was the general check-up made? What was its condition? Was the electrical system faulty? Were repairs made? Had the car been driven out of the garage? If so, by whom and under what circumstances? When did the fire occur? The fact that Connelly could have no knowledge of such matters, while the defendant could and should have full knowledge of these matters, indicates the reason underlying the rule as to mode of proof in such bailments. The *prima facie* case rule is invoked when the plaintiff's evidence discloses an unexplained failure to return the bailed property or an unexplained destruction of or damage to the bailed property while in the bailee's possession and control. Here, neither the allegations nor the evidence purport to particularize any facts or circumstances relating to the fire upon which negligence is predicated.

Here, as was true in *Hutchins v. Taylor-Buick Co., supra,* only the one car burned. Too, as in that case, Connelly's car was between two other cars, which did not burn. The facts in the two cases are quite similar. It would seem that this case is stronger for the plaintiffs' position for here the car was left for a general check-up, repairs and servicing while in that case the car was left for storage only. Be that as it may, *Hutchins v. Taylor-Buick Co., supra,* controls decision here.

Ordinarily, in a negligence case, it is incumbent upon plaintiff to allege and prove facts constituting actionable negligence; and, when the evidence fails to disclose actionable negligence as alleged, nonsuit is proper. Conjecture and surmise will not suffice. Appellant cites many cases involving this well settled principle. Decision in several of the cases cited turns upon the applicability or nonapplicability of the doctrine of *res ipsa loquitur,* which, if applicable, makes out a *prima facie* case akin to that involved here. (See *White v. Hines,* 182 N.C. 275, 109 S.E. 31.) In the cases cited the doctrine *res ipsa loquitur* was held inapplicable; and the plaintiff was required to allege and prove his case under the ordinary rule. Here plaintiffs invoke a long established rule applicable to bailments. The evidence was sufficient under this rule to repel the defendant's motion for judgment of involuntary nonsuit.

While it is not required, in the circumstances of this case, that the plaintiffs establish the specific negligent act or omission proximately causing the loss or damage, it is incumbent upon the plaintiffs to satisfy the jury by the greater weight of the evidence that the loss or damage was caused by negligence on the part of the defendant. *Ross v. Cotton Mills,* 140 N.C. 115, 52 S.E. 121; *Howard v. Texas Co.,* 205 N.C. 20, 169 S.E. 832.

By analogy to the doctrine of *res ipsa loquitur,* plaintiffs are not relieved of the burden of proof nor is any presumption raised in their favor. Indeed, it has been stated (*Ross v. Cotton Mills, supra*) that the trial judge should make no reference to the expressions "*prima facie* case" or "presumptive evidence;" rather it is for the jury to say, upon the facts and the circumstances shown by plaintiff's evidence, whether negligence should be inferred, that is, whether upon all the evidence the plaintiff has established actionable negligence.

When the facts in evidence make out a *prima facie* case, it is one for submission to the jury. As stated by *Connor, J.,* in *Ross v. Cotton Mills, supra:* "The defendant may, or may not, introduce evidence as it is advised. By failing to do so, it admits nothing, but simply takes the risk of nonpersuasion. This is what is meant by going forward with testimony. He, by this course, says that he is willing to go to the jury upon the plaintiff's evidence." If the defendant elects to offer evidence tending to explain the cause of the fire, the reasonableness of the explanation is for the jury. *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251. If the defendant offers evidence tending to show what happened with reference to the car while in its possession as bailee, the credibility of such evidence is for the jury. If the evidence offered by the defendant, assuming credibility, would exonerate the defendant, it would be entitled to a peremptory instruction thereon. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. The significance of "*prima facie* case" has been stated clearly and often. *Speas v. Bank,* 188 N.C. 524, 125 S.E. 398; *Hunt v. Eure,* 189 N.C. 482, 127 S.E. 593; *Vance v. Guy,* 224 N.C. 607, 31 S.E. 2d 766; N. C. Evidence, Stansbury, Section 203.

If the defendant exercised due care in handling and in keeping the Connelly car, no liability devolves upon it. It is liable only if the loss or damage was caused by its negligence.

The case here presented is one for the jury under appropriate instructions. Hence, the judgment of involuntary nonsuit at the close of plaintiffs' evidence is

Reversed.

MRS. MILDRED J. MILLS *v.* GEORGE D. RICHARDSON.

(Filed 28 April, 1954.)

1. Pleadings § 15—

Where there is a defective statement of a good cause of action, the complaint is subject to amendment and the cause should not be dismissed until after the time for obtaining leave to amend has expired, G.S. 1-131; but where there is a statement of a defective cause of action, final judgment dismissing the action is proper.

2. Same: Judgments § 27c—

Where there is a defective statement of a good cause of action, judgment dismissing the action is erroneous, but after term the sole procedure to correct the error of law is by appeal.

3. Pleadings § 22b—

Judgment was entered sustaining demurrer and dismissing the cause of action, and plaintiff appealed. At a subsequent term the court allowed plaintiff's motion to set aside the judgment of dismissal as being contrary to G.S. 1-131 and allowed plaintiff's request to withdraw the appeal and file an amended complaint. *Held:* After expiration of the term the court was without authority to reinstate the action and allow amendment of the complaint, the action having been dismissed by a final judgment.

4. Appeal and Error § 2—

Where, upon demurrer, a cause of action is dismissed, and at a subsequent term plaintiff is allowed to withdraw her appeal from the final judgment and file an amended complaint, such order affects a substantial right of the defendant and he is entitled to appeal therefrom. G.S. 1-277.

APPEAL by defendant from *Stevens, J.,* Second February (1954) Civil Term, of WAKE.

Civil action to recover damages on account of personal injuries. Allegations of the complaint, indicating the nature of the action, are summarized below.

On or about 5 April, 1951, the defendant owned a two-story business building at #313½ Fayetteville Street, Raleigh, N. C. The second floor was leased to and occupied by the Employment Security Commission. Access thereto was by a stairway leading from the street to the second floor office space. The outer edge of each step of this stairway was covered by a metal strip. It was necessary for the plaintiff, employed as an office worker by the Employment Security Commission, to use this stairway in going to and from her work; and, when she started to walk down the stairway, the heel of one of her shoes caught on a loose and worn metal strip on the step near the top landing, thereby causing her to fall to the bottom of the stairway and to sustain personal injuries. She alleges that such injuries were proximately caused by the negligence of the defendant, (1) in that he failed to keep his building in a reasonably safe condition, (2) in that he allowed the metal strip on the step where she fell to become worn, loose and to protrude above the surface of the step to which it was attached, and (3) in that he failed to have the stairway, steps and metal strips inspected by competent mechanics at reasonable intervals.

The action was commenced 23 May, 1953. The defendant demurred to the complaint, specifying primarily a failure to allege facts sufficient to show legal duty on the part of the defendant to the plaintiff in respect of the matters alleged, and prayed that the demurrer be sustained and

the action dismissed. Thereafter, at September Civil Term, 1953, by leave of court, the plaintiff amended her complaint by adding an allegation to the effect that the stairway involved, at the time of plaintiff's injury on or about 5 April, 1951, was "under the sole and exclusive control of the defendant, George D. Richardson, who was charged with the duty of keeping the same in a reasonably safe condition." The defendant filed a demurrer to the amended complaint, substantially the same as his demurrer to the original complaint.

At the First February (1954) Civil Term, which convened 1 February, 1954, after hearing on the demurrer to the amended complaint before Stevens, J., judgment was entered as follows:

"It is thereupon ordered, adjudged and decreed that defendant's demurrer be and the same is hereby sustained and that this action be dismissed. . . . This February 2, 1954."

To the court's ruling and judgment the plaintiff excepted and gave notice of appeal in open court; and thereupon, by agreement, an order was entered specifying what would constitute the record on appeal.

At the Second February (1954) Civil Term, which convened 15 February, 1954, the plaintiff, under date of 16 February, 1954, filed a motion, wherein she asked the court to set aside, as being contrary to G.S. 1-131, that part of the judgment entered at the prior term, to wit, the First February (1954) Civil Term, which dismissed the action, and asked further that she be allowed to withdraw her appeal and file an amended complaint setting forth new facts that had just come to the knowledge of her counsel. By order dated 22 February, 1954, Stevens, J., granted in all respects the plaintiff's motion. Thereupon, the defendant excepted and appealed.

Thomas W. Ruffin for plaintiff, appellee.

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

BOBBITT, J. Did the court below, at the Second February (1954) Civil Term, have authority, upon withdrawal of plaintiff's appeal, to strike out the judgment dismissing the action entered at the First February (1954) Civil Term? Authoritative decisions compel a negative answer.

The plaintiff, having appealed from the judgment entered at the First February (1954) Term, elected to abandon or withdraw her appeal. She had a legal right to do so.

However, upon abandonment or withdrawal of her appeal, the judgment from which her appeal was taken remained unchallenged. This was a final judgment, which by its express terms sustained the demurrer and

dismissed the action. True, if it had sustained the demurrer, without dismissing the action, the plaintiff, within thirty days from 2 February, 1954, upon notice, could have moved for leave to amend. G.S. 1-131. *Harris v. Board of Education,* 217 N.C. 281, 7 S.E. 2d 538.

Our decisions draw a distinction between (1) a defective statement of a good cause of action and (2) a statement of a defective cause of action. *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43, and cases cited. *Scott v. Veneer Co., ante,* 73. In each instance, the demurrer should be sustained. Where there is a defective statement of a good cause of action, the complaint is subject to amendment; and the action should not be dismissed until the time for obtaining leave to amend has expired. G.S. 1-131. But where there is a statement of a defective cause of action, final judgment dismissing the action should be entered.

In *Davis v. Rhodes, supra,* the plaintiff alleged that his intestate was killed by the negligence of the defendant in an automobile-motor scooter collision. The demurrer was sustained on the ground that the complaint did not set forth the facts constituting the alleged negligence. The trial judge dismissed the action. This Court reversed on the ground that, since the complaint was defective in its statement of a good cause of action, it was subject to amendment.

In *Scott v. Veneer Co., supra,* this Court upheld the trial court in sustaining the demurrer and in dismissing the action since the allegations of the complaint affirmatively disclosed that there was a defective cause of action, *i.e.,* that the plaintiff had no cause of action against the defendant.

As stated by *Pearson, C. J.,* in *Garrett v. Trotter,* 65 N.C. 430: "When there is a defect in substance, as an omission of a material allegation in the complaint, it is a defective statement of the cause of action; and the demurrer must specify it, to the end that it may be amended by making the allegation. And when there is a statement of a defective cause of action, the demurrer must specify, to the end that as there is no help for it, the plaintiff must stop his proceeding without a further useless incurring of costs."

Conceding, without deciding (see *Wilson v. Dowtin,* 215 N.C. 547, 2 S.E. 2d 576; *Leavitt v. Rental Co.,* 222 N.C. 81, 21 S.E. 2d 890), that the amended complaint contained a defective statement of a good cause of action, the judgment at the First February (1954) Term, in respect of its dismissal of the action, was entered upon a mistaken principle of law or, as the plaintiff put it in her motion, "contrary to G.S. 1-131."

The distinction between void, erroneous and irregular judgments was pointed out by *Merrimon, C. J.,* in *Carter v. Rountree,* 109 N.C. 29, 13 S.E. 716, as follows: "A void judgment is one that has merely semblance, without some essential element or elements, as when the court purporting

to render it has not jurisdiction. An irregular judgment is one entered contrary to the course of the court—contrary to the method of procedure and practice under it allowed by law in some material respect; as if the court gave judgment without the intervention of a jury in a case where the party complaining was entitled to a jury trial and did not waive his right to the same. *Vass v. Building Association,* 91 N.C. 55; *McKee v. Angel,* 90 N.C. 60. *An erroneous judgment is one rendered contrary to law. The latter cannot be attacked collaterally at all, but it must remain and have effect until by appeal to a court of errors it shall be reversed or modified.* An irregular judgment may ordinarily and generally be set aside by a motion for the purpose in the action. This is so because in such case the judgment was entered contrary to the course of the court by inadvertence, mistake or the like. A void judgment is without life or force, and the court will quash it on motion, or *ex mero motu.* Indeed, when it appears to be void, it may and will be ignored everywhere, and treated as a mere nullity." (Emphasis added.) The later decisions are in full accord: *Stafford v. Gallops,* 123 N.C. 19, 31 S.E. 265; *Moore v. Packer,* 174 N.C. 665, 94 S.E. 449; *Duffer v. Brunson,* 188 N.C. 789, 125 S.E. 619; *Simms v. Sampson,* 221 N.C. 379, 20 S.E. 2d 554. See McIntosh, N.C.P.&P. 734-737.

The judgment entered at the First February (1954) Term was not void, for the court had jurisdiction of the parties and over the subject matter. It was not irregular, for the cause came on regularly for hearing and was heard and judgment entered. Indeed, the appellee's contention is that it was rendered contrary to law, that is, based upon an erroneous application of legal principles. The order of 22 February, 1954, refers to the dismissal of the action as "erroneous." If this be conceded, it was an erroneous judgment. *Stafford v. Gallops, supra.* In such case, upon expiration of the term at which the judgment was rendered, it could be corrected only by this Court; for as stated by Professor McIntosh, "after the term neither the judge who rendered the judgment nor another judge holding the court can set it aside for such error, and the only remedy is an appeal or a *certiorari* as a substitute for an appeal." McIntosh, N.C. P.&P., p. 736; *Simmons v. Dowd,* 77 N.C. 155; *May v. Lumber Co.,* 119 N.C. 96, 25 S.E. 721; *Henderson v. Moore,* 125 N.C. 383, 34 S.E. 446; *Becton v. Dunn,* 142 N.C. 172, 55 S.E. 101; *Caldwell v. Caldwell,* 189 N.C. 805, 128 S.E. 329; *Phillips v. Ray,* 190 N.C. 152, 129 S.E. 177; *Wellons v. Lassiter,* 200 N.C. 474, 157 S.E. 434; *Williams v. Williams,* 190 N.C. 478, 130 S.E. 113; *Clark v. Cagle,* 226 N.C. 230, 37 S.E. 2d 672; *Dellinger v. Clark,* 234 N.C. 419, 67 S.E. 2d 448.

The judgment entered at the First February (1954) Term, in consequence of the plaintiff's withdrawal or abandonment of her appeal, being a final judgment dismissing the action, the court below was without

authority to reinstate the action and allow further amendment of the complaint. The order of 22 February, 1954, allowing plaintiff's motion of 16 February, 1954, purported to do so. This affected a substantial right of the defendant. He was entitled to appeal therefrom. G.S. 1-277. His assignment of error is well taken and the order of 22 February, 1954, is

Reversed.

MRS. E. W. HOBBS v. AL GOODMAN AND ETHEL GOODMAN, T/DBA AL GOODMAN OF CHARLOTTE FINE SHOES, ORIGINAL DEFENDANTS, AND J. P. HACKNEY, JR., AND GEORGE D. PATTERSON, TRUSTEES, ADDITIONAL DEFENDANTS.

(Filed 28 April, 1954.)

1. Torts § 6—

The purpose of G.S. 1-240 is to permit a defendant who has been sued in tort to bring into the action, for the purpose of enforcing contribution, a person whom plaintiff, upon the subject matter alleged in the complaint, could have joined as a party defendant in the first instance.

2. Same: Landlord and Tenant § 33—

Plaintiff alleged that she was injured by the falling of a sign erected over a sidewalk by lessees. Defendant lessees alleged that plaintiff was injured by the falling of an awning erected by lessor prior to their occupancy, and sought to have lessor joined as a party defendant for the purpose of contribution. *Held:* Defendants may not set up an entirely different state of facts which invoke principles of law which have no relation to the subject matter of the action as stated in plaintiff's complaint, and thus litigate in plaintiff's action differences between themselves and lessor.

3. Landlord and Tenant § 33: Negligence § 8—

Where plaintiff sues to recover for injuries sustained when a sign erected over a sidewalk by lessees fell and struck her, lessees are not entitled to joinder of lessor as a party defendant on the principle of primary and secondary liability, since upon the cause as set out in the complaint, lessees' active negligence created the situation which caused the injury, and therefore lessees are primarily liable.

4. Pleadings § 15: Torts § 6—

Upon demurrer of the additional defendants to the cross-action of the original defendants, the original defendants may not maintain that plaintiff might amend so as to state a cause of action against the additional defendants as joint tort-feasors, but the demurrer must be determined upon the cause as alleged by plaintiff.

APPEAL by defendants Goodman from *Rudisill, J.*, first February Regular Term 1954, MECKLENBURG. Affirmed.

Civil action to recover compensation for personal injuries, heard on demurrer to the cross action of the original defendants against the defendants trustees.

The Goodmans lease a mercantile building from defendants trustees. The last extension lease was executed 19 October 1951 for the period from 15 January 1952 to 15 January 1959.

This action was instituted originally against the defendants Goodman, tenants under said lease. The plaintiff alleges in her complaint that the Goodmans, while occupying the building as tenants, attached a sign to the front of the building so that the sign projected over the sidewalk of North Tryon Street; that the sign was negligently erected in the particulars set forth in the complaint; and that on 7 July 1952, as she was walking along the sidewalk in front of the building, said sign fell, struck her, and inflicted certain personal injuries.

Defendants Goodman, answering, deny all the material allegations contained in the complaint and attempt to plead contributory negligence on the part of plaintiff. They further plead a cross action for contribution against the defendants trustees. In their cross action they allege that they leased the building from the defendants trustees; that at the time the lease was executed there was attached to the front wall of the building an awning having a metal cover; that said awning was attached to the building prior to their first occupancy; and that it was a part of this metal cover—and not the sign—that fell and injured plaintiff. They then allege negligent erection of the awning in such manner that it constituted a latent defect not known to or discoverable by them. The alleged negligence on the part of the defendants trustees is set forth in some detail. It is sufficient to say, without summarizing these allegations, that the substance of the alleged cross action is that the defendants trustees leased the building to the Goodmans in a ruinous condition and that, in the event the plaintiff recovers, the defendants Goodman are entitled to contribution from the trustees or to recover over against them under the doctrine of primary and secondary liability.

The lease agreement of 19 October 1951, executed while the prior lease was in full force and effect, stipulates therein that the term of the lease shall begin 15 January 1952. The lease likewise provides that the landlord shall not be liable for "any latent defect in the building."

Said defendants pray that the said trustees be made parties defendant to the end that the original defendants may have judgment over against the trustees in the event plaintiff recovers judgment herein.

On 11 January 1954 the clerk entered an order making J. P. Hackney, Jr. and George D. Patterson as trustees parties defendant and directing that summons be issued and served on said additional defendants. Having been served with summons herein, said trustees appeared and filed a

written demurrer for that (1) the cross action fails to state a cause of action for contribution or under the doctrine of primary and secondary liability, (2) it affirmatively appears from the allegations contained in said cross action that at the time plaintiff was injured the Goodmans were tenants, in the actual exclusive possession of the premises, and the lease agreement expressly provides that the trustees shall not be liable "for any latent defects," and (3) (specifications of defects in the cross action which demonstrate the insufficiency thereof.).

When the cause came on for hearing on the demurrer, the court below sustained the same. Thereupon the defendants Goodman excepted and appealed.

McDougle, Ervin, Horack & Snepp and Robinson & Jones for defendants Goodman, appellants.

Pierce & Blakeney and R. E. Wardlow for defendants trustees, appellees.

BARNHILL, C. J. The plaintiff seeks to recover compensation for personal injuries she sustained when an advertising sign attached to the building by the Goodmans while they were in exclusive control thereof fell and struck her as she was passing in front of the building. The defendants Goodman seek to recover over against the defendants trustees on the allegation that the plaintiff was injured when a part of the metal cover of an awning attached to the building prior to their (the Goodmans') first occupancy of the building, fell and struck plaintiff. Thus plaintiff seeks to recover on one cause of action while defendants Goodman seek contribution from, or to recover over in full against, the trustees upon an entirely different state of facts. Under these circumstances the provisions of G.S. 1-240 are not available to the original defendants.

The purpose of the Act, G.S. 1-240, is to permit a defendant who has been sued in tort to bring into the action, for the purpose of enforcing contribution, a joint tort-feasor whom the plaintiff could have joined as party defendant in the first instance. *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335.

The cause of action as stated in the complaint is the subject matter of the controversy. Defendants are not permitted to litigate in plaintiff's action differences which are not directly related thereto. To entitle the original defendant in a tort action to have some third party made an additional party defendant under G.S. 1-240 to enforce contribution, it must be made to appear from the facts alleged in the cross action that the defendant and such third person are tort-feasors in respect of the subject of controversy, jointly liable to the plaintiff for the particular wrong alleged in the complaint. The facts must be such that the plaintiff, had

he desired so to do, could have joined such third party as defendant in the action. *Wilson v. Massagee, supra; Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73; *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 369.

The plaintiff alleges she was injured when an advertising sign erected by the Goodmans fell and struck her as she walked along the sidewalk in front of the building occupied by them as tenants. This sign was erected by the Goodmans for their own use and benefit while they were in exclusive possession of the premises. Negligence in the erection and maintenance of this sign is the heart of her claim to compensation for personal injuries.

If the sign was negligently erected or maintained, that negligence was the negligence of the Goodmans alone. In no sense were the trustees joint tort-feasors in respect thereto. *Garrett v. Garrett,* 228 N.C. 530, 46 S.E. 2d 302; *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295. Indeed, the Goodmans do not so allege. They base their cross action on an entirely different state of facts which invoke the application of principles of law which have no relation to plaintiff's cause of action. It follows that the order sustaining the demurrer was well advised.

From what has been said heretofore, it clearly appears that the doctrine of primary and secondary liability has no application. Even if we concede that the doctrine applies, the Goodmans are the ones who were actively negligent and created the situation which caused the plaintiff's injuries.

But the original defendants suggest that plaintiff may now amend her complaint and allege that it was the top or cover of the awning, and not the sign, that fell and injured her. They therefore urge us to render decision on this appeal as though she had so alleged in the first instance. But this we may not do. *Skipper v. Yow, ante,* 102. In the first place we must assume that plaintiff has alleged in good faith the facts as she understands them to be. In the second place what we might now say, in anticipation of an amendment, respecting the interesting questions discussed in the briefs would be *dicta* in which we should not—but sometimes do—indulge.

The judgment entered in the court below is

Affirmed.

CAROLINA POWER & LIGHT COMPANY v. MERRIMACK MUTUAL FIRE INSURANCE COMPANY ET AL.

(Filed 28 April, 1954.)

Appeal and Error § 43—

Where the Supreme Court is evenly divided in opinion as to the points raised as grounds for rehearing, one Justice not sitting, the petition will be denied.

ON PETITION to rehear case on appeal, and reconsider opinion reported in 238 N.C. 680, 79 S.E. 2d 167.

A. A. Bunn, Kittrell & Kittrell, Perry & Kittrell, E. S. DeLaney, Jr., Charles F. Rouse, and A. Y. Arledge for plaintiff appellant.

Murray Allen, R. P. Upchurch, Gholson & Gholson, and William T. Joyner for defendants appellees.

PER CURIAM. The Court, one member, *Parker, J.*, not sitting, being evenly divided in opinion as to points raised as grounds for rehearing, the opinion reported as above shown will stand as written, in accordance with the usual practice in such cases, and the petition will be, and it is hereby

Denied.

STATE v. WINFORD AYSCUE.

(Filed 28 April, 1954.)

1. Criminal Law § 78c: Appeal and Error § 6c (1)—

Challenges to the admissibility of certain evidence and the sufficiency of the evidence to carry the case to the jury may not be raised initially in the Supreme Court, but must be presented by exceptions and assignments of error duly made in the lower court.

2. Criminal Law § 78c: Appeal and Error § 6c (2)—

An appeal itself is an exception to the judgment, but where the judgment is regular in form and is supported by the verdict, a sole challenge by appeal must fail.

APPEAL by defendant from *Harris, J.*, and a jury, at October Term, 1953, of FRANKLIN.

Criminal prosecution tried upon two bills of indictment, consolidated for trial, charging the defendant with forging and uttering certain checks in violation of G.S. 14-119 and 14-120.

From a verdict of guilty and judgment imposing penal servitude of eighteen months, the defendant appeals.

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

John F. Matthews for defendant, appellant.

PER CURIAM. The defendant, being without counsel in the trial below, seeks to challenge in this Court for the first time (1) the admissibility of portions of the evidence adduced against him, and (2) the sufficiency of the evidence to carry the case to the jury. However, the record discloses no objection to any of the evidence nor motion for judgment as of nonsuit. In fact, nowhere in the record is there an objection or exception to any ruling of the trial court. The objections, first made in this Court, come too late. Decision here is controlled by what is said in *S. v. Howell,* 239 N.C. 78, 79 S.E. 2d 235, and *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311.

True, the appeal itself is an exception to the judgment, *S. v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738, but the judgment appears to be regular in form and is supported by the verdict. It would seem the defendant has applied to the wrong forum.

No error.

LIZZIE B. HUBBARD, EXECUTRIX OF THE ESTATE OF CHRISTIAN GAY PATE, DECEASED, v. JAMES A. WIGGINS, MOLLIE LOUISE WIGGINS, JAMES WILHELM WIGGINS, JOHN DEWEY WIGGINS, JOHN DEWEY WIGGINS, JR., JAMES HAMPTON WIGGINS, SAMUEL PAUL WIGGINS, STANLEY PAUL WIGGINS, JOHN WILLIAM ARCHER, MARY FRANCES ARCHER, JOHN WILLIAM ARCHER, JR., ROBERT WALTER ARCHER, CAROLYN WHITE ARCHER, BARBARA JEAN ARCHER, JESSE WAYNE ARCHER, J. FORREST ARCHER, DAISY ARCHER BRITT, ROBERT CLINTON ARCHER, ROBERT CLINTON ARCHER, JR., DEBORAH LOUISE ARCHER, MARY ALICE ARCHER EDWARDS, PEGGY ANN ARCHER, J. SAMUEL HUBBARD, JUANITA HUBBARD DAVIS, H. COMPTON GAY, FRANK H. GAY, FRANKIE SUE GAY, HARVEY H. GAY, VIRGINIA BELLE GAY WHITE, BARBARA LEE WHITE, BARBARA ANN GAY CLAYTON, ALMA CHRISTINE GAY KYTE, WILLIAM C. GAY, JR., ELIZABETH BLANCHE GAY, DEWEY ELIZABETH GAY TAYLOR, DEWEY GAY HARRISON, ERNEST WOOD TAYLOR, JR., NELLIE GREENE GAY, GERTRUDE GAY BRYANT, HARVEY H. GAY, JR., NELL GAY WHITE, DOROTHY GAY WHITE WATKINS, JOHN E. WHITE, LILAR BIRDSONG VICK, OMA LEE VICK HARRIS, JAMES BATTE HARRIS, SANDRA DIANNE HARRIS, JAMES VICK, JUDITH DEE VICK, JOYCE ANN VICK, NELL VICK NEAL, ELLEN LEE ADAMS, PATRICIA ANN NEAL, MAY VICK SHIELDS, JEAN MARIE SHIELDS, LINDA TART SHIELDS, JAMES

ANDERSON SHIELDS, ELIZABETH ANN SHIELDS, LAURICE VICK ALLEN, MINA VICK LIGGAN, ELIZABETH BIRDSONG HUBBARD, HOWARD STOCKWELL, GLORIA STOCKWELL FAISON, ELIZABETH STOCKWELL, SHIRLEY STOCKWELL, HOWARD STOCKWELL, JR.; MASONIC AND EASTERN STAR HOME, INC., A NORTH CAROLINA CORPORATION, OF GREENSBORO, NORTH CAROLINA, AND J. CRAWFORD BIGGS, JOHN N. DUNCAN, C. C. CUNNINGHAM, GROVER L. DILLON, B. TROY FERGUSON, L. B. FLOURNOY, H. O. LINEBERGER AND A. EUGENE SPIVEY, TRUSTEES OF EDENTON STREET METHODIST CHURCH OF RALEIGH, NORTH CAROLINA, AND ALL OTHER PERSONS, KNOWN OR UNKNOWN, IN BEING OR NOT IN BEING, AND NOT SPECIFICALLY NAMED HEREIN, WHO HAVE OR MAY HAVE OR CLAIM AN INTEREST IN THE ESTATE OF CHRISTIAN GAY PATE, DECEASED.

(Filed 5 May, 1954.)

1. Wills § 32—

While ordinarily it will be presumed that a testator intended to dispose of property owned by him and did not intend to dispose of property over which he did not have power of testamentary disposition, such presumption of fact, like other presumptions of fact and technical rules of construction, as distinguished from rules of law, will not be permitted to overrule the evident intent of the testator, express or implied in the language of the instrument considered as a whole.

2. Wills §§ 31, 39—

Where the language of a will is ambiguous or doubtful, evidence is competent to show the circumstances surrounding the execution of the will, including the condition, nature and extent of testatrix' property, and her relation to her family and to the beneficiaries named in the will, so as nearly as possible to get testatrix' viewpoint at the time the will was executed, and even if the language of the will is not ambiguous or doubtful, the admission of such evidence may not be prejudicial.

3. Wills § 31—

The intention of testatrix as gathered from the general purpose of the will and the significance of the various expressions, enlarged or restricted according to their real intent, is the will, and a phrase will not be given its literal meaning if contrary to the intent as gathered from the language of the instrument considered as a whole.

4. Wills § 36—

Ordinarily, where a definite and certain devise or bequest is made and some part of the same property is disposed of in a later part of the will, the original devise or bequest is only reduced to the extent necessary to comply with the later provision in the will.

5. Wills § 39—

In an action to construe a will, the extent and character of the estate should be established when material as an aid in ascertaining the intent of the maker of the will.

6. Wills § 34e—

Where the amount of property intended to be embraced in a bequest is ambiguous and doubtful under the language of the will, later directions

in the instrument for the disposition of testatrix' property inconsistent with one of the possible interpretations of the prior bequest, even though such directions are ineffectual because of ambiguity or illegibility, are proper to be considered in ascertaining the amount of property testatrix intended to embrace within the prior bequest, since such later provisions throw light upon testatrix' intent in this regard.

7. **Same—Where amount of government bonds included in bequest is ambiguous, the amount must be ascertained in accordance with intent as gathered from entire instrument.**

Testatrix directed that a named nephew "is to have the Bonds & on Hundred Dollars." At her death testatrix possessed two sets of bonds, one in an unmarked envelope of the value of three hundred dollars payable to herself or the nephew, and the other in an envelope marked her personal account, in the amount of six thousand dollars, payable to herself alone. Testatrix left no children her surviving, but was survived by 46 nieces and nephews and grand-nieces and grand-nephews, two brothers and one sister, and made bequests to 45 of these relatives, specifically excluding four from any share for reasons stated, with substantial equality among the beneficiaries named. Later provisions of the will attempting to dispose of fifteen hundred dollars in bonds and to set up a trust fund for business schooling of certain children were ineffective for ambiguity or illegibility. *Held:* In accordance with the intent of testatrix as gathered from the language of the instrument construed in its entirety, the phrase in question was properly construed to direct the delivery of the three hundred dollars in bonds in their joint names to the nephew and to bequeath to him one hundred dollars in cash, rather than a bequest of the six thousand dollars in bonds and one hundred dollars to him, which would result in a grossly disproportionate gift to the nephew.

BOBBITT, J., concurring.

ERVIN, J., dissenting.

BARNHILL, C. J., and WINBORNE, J., concur in dissent.

APPEAL by defendant J. Samuel Hubbard, from *Hall, Special Judge,* December Term, 1953, of WAKE.

This action was brought pursuant to the provisions of the Uniform Declaratory Judgment Act (G.S. 1-253, *et seq.*), for the purpose of obtaining the advice and guidance of the court in the construction and interpretation of the last will and testament of Christian Gay Pate, and in the administration of her estate.

The facts essential to the disposition of this appeal are fully stated in the court's findings of fact, conclusions of law and the judgment included therein, which are as follows:

"This cause being duly calendared for hearing and coming on to be heard before the undersigned Judge presiding at the December 1953 Assigned Civil Term of Wake County Superior Court, and a jury trial having been waived and all parties having agreed in open Court that the Court should hear and decide all questions of fact and law in issue in this

action, and, it appearing to the Court that all parties involved in this action have been properly served with summons either by personal service, by publication, or by personal service outside of the State and are before the Court.

"And it further appearing that all minors and incompetents and all unknown parties are represented in this action by and through A. L. Purrington, Jr., guardian *ad litem* for Frankie Sue Gay, Barbara Lee White, Barbara Ann Gay Clayton, Alma Christine Gay Kyte, William C. Gay, Jr., Elizabeth Blanche Gay, Dewey Gay Harrison, Ernest Wood Taylor, John Dewey Wiggins, Jr., James Hampton Wiggins, Stanley Paul Wiggins, Jesse Wayne Archer, Deborah Louise Archer, Peggy Ann Archer, James Batte Harris, Sandra Dianne Harris, Judith Dee Vick, Joyce Ann Vick, Ellen Lee Adams, Patricia Ann Neal, Jean Marie Shields, Linda Tart Shields, James Anderson Shields, Elizabeth Ann Shields, Elizabeth Stockwell, Shirley Stockwell, Howard Stockwell, Jr., and Barbara Jean Archer, and for all other persons, known or unknown, or in being or not in being, and not specifically named in this action, who have or may have or claim an interest in the estate of Christian Gay Pate, deceased, who are defendants in the above entitled action, and for all unknown spouses of defendants, known or unknown, and not specifically named in this action, who have or may have or claim an interest in the estate of Christian Gay Pate, deceased, and that said guardian *ad litem* has duly filed answer herein, and,

"The Court having heard the evidence and arguments of counsel on matters of fact and law at issue, hereby finds the following facts:

"1. That the true and accurate transcription of the Will of Christian Gay Pate, indecipherable words being indicated by dashes, is as follows: (Note: the lines of said will are numbered for convenience of reference)

1 I Christian Gay Pate, I am a right & sound
2 mind, and this is my Will. If anything
3 should happin to me before I do it I want a
4 nice family marker put to the graves for I don't
5 like the one there. & Lizzie B. Hubbard &
6 Dorothy Gay White is act as administrators of my
7 state. I want them to have one thousand
8 Dollars a piece for their time, & I want
9 Jim Wiggins and Louise to have my car &
10 5 hundred dollars. & Christine Gay my niece
11 to have a nuf money to pay for Business Course
12 if she will take one, & my house is to
13 stay like it & my sister family is to
14 live here for 2 year or more if they

15 need to pay the taxes and up keep, & put
16 fifty Dollars a month in bank for Dorothy Gay.
17 if they make that above the expenses. Lizzie is
18 keep one five hundred for Lillie Vick to
19 buy thing that she really need. Mary Archer is to
20 have. 2. hundred. in cash. & Sam Hubbard
21 is to have the Bonds & on Hundred Dollars
22 & Nita H. Davis is to have 2. hundred
23 dollars, in cash. & my great nieces & fifty a
24 piece. & Loris D. Allen is to have one
25 hundred. & my church to have one Hundred
26 in cash. & my Brothers don't need none so they
27 will get five Dollars each. && the other
28 shall stay in trust to for a while & if any one
29 of the - - - children fish high help them with
30 a Business course up to five Hundred
31 Dollars each. The piano is Dorothy Gays & any
31a that she lizzi
32 thing else she wants in my house. &
33 Mr. John White can help them & he
34 shall have six hundred dollars for his
35 help to pay on a car for them. & if any
36 one tries to Break this they are not to have
37 nothing at all, for these are the things I
38 want done. they don't have to give Bond.
39 one hundred. fifty dollars more to the
40 Masonic & eastern Star home to furnish a room in the
41 hospital. & when my home is sold it shall
42 be divided between my nieces & nephews & my
43 & great nieces and nephews. at 2 hundred a piece
44 & my sister shall have 5 Hundred Dollars.
45 I don't want Bill Gay or Harvey Gay Jr. to
46 have any for they Drink & throw it way, so
47 I doe want Almo Gay, Bill Wife to have
48 2 hundred Dollars to feed her children
49 with instead of him getting it she shall
Clint
50 use it for the children. Bill or Foris Archer is
51 not to have anything for they Drink. I don't want them to
52 have any. Lizzie is to have my china if she wants
53 it. & I want fifteen hundred dollars in saving Bonds
54 for flowers to the graves.
55 This is my Will. Feb. 12, 1949
Christian. Gay. Pate.

"2. That the persons named by testatrix in line 45 of her said will as Bill Gay and in line 50 of her said will as 'Bill or Foris Clint Archer' were intended by testatrix to be those persons among her nephews bearing such names, *i.e.,* William C. Gay, Sr., John William Archer, Sr., J. Forest Archer and Robert Clinton Archer, Sr.

"3. That in lines 31, 31a and 32 of testatrix's will the words 'anything else . . . in my house' were intended by testatrix to include only furniture in testatrix's house.

"4. That a family marker and individual name plates have been purchased, paid for and erected on testatrix's lot in Montlawn Memorial Park, Wake County, North Carolina, at a cost of $636.83.

"5. That testatrix's automobile has been delivered to James A. Wiggins and Louise Wiggins.

"6. That the language in lines 23 and 24 of said will, '& my great nieces & 50 a piece.,' was intended by testatrix to constitute a bequest of $50.00 to each of testatrix's great nieces living at her death.

"7. That the language appearing in lines 20 and 21 of testatrix's will, to wit: 'Sam Hubbard is to have the Bonds & on Hundred Dollars,' when considered with other provisions appearing in said will and with the fact that testatrix held at her death two sets of bonds (one set in an unmarked envelope and consisting of three $100.00 U. S. Bonds, Series D, payable to 'Mrs. Christian G. Pate or Mr. J. Sam Hubbard,' and the other set in an envelope marked 'Mrs. W. L. Pate, personal account,' and consisting of six $1,000 U. S. Bonds, Series D, payable to 'Mrs. Christian Gay Pate') is ambiguous and subject to interpretation and the Court hereby finds as a fact that said language appearing in lines 20 and 21 of the will, 'Sam Hubbard is to have the Bonds & on Hundred Dollars,' was intended to bequeath to Sam Hubbard the three $100 U. S. Bonds, Series D, payable to 'Mrs. Christian G. Pate or Mr. J. Sam Hubbard,' and $100.00, and that Sam Hubbard is entitled to no other property under the language of said bequest; that this finding does not prejudice the rights of Sam Hubbard under any other part of said will.

"8. That Christian Gay Pate left no children or issue surviving her and the Court cannot determine from the pleadings and the evidence to what children the testatrix intended to refer in line 29 of her will, reading 'of the - - - children fish high help them with.'

"NOW, THEREFORE, upon the foregoing findings of fact and upon the admissions of facts in the pleadings, the Court concludes as matters of law and orders, adjudges and decrees as follows:

"1. That the transcription of the will of Christian Gay Pate, as set forth in Exhibit B attached to the complaint and as set forth in Book of Wills S, page 72, Office of the Clerk of Superior Court of Wake County, be, and the same is hereby amended in accordance with findings

of facts No. 1 above, and that the Clerk of the Superior Court of Wake County be, and he is hereby authorized and directed to amend the transcription of said will as the same appears in Book of Wills S, page 72, Office of the Clerk of the Superior Court of Wake County to conform with said findings of facts No. 1 above, and, as amended, said transcript is hereby ordered, adjudged and decreed to be a true and accurate transcription of the will of Christian Gay Pate, deceased.

"2. That under the provisions in lines 31, 31a and 32 of the will of Christian Gay Pate, testatrix bequeathed her piano to Dorothy Gay White Watkins and also bequeathed to Dorothy Gay White Watkins and to Elizabeth Birdsong Hubbard any pieces of furniture contained in testatrix's home at the time of her death which either Dorothy Gay White Watkins or Elizabeth Birdsong Hubbard might select and elect to take.

"3. That under the provisions of lines 41 through 52 of said will, the executrices of said will are given an implied power to sell, after two years from testatrix's death, the homeplace of testatrix at 7 East Lane Street in the City of Raleigh, North Carolina, in such manner and to such person or persons and at such prices as they might deem for the best interest of said estate, and to distribute the proceeds of said sale as follows: (a) $500.00 to testatrix's sister, Nell Gay White; (b) $200.00 to each of testatrix's nieces, nephews, great-nieces and great-nephews living at her death, excluding William C. Gay, Sr., Harvey H. Gay, Jr., John William Archer, Sr., Robert Clinton Archer, Sr., and J. Forest Archer; (c) $200.00 to Alma Norwood Gay, wife of William C. Gay, Sr., for the use of her children, Barbara Ann Gay Clayton, Alma Christine Gay Kyte, William C. Gay, Jr., and Elizabeth Blanche Gay; that the sale of said homeplace, as the same is set forth and admitted in all of the pleadings filed herein, be, and the same is hereby approved and confirmed and Lizzie B. Hubbard, Executrix of the Estate of Christian Gay Pate, deceased, is hereby authorized and empowered to make, execute and deliver deed therefor under her power of sale; that no person was given the right under said will, as a beneficiary, devisee or legatee, to use or occupy said homeplace after the 9th day of July, 1951; that the legacies provided in lines 41 through 52 of said will are demonstrative legacies, and as such are entitled, if the proceeds of sale of said homeplace shall be insufficient to satisfy in full all of such legacies, to have any deficiency supplied from the general assets of the estate to the extent necessary to pay all such legacies in full and the expenses of sale of said homeplace shall be paid from the general assets of the estate.

"4. That under the provisions of lines 10, 11 and 12 of said will, Christine Gay (Alma Christine Gay Kyte) is to have enough money to pay for a business course if she will take one; that in carrying out this provision the Executrix be, and she is hereby authorized and directed to set aside

for the benefit of Alma Christine Gay Kyte in full and complete discharge of the legacy provided in lines 10, 11 and 12 of said will, the sum of $500.00 out of the general assets of the estate, which sum is hereby declared to be a general legacy, and to pay therefrom the actual expenses of tuition, books and supplies incurred by the said Alma Christine Gay Kyte in taking a business course from such *bona fide* school offering such business course as she may elect: PROVIDED, that the said Alma Christine Gay Kyte must elect to take such course and must begin such course on or before March 7, 1958, and must complete such course on or before March 7, 1959, in default of which such funds as shall not theretofore have been paid by the Executrix shall be included in the residue of said Estate and so distributed; and in the payment of any portion of such legacy, the Executrix is hereby authorized to pay said funds in the discretion of said Executrix.

"5. That the provisions of lines 27 through 31 of said will, '& the other shall stay in trust to for a while & if any one of the (word indecipherable) children fish high help them with a business course up to five Hundred Dollars each,' are so vague, indefinite and ambiguous as to be incapable of administration under the law and therefore the same are hereby ordered, adjudged and decreed to be void.

"6. That the provisions in lines 53 and 54 of said will reading: 'I want fifteen hundred dollars in savings Bonds for flowers to the graves,' are so vague, indefinite and ambiguous as to be incapable of administration under the law and therefore the same are hereby ordered, adjudged and decreed to be void.

"7. That testatrix's will contains no valid residuary clause, wherefore any funds or properties not otherwise disposed of, including any legacies or devises which may have lapsed or may have been found by this Court to be void, shall be distributed among the distributees and heirs at law of Christian Gay Pate under the laws of descent and distribution as upon an intestacy, without exclusion of any distributee or heir at law, and particularly without exclusion of testatrix's brothers referred to in lines 26 and 27 of the will and her nephews, referred to in lines 45 and 50 of the will.

"8. That in the payment of bequests and other benefits provided in testatrix's will it is ordered, adjudged and decreed that all properties specifically bequeathed shall be delivered to the respective legatees denominated in said will to receive said property; that the legatees of the proceeds of sale of the homeplace shall be paid in full from the proceeds of sale of the homeplace, any deficiency to be supplied from the general assets of the estate; that thereafter general legacies shall be paid to the extent of funds available from funds of the estate then remaining; any residue of funds thereafter remaining shall be distributed among the heirs at law and distributees of Christian Gay Pate in accordance with the

general laws of descent and distribution as upon an intestacy; and if the funds or properties of the Estate shall be insufficient to pay the various legacies and benefits provided under the will then such legacies and benefits shall abate in the following order, with pro rata abatement within each class: (a) residuary benefits; (b) general legacies; (c) demonstrative legacies; (d) specific legacies.

"9. That the costs of this action, including a fee to A. L. Purrington, Jr., guardian *ad litem* as aforesaid, in the amount of $400.00, to be taxed by the Clerk, be and they are hereby taxed against the Estate of Christian Gay Pate to be paid by the Executrix of the Estate of Christian Gay Pate, deceased.

"10. That any orders herein directed, or authority herein given, to Lizzie B. Hubbard, Executrix, or to the Executrix of the Will of Christian Gay Pate, shall have equal binding effect and authority on any other person who may at any time succeed Lizzie B. Hubbard as Executrix or who may at any time serve as executor, executrix or administrator *c.t.a* of the Will and Estate of Christian Gay Pate.

"11. That the six $1,000.00 U. S. Bonds, Series D, payable to 'Mrs. Christian Gay Pate,' were not disposed of by said will and shall fall into the residue of the Estate; and that Sam Hubbard is entitled to the three $100.00 U. S. Bonds, Series D, payable to 'Mrs. Christian G. Pate or Mr. J. Sam Hubbard.'

"This 11th day of December, 1953.

"C. W. HALL
Judge Presiding, December, 1953, Assigned
Civil Term, Wake County Superior Court."

From the foregoing findings of fact, conclusions of law and judgment, the defendant J. Samuel Hubbard appeals, assigning error.

Parker & Sink for plaintiff, appellee.

Lassiter, Leager & Walker and Ballard S. Gay for appellees John William Archer, et al.

A. L. Purrington, Jr., guardian ad litem.

J. C. B. Ehringhaus, Jr., for defendant, appellant.

DENNY, J. The one question to be determined on this appeal is whether the testatrix intended to give J. Samuel Hubbard the three $100.00 U. S. Bonds, Series D, which were payable to her or J. Sam Hubbard, and $100.00; or did she intend to give him the six $1,000.00 U. S. Bonds, Series D, payable to herself, Mrs. Christian Gay Pate, and $100.00?

We are not inadvertent to the fact that if the testatrix in the instant case had died intestate, J. Samuel Hubbard would have been entitled to the three $100.00 U. S. Bonds, Series D, as a matter of law. *Ervin v. Conn,* 225 N.C. 267, 34 S.E. 2d 402; *Watkins v. Shaw, Comr. of Revenue,* 234 N.C. 96, 65 S.E. 2d 881. There is also a presumption recognized by the courts in construing wills that a testator intended only to dispose of property owned by him and did not intend to include in a devise or bequest any property over which he did not have the power of testamentary disposition. 57 Am. Jur., Wills, section 1163, page 760; *Bank v. Misenheimer,* 211 N.C. 519, 191 S.E. 14, 110 A.L.R. 1310. It is not unusual, however, for persons to misconceive the extent of their testamentary rights and to undertake to dispose of property over which they have no power of testamentary disposition. *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162; *Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584, 156 A.L.R. 814; *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29; *Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45; *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183.

We must remember, however, that in the interpretation of a will to ascertain the intent of the testator, neither presumptions nor technical rules of construction, as distinguished from rules of law applicable to the construction of wills, such as the rule in *Shelley's case* or the rule against perpetuities, will be permitted to overrule the evident intent of the testator, either expressly or by necessary implication, gathered from the language of the will as a whole. *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892; *Haywood v. Rigsbee,* 207 N.C. 684, 178 S.E. 102; *Heyer v. Bulluck,* 210 N.C., 321, 186 S.E. 356; *Richardson v. Cheek,* 212 N.C. 510, 193 S.E. 705; *Trust Co. v. Miller,* 223 N.C. 1, 25 S.E. 2d 177; *Trust Co. v. Waddell,* 234 N.C. 454, 67 S.E. 2d 651.

In 57 Am. Jur., Wills, section 1135, page 731, *et seq.,* we find this statement: "The one rule of testamentary construction to which all others are servient and assistant, it has been said, is that the meaning intended by the testator is to be ascertained and given effect in so far as legally possible. The testatorial intention will control any arbitrary rule, however ancient may be its origin, . . ."

The court below being of the opinion that the provision in the will with respect to the disposition of the bonds is ambiguous, admitted testimony, over the objection of the appellant, to show the extent of the personal contacts of the testatrix with her relatives who were named as beneficiaries in her will.

The appellant assigns as error the admission of the evidence referred to above, which, in sum and substance, discloses that her sister, Nell Gay White, and her husband, John E. White, lived in the home of the testatrix from the time of their marriage in 1931 until the death of Mrs. Pate; that Mrs. White is the sister referred to in line 13 of the will, who was to con-

tinue to live in the decedent's home for two years after Mrs. Pate's death; that Dorothy Gay White (now Dorothy Gay White Watkins), who was named as co-executrix of Mrs. Pate's will, is the daughter of Mr. and Mrs. John E. White and was born and reared in the Pate home. (She qualified as co-executrix of Mrs. Pate's will but later married and moved to Meridian, Miss., and was permitted by the court to resign.) That Mrs. Pate from time to time visited J. Samuel Hubbard, a nephew, Nita H. Davis (Juanita Hubbard Davis), a niece, Mrs. Lizzie Hubbard, a niece by marriage, and James A. Wiggins, a nephew. That J. Samuel Hubbard visited Mrs. Pate several times while the Whites lived in her home; so did James A. Wiggins; that Lizzie Hubbard visited her more often than anyone else, and that Lizzie Hubbard was the only relative that visited Mrs. Pate during the last two or three years of her life.

In our opinion, irrespective of whether the will of Mrs. Pate is ambiguous or doubtful in the respect contended by the appellees, this evidence was not prejudicial to the appellant. It simply tends to show that the personal contacts of Mrs. Pate with her relatives, the objects of her bounty, were limited largely to those with the Whites who lived in her home, J. Samuel Hubbard and his sister Nita H. Davis (Juanita Hubbard Davis) of Petersburg, Virginia, Mrs. Lizzie Hubbard of Emporia, Virginia, and James A. Wiggins of West Greene, Georgia.

In seeking to discover the intent of a testatrix, when the language used is ambiguous or of doubtful meaning, it is proper for the court to take into consideration the circumstances surrounding the execution of the will, including the condition, nature, and extent of her property, her relationship to her family and to the beneficiaries named in the will, so as nearly as possible to get her viewpoint at the time the will was executed. 57 Am. Jur., Wills, section 1144, page 741, *et seq.*; *Herring v. Williams,* 153 N.C. 231, 69 S.E. 140, 138 Am. St. Rep., 659; *Crouse v. Barham,* 174 N.C. 460, 93 S.E. 979; *Haywood v. Rigsbee, supra; Anderson v. Bridgers,* 209 N.C. 456, 184 S.E. 78; *Heyer v. Bulluck, supra; Cannon v. Cannon,* 225 N.C., 611, 36 S.E. 2d 17; *Trust Co. v. National Missions,* 226 N.C. 546, 39 S.E. 2d 621.

In *Cannon v. Cannon, supra,* the late *Chief Justice Stacy* said: "The intention of the testatrix is her will. This intention is to be gathered from the general purpose of the will and the significance of the various expressions, enlarged or restricted according to their real intent. In interpreting the different provisions of the will, the courts are not confined to the literal meaning of a single phrase. A thing within the intention is regarded within the will though not within the letter. A thing within the letter is not within the will if not also within the intention." *Bank v. Corl,* 225 N.C. 96, 33 S.E. 2d 613; *Weathers v. Bell,* 232 N.C. 561, 61 S.E. 2d 600; *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12;

Trust Co. v. Waddell, supra; Efird v. Efird, 234 N.C. 607, 68 S.E. 2d 279; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578.

It is apparent that the testatrix was a person of very limited education, who undertook to write her own will. Generally speaking it would seem that she had in mind a rather comprehensive and elaborate plan for the disposition of her estate, but did not have sufficient experience and training in such matters to make her intent in respect to certain bequests either clear or effective. She had forty-six nieces and nephews and great-nieces and great-nephews, four of whom she excluded; two living brothers, and one sister; she made bequests to forty-five of these relatives. Except for those rendering service in connection with the administration of her estate, and Dorothy Gay White (now Watkins), who was reared in her home, all were treated substantially alike unless J. Samuel Hubbard is to take all of her bonds in the aggregate sum of $6,300.00, and $100.00, plus $200.00 along with the other nieces and nephews, great-nieces and great-nephews (except those expressly excluded), in the division of the proceeds from the sale of her home.

The testatrix had two sets of bonds in different envelopes, one containing $300.00 par value, and the other $6,000.00 par value. The $300.00 in bonds in the name of the testatrix and J. Sam Hubbard, and $100.00 in cash, would be the largest amount given to any of her relatives other than those connected with the administration of her estate, except the sum of $500.00 bequeathed to James A. Wiggins, who, according to the record, is a Methodist minister; $500.00 to her sister Nell Gay White, who lived in her home; and $500.00 to her niece, Lillie Vick, to enable her "to buy thing that she really need." Lillie Vick, according to the pleadings, has six children, while J. Samuel Hubbard has no children. Moreover, if this testatrix knew that she did not have the testamentary power to dispose of the $300.00 in bonds because they were made payable to her and J. Sam Hubbard, but intended to give him the $6,000.00 in bonds, it is rather strange and unusual that she would have added "& on Hundred Dollars," to this very large and disproportionate bequest.

Furthermore, later in her will this statement appears, "& I want fifteen hundred dollars in saving Bonds for flowers to the graves." Ordinarily where a definite and certain devise or bequest is made and some part of the same property is disposed of in a later part of the will, the original devise or bequest is only reduced to the extent necessary to comply with the later provision in the will. 57 Am. Jur., Wills, section 1128, page 721, *et seq.* But, since there is some uncertainty or doubt as to what bonds the testatrix intended to include in the bequest to J. Samuel Hubbard, the court has the right to consider the later bequest or reference to savings bonds, on the question as to whether she intended to include the $6,000.00 in bonds in her bequest to him.

It is unfortunate that the court was not given any information as to the extent of the testatrix's estate. It was entitled to such information. Often the knowledge of the extent or character of an estate is helpful in asceraining the intent of the maker of the will. *Herring v. Williams, supra; Ripley v. Armstrong,* 159 N.C. 158, 74 S.E. 961; *Adams v. Cowen,* 177 U.S. 471, 44 L. Ed. 851; *Blake v. Hawkins,* 98 U.S. 315, 25 L. Ed. 139.

The testatrix after making her bequests, exclusive of those in connection with the disposition of the proceeds to be derived from the sale of her home, undertook to set up a trust consisting of the residue of her estate, for the purpose of giving certain children a business education at a cost not to exceed $500.00 for each of such children. We concur with the ruling of the court below to the effect that the attempt to establish this trust failed because of its indefiniteness or illegibility of the writing in connection therewith. Even so, it is worthy of note that at the time the testatrix executed her will she had no nieces or nephews under eighteen years of age but she did have twenty-two great-nieces and great-nephews seventeen years of age or under, none of whom, in all probability, had finished high school and who might have become eligible for benefits under such trust had the testatrix used sufficient legible language to make her intent effective. However, the mere fact that she failed in her attempt to establish this trust, and also failed to make effective provisions for the establishment of the flower fund, does not prevent the consideration of these attempts on the question of her intent.

In seeking to find and apply the intent of a testator, *Stacy, C. J.,* said in *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659: "It is this quest for the variant minds of testators, with no two situated exactly alike and the necessity of interpreting language according to the circumstances of its use, that often results in close distinctions and renders the law of wills *sui generis. Richardson v. Cheek, supra; McIver v. McKinney,* 184 N.C. 393, 114 S.E. 399. Yet after saying this, we assiduously pursue the adjudicated cases for any gleam of light that may help us with the problem in hand. Worthy ideas expressed elsewhere and on other occasions, like nuggets of truth when or wherever found, know no barriers of time or place. It is only the foggy horizon that shuts them out." Surely the testatrix's attempt to set aside "fifteen hundred dollars in saving Bonds for flowers to the graves," is more than a mere gleam of light bearing on her intent obtained from other adjudicated cases. We think it clearly indicates that she did not intend to bequeath the $6,000.00 in bonds to J. Samuel Hubbard.

Notwithstanding all the facts and circumstances revealed by the record, the appellant seriously contends that the testatrix not only intended to bequeath to him all her bonds, totaling $6,300.00 and $100.00 in cash,

plus $200.00 from the proceeds to be derived from the sale of her home, but that she did so in plain and unambiguous language. We do not concur in this view.

As the authorities cited herein point out, in construing a will the language used in a single sentence, clause, or phrase, will not be permitted to control as against the evident intent gathered from the entire instrument. A will is not to be construed *per parcella,* but in its entirety. 57 Am. Jur., Wills, section 1137, page 735, *et seq.*

In our opinion when the will of the testatrix is considered in its entirety, it does not reveal an intent to give to J. Samuel Hubbard approximately twelve times as much as she gave to any of the other objects of her bounty exclusive of those administering her estate, and from six to ten times as much as she gave to each one of them. We think the provisions of the will support the ruling of the court below to the effect that the testatrix intended to give to J. Samuel Hubbard the $300.00 in bonds which she kept in a separate envelope, and $100.00 in cash, plus the amount bequeathed to him from the proceeds to be derived from the sale of her home.

The judgment of the court below is

Affirmed.

ERVIN, J., dissenting: While she dwelt among the living, the testatrix purchased three United States Savings Bonds, Series D, of the value of $100.00 each, which were payable to herself or her nephew Sam Hubbard, and six United States Savings Bonds, Series D, of the value of $1,000.00 each, which were payable to herself alone. She placed the three $100.00 bonds in an unmarked envelope. She put the six $1,000.00 bonds in another envelope bearing her name and the notation "personal account."

The testatrix had the legal power to dispose of the six $1,000.00 bonds by will. It was otherwise with respect to the three $100.00 bonds. Under the applicable Federal regulations, the complete title to the three $100.00 bonds automatically passed to Sam Hubbard by right of survivorship when the testatrix predeceased him without having cashed them.

When she executed her will, the testatrix made two references to bonds. The first appears in lines 20 and 21, and is couched in this language: "Sam Hubbard is to have the bonds & on Hundred Dollars." The second appears in lines 53 and 54, and is expressed in this way: "I want fifteen hundred dollars in Savings Bonds for flowers for the graves." The will does not contain a residuary clause. The United States Savings Bonds were found in their enclosing envelopes after the death of the testatrix, who did not have any claim to any other bonds.

The appeal raises this solitary question for decision: Did the testatrix bequeath the six $1,000.00 bonds to Sam Hubbard?

We must look to the will for the answer to this question. "In construing a will, the court seeks to ascertain and carry into effect the expressed intent of the testator, *i.e.*, the intention which the will itself, either explicitly or implicitly, declares. Where the language employed by the testator is plain and its import is obvious, the judicial chore is light work; for, in such event, the words of the testator must be taken to mean exactly what they say. But where the language in the will does not clearly express the testator's purpose, or when his intention is obscure because of the use of inconsistent clauses or words, the court finds itself confronted by a perplexing task. In such case, the court calls to its aid more or less arbitrary canons or rules of testamentary construction designed by the law to resolve any doubts in the language of the testator in favor of interpretations which the law deems desirable." *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205.

The attorneys for all the parties and the majority of this Court accept as valid the determination of the presiding judge that the words "I want fifteen hundred dollars in Savings Bonds for flowers to the graves" are meaningless and void. I have no quarrel with this holding.

With the second testamentary reference to bonds thus removed, there is virtually no room left for construction. This is true because the testatrix has expressed in plain language of obvious import her unmistakable intention to bequeath to Sam Hubbard the bonds over which she had the power of testamentary disposition.

To be sure, it may be argued that the broad and unrestricted words "Sam Hubbard is to have the bonds" are susceptible of these two constructions: *First,* the testatrix intended to give Sam Hubbard all "the bonds," that is to say, the three $100.00 bonds as well as the six $1,000.00 bonds; *Second,* the testatrix intended to give Sam Hubbard "the bonds" over which she had the power of testamentary disposition, that is to say, the six $1,000.00 bonds. Her action in segregating the bonds and labeling the envelope containing the six $1,000.00 bonds as her "personal account" indicates that she knew the legal powers she had in reference to the bonds and lends support to the second of these constructions. To belabor this point, however, on this phase of the appeal would be as absurd an undertaking as to debate the medieval query "how many angels can dance on the point of a very fine needle without jostling each other." Since the testatrix was without legal power to dispose of the three $100.00 bonds by will, Sam Hubbard would receive exactly the same legacy, *i.e.*, the six $1,000.00 bonds, under either construction. *Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584, 156 A.L.R. 814.

For these reasons, this Court ought to make this determination: When the testatrix said "Sam Hubbard is to have the bonds & on Hundred Dollars," she gave him the six $1,000.00 bonds and $100.00.

My brethren disagree. They adjudge that when the testatrix said "Sam Hubbard is to have the bonds & on Hundred Dollars," she gave him $100.00, but no bonds. They adjudge, moreover, that the testatrix died intestate as to these bonds in spite of her positive declaration that "Sam Hubbard is to have the bonds."

These adjudications rest on a premise, which cannot be harmonized with the language of the will or the facts *dehors* that instrument, and a conclusion which cannot be reconciled with the premise.

This is the premise: When the words "Sam Hubbard is to have the bonds" are read in the light of other provisions of the will and "the fact that testatrix held at her death two sets of bonds," it appears that the testatrix was ignorant of the difference in the state of her titles to the two sets of bonds and believed that she had full legal power to dispose of both sets of bonds by will. As a consequence, the words "Sam Hubbard is to have the bonds" are so ambiguous as to be susceptible of these two constructions: *First,* the testatrix intended to give Sam Hubbard the three $100.00 bonds and no others; *second,* the testatrix intended to give Sam Hubbard the six $1,000.00 bonds and no others. This ambiguity must be removed by construction.

This is the conclusion: When the words "Sam Hubbard is to have the bonds" are construed in the light of other provisions of the will and "the fact that testatrix held at her death two sets of bonds," it appears that it was the intention of the testatrix to give Sam Hubbard the three $100.00 bonds which she could not give and to withhold from him the six $1,000.00 bonds which she could give. Since the testatrix had no legal power to bequeath the three $100.00 bonds, the testamentary provision "Sam Hubbard is to have the bonds" has no more legal significance than the whistling of the wind through the willows. And since the will contains no residuary clause, the testatrix died intestate as to the bonds in controversy.

Every jot and every tittle in the reasoning of my brethren rests in final analysis on their notion that the testatrix was ignorant of the difference in the state of her titles to the two sets of bonds and believed that she had full legal power to dispose of both sets of bonds by will. Their decision would be without validity even if support for this notion could be found in "provisions of the will and the fact that testatrix held at her death two sets of bonds." If the testatrix incorporated the words "Sam Hubbard is to have the bonds" in her will in the belief that she had full legal power to dispose of both sets of bonds by will, the conclusion is inescapable and unassailable that she intended to give Sam Hubbard both sets of bonds and her will was effectual to transfer to him the six $1,000.00 bonds over which she had the power of testamentary disposition. The supposed ignorance and the supposed belief of the testatrix do not afford an iota of support for the idea that she intended to divorce one set of bonds from the other.

The basic notion of my brethren and the reasoning based on it are in irreconcilable conflict with the presumption that the testatrix knew her own titles and the powers she had in reference to the property held by her. *Funk v. Eggleston,* 92 Ill. 515, 34 Am. R. 136; *Re McNulta,* 168 Wash. 397, 12 P. 2d 389; 57 Am. Jur., Wills, section 1163. My brethren do not specify anything in "the fact that testatrix held at her death two sets of bonds" having any logical tendency to rebut this presumption or to sustain their position. I respectfully submit that they cannot do so. When she segregated the bonds, noted on one envelope that its contents belonged to her "personal account," and refrained from making any comparable notation on the other envelope, the testatrix demonstrated that she knew the difference in the state of her titles to the two sets of bonds and that she knew her power of testamentary disposition was limited to the six $1,000.00 bonds belonging to her "personal account."

My brethren assign two reasons for their assertions that their premise and their conclusion find support in provisions of the will. The first is that Sam Hubbard would receive a "very large and disproportionate bequest" if the testatrix's words "Sam Hubbard is to have the bonds" are construed to give him the bonds which she had the legal power to bequeath to him. This reason is wholly unsatisfying. It rests on conjecture. As the majority opinion points out, "the court was not given any information as to the extent of the testatrix's estate." The first reason would be destitute of validity, however, even if it were based on fact. Since the law permitted her to do with her own as she pleased, the testatrix had an absolute legal right to make Sam Hubbard a "very large and disproportionate bequest." The will negates any theory that the testatrix had the intention to distribute her property among the natural objects of her bounty with any substantial degree of equality. She gave various persons varying gifts of varying values. She cut off her brothers with $5.00 apiece. She disinherited some of the natural objects of her bounty altogether. I fear that the first reason is simply symptomatic of the unconscious succumbing of the majority of the court to a temptation which lies in constant wait for judges—the temptation to make for a decedent in the name of construction a will which the judges deem to be more equitable than the will the decedent has made for himself.

The second reason advanced by my brethren for their assertion that their premise and their conclusion find support in the provisions of the will is bottomed on this second reference to the bonds: "I want fifteen hundred dollars in Savings Bonds for flowers to the graves." The presiding judge held these words void for vagueness, and my brethren affirm this holding. Yet they declare these meaningless words clearly indicate that the testatrix did not intend to bequeath the six $1,000.00 bonds to Sam Hubbard. I am unable to give assent to this reason. When she

inserted these words in her will, the testatrix merely exercised the privilege of changing her mind, and attempted to withdraw from her prior bequest to Sam Hubbard "fifteen hundred dollars in Savings Bonds for flowers to the graves." And this is precisely what she would have done if she had expressed her apparent purpose in words of legal validity. 57 Am. Jur., Wills, section 1128. My brethren do not reveal any reason why the law should give to void words a power which it denies to valid ones. I can think of none. Consequently I favor abiding by this well settled doctrine of the law of wills: "A clear gift by an earlier provision will not be modified or qualified by a later obscure or ambiguous provision." 69 C.J., Wills, section 1158.

For the reasons given, the premise and the conclusion of my brethren cannot be harmonized with the language of the will or the facts *dehors* that instrument.

When the premise of the majority is reduced to ultimate terms, it comes to this: The words "Sam Hubbard is to have the bonds" are so ambiguous as to be susceptible of these two constructions: *First,* the testatrix intended to give Sam Hubbard the three $100.00 bonds, and no others; *second,* the testatrix intended to give Sam Hubbard the six $1,000.00 bonds, and no others.

The conclusion that the testatrix intended to give Sam Hubbard the three $100.00 bonds she could not give and to withhold from him the six $1,000.00 bonds she could give cannot be reconciled with this premise. This is true because the conclusion runs counter to the canons or rules of testamentary construction which an ambiguity of the nature alleged calls into play.

These canons or rules are as follows:

1. The presumption is that the testator intended to dispose of property which the law permitted him to dispose of by will. *Bank v. Misenheimer,* 211 N.C. 519, 191 S.E. 14, 110 A.L.R. 1310; *Gano v. Gano,* 239 Ill. 539, 88 N.E. 146, 22 L.R.A. (N.S.) 450; *Collins v. Capps,* 235 Ill. 560, 85 N.E. 934, 126 Am. S. R. 232; *Wilkison v. Wilkison,* 130 Kan. 424, 286 P. 252; *Hood v. Nicol,* 236 Ky. 779, 34 S.W. 2d 429; *Lane v. Gess' Admr.,* 223 Ky. 448, 3 S.W. 2d 1076; *Lasater v. Cumberland Coal Corp.,* 26 Tenn. App. 277, 171 S.W. 2d 407; *Ottenhouse v. Paysinger* (Tex. Civ. App.), 244 S.W. 2d 714; *Edds v. Edds* (Tex. Civ. App.), 282 S.W. 638; *In re McNulta's Estate, supra;* 57 Am. Jur., Wills, section 1163; 69 C.J., Wills, section 1376. The reverse is also true. The presumption is that the testator did not intend to dispose of property over which he had no power of testamentary disposition. *Cox v. George* (Tex. Civ. App.), 184 S.W. 326; *Waggoner v. Waggoner,* 111 Va. 325, 68 S.E. 990, 30 L.R.A. (N.S.) 644; 54 Am. Jur., Wills, section 1163; 69 C.J., Wills, section 1376. As a consequence, a will is not to be given the construction that

the testator intended to dispose of property not devisable or bequeathable by him, unless its language is fairly susceptible of no other construction. *Bank v. Misenheimer, supra; Hood v. Nicol, supra; Long v. Long* (Tex. Civ. App.), 252 S.W. 2d 235; *Ottenhouse v. Paysinger, supra; Ford v. Bachman* (Tex. Civ. App.), 203 S.W. 2d 630; *Cheatham v. Mann* (Tex. Civ. App.), 133 S.W. 2d 264; *Sailer v. Furche* (Tex. Civ. App.), 22 S.W. 2d 1065.

2. When a person dies testate, it will be presumed that he intended to dispose of all his property by his will, and that he did so dispose of it. As a consequence, any construction of a will which will result in partial intestacy is to be avoided, unless the language of the will compels it. *Armstrong v. Armstrong,* 235 N.C. 733, 71 S.E. 2d 119; *Trust Co. v. Waddell,* 234 N.C. 454, 67 S.E. 2d 651; *Renn v. Williams,* 233 N.C. 490, 64 S.E. 2d 437; *Jones v. Jones,* 227 N.C. 424, 42 S.E. 2d 620; *Ferguson v. Ferguson,* 225 N.C. 375, 35 S.E. 2d 231; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888; *McWilliams v. McWilliams,* 223 N.C. 857, 26 S.E. 2d 901; *Morris v. Waggoner,* 209 N.C. 183, 183 S.E. 353; *Case v. Biberstein,* 207 N.C. 514, 177 S.E. 802; *McIver v. McKinney,* 184 N.C. 393, 114 S.E. 399; *Faison v. Middleton,* 171 N.C. 170, 88 S.E. 141, Ann. Cas. 1917E, 72; *Ireland v. Foust,* 56 N.C. 498; *Foust v. Ireland,* 46 N.C. 184; *Boyd v. Latham,* 44 N.C. 365; *Reeves v. Reeves,* 16 N.C. 386.

3. Every part of a will is to be considered in its construction, and none of its words are to be cast aside as idle jargon, if any meaning can be put upon them. *Holland v. Smith, supra; Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Lee v. Lee,* 216 N.C. 349, 4 S.E. 2d 880; *Edens v. Williams,* 7 N.C. 27. To this end, clauses susceptible of inconsistent constructions are to be reconciled, if this may fairly be done. *Voncannon v. Hudson Belk Co.,* 236 N.C. 709, 73 S.E. 2d 875; *Bank v. Brawley,* 231 N.C. 687, 58 S.E. 2d 706; *Holland v. Smith, supra; Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Richardson v. Cheek,* 212 N.C. 510, 193 S.E. 705; *Westfeldt v. Reynolds,* 191 N.C. 802, 133 S.E. 168.

My brethren conclude that the testatrix intended to dispose of the three bonds not bequeathable by her and to die intestate as to the six bonds over which she had the power of testamentary disposition, although the language of her will is certainly susceptible of contrary interpretations. They cast aside as idle jargon the testatrix's words "Sam Hubbard is to have the bonds," although this meaning can be put on those words: The testatrix intended to give Sam Hubbard the bonds which the law permitted her to dispose of by her will.

BARNHILL, C. J., and WINBORNE, J., concur in dissent.

BOBBITT, J., concurring: Without elaboration the following considerations convince me that the intent of the testatrix is rightly determined in the decision of the Court.

1. The provisions for Sam Hubbard: "& Sam Hubbard is to have the Bonds & on Hundred Dollars." Here, it will be noted, she does not refer to "all the bonds" or "my bonds." In my opinion, "*the* Bonds" refers to the bonds with which "Sam Hubbard" is identified, namely, the bonds in her possession, presumably purchased by her, made out to "Mrs. Christian G. Pate or Mr. J. Sam Hubbard." (Emphasis added.)

2. The context: I quote only the provisions immediately preceding and immediately following: ". . . Mary Archer is to have. 2. hundred. in cash. & Sam Hubbard is to have the Bonds & on Hundred Dollars & Nita H. Davis is to have 2. hundred dollars, in cash. & . . ." There is nothing here to suggest that Sam Hubbard is to be the chief beneficiary of the estate. The inference I draw is that these beneficiaries are being treated substantially on the same basis.

3. The addition of the words: "& on Hundred Dollars." It seems to me altogether unreasonable to infer that the intent of the testatrix was to leave Sam Hubbard $6,000.00 of U. S. Bonds and add to a bequest of this value, "& on Hundred Dollars."

4. The provision: "I want fifteen hundred dollars in Savings Bonds for flowers to the grave." We are not concerned with the validity of this provision. Rather, we are concerned solely with ascertaining the intent of the testatrix. In my view, she did not think she had disposed of bonds other than those with which Sam Hubbard was definitely identified.

5. The three $100.00 bonds made out to "Mrs. Christian G. Pate or Mr. J. Sam Hubbard" were kept in a separate envelope. The six $1,000.00 bonds made out to Mrs. Christian Gay Pate were in another envelope marked, "Mrs. W. L. Pate, personal account." The two sets of bonds were separated physically and separated in her thoughts. Having purchased the three $100.00 bonds, having kept them in her possession, in a separate envelope, with no delivery of these bonds in her lifetime, it seems clear to me that these were the bonds intended for Sam Hubbard when she made provision for him: "& Sam Hubbard is to have the Bonds & on Hundred Dollars." True, resolving a question long mooted, this Court held in *Ervin v. Conn,* and *Bank v. Frederickson,* 225 N.C. 267, 34 S.E. 2d 402, that the State law otherwise applicable to gifts *inter vivos* was superseded by the Federal Statutes and regulations concerning such bonds and that the alternate payee, even though no delivery had been made during the lifetime of the purchaser, was entitled thereto. Even so, the State law prevails to the extent that such bonds are a part of the decedent purchaser's estate for inheritance tax purposes. *Watkins v. Shaw, Comr. of Revenue,* 234 N.C. 96, 65 S.E. 2d 881. It seems unrea-

sonable to assume that Mrs. Pate was aware of these refinements. She had not given the three $100.00 bonds to Sam Hubbard during her lifetime. She thought she was doing so by her Will, albeit this result was actually accomplished by operation of law under authority of *Ervin v. Conn,* and *Bank v. Frederickson, supra.*

In short, my view is that the testatrix purchased the three $100.00 U. S. Bonds, had them made payable to herself or J. Sam Hubbard, thereby earmarking these bonds for him and identifying him with them, and that she had these bonds and these only in mind when she provided: "& Sam Hubbard is to have *the* Bonds & on Hundred Dollars." (Emphasis added.)

KAY JYACHOSKY v. L. R. WENSIL AND CURTIS GARMON.

(Filed 5 May, 1954.)

1. Automobiles § 24½d—

It is competent for witnesses to testify from appearance that the truck which they saw at the scene of the accident was the same truck, identified as belonging to defendant employer, which they saw shortly thereafter at another place.

2. Automobiles § 23½e—

Testimony of witnesses identifying the truck which they saw at the scene of the accident as the same truck identified as belonging to defendant employer is sufficient to take the case to the jury on that question, defendant employer's evidence in conflict therewith being for the jury to resolve.

3. Same—

G.S. 20-71.1 does not affect the burden of proof but merely provides that proof of ownership of a truck involved in an accident establishes *prima facie* that the truck was being operated by an employee and that at the time the employee was acting within the scope of his employment. Such *prima facie* showing is sufficient to take the issue of *respondeat superior* to the jury, but does not compel an affirmative finding thereon.

4. Evidence § 7e—

The establishment of facts sufficient to give rise to a *prima facie* case merely takes the issue to the jury, and the credibility of defendant's evidence in explanation or rebuttal is also for their determination.

5. Automobiles § 24½f—Instruction on issue of respondeat superior held without error under provisions of G.S. 20-71.1.

Plaintiff offered evidence that the truck involved in the accident belonged to defendant employer and also introduced in evidence the certificate of registration disclosing that license for the vehicle was issued to defendant employer as the owner. Defendant employer introduced evidence that the

operator of the truck was his employee but that at the time of the accident the employee was on a purely personal mission and was not acting within the scope of his employment. *Held:* Under the provisions of G.S. 20-71.1 the court correctly charged the jury that if the plaintiff had satisfied them by the greater weight of the evidence that defendant employer was the owner of the truck involved, the jury should consider the question of agency, and that if plaintiff had satisfied them by the greater weight of the evidence that the operator of the truck was then and there driving it as an employee or agent of defendant employer and was acting within the scope of his employment or agency, to answer the issue in the affirmative, but that if plaintiff had not so satisfied them, to answer the issue in the negative. In addition, the court charged peremptorily that if the jury believed defendant's evidence to answer the issue, no.

6. Automobiles § 23½d—

In an action seeking to hold the owner of a vehicle liable under the doctrine of *respondeat superior* it is competent for plaintiff to introduce in evidence the certificate of registration from the Motor Vehicles Department indicating that license for the vehicle was issued to the employer.

7. Husband and Wife § 10—

In the wife's action to recover for personal injuries, the admission of evidence as to hospital bills paid by the husband cannot be prejudicial when the husband would be estopped to recover these items of damage in a separate action.

8. Appeal and Error § 39f—

Upon an issue relating solely to whether a truck involved in an accident was owned by defendant employer, the liability of the employer under the doctrine of *respondeat superior* being presented under a subsequent issue, an instruction that the issue presented a question of fact and that "There is no law involved in that question." *Held:* Not prejudicial when considered in context.

9. Same—

Inadvertence of the court in referring to the truck in question as a "panel" truck when in fact the truck was a pickup truck, *held,* not prejudicial, it being apparent that the jury was not misled and there being no request by counsel at the time that the inadvertence be corrected.

10. Trial § 22c—

Contradictions and discrepancies in the evidence are for the jury to resolve, largely on the basis of credibility of the witnesses.

11. Appeal and Error § 1—

The Supreme Court on appeal is limited to consideration of errors of law in the court below.

BARNHILL, C. J., concurring.

WINBORNE and PARKER, JJ., join in concurring opinion.

APPEAL by defendants from *Whitmire, Special Judge,* 3 October, 1953, Extra Civil Term, of MECKLENBURG.

Action to recover damages for personal injuries.

Plaintiff alleged that on 16 June, 1951, about 7:45 p.m., she was riding in an automobile (Studebaker) operated by Andrew Jyachosky, her husband, *traveling east on* Highway #74 *en route from Charlotte, via* Monroe, to Wadesboro; that they were meeting a Ford automobile; that a red Dodge pick-up truck, traveling west, suddenly and negligently pulled out from behind the Ford, right in front of the car in which plaintiff was riding and in its lane of travel; and that the car in which plaintiff was riding was forced off the highway and collided with a parked car on the shoulder of the highway, throwing plaintiff from the car onto the pavement, unconscious and seriously injured. Evidence offered by plaintiff tended to establish these allegations.

Plaintiff alleged further that the red Dodge pick-up was owned by defendant L. R. Wensil and was operated by defendant Curtis Garmon, who, upon the occasion, was an employee of defendant Wensil, then and there acting within the scope of his employment. Defendants, answering, denied these allegations.

Defendants, answering, denied all allegations of the complaint, except those relating to residence of the parties and the allegation that the defendant Wensil was engaged in the plumbing and heating business under the trade name of L. R. Wensil Company and that the defendant Garmon during the period in question was in the employ of the defendant Wensil.

Testimony offered by plaintiff included the following:

Paul P. Ward, a State Highway Patrolman stationed in Union County, testified that he arrived at the scene of injury, some 3-3½ miles west of Monroe, about 8:10 p.m.; that he put out a call for a red Dodge pick-up truck that had some appliance, either a refrigerator or a stove, on the back of it; that some 45 minutes later, in response to a call, he went to Matthews, in Mecklenburg County, some 10 or 11 miles west of the scene of injury, saw A. E. Pierce, a State Highway Patrolman who had arrested defendant Garmon; that he took defendant Garmon to the Police Station in Monroe; that he also took into his possession a red Dodge pick-up, which had a stove on the back of it and had attached a North Carolina license plate for 1951 bearing the number 841-730; and that he had some one drive this truck to the Police Station in Monroe where it remained until some time the next morning.

A. E. Pierce, a State Highway Patrolman stationed in Mecklenburg County, testified that he arrested defendant Garmon at Lemmons Service Station in Matthews; that he had in his possession a 1940 red Dodge pick-up truck, with a stove, white with black trimmings, and also some scattered plumbing fixtures and fittings, in the truck bed; that he held defendant Garmon and the truck until Patrolman Ward came; and that defendant Garmon and the truck were turned over to Ward.

Plaintiff's witnesses Jyachosky, Garland, Mills, Presson and Moore, and defendants' witnesses Plyler, Baker and Howie, gave testimony tending to show the make, model, color, markings and other *indicia* of the truck observed by them upon the occasion of plaintiff's injury.

Plaintiff's witnesses Ward and Pierce, and defendant Garmon gave testimony tending to show identifying *indicia* of the truck defendant Garmon had when arrested in Matthews.

Plaintiff's witnesses Jyachosky and Garland gave testimony tending to show the appearance of the red Dodge pick-up they saw at the Police Station in Monroe.

While different inferences may be drawn therefrom, none of the witnesses mentioned, so far as the evidence discloses, noticed the number "10" on the pick-up truck observed by them on 16 June, 1951.

Andrew Jyachosky testified he saw the red Dodge pick-up, with the appliance in the truck bed and a white emblem on the door, at the Police Station in Monroe. Over objection by defendants, he testified on direct examination as follows:

"Q. Did the truck which you observed at the Police Station have any markings on it?

"A. Yes, sir, it had a white emblem on the door.

"Q. Mr. Jyachosky, can you state whether the truck which you observed at the Police Station on the night following the accident was the same truck which you have testified ran you off the road?

"A. Yes, sir, I'd say it was the same truck."

On cross-examination by counsel for defendant Garmon, he testified that his identification was based upon his observation of the red pick-up truck in the glance he had of it as it was passing on his left.

Tom Garland testified that he was standing at Moore's Body and Paint Shop, some 50 feet north of the highway, when he heard tires squeal and a crash; that he ran out to the road, getting there while the Studebaker (the car in which plaintiff was riding) was still in motion; that he saw a red pick-up truck, the paint "aged with the truck," with some name over the rear glass, and in the truck bed was a white appliance of some kind; that it was not at Smith's store and filling station but was on the highway, "zigzagging up the road," in the "vicinity" of Smith's place, and continued to travel as long as he observed it. His estimate was that the truck was from one to two blocks away when he observed it. Over objections by defendants, he testified on direct examination as follows:

"Q. Well, Mr. Garland, do you know whether you have seen the truck or not?

"A. I'm satisfied I did, yes.

"Q. Where did you see the truck?

"A. Can I tell the hour, approximately?

"Q. Yes, sir, and the place.

"A. Between 8 and 9 o'clock Sunday morning, beside the police building in Monroe."

On cross-examination by counsel for defendant Wensil, he testified: "I'm positive it was the same thing I saw Saturday afternoon. I was starting to say that it was only my opinion, that's right. Well, to be specific, I will say yes, that it was the truck."

Over objection by defendants, plaintiff introduced in evidence a certificate from the Director of Registration Division, North Carolina Department of Motor Vehicles, to the effect that license number 841-730 was issued and assigned to L. R. Wensil for 1951 for a 1940 Dodge truck bearing specified motor and serial numbers. We note the following: "Defendant Wensil objects because of the question of identity of the truck with the one that caused the accident, not as to the form of the certificate."

Testimony offered by defendants included the following:

Defendant Garmon testified that the truck of defendant Wensil operated by him on 16 June, 1951, was in no way involved.

John Plyler, Aaron Baker and Sallie Howie testified that Plyler and Baker were seated in a car parked in front of the Howie residence, located some 50 yards north of Highway #74 and across the road from Smith's store and filling station; that Miss Howie was standing beside the car; that they saw the red Studebaker, traveling east, pull off the highway to its right and heard the collision between it and a car parked on or near the shoulder near the front of the Strawn house, on the south side of the highway and across from Moore's Body and Paint Shop; and that the only other vehicle present at or about this time was a truck, traveling west, which appeared to be traveling in the middle of the road and then pulled towards its left in front of the Studebaker and then entered the premises of Smith's store and filling station and stopped there for a few seconds before driving on west towards Charlotte.

Defendant Wensil testified that he operated his plumbing and heating business out of Concord; that in June, 1951, he had the "right good sized job" at Kinston, where Garmon was employed; that about a week or ten days after 16 June, 1951, he was advised of the accident; that he investigated and found that defendant Garmon had his truck #10 that week-end; that his trucks were numbered, the respective number being painted on each truck; and that, upon learning of the accident and ascertaining the truck defendant Garmon had 16 June, 1951, he took this truck (#10) to the scene of injury, and located John Plyler and Aaron Baker. Plyler and Baker testified that the truck he showed them was not the truck they saw at Smith's store and filling station shortly after plaintiff was injured. Photographs were made of this truck (#10). Plyler and Baker testified that the truck they had seen on 16 June, 1951, was not the truck shown in the photographs.

H. E. Howell testified that he was in charge of the Wensil trucks, at the Wensil place of business in Concord; that he did not learn of the accident until around 4 July, 1951; that he then assisted in identifying the truck defendant Garmon had on 16 June, 1951; that he knew this truck was #10, because he "issued that truck to him"; that he had painted this truck about three weeks before 16 June, 1951; that the signs on it were complete, not painted but pasted on and shellacked; and the number "10" was painted thereon.

The photographs, defendants' exhibits 8, 9, 10 and 11, show a truck of clean appearance, with the number "10" appearing prominently thereon, and with very plain markings on the side, "One Stop Home Utility Service," and "L. R. Wensil Co. Plumbing, Electrical, Sheet Metal, Heating," "Concord, N. C.," and "Dial—2266," and on the back of the cab, "L. R. Wensil Co." It does not appear when the photographs were made, but since a 1952 license tag is shown it may be assumed that they were made many months after plaintiff's injury.

Neither of the State Highway Patrolmen, nor any other of plaintiff's witnesses, were questioned concerning these photographs. It does not appear who got the 1940 red Dodge pick-up from the Police Station in Monroe or any circumstances in connection with its removal therefrom.

E. L. Riggins testified that defendant Garmon was working with him on the Wensil job at Kinston; that he had a truck on that job for carrying materials around to different places, on the job, as needed; that on 15 June, 1951, he sent him to Concord to get more materials, mostly soil pipe fittings, giving him permission to spend the night in Monroe on his way back; that he had permission to go to Concord and Monroe, nowhere else, and that he (Riggins) was familiar with Highway #74 between Monroe and Charlotte, a distance of 26 miles.

Defendant Garmon testified that he was working as a plumber's helper on the Wensil job at Kinston; that on Friday, 15 June, 1951, he left Kinston in Wensil's Dodge pick-up truck, driving to Monroe and spending the night there; that the man in charge (Mr. Bill Riggins) told him to "take the truck to see about your business and bring the material back"; that his personal business was to close out his apartment at Monroe, make provision for removal of his furniture, etc., with the idea of living in Kinston while the job lasted; that he drove to Concord the morning of 16 June, 1951, arriving at Wensil's place there about 9 a.m., where the truck was washed; that he got the materials, consisting of pipe fittings, which he was to take back to Kinston, and also a small stove, suitable to be fitted in a trailer; and that he got back to Monroe about 4:00 p.m. He testified that the truck he was driving was the Wensil truck #10 shown in the photographs.

Defendant Garmon further testified that about 7:00 p.m., in Monroe, he decided to drive to Charlotte to see his uncle, who lived on North Davidson Street; that he drove from Monroe to Charlotte on Highway #74, at a speed of 35-40 miles per hour, meeting cars but passing none, arriving in Charlotte "a little after seven," "maybe 7:30"; that when he got to his uncle's home he found the door locked and no one there; that he waited there 25 to 30 minutes, maybe longer, failed to see his uncle, drove out Davidson Street to Trade Street; that, traveling east on Trade Street he came to the McDowell Street crossing where he saw Caritha Barrino, who lived in Monroe and whom he knew, standing on the corner waiting for the Monroe bus; that he invited her to ride with him; that they left Charlotte on Highway #74 and did not stop until they reached Lemmons Service Station in Matthews, where he was arrested.

Caritha Barrino, who was with defendant Garmon when he was arrested in Matthews, testified that on 16 June, 1951, she came to Charlotte from Monroe by bus; that she spent most of her time in Charlotte window-shopping; that she was at McDowell and Trade Streets, waiting for the Monroe bus, which she expected around 7:55 to 8:00 p.m.; that at that time she lived with her people in Monroe in the same apartment house with defendant Garmon; that defendant Garmon came along in the truck; and that she got in and rode with him out Highway #74 without stopping until they reached the place in Matthews where defendant Garmon was arrested.

The issues upon which the case was submitted, and the jury's answers thereto, are as follows:

"1. Did the motor vehicle of the defendant Wensil, and driven by the defendant Garmon, cause the vehicle in which the plaintiff was riding to leave the highway and collide with a third vehicle, resulting in injuries to the plaintiff, as alleged in the Complaint?

"Answer: YES.

"2. If so, was said collision and resulting injuries proximately caused by the negligence of the defendant Garmon, as alleged in the Complaint?

"Answer: YES.

"3. At the time of said collision, was the defendant Wensil's vehicle being driven and operated by the defendant Garmon as the agent of the defendant Wensil, for the defendant Wensil's benefit, and within the course and scope of the defendant Garmon's employment, as alleged in the Complaint?

"Answer: YES.

"4. What amount is the plaintiff entitled to recover of the defendants Wensil and Garmon?

"Answer: $18,000.00.

"5. What amount is the plaintiff entitled to recover of the defendant Garmon?

"Answer: "

The court signed judgment on the verdict against both defendants and they appeal, assigning errors.

Taliaferro, Grier, Parker & Poe for plaintiff, appellee.

Coble Funderburk for defendant Garmon, appellant.

Jones & Small and Bernard W. Cruse for defendant Wensil, appellant.

BOBBITT, J. The assignments of error upon which appellants place great stress challenge the sufficiency of the evidence to warrant submission to the jury of the first and third issues. These assignments are directed to the refusal of the court below to sustain their motions for judgment of nonsuit (AE 11, 12, 13 and 14) and to its refusal to direct a verdict in their favor on the first and third issues. (AE 15, 16.)

Plaintiff's case rests principally upon evidence as to appearance of the truck involved in causing her injury; evidence as to the appearance of the truck in possession of Garmon at the service station in Matthews when he was arrested and thereafter parked at the Police Station in Monroe; and evidence from two witnesses who saw the truck at the scene of injury and who identified the truck at the Police Station in Monroe as being the same truck. It was sufficient for submission to the jury on the question as to whether the truck operated by Garmon was the truck involved in causing plaintiff's injury. In this connection, we note that the rule as to the sufficiency of circumstantial evidence in criminal prosecution differs from that applicable in civil actions. *Hat Shops v. Ins. Co.*, 234 N.C. 698, 68 S.E. 2d 824, and cases cited.

While defendants assign as error (AE 1, 4) the admission of the quoted testimony of Jyachosky and Garland, they cite no authority in support of this contention. The testimony is clearly competent. Its credibility was for the jury. We have considered all the evidence, testimony and exhibits, carefully. It would serve no useful purpose to set forth in detail the testimony of Jyachosky and Garland or of the other witnesses. Analysis thereof only emphasizes the conflicts and contradictions and brings us to the conclusion that decision on the crucial issues was dependent upon determination of the credibility of the witnesses. The testimony of Jyachosky and Garland, considered with the testimony of Patrolmen Ward and Pierce, fully justified submission of the first issue.

Defendant Wensil further challenges the sufficiency of the evidence to warrant submission to the jury on the third issue on the ground that defendant Garmon, in any event, was on a personal mission and was not

operating the Wensil truck within the scope of his employment and in furtherance of his employer's business.

It is true now, as it was when *Carter v. Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586, was decided, that plaintiff was required to allege and establish that the operator of the truck was an agent or employee of the owner thereof and that this relationship existed at the time and in respect of the very transaction out of which injury arose before the doctrine *respondeat superior* applies. As to necessity for such pleading: *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765; *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767.

In *Carter v. Motor Lines, supra,* where plaintiff was nonsuited, *Barnhill, J.* (now *C. J.*), after reviewing many decisions, pointed out that the well established rule in North Carolina required a plaintiff, after showing ownership of the truck and the employment of the operator by such owner, to go further and offer positive evidence that the operator was about his employer's business at the time and in respect of the very transaction out of which the injury arose. This rule imposed a very difficult and often insurmountable burden on an injured plaintiff. (Cases cited by defendants are in accord with *Carter v. Motor Lines, supra,* all arising prior to G.S. 20-71.1.)

Thereafter, the General Assembly enacted Ch. 494, Session Laws of 1951, *entitled,* "An Act To Provide New Rules of Evidence In Regard To The Agency Of The Operator Of A Motor Vehicle Involved In Any Accident." This statute, now codified as G.S. 20-71.1, did not change the basic rule as to liability. It did establish a new rule of evidence, changing radically the requirements as to what the injured plaintiff must show in evidence in order to have his case passed on by the jury. *Hartley v. Smith, supra; Parker v. Underwood, supra.*

Under G.S. 20-71.1, all now required for submission of the issue to the jury, is that the injured party show ownership of the motor vehicle, which may be done *prima facie* by proof that the motor vehicle was registered in the name of the person sought to be charged, and if ownership is established this constitutes *prima facie* evidence 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." *Hartley v. Smith, supra.*

A candid appraisal prompts the observation that in passing from the rule recognized in *Carter v. Motor Lines, supra,* to the rule prescribed by G.S. 20-71.1, the pendulum seems to have swung from one extreme to the other. For under G.S. 20-71.1, proof of ownership alone takes the case to the jury. It is not required that positive evidence be offered that the operator was then and there acting as employee or agent within the scope of his employment or agency. Moreover, it is not required that positive

evidence be offered that the operator was an employee or agent of the owner.

Evidence offered by defendants tends to show that defendant Wensil was the owner of the 1940 Dodge pick-up truck in defendant Garmon's possession in Matthews on the occasion of his arrest. Plaintiff's evidence tends to show that N. C. license plate attached thereto bore license number 841-730. Certificate of registration, offered by plaintiff, tends to show that defendant Wensil was the owner in 1951 of the 1940 Dodge pick-up for which this license was issued. By virtue of G.S. 20-71.1, proof of such registration was competent and constituted *prima facie* evidence of ownership. Defendants' assignment of error (AE 10) to its admission in evidence is without merit. Ownership, if established, under G.S. 20-71.1, was *prima facie* evidence that the truck was being operated by defendant Garmon as employee of defendant Wensil within the scope of his employment.

The trial judge instructed the jury, in relation to the third issue, that if plaintiff satisfied the jury by the greater weight of the evidence that defendant Wensil was the owner of the truck involved in causing injury to plaintiff, then the jury would consider the question of agency; and upon consideration thereof, the burden of proof rested upon plaintiff to satisfy the jury by the greater weight of the evidence that the operator of defendant Wensil's truck was then and there operating it as employee or agent of defendant Wensil and within the scope of his employment or agency.

When plaintiff has offered evidence of facts sufficient to give rise to a *prima facie* case, the ultimate issue is for the jury; and when the defendant offers evidence, which, if accepted, would establish that he is not legally responsible, the credibility of such evidence is for the jury. The significance of a *prima facie* case has been often discussed and authorities cited. *Ins. Co. v. Motors, Inc., ante,* 183, 81 S.E. 2d 416. The trial judge correctly stated the law in relation to the significance of a *prima facie* case; and assignments of error (AE 18, 19, 20) are without merit.

True, the only positive evidence as to the relationship between defendant Garmon and defendant Wensil was offered by the defendants. While to the effect that defendant Garmon was an employee of defendant Wensil in connection with his business, defendants' evidence tended to show explicitly that on 16 June, 1951, on the highway between Charlotte and Monroe, defendant Garmon was on a purely personal mission wholly unrelated to his employer's business. In *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309, it was held that proof of ownership of the tractor-trailer was *prima facie* evidence that the operator was then and there acting as agent and within the scope of such agency; that motion of nonsuit was properly overruled, the issue being for the jury; but a new trial was ordered because of the failure of the trial judge to give a peremptory

instruction to the effect that it would answer the issue of agency in the negative if it found the facts to be as the defendants' evidence tended to show, namely, that the operator was on a purely personal mission at the time of the collision. Correctly applying the law as stated in *Travis v. Duckworth, supra,* the trial judge instructed the jury as follows:

"Now, the Court charges you, as a matter of law, that if you believe the evidence of the defendants that he was sent from Kinston to Concord on business for the defendant Wensil, and that, having transacted the defendant Wensil's business, he was on his way back to Kinston, and had reached the town of Monroe, and that, having reached Kinston—I mean Monroe—having reached Monroe on his way back to Kinston, he then turned and drove the truck from Monroe to Charlotte on business for his own, and not on business for the defendant Wensil, and in pursuit of something entirely unrelated and disconnected with his employment, the Court charges you if you find those things to be true, it would be your duty to answer the third issue No."

In addition to the portion of the charge quoted above, the court restated the same proposition in other instructions. A careful reading of the charge gives the impression that it was made quite clear to the jury that if they believed the defendants' evidence relating to this issue it was their duty to answer the third issue, "No." Too, the trial judge repeatedly emphasized that the burden of proof on the issue rested and remained on plaintiff throughout the trial to establish agency at the time and in respect of the very transaction out of which plaintiff's injury arose. The charge in these respects was correct and adequate. Indeed, considered in its entirety, we find therein no error of law prejudicial to the defendants.

Defendants assign error (AE 2) to the admission in evidence of testimony by Andrew Jyachosky tending to show amounts paid by him to doctors, nurses, hospital, etc., in treatment of plaintiff, approximating $1,900.00. The bills and canceled checks were produced and checked by counsel for defendants. Jyachosky's testimony is that these payments were made from funds belonging to him and plaintiff, his wife, jointly. The total amount of these joint funds does not appear. Nor is there evidence as to the respective rights of the co-owners, as between themselves. There is evidence that plaintiff had been regularly employed as State Secretary for the Reserve Life Insurance Company since the latter part of 1946, and that her salary had been $225.00 per month. Whether her interest in these joint funds exceeded the amounts paid therefrom does not appear. Ordinarily, such expenses are proper elements of damages in a wife's tort action. *Helmstetler v. Power Co.,* 224 N.C. 821, 32 S.E. 2d 611. It does not appear that her husband's money was expended in discharge of these bills. In any event, under the circumstances disclosed

here, he would be estopped to recover in a separate action for these items of damage. Consequently, no error prejudicial to defendants is made to appear.

Defendants assign as error (AE 16) this excerpt from the portion of the charge relating to the first issue. "Now, this issue presents a question of fact. There is no law involved in that question. Was it the automobile of the defendant Wensil, or wasn't it? The Court does not consider any useful purpose to be served by reviewing the testimony of the witnesses."

The wording of the first issue is set out above. In his instructions, the trial judge submitted it, not on questions of negligence, proximate cause or agency, but solely on the question as to the identity of the truck involved in the incident causing plaintiff's injury. The second issue was: "If so, was said collision and resulting injuries proximately caused by the negligence of the defendant Garmon, as alleged in the Complaint?" Here the trial judge, in a charge to which no exception was taken, instructed the jury bearing upon the alleged negligence of the operator of the truck (Garmon) in forcing the Jyachosky car off the highway and causing it to collide with the parked car. The trial judge was certainly correct in stating that the first issue presented a question of fact. Perhaps his further statement, "There is no law involved *in that question*," was unnecessary and rather sweeping in its implications. However, considered in context, we cannot conclude that this remark was prejudicial to defendants. It is plain that the jury understood what they had to decide concerning the first issue.

Defendants assign as error (AE 17) this excerpt from the portion of the charge relating to the third issue: "Now, it is alleged by the plaintiff and admitted by the defendant that a red Dodge panel truck belonging to the defendant Wensil and driven by the defendant Garmon was in the general vicinity or somewhere along Highway 74 between Charlotte and Monroe at the time plaintiff was injured." No objection was interposed to this statement when made, nor at the close of the charge when, in response to the court's inquiry, "Anything further, gentlemen?" counsel for defendant Wensil observed: "I don't believe anything that would be helpful at this time. You did forget to tell the jury that the court excused Mr. Funderburk (Garmon's separate counsel) for having another appointment." The reference to a "panel" instead of a "pick-up" truck was an obvious inadvertence. No one contended that a "panel" truck was involved. All the evidence tended to show that Garmon traveled on Highway #74 between 7:00 p.m. and 9:00 p.m. between Monroe and Charlotte. Plaintiff's evidence tended to show that he was driving the truck that caused her injury 3-3½ miles west of Monroe about 7:45 p.m. Defendants' evidence tended to show that Garmon was in or near Char-

lotte when plaintiff was injured. The respective positions of plaintiff and defendants were crystal clear. The quoted statement of the trial judge, considered alone, did not develop the precise contentions of the respective parties; but, considering the evidence and the charge in its entirety, there is no sound reason to believe that the jury was in any way misled as to defendants' position. Evidently, counsel for defendants did not so consider at the time for no suggestion was made that the trial judge modify or clarify the statement.

Other assignments of error are brought forward in the brief of defendants, supported by argument but without citation of authority. To discuss each would unduly extend this opinion. We have examined each assignment and find none of sufficient merit to constitute reversible error.

The preliminary statement of the evidence, necessarily incomplete, indicates the sharp conflicts in testimony. Such conflicts are for jury determination, to be resolved largely on the basis of the credibility of the several witnesses. The jury, had it rejected the evidence favorable to plaintiff or had it accepted the evidence favorable to defendants, might have reached a different conclusion. However, as to the facts, both the trial court and this Court are bounded by the jury's findings. True, in proper cases, the trial judge, in his discretion, may set the jury's verdict aside as being contrary to the greater weight of the evidence. This Court, upon appeal, is limited to a consideration of errors of law in the court below. No prejudicial error of law has been shown. The result is that the judgment of the court below will not be disturbed.

No error.

BARNHILL, C. J., concurring: There is grave error appearing in the record. But it is error committed by the jury. No error was committed by the presiding judge unless it was error on his part to decline to exercise his discretionary power to grant the motion to set aside the verdict. Thus he could have saved the situation. In the absence of prejudicial error committed by him, we are without authority to disturb the verdict and judgment entered thereon.

When a nonowner-operator of a motor vehicle, by his negligent operation thereof, injures the person or damages the property of another, G.S. 20-71.1 makes proof of the ownership of the vehicle *prima facie* evidence that the operator was, at the time, the agent or employee of the owner and was about his master's business, so as to render the owner liable in damages under the doctrine of *respondeat superior*. This fact, which the jury may, but is not compelled to infer from the mere proof of ownership, is not an inference of fact which naturally and necessarily follows proof of ownership. It is a bare, artificial inference manufactured by statute.

In this case it is not supported by a single fact or circumstance appearing of record. On the contrary, all the testimony and every fact and circumstance disclosed by the record tend to show that the operator was on a mission of his own and was at the time operating the vehicle without the knowledge, consent, or approval—either express or implied—of the owner. There was no effort to attack the reputation or impeach the testimony of any one of the witnesses who so testified. We must, therefore, assume they are persons of character and integrity. Yet the jury adopted the bare, artificial inference of fact permitted by the statute and found that it was sufficient to override and outweigh all the positive evidence to the contrary. While we may grant new trials for errors of law committed by the trial judge, we are without authority to correct this error in the verdict. The jury was the final arbiter of the facts. Therefore we must affirm a judgment which compels the defendant to pay plaintiff $18,000 which he should not be required to pay. This offends my every sense of justice and fair play. I can only say that it is most unfortunate that judicial officers should be placed in a position where they must deny relief against injustice in the name of the law. While we need some statute such as G.S. 20-71.1, this Act should be so amended as to afford the Court an opportunity to grant relief in a case of this kind.

Since the trial judge committed no error in the trial of the cause, I must, in compliance with my oath to administer the law as it is written, concede that the judgment entered must be affirmed. In so doing, I make my assent as negative as language will permit.

WINBORNE and PARKER, JJ., join in concurring opinion.

STATE v. JAMES W. HACKNEY.

(Filed 5 May, 1954.)

1. Constitutional Law § 34d—Circumstances held not such as to require court to appoint counsel for defendant in noncapital case.

Where petitioner, in a proceeding under the Post Conviction Hearing Act, neither alleges nor offers evidence that he was ignorant, of limited education, incompetent, or inexperienced in criminal trials, but his own testimony discloses that at the time of the trial he was a mature man and had entered a plea of guilty to a felony some years prior thereto, without evidence that he had been unable to employ counsel on his own behalf, *is held* insufficient to show any special circumstances requiring the court to appoint counsel to represent him, even upon his request, and the failure of the court to appoint counsel for him did not violate his constitutional rights

under Article I, Secs. 11 and 17 of the State Constitution or the Fourteenth Amendment to the Federal Constitution.

2. Constitutional Law § 34c—

The constitutional right of a person accused of crime to confront his accusers embraces the right of accused to have witnesses in court and to examine them in his behalf, and a fair opportunity to prepare and present his defense, and this constitutional right of confrontation must be afforded accused not only in form but also in substance.

3. Same: Criminal Law §§ 41, 81a—

When a request for a continuance in a criminal prosecution is based on the right of the accused guaranteed by the Fourteenth Amendment to the Federal Constitution and Article I, Secs. 11 and 17 of the State Constitution, the question is one of law and not of discretion, and the decision of the lower court is reviewable.

4. Criminal Law § 44—

Trial upon an indictment charging an offense less than a capital felony may be had at the term the bill of indictment is returned.

5. Same: Criminal Law § 89—Held: Defendant failed to show deprivation of constitutional right necessary to relief under Post Conviction Hearing Act.

Where, in a hearing under the Post Conviction Hearing Act, G.S. 15-217, *et seq.*, petitioner asserts that he was denied his constitutional rights in the trial resulting in his conviction because he was put on trial without preliminary hearing on the day the indictment was returned after his motion for continuance had been denied, *is held* insufficient basis for relief when petitioner fails to show that he gave the court names of any witnesses, or that if given time he could have produced any witnesses in his behalf, since there is no showing that defendant was denied his constitutional rights of confrontation or that the court manifestly abused its discretion in refusing a continuance.

6. Indictment and Warrant § 1—

A preliminary hearing is not an essential prerequisite to the finding of an indictment in this State.

7. Criminal Law § 89—

Relief under the Post Conviction Hearing Act must be based upon some deprivation of a substantial constitutional right in the trial resulting in petitioner's conviction.

JOHNSON and BOBBITT, JJ., dissent.

PROCEEDING under the North Carolina Post-Conviction Hearing Act, G.S. 15-217, *et seq.*, heard by *Williams, J.*, at the August Term 1953 of CHATHAM, and reviewed by the North Carolina Supreme Court upon a duly granted writ of *certiorari*. For good cause shown, the Superior

Court permitted the petitioner to prosecute his proceeding in the Supreme Court without providing for the payment of costs.

In prosecuting this proceeding, both in the Superior Court and in the Supreme Court, the petitioner, James W. Hackney, was represented by able and experienced counsel, resident in Chatham County, duly appointed by the Superior Court of Chatham County.

The petitioner, James W. Hackney, was indicted by a grand jury at the January Term 1950 of the Superior Court of Chatham County. The bill of indictment charged the petitioner on 5 December 1949 with robbery with firearms, to-wit, a pistol, of Ed Neal, whereby the life of Ed Neal was endangered or threatened. The indictment charged a violation of G. S. N. C. 14-87. At the same term he pleaded Not Guilty; was put on trial and convicted by a petit jury on this charge. In consequence the presiding judge sentenced him to serve 20 years in the State Prison; the sentence to begin at the expiration of sentence imposed in Union County at the October Term 1944, which sentence James W. Hackney, the petitioner, was serving at the time of his escape.

The petitioner did not appeal. He is now in the State Prison serving the sentence imposed at the October Term 1944 of the Superior Court of Union County, which sentence does not expire until 15 December 1959.

On 5 March 1953 the petitioner commenced this proceeding in the Superior Court of Chatham County against the State of North Carolina. The petitioner alleges that his constitutional rights were violated in the original criminal action in Chatham County, in this particular; that no warrant, capias or court order was served upon, or read to him; that no previous hearing in a court inferior to the Superior Court had been had; that he was placed in the county jail, and put on trial, the week the indictment was found; that his request for the appointment of counsel by the court to represent him was denied; that his request for witnesses was denied; that his entire trial, conviction and sentence, lasted less than twenty minutes.

The solicitor filed answer denying that petitioner made any request for the appointment of counsel to represent him; denying that he requested any witnesses to be subpoenaed for him; and alleging that the petitioner was brought from the State Prison by order of the Presiding Judge at the January Term 1950 of Chatham County Superior Court; placed on trial at said term, and while he does not recall the time consumed in the trial, "such time as was necessary to hear the State's evidence and to permit deliberation by the jury, the return of the verdict, the imposition of sentence upon the defendant, was consumed and no more."

At the August Term 1953 of the Superior Court of Chatham County the Presiding Judge heard the evidence offered by the petitioner—the

State offered none—made findings of fact, conclusions of law, and entered judgment. G. S. N. C. 15-221.

The essential facts appearing in the Record are stated below.

One. At the October Term 1944 of the Superior Court of Union County the petitioner herein entered a plea of guilty of robbery with firearms, and was sentenced to serve a term in the State Prison. In November 1949, while serving this sentence, he escaped. On 12 December 1949 he was captured, and returned to the State Prison. On the night of 4 December 1949, and the early morning of 5 December 1949, petitioner testified he was in Chatham County visiting his children.

Two. The minutes of the Chatham County Superior Court show the January Term 1950 of that court convened on Monday 16 January, and on the same day the Grand Jury returned the bill of indictment charging the petitioner with the robbery of Ed Neal. On the afternoon of that day the petitioner pleaded Not Guilty and was placed on trial before the judge and a petit jury. The following day the jury returned a verdict of Guilty, and sentence was imposed.

Three. The petitioner testified that about 2:30 p.m. on 16 January 1950 he was carried directly from a State Prison Camp in an adjoining county to the courthouse of Chatham County. He was carried into the courtroom, where court was in session. Shortly after arrival the solicitor for the State told him he was indicted for robbery with firearms, and asked him if he was Guilty or Not Guilty. Petitioner told the Presiding Judge he did not know until then that he had been charged or indicted for the crime of robbery of Ed Neal; that he was Not Guilty; and that he wanted time to get some witnesses, and prepare for trial. The judge asked him what witnesses he wanted. The petitioner did not give him the names of any witnesses; he didn't have time to think because just then was the first notice he had that he was charged with the robbery of Ed Neal. When the petitioner testified in this proceeding at the August Term 1953, he gave no names of any witnesses he wanted. The petitioner then requested the judge to appoint counsel to represent him at the January Term 1950, but his request was refused, and he was placed upon immediate trial. The petitioner gave no testimony as to the length of the trial, except that he said the trial began Monday afternoon, and was finished Tuesday morning.

Four. The State offered testimony which, if believed beyond a reasonable doubt by the jury, was amply sufficient to convict. The petitioner testified in his own behalf, denying *in toto* the charge in the indictment against him.

Five. The only evidence offered by petitioner in this proceeding at the August Term 1953 was his own testimony, the minutes of the court, and the commitment.

After hearing the evidence Judge Williams found as a fact that the petitioner at the January Term 1950 of the Superior Court of Chatham County was duly tried upon a valid bill of indictment, found Guilty and sentenced to prison, where he is now; that he had a fair trial and that no substantial constitutional rights of the petitioner have been denied as guaranteed by State and U. S. Constitutions; that the allegations of his petition are not supported by the evidence, and entered judgment declaring the petitioner is entitled to no relief in this proceeding.

Petitioner excepted and assigned error to the judge's findings of fact that he had a fair trial; that no substantial constitutional rights of his have been denied; that the *allegata* of his petition were not supported by *probata;* and excepted to the judgment.

The petition for *certiorari* was granted, and the case brought to the Supreme Court for review. G. S. N. C. 15-222.

Harry McMullan, Attorney General, and Ralph Moody, Assistant Attorney-General, for the State.

Ike F. Andrews, W. Reid Thompson and Wade Barber for Defendant, Petitioner Appellant.

PARKER, J. While Judge Williams did not specifically find that the petitioner, James W. Hackney, requested the judge at the January Term 1950 of the Superior Court of Chatham County to appoint counsel to represent him at the trial, and the judge failed to do so, the evidence is uncontradicted to that effect, and we assume such to be the fact. Petitioner's contention that this deprived him of a substantial constitutional right given to him by Art. I, secs. 11 and 17 of the North Carolina Constitution and the 14th Amendment to the U. S. Constitution rests solely upon his bald assertion that he requested the judge to appoint counsel to represent him at the trial, and the court did not do so. The charge was not a capital offense. The petitioner has neither allegation nor evidence that he was illiterate, ignorant, incompetent, of limited education, or inexperienced in criminal trials. His own testimony shows that he entered a plea of guilty to an indictment charging him with robbery with firearms at the October Term 1944 of the Superior Court of Union County, and was sentenced to prison. Certainly in 1950 he, the father of two children, was neither a tender youth, nor a stranger at the bar in a criminal court charged with a serious felony. The petitioner has failed to show any special circumstances requiring the court to appoint a lawyer to represent him to secure him an adequate and fair defense, and that the failure to appoint counsel for him violated his constitutional rights under the State or Federal Constitutions. *S. v. Cruse,* 238 N.C. 53, 76 S.E. 2d 320; *S. v. Wagstaff,* 235 N.C. 69, 68 S.E. 2d 858; *S. v. Hedgebeth,* 228

N.C. 259, 45 S.E. 2d 563; *Palmer v. Ashe,* 342 U.S. 134, 96 L. Ed. 154 (See Anno. p. 161); *Uveges v. Pennsylvania,* 335 U.S. 437, 93 L. Ed. 127 (See Anno. p. 137); *Betts v. Brady,* 316 U.S. 455, 86 L. Ed. 1595; *People v. Pring,* 414 Ill. 63, 110 N.E. 2d 214; Anno. 149 A.L.R. 1403; 23 C.J.S., Crim. Law, sec. 982.

The petitioner has a constitutional right of confrontation, of which he cannot lawfully be deprived, and this includes the right of a fair opportunity "to confront the accusers and witnesses with other testimony." N. C. Cons., Art. I, sec. 11; *S. v. Garner,* 203 N.C. 361, 166 S.E. 180.

The word *confront* secures to the accused the right to have his witnesses in court, and to examine them in his behalf. *S. v. Thomas,* 64 N.C. 74. It further secures to the accused a fair opportunity to prepare and present his defense, which right must be afforded him not only in form but in substance. *S. v. Whitfield,* 206 N.C. 696, 175 S.E. 93; *S. v. Utley,* 223 N.C. 39, 25 S.E. 2d 195.

When a request for a continuance in a criminal case for a later day in the term, or for the term, is based on a right guaranteed by the 14th Amendment to the U. S. Constitution or by Art. I, secs. 11 and 17 of the North Carolina Constitution, "the question presented is one of law and not of discretion and the decision of the court below is reviewable." *S. v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322.

It is established law in this jurisdiction that "a motion for a continuance is addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review on appeal, except in case of manifest abuse." *S. v. Whitfield, supra* (where many cases are cited); *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520.

"There is no rule of law or practice that when a bill of indictment is found at one term the trial cannot be had till the next." *S. v. Sultan,* 142 N.C. 569, 54 S.E. 841. As to capital cases this rule was changed in 1949. G. S. N. C. 15-4.1.

In *S. v. Riley,* 188 N.C. 72, 123 S.E. 303, the defendants excepted to being placed on trial the same term the bill of indictment was found, and so soon after the alleged theft they were denied the right to obtain necessary evidence. This Court held this was "a matter within the discretion of the trial judge, and not the basis of a valid exception, unless there has been manifest abuse, and on the facts presented, we are of opinion that no such abuse has been made to appear."

In *S. v. Gibson, supra,* the defendant was found guilty of the capital crime of rape. The trial was set for the afternoon of the day following the appointment of counsel for him by the court. Counsel for the defendant moved for a continuance to have time to prepare the defense. Counsel gave no specific reason for his assertion that he had inadequate time to prepare the defense. The witnesses were few and resided in the neighbor-

hood; no complicated questions of law or fact were involved. In finding No Error in the trial below this Court said: "The record fails to show that the requested continuance would have enabled the prisoner and his counsel to obtain additional evidence or otherwise present a stronger defense." See also *Avery v. Alabama,* 308 U.S. 444, 84 L. Ed. 377.

U. S. v. Nierstheimer, 166 F. 2d 87 (Petition for *Certiorari* denied 334 U.S. 850, 92 L. Ed. 1773), was a *habeas corpus* proceeding by the United States, on the relation of Coy Thompson against Walter Nierstheimer, Warden, Illinois State Penitentiary. Petitioner contended on 6 July 1931 in the Criminal Court of Cook County, Illinois, he was indicted, arraigned, tried, and convicted in a capital case all in one day, and that counsel appointed by the court defended him. He was sentenced to serve one hundred years in prison. The record supported by the testimony of the judge and others, though denied by the defendant, showed petitioner consented to trial by court, and that he had been consulted on two different days with counsel who represented him. Petitioner contended such expeditiousness denied him due process in that his counsel made no independent investigation, subpoenaed no witnesses, and asked for no continuance, as requested by him. Petitioner's counsel testified petitioner never gave him the names of any witnesses to be subpoenaed. The court held that no standard length of time must elapse before defendant in a capital case should go to trial, and the facts of each case provide its own yardstick, but there must not be an idle ceremony of going through the motions of a trial, and a court should not move so rapidly as to ignore or violate the rights of the defendant to a fair trial. *Minton, C. J.* (now a Justice of the U. S. Supreme Court) speaking for the Court said: "Courts do not deny due process just because they act expeditiously. The law's delay is the lament of society. . . . If no witnesses are suggested or information furnished that would possibly lead to some material evidence or witnesses, the mere failure to delay in order to investigate would not be, in and of itself, a denial of due process." The judgment of the District Court denying the petition was affirmed.

A request for a continuance should be based on sufficient grounds furthering justice. Such a request is properly denied where no substantial rights are prejudiced by proceeding promptly with the trial. 22 C.J.S., Crim. Law, sec. 483.

The petitioner, James W. Hackney, contends his constitutional rights were violated in that he told the court he would like to have some time to get some witnesses and prepare for trial, and that the court refused a continuance. The trial court asked him what witnesses he wanted. He gave the court no names of witnesses he wanted. He said in this proceeding in August 1953 he gave the judge no names; he didn't have time to think because he had just heard he was charged with robbery. However,

in the hearing of this proceeding in August 1953, three and one-half years after January 1950, with abundance of time to ponder and reflect on his case, he still gives no names of any witnesses he wants.

Petitioner has not even suggested that in the lonely hours of prison nights he can sometime recall the names of some "phantom witnesses" somewhere he wants an opportunity to investigate and subpoena in his behalf.

Petitioner relies upon *Commonwealth v. O'Keefe,* 298 Pa. 169, 148 Atl. 73. A careful reading of that case would indicate the defendant was denied an opportunity to have in court at his trial real witnesses.

In the trial in January 1950 no complicated question of law was involved. The facts were simple. The petitioner has totally failed to show that if a new trial is awarded him, he can obtain additional evidence, or can have a better defense. The petitioner has neither *allegata* nor *probata* that he was in any way denied full opportunity to employ counsel at the January Term 1950 of Chatham County Superior Court. We cannot hold as a matter of law that the court in January 1950 in placing the defendant on trial denied him his constitutional rights of confrontation, of due process, or that the court manifestly abused its discretion in refusing a continuance. *S. v. Whitfield, supra; S. v. Gibson, supra.*

Unless there is a statute requiring it, it is the general, if not the universal, rule in the United States that a preliminary hearing is not an essential prerequisite to the finding of an indictment. Such hearing is unknown to the common law. 27 Am. Jur., Indictments and Informations, p. 596; 22 C.J.S., Crim. Law, p. 484; *U. S. ex rel. Hughes v. Gault,* 271 U.S. 142, 70 L. Ed. 875. We have no statute requiring a preliminary hearing, nor does the State Constitution require it. It was proper to try the petitioner upon a bill of indictment without a preliminary hearing. The petitioner alleges in his petition that the January Term 1950 of Chatham Superior Court was "a court of proper jurisdiction."

Stacy, C. J., speaking for the Court said in *S. v. Beal,* 199 N.C. 278, p. 303, 154 S.E. 604: "The foundation for the application of a new trial is the allegation of injustice arising from error, but for which a different result would likely have ensued, and the motion is for relief upon this ground. Unless, therefore, some wrong has been suffered, there is nothing to relieve against. The injury must be positive and tangible, and not merely theoretical." See also *S. v. Gibson, supra.*

People v. Hall, 413 Ill. 615, 110 N.E. 2d 249, was a Post-Conviction Hearing. The Court said: "The petitioner has the burden of showing that he was deprived of a substantial constitutional right in the trial resulting in his conviction."

After a careful examination of all the facts brought out in the hearing on James W. Hackney's petition under the statute, we reach the conclu-

sion no constitutional rights of James W. Hackney under the State Constitution or U. S. Constitution were violated at the trial in January 1950.

The judgment of Judge Williams denying relief is

Affirmed.

JOHNSON and BOBBITT, JJ., dissent.

GUY P. HONEYCUTT v. D. L. BRYAN.

(Filed 5 May, 1954.)

1. Negligence § 1—

Where the circumstances in which a person is placed are such that a man of ordinary sense using his faculties will recognize that his failure to use ordinary care and skill in his own conduct with regard to those circumstances will cause danger of injury to the person or property of another, such person is under duty to use ordinary care and skill to avoid such danger.

2. Same—

He who puts a thing in charge of another which he knows, or in the exercise of ordinary prudence should know, to be dangerous, or to possess characteristics which, in the ordinary course of events, are likely to produce injury, owes a duty to such person to give reasonable warning or notice of such danger.

3. Same—

Negligence is the failure to exercise ordinary care in performance of some legal duty which the defendant owes plaintiff under the circumstances in which they are placed.

4. Carriers § 8—

A franchise motor carrier of goods by contract in intrastate commerce, operating as both initial and delivering carrier, owes the duty to the employees of the consignee to exercise reasonable care to furnish a vehicle in reasonably safe condition so that the employees of the consignee can unload the trailer with reasonable safety, and the duty to make reasonable and timely inspection of the vehicle to ascertain whether it is reasonably safe for unloading, and to repair or give warning of any dangerous condition in the trailer discoverable by such inspection.

5. Same—Evidence held sufficient for jury on issue of negligence of motor carrier in failing to use due care to provide vehicle reasonably safe for unloading and in failing to warn of danger.

Plaintiff's evidence tended to show that defendant, a contract carrier, delivered a load of steel beams and columns to the consignee, that he parked the trailer truck as directed by the consignee's employees on a twelve per cent slope to the left and approximately a seven per cent slope

from the front to the rear, that he removed the binder chains so that there was nothing to keep the beams, slippery and wet from rain, from sliding off except three 1½ inch pieces of pipe used as standards on the left side of the trailer, that in unloading the beams with a wrecker bar, an employee of the consignee asked defendant carrier if it was safe for him to walk up on the beams on the truck, and that as he did so upon the assent of defendant, one of the standards bent, and the beams began sliding off the truck to the left, resulting in serious injury to the consignee's employee. *Held:* The evidence is sufficient to be submitted to the jury on the issue of the carrier's breach of duty to exercise reasonable care to provide a vehicle reasonably safe for unloading, and in failing to warn the consignee's employee of the danger due to the position and slant of the vehicle and the removal of the binder chains.

APPEAL by defendant from *Whitmire, Special J.*, December Extra Term 1953, MECKLENBURG.

Civil action to recover compensation for personal injuries.

Defendant is a contract carrier of merchandise operating under a franchise granted him by the Utilities Commission. Herman Sipe Company, hereinafter referred to as Sipe, is a building contractor; and plaintiff, at the time he received his injuries, was one of its employees.

Defendant's vehicle is the tractor-trailer type. The trailer is flat bottomed, about thirty feet long, and its over-all width is eight feet. There is a band of steel about four inches wide and one-fourth inch thick on the sides of the trailer. To this band there are welded on each side ten brackets, about one and one-half by four inches in size, for the purpose of holding standards or stanchions.

On 16 February 1952 the defendant transported a full load of building material from Charlotte to the site of a building then being erected in Morganton by Sipe. The shipment consisted of nineteen I-shaped steel beams, twenty feet long and twenty-one inches wide, weighing approximately 1237 pounds each, and some steel columns. The beams were loaded to the front of the trailer and the columns to the rear. There were three standards on the left side of the truck opposite the beams—one near each end of the beams and one in the middle. They were pieces of pipe, and the middle one was smaller than the others. The end ones were about one and one-half inches in diameter. There were two on each side for the columns.

Before leaving Charlotte, defendant securely tied down the beams and columns by the use of chains which were tightened so as to leave clearance between the beams and standards and prevent any shifting of the load while in transit.

When defendant arrived at the site of the building under construction, he placed his tractor as directed by Sipe's foreman. This put the tractor-trailer on a slight decline to the left and rear. Having parked the vehicle

as directed, the defendant then removed the binder chains and the standards on the right side. Sipe's employees unloaded the columns. Plaintiff then asked the defendant how was the best way to go about unloading the beams, and defendant replied: "Take a bar and ratch them out to the edge."

Plaintiff and his fellow employee, by using a wrecker bar, pushed the end of a beam over the edge of the truck, and gravity caused it to fall to the ground. They proceeded to unload in this manner until the front end of the fourth beam hooked to some part of the trailer and did not fall. Plaintiff asked defendant if it was safe for him to walk up the beams to the front "to get that one loose," and defendant told him it was safe. Plaintiff then took an iron bar, got on the truck, and started up the beams to the front. As soon as he got on the beams, the rear standard bent and the beams began sliding off the truck on the left side. The steel band holding the other two standards on that side tore loose from the truck. Plaintiff "just rode the steel on off." He suffered certain injuries including the loss of a major portion of one hand.

Defendant testified that plaintiff was on the beams, attempting to pry off the one that was caught at the time the beams began to fall off the left side. He also testified that when he needed standards he usually got them off the scrap heap; that he sometimes helped unload, but that he did not do so on this occasion; and that he did not use more standards because he used the brackets for chains.

There was testimony tending to show that when the shipment is a carload or truckload, it is the duty of the consignee to unload, and the judge so charged the jury.

The customary issues, including an issue of contributory negligence, were submitted to and answered by the jury in favor of the plaintiff. The court entered judgment on the verdict and defendant appealed.

G. T. Carswell and Robinson & Jones for plaintiff appellee.
Jones & Small for defendant appellant.

BARNHILL, C. J. This case has no counterpart in our books. Our research has not disclosed one substantially on all fours in any other jurisdiction. Yet it presents no complex or insolvable question for decision. We are only required to apply old law to a new combination of facts.

Whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other, duty arises to use ordinary care

and skill to avoid such danger. *Stroud v. Transportation Co.,* 215 N.C. 726, 3 S.E. 2d 297.

He who puts a thing in charge of another which he knows, or in the exercise of ordinary prudence he should have known, to be dangerous, or to possess characteristics which, in the ordinary course of events, are likely to produce injury, owes a duty to such person to give reasonable warning or notice of such danger. *Stroud v. Transportation Co., supra.*

Negligence is a want of due care—a failure to exercise ordinary care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they are placed at the time.

But these are nothing more than general, abstract statements of the law of negligence. We must relate that law to the particular facts and circumstances, and the relation of the parties one to the other, at the time plaintiff was injured. *Holderfield v. Trucking Co.,* 232 N.C. 623, 61 S.E. 2d 904.

The defendant, a contract carrier of freight, transported a truckload of steel beams and columns to Sipe, the consignee. He placed the tractor and trailer as directed by employees of Sipe, removed the "binder" chains and the standards on the right side of the trailer, and then turned the vehicle over to Sipe's employees for unloading. In so doing, did he owe plaintiff and his coemployees any duty, and if so, did he breach that duty? These are the real questions presented for decision, and decision must be made on the facts and circumstances which arose after the vehicle reached its destination.

We have recently discussed the duties a common carrier of freight by rail owes the employees of the consignee when the shipment is to be unloaded by the consignee. *Yandell v. Fireproofing Corp.,* 239 N.C. 1. While the facts in that case are not the same as those appearing in this record, the two cases, in principle, are on all fours and invoke the application of the same rules of law. There the defendants were carriers of freight by rail—here by motor vehicle. There the boxcar—here the trailer—when delivered to the consignee, was in such defective condition that an employee of the consignee, while engaged in unloading, received personal injuries as a result thereof. Hence we cannot perceive any sound reason why we should not say that the law, as stated in that case, is not controlling here.

Ervin, J., speaking for the Court in the *Yandell case,* says:

"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. (Numerous cases cited.) A delivering carrier by rail, which delivers to the consignee for unloading a car re-

ceived 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. (Numerous cases cited.)" Since the defendant was both the initial and delivering carrier, he owed to Sipe's employees the duty (1) to exercise reasonable care to furnish a vehicle in reasonably safe condition so that the employees of Sipe could unload the trailer with reasonable safety, and (2) to make a reasonable and timely inspection of the vehicle to ascertain whether it was reasonably safe for unloading, and to repair or give warning of any dangerous condition in the trailer discoverable by such inspection.

The court below, during the trial and in its charge to the jury, was very careful to limit the alleged liability of the defendant to a breach of these duties. In so doing, it adhered, with commendable accuracy and detail, to the requirements of G.S. 1-180. It charged the jury in part as follows:

"Now in this case the court charges you that when a common carrier of freight delivers an entire load of merchandise, or, in this case, building materials, steel beams, to the consignee, the law imposes the duty upon the consignee to unload that trailer, in the absence of some agreement to the contrary. That being true, the law charges the carrier with the duty of anticipating the presence of the consignee or his employees on or about or upon the trailer for the purpose of unloading it, and that being true, the law imposes the duty upon the carrier, that is, the defendant, in this case, to see, in the exercise of reasonable care or due care, that the trailer is in a reasonably safe condition for unloading purposes. That does not mean that the carrier becomes or is a guarantor of the absolute safety of the consignee or his employees, but it simply means that he is required, in the exercise of due care, to see that the truck or the trailer is in a reasonably safe condition, safe condition meaning not only the truck itself but the way it is placed and loaded and so forth."

"Now on the first issue the court charges you that if you find from this evidence and by its greater weight that when the defendant placed the truck in the position for unloading, that the standards put there for the purpose of holding the beams in place were not properly or securely fixed to the side of the bed, the bed of the truck, or that they were not sufficient in number, and that for that reason the truck was not in a reasonably safe condition for unloading purposes, and if you further find by the greater weight of the evidence that the defendant knew or could have known from a reasonable inspection that the truck was not in a reasonably safe condition, and if you further find that by the greater weight of the evidence that the defendant failed to warn the plaintiff of the danger of being upon

the truck or the beams, because of its unsafe condition, and if you further find that the plaintiff, as an employee of the consignee, got upon the trailer for the purpose of unloading it . . . and that while he was on the truck and on the beams for the purpose of unloading, that the standards gave way or broke off and, because of that, the steel beams remaining on the truck shifted and fell off on the lower side and to the ground, resulting in injury to the plaintiff, then the court charges you that the defendant would be guilty of negligence, and if you further find by the greater weight of the evidence that such negligence was the proximate cause of the plaintiff's injury, or one of the proximate causes of the plaintiff's injury, that it would be your duty to answer the first issue yes . . ."

The record contains ample competent evidence tending to show that defendant breached this duty imposed on him under the circumstances here disclosed.

It is true he parked the trailer as directed by Sipe's employees. Yet in so doing, he knew when he surrendered custody of the vehicle to them for the purpose of unloading that the vehicle was parked "on a little bit of a slant" to the left—a twelve per cent slope to the left and approximately seven per cent from the front to the rear; that the beams were piled five high; that it was raining, rendering the beams and supports slippery; that he had removed the binder chains; and that there was nothing to keep the beams from sliding off on the left except three one and one-half inch pieces of pipe. Although he had considered it necessary to stop and inspect his load twice while in transit to discover whether there had been any shift of the beams then tied down by the binder chains, he did not look, at the scene of the accident, to see whether there was any space between the beams and the standards on the left or use any of the additional five standards then available for use on the left. He made no inspection and gave no warning that due to the position of the vehicle and the removal of the chains the beams might slide to the left or that the three pipe standards were insufficient to hold the weight of the beams if that should occur. Instead of warning of the danger, when asked, he assured plaintiff it was safe for him to get on top of the beams.

These and the other facts and circumstances appearing of record were sufficient to repel the motion to dismiss the action as in case of nonsuit.

We have carefully examined the other exceptive assignments of error. While some of them may point out technical error of little significance, none are of sufficient merit to require discussion. The cause was carefully tried, and the charge was as favorable to defendant as he had any reasonable cause to expect. He has had his day in court in a trial free from any error that might have affected the verdict of the jury. He must, therefore, abide the results.

Affirmed.

STATE v. ANDY COPE.

(Filed 5 May, 1954.)

1. Criminal Law §§ 33, 52a (2)—

An extrajudicial confession must be corroborated by other evidence which at least establishes the *corpus delicti* in order to be sufficient to sustain conviction of a felony. This is particularly true in prosecutions for sexual offenses.

2. Criminal Law § 42e: Evidence § 19—

Testimony of a witness at the preliminary hearing, brought out on cross-examination after the witness has given contradictory testimony at the trial, *is held*, competent solely for the purpose of impeaching the testimony of the witness at the trial and may not be considered as substantive evidence of the facts at issue.

APPEAL by defendant from *Patton, Special Judge,* November Term, 1953, of GASTON.

The defendant had returned against him three separate bills of indictment which were consolidated for trial. Under one indictment he was charged with feloniously, incestuously, unlawfully, and willfully having sexual intercourse with Beulah Cox, his granddaughter. Under another he was charged with unlawfully, willfully, maliciously, and feloniously committing a crime against nature with Rosie Dean. Under the third one he was charged with unlawfully, willfully, and feloniously raping, ravishing, and carnally knowing Rosie Dean, a female.

The State offered evidence tending to show that the defendant confessed to the arresting officers that he had committed unnatural sex acts with his granddaughters, Rosie and Polly Dean, and also confessed that he had been having sexual relations with his granddaughter Beulah Cox over a period of several years; that he likewise made similar confessions to the jailer while confined in the county jail.

At the close of the State's evidence the defendant moved for judgment as of nonsuit as to each charge. The court sustained the motion as to the charge of rape, but overruled it as to the other charges.

The defendant testified in his own behalf and denied that he had ever had sexual relations with Beulah Cox, or that he had ever made any statement to any of the State's witnesses that he had had any such relations with her. He likewise denied that he had ever had any unnatural relations with Rosie or Polly Dean, or that he had ever told anyone that he had had such relations with them or either of them. He offered numerous witnesses who testified that he was a man of good character and reputation.

Beulah Cox, age nineteen, testified that she was married and had two children; that shortly before she swore out the warrant against the defendant, her grandfather, her husband, Howard Cox, had been arrested upon a charge of raping her seven-year-old sister; that the tale she told on her grandfather was made up in an effort to save her husband; that while she swore out a warrant against her grandfather and testified against him at the preliminary hearing, her grandfather had never had anything to do with her that was improper. She likewise testified that what she told the officers about the defendant's relations with her and with her seven-year-old sister was a falsehood; that she had been told that if she would implicate someone else it would help her husband.

Polly Dean, age twelve, testified that her grandfather had never mistreated her and that there was no truth in the story that she had told about him. That she told the story because her sister Beulah asked her to and said it would help out Howard. Rosie Dean, age seven, never testified.

From a verdict of guilty of crime against nature and of incest, as charged in the respective bills of indictment, and the judgments imposed, the defendant appeals, assigning error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

Mullen, Holland & Cooke for defendant, appellant.

DENNY, J. The defendant assigns as error the refusal of the court below to sustain his motion for judgment as of nonsuit, interposed at the close of the State's evidence, as to both charges, and renewed at the close of all the evidence. This assignment raises two questions. (1) Is a naked extrajudicial confession, uncorroborated by any other evidence, sufficient to sustain a conviction of a felony? (2) When in the course of a trial a witness testifies to facts which are inconsistent with her testimony in the preliminary hearing in the case, is her testimony given at the preliminary hearing, which is brought out on cross-examination, limited to that of impeachment of the witness, or may it be admitted and considered as substantive evidence of the facts at issue?

The first question posed has been considered by this Court in the cases of *S. v. Long,* 2 N.C. 455, and *S. v. Cowan,* 29 N.C. 239, both of which were capital cases. In the *Long case* the Court said: "Where A makes a confession, and relates circumstances which are proven to have actually existed as related in the confession, that may be evidence sufficient for a jury to proceed upon to convict the prisoner; but a naked confession, unattended with circumstances, is not sufficient. A confession, from the very nature of the thing, is a very doubtful species of evidence, and to be received with great caution. It is hardly to be supposed that a man

perfectly possessed of himself would make a confession to take away his own life."

In the case of *S. v. Cowan, supra,* the defendant was indicted for highway robbery, which at that time was a capital offense. It was proven that a Captain Rodney had been assaulted and badly wounded on the night in question and that his watch had been taken. Thereafter, the prisoner was found to be in possession of the watch which was identified as the one taken from the Captain. At the preliminary hearing, after due and proper caution had been given to the prisoner as to his rights with respect to any confession or admission he might make, he made a full and complete confession, giving the details as to how and where he committed the robbery. The Court held the confession to be free and voluntary, and overruled the exceptions to testimony of the witnesses in respect to the statements made by the prisoner at the preliminary hearing.

The court charged the jury that the prisoner's confession alone, if believed by them to be true, would justify them in returning a verdict of guilty. The defendant, among other things, excepted to this instruction. *Ruffin, C. J.*, in speaking for the Court, said: "We likewise hold that his Honor directed the jury correctly as to the effect they might allow to the prisoner's confessions. There was, indeed, evidence in corroboration of the confession, namely, the injuries inflicted on Rodney, which added greatly to the credit to which the confessions, in themselves, might be entitled. But we believe that it is now held by courts of great authority that an explicit and full confession of a felony, duly made by a prisoner, upon examination on a charge before a magistrate, is sufficient to ground a conviction, though there be no other proof of the offense having been committed. . . . Of the same grade of evidence, precisely, is a confession out of court, provided only it be fully proved and appear to have flowed from the prisoner's own unbiased will. Such a confession which goes to the whole case is plenary evidence to the jury."

It is clear that what the Court said in the *Cowan case,* relative to an extrajudicial confession, was not essential to a decision and was, therefore, mere *dicta.* Moreover, the fact that Captain Rodney had been assaulted and his watch taken from him, as well as the further fact that the prisoner had Captain Rodney's watch in his possession, was sufficient to have justified the court in submitting the case to the jury if the prisoner had made no confession. In other words, the *corpus delicti* was proven by evidence exclusive of the confession and such evidence pointed strongly to the defendant as the person who committed the crime. Hence, as the Court said, this evidence corroborated the confession and added greatly to the credit to which the confession might be entitled. Surely, no one would question the sufficiency of such evidence to sustain a conviction.

The State contends, however, as stated in 23 N. C. Law Review, page 364, *et seq.*, that in the *Cowan case* this Court shifted to the view that a prisoner could be convicted of a capital crime upon his own unbiased and voluntary confession without any other evidence; thereby, in reasoning, overruling the earlier *Long case.*

The State also, in support of the foregoing view, quotes in its brief from section 182 of Stansbury's North Carolina Evidence, the following: ". . . even in capital cases conviction may be had upon the prisoner's voluntary confession unattended by any other evidence." It is apparent this statement was based on the *dicta* in the *Cowan case* if intended to apply to an extrajudicial confession, and the reference to a confession in *S. v. Graham,* 68 N.C. 247, since these cases are cited as authority for the view expressed.

In our opinion, none of the above cases authoritatively holds that a naked extrajudicial confession, uncorroborated by any other evidence, is sufficient to sustain the conviction of a defendant charged with the commission of a felony. The *Long case* definitely and expressly holds to the contrary. Therefore, it is our considered judgment that in such cases there must be evidence *aliunde* the confession of sufficient probative value to establish the fact that a crime of the character charged has been committed. Wigmore on Evidence, Third Edition, Vol. VII, section 2071. This does not mean, however, that the evidence tending to establish the *corpus delicti* must also identify the defendant as the one who committed the crime. *Ivy v. State,* 109 Ark. 446, 160 S.W. 208; *People v. Jones,* 123 Cal. 65, 55 P. 698; *Wigginton v. Commonwealth,* 92 Ky. 282, 17 S.W. 634; *Weller v. State,* 150 Md. 278, 132 A. 624; *People v. Roach,* 215 N.Y. 592, 109 N.E. 618, Ann. Cas. 1917A, 410.

We concede that there are instances in which it is extremely difficult to prove the *corpus delicti.* Even so, it cannot be left unproven if a conviction is to be sustained. *S. v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533; 23 C.J.S., Criminal Law, section 916, page 181, *et seq.;* 26 Am. Jur., Homicide, section 383, page 425. In such cases, for example, when a person is missing and the body cannot be found and there is no direct and positive evidence that a crime has been committed, the State may resort to circumstantial or presumptive evidence for the purpose of establishing it. *S. v. Williams,* 52 N.C. 446, 78 Am. Dec. 248.

In 20 Am. Jur., Evidence, section 1242, page 1092, *et seq.,* we find the following statements: "It is generally held that a mere naked confession, uncorroborated by any circumstances inspiring belief in the truth of the confession, is not sufficient to warrant the conviction of the accused for the crime with which he is charged; . . . In those instances where a corroboration of a confession is required, the corroborative evidence must consist of facts or circumstances appearing in evidence which are inde-

pendent of the confession and consistent therewith and which tend to confirm and strengthen the confession. On the question how much corroboration of an extrajudicial confession is necessary to warrant the conviction of the accused in jurisdictions which require some corroboration, the general rule is that independent proof of the *corpus delicti* must exist in order to convict . . . The rule that a confession does not warrant a conviction unless corroborated is generally held applicable to extrajudicial confessions only, and not to judicial confessions, in the absence of statutes to the contrary." See also Underhill's Criminal Evidence, Fourth Edition, section 281.

In view of the fact that the overwhelming authority in this country is to the effect that a naked extrajudicial confession of guilt by one accused of crime, unaccompanied by any other evidence, is not sufficient to warrant or sustain a conviction, the answer to the first question under consideration should be in the negative. *United States v. Angel* (C.C.A. 7th), 201 F. 2d 531; *Flower v. United States* (C.C.A. 5th), 116 F. 241; *Forte v. United States,* 68 App. D.C. 111, 94 F. 2d 236, 127 A.L.R. 1120; *People v. Rupp,* 41 Cal. 2d 371, 260 P. 2d 1; *Grimes v. State,* 204 Ga. 854, 51 S.E. 2d 797; *Parker v. State,* 228 Ind. 1, 89 N.E. 2d 442; *People v. Franklin,* 415 Ill. 514, 114 N.E. 2d 661; *Vanderheiden v. State,* 156 Neb. 735, 57 N.W. 2d 761; *State v. Gambetta,* 66 Nev. 317, 208 P. 2d 1059; *State v. Carleton* (Me.), 92 A. 2d 327; *Davis v. State* (Md.), 97 A. 2d 303; *State v. Humphrey,* 358 Mo. 904, 217 S.W. 2d 551; *State v. Boswell,* 73 R.I. 358, 56 A. 2d 196; *Witham v. State,* 191 Tenn. 115, 232 S.W. 2d 3; *Campbell v. Commonwealth,* 194 Va. 825, 75 S.E. 2d 468; *State v. Moore,* 35 Wash. 2d 106, 211 P. 2d 172; Wharton's Criminal Law, Twelfth Edition, Vol. I, section 361. See also 127 A.L.R., Corroboration of Confession, page 1131, *et seq.,* where decisions from thirty-nine states and the District of Columbia are cited in support of the above view. In 20 Am. Jur., Evidence, section 1244, page 1095, and the cases cited in 40 A.L.R., Anno.—Confession—Corroboration—Sexual Crimes, page 461, it is pointed out that the courts almost uniformly hold that a naked confession must be corroborated in prosecutions for sexual offenses.

A number of states have enacted statutes which require extrajudicial confessions to be corroborated in order to sustain a conviction. See *Meisenheimer v. State,* 73 Ark. 407, 84 S.W. 494; *State v. Westcott,* 130 Iowa 1, 104 N.W. 341; *Williams v. Commonwealth,* 306 Ky. 225, 206 S.W. 2d 922; *People v. Cassese,* 281 App. Div. 890, 119 N.Y.S. 2d 604; *State v. Jordan,* 146 Ore. 504, 26 P. 2d 558.

We now come to the second question. Ordinarily, testimony given by a witness in a preliminary hearing, or former trial, will not be admitted as substantive evidence in a trial unless it is impossible to produce the

witness. The witness himself, if available, must be produced and testify *de novo.* 20 Am. Jur., Evidence, section 686, page 578, *et seq.;* 31 C.J.S., Evidence, section 384, page 1187. Moreover, prior statements of a witness may not be admitted in corroboration of his testimony in the absence of an attack on his credibility. *S. v. DeGraffenreid,* 223 N.C. 461, 27 S.E. 2d 130. Prior inconsistent statements of a witness are always admissible for the purpose of impeachment, and to show that the witness is unworthy of belief. 20 Am. Jur., Evidence, section 458, page 404, *et seq.*

In Stansbury's North Carolina Evidence, section 46, it is said: "Inconsistent statements of a witness may not be used as substantive evidence of the facts stated, . . . They are simply for the consideration of the jury in determining the witness's credibility. Hence, they are not admissible until the witness has testified to some fact inconsistent with his earlier statement; . . . Thus, if the witness is an agent or accomplice, his statements may be admitted to impeach his testimony although not fulfilling the requirements for their reception as vicarious admissions," citing *S. v. Neville,* 51 N.C. 423; *Hubbard v. R. R.,* 203 N.C. 675, 166 S.E. 802; *Hopkins v. Colonial Stores,* 224 N.C. 137, 29 S.E. 2d 455.

Likewise, in 31 C.J.S., Evidence, section 402, page 1209, it is stated: "Prior contradictory statements of the witness, made in a prior proceeding, do not constitute affirmative evidence or evidence in chief of the facts stated."

In light of our own decisions and those from other jurisdictions, as well as the views expressed by the textbook writers on the subject under consideration, in our opinion, the defendant's motion for judgment as of nonsuit should have been sustained. Our conclusion, however, is not based on any doubt as to the veracity of the officers who testified for the State, but solely on the principle that an uncorroborated extrajudicial confession is insufficient in law to sustain the conviction.

The judgment of the court below is

Reversed.

ALEX DANIEL v. DURWOOD B. GARDNER.

(Filed 5 May, 1954.)

1. Pleadings § 30—

A motion to strike made before answer, demurrer, or extension of time to plead, is made as a matter of right rather than of grace, G.S. 1-153.

2. Pleadings § 3a—

Allegations which set forth matters foreign and immaterial to the controversy are considered irrelevant; whereas, excessive fullness of detail or the repetition of facts are treated as being redundant.

3. Pleadings § 31—

On motion to strike, the test of relevancy is the right of the pleader to present in evidence on the trial the facts to which the allegations relate, and nothing should remain in a pleading over objection which is not competent to be shown in evidence.

4. Pleadings § 3a—

The function of a pleading is not the narration of the evidence, but rather the statement of substantive, ultimate facts upon which the right to relief is founded.

5. Pleadings § 31—

Allegations which are clearly evidential, irrelevant, or repetitious and probative have no place in stating a cause of action and should be stricken on motion aptly made.

6. Appeal and Error § 38—

The burden is on appellant not only to show error but also that the alleged error is material and prejudicial.

7. Appeal and Error § 40f—

The denial of a motion to strike matter from a pleading will not be disturbed on appeal unless appellant shows that the matter is irrelevant or redundant, and further shows that its retention in the pleading will cause harm or injustice.

8. Same—

On appeal from denial of motion to strike, the Supreme Court will not undertake to chart the course of the trial.

9. Pleadings § 31: Assault § 4—

In this civil action to recover damages for assault and battery, allegations as to the peaceful and gentlemanly character of plaintiff and that defendant had been involved in many criminal cases charging him with violation of the liquor laws and engaging in assaults with deadly weapons, and as to the wild and drunken conduct of defendant previous to the occasion in suit, should have been stricken on motion aptly made.

APPEAL by defendant from *Stevens, J.*, at January Term, 1954, of FRANKLIN.

Civil action to recover damages for alleged assault and battery.

The defendant before answering or otherwise pleading moved to strike certain portions of the complaint. The court ruled that the word "small" appearing in paragraph 3 should be stricken, but that otherwise the motion should be denied.

From the order entered in accordance with the foregoing ruling, the defendant appealed, assigning errors.

Hamilton Hobgood and E. C. Bulluck for plaintiff, appellee.
Yarborough & Yarborough for defendant, appellant.

JOHNSON, J. The statute, G.S. 1-153, under which the defendant's motion to strike was made, provides: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, . . ." The defendant lodged his motion before answer, demurrer, or extension of time to plead. This being so, he may claim the benefits of the statute as a matter of right, rather than of grace. *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412; *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308.

As bearing upon the interpretation and application of this statute, these propositions may be taken as established:

1. Allegations which set forth matters foreign and immaterial to the controversy are considered irrelevant; whereas, excessive fullness of detail or the repetition of facts are treated as being redundant. *Newsom v. Newsom,* 40 N.C. 122; *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551; McIntosh, North Carolina Practice and Procedure, p. 378.

2. On motion to strike, the test of relevancy is the right of the pleader to present in evidence upon the trial the facts to which the allegations relate. *Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410; *Council v. Dickerson's, Inc., supra; Whitlow v. R. R.,* 217 N.C. 558, 8 S.E. 2d 809; *Hildebrand v. Telegraph Co.,* 216 N.C. 235, 4 S.E. 2d 439.

3. Nothing should remain in a pleading over objection which is incompetent to be shown in evidence." *Penny v. Stone,* 228 N.C. 295, 45 S.E. 2d 362; *Duke v. Crippled Children's Commission,* 214 N.C. 570, 199 S.E. 918; *Scott v. Bryan,* 210 N.C. 478, 187 S.E. 756.

4. The function of a pleading is not the narration of the evidence, but rather the statement of the substantive, ultimate facts upon which the right to relief is founded. It is these ultimate facts that are put in issue by the pleadings; the probative facts are those which may be in controversy, but are not issuable. "Facts from which the ultimate and decisive facts may be inferred are but evidence, and therefore probative. . . . 'The ultimate facts are those which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts.' " *Winders v. Hill,* 141 N.C. 694, 54 S.E. 440; *Hawkins v. Moss,* 222 N.C. 95, 21 S.E. 2d 873.

5. Allegations which are wholly evidential and probative have no place in stating a cause of action and should be stricken out. *Hawkins v. Moss, supra; Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47.

6. Nevertheless, allegations in a complaint should be stricken only when they are clearly improper, irrelevant, or unduly repetitious. *Rhodes v. Jones,* 232 N.C. 547, 61 S.E. 2d 725.

7. Furthermore, to invoke the aid of this Court it is not enough to show error and no more; the burden is on the appellant to show error which is

material and prejudicial. *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *S. v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39.

8. Accordingly, the denial of a motion to strike matter from a pleading under the provisions of G.S. 1-153 is not ground for reversal unless the record affirmatively reveals these two things: "(1) That the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm or injustice to the moving party." *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185. See also *Ledford v. Transportation Co.,* 237 N.C. 317, 74 S.E. 2d 653, and cases cited; *In re Will of Wood, ante,* 134.

9. Nor is it the function of this Court in deciding an appeal from a ruling on a motion to strike to chart the course of the trial in advance of the hearing. *Hildebrand v. Telegraph Co., supra; Pemberton v. Greensboro,* 205 N.C. 599, 172 S.E. 196; *Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, 63 S.E. 2d 118.

The defendant's motion to strike relates to nineteen separate portions of the complaint. To set all of them out verbatim and discuss the contextual setting of each would burden this opinion with a tediousness serving no useful purpose. It suffices to say that after examining the complaint and each of the defendant's exceptions in the light of the applicable principles of law, we have reached the conclusion that the following portions of the complaint should be stricken out, and it is so ordered:

1. Strike out all of paragraph 3. It reads as follows: "That the plaintiff is a small farmer who resides on a farm located adjacent to Cedar Rock Baptist Church, Cedar Rock Township, Franklin County, North Carolina, where said plaintiff has engaged in the cultivation of agricultural crops for the past several years. That for his entire life said plaintiff has been a peace-loving and law-abiding citizen, never having been involved in riotous or boisterous conduct, always conducting himself in a gentlemanly and peaceful manner."

2. Strike from paragraph 4 the following: "That previous to the time hereinafter specifically complained of, and on more than one occasion, the defendant has made drunken excursions in Franklin and adjoining counties, shooting at various residents of Cedar Rock Township, and the cars occupied by citizens of this county, and having on previous occasions been involved in many criminal cases in Franklin and Nash Counties as a defendant, wherein the defendant was charged with violation of the North Carolina liquor laws, and engaging in assaults with deadly weapons with intent to kill."

3. Strike from paragraph 5 the following: "That despite the wild and drunken conduct of the defendant as hereinbefore alleged, the defendant was a farmer of Cedar Rock Township, and this plaintiff has, at all times prior to the things hereinafter complained of, been able to associate with the defendant in a pleasant and peaceful manner."

It may be conceded that some of the allegations to which other exceptions relate are somewhat decorative and evidential. Nevertheless, it has not been made to appear that the defendant will be prejudiced by the rest of the challenged averments. Therefore, under application of the doctrine applied in *Ledford v. Transportation Co., supra* (237 N.C. 317), and *Hinson v. Britt, supra* (232 N.C. 379), the defendant's remaining exceptions are overruled.

The plaintiff cites and relies on *Long v. Love,* 230 N.C. 535, 53 S.E. 2d 661, as authority for retention of the portion of paragraph 4 which we are ordering stricken. However, our examination of the record in that case discloses a factual situation clearly distinguishable from the instant case.

Subject to the modifications indicated, the order below is affirmed. Let the plaintiff be taxed with the costs.

Modified and affirmed.

STATE v. LEVI BARLEY.

(Filed 5 May, 1954.)

1. Attorney and Client § 6—

The relation of attorney and client rests on principles of agency and not those of guardian and ward, and while an attorney has implied authority to make procedural stipulations and decisions in the management or prosecution of an action, in the absence of special authority the attorney ordinarily has no power to enter a stipulation operating as a surrender of a substantial right of the client.

2. Same: Criminal Law § 17c—

Where defendant's attorney tenders a plea of *nolo contendere,* but the defendant in apt time disavows the plea and continues to protest his innocence throughout the proceeding, the defendant is not bound by the plea and is entitled to have his day in court before a jury, and judgment entered on the plea of *nolo contendere* will be vacated on appeal.

APPEAL by defendant from *Sink, J.,* at September Term, 1953, of RANDOLPH.

Criminal prosecution tried on appeal from County Recorder's Court upon a warrant charging the defendant with transporting and having in his possession nontax-paid liquor.

The series of events on which the defendant's appeal rests is epitomized by this statement taken from the case on appeal: "The Court did not charge the jury and did not submit the case to the jury, but accepted the

plea of NOLO CONTENDERE as entered by the defendant's counsel, when and notwithstanding the defendant was insisting that he was NOT GUILTY . . ."

The foregoing statement is elucidated and explained by these further excerpts taken from the case on appeal:

"Upon inquiry of the Court the defendant announced that he was NOT GUILTY but notwithstanding this announcement the defendant's attorney, W. C. York, told the court he would enter a plea of NOLO CONTENDERE. Thereupon the defendant said, 'No, I am not guilty,' and his attorney told him, 'Let's enter a plea of NOLO CONTENDERE and then I will move to NOL PROS the case' without any explanation of the meaning of the words '*nolo contendere*.' The court accepted the plea of said attorney and thereupon the following proceedings were had": Constable A. H. Stutts, witness for the State, testified, in substance, that at the time laid in the warrant he walked up to the defendant's parked taxicab; that the defendant was under the steering wheel. Two passengers were in it. The man in the rear seat had a paper bag. "I asked him if it had liquor in it and he said 'No,' he had Coca-Colas, and I asked him to hand it to me, and he did, and the paper bag contained a one-half gallon jar of nontax-paid liquor and two bottles of Coca-Cola. . . . I talked with Barley (the defendant) and Barley said . . . the two passengers had been around back of the garage and came back to the taxi from the rear, and one got in the front seat and the one with the paper sack got in the rear seat and that he started off and drove about ten feet and then backed his taxi up to the place where he started from when the passengers came from around the building. Barley said he asked the passenger if he had liquor in that sack, and that he said, 'No' . . . he had Coca-Colas, and he said he told the passenger if he had liquor in it he would have to get out, that he could not haul liquor and would not do it, and that is what they were talking about when I went up to the taxi."

"The State rested.

"The defendant's counsel moved the court to NOL PROS the case, which motion was overruled.

"Thereupon the Court pronounced JUDGMENT: That the defendant be confined in the common jail of Randolph County for . . . three months, . . . and . . . be placed on probation for twelve months.

"The defendant insisted upon going upon the stand and was not satisfied with the plea entered by his counsel, or with the manner in which he handled the case, and thereupon . . . counsel for the defendant, with permission of the court, withdrew as counsel for the defendant.

"Thereupon the defendant went upon the stand in his own behalf and testified as follows: 'I did not enter a plea of guilty or authorize my counsel to do so. I contended then, and I contend now, that I am not

guilty.' (The defendant then went on to deny that he had any interest in or control over the liquor and said he did not know it was in the taxi until the officer found it.) . . .

"The defendant rested."

The court pronounced judgment directing that the defendant be imprisoned and assigned to work under the supervision of the State Highway and Public Works Commission for a period of twelve months. From the judgment so entered the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

W. E. Gavin and Gavin, Jackson & Gavin for defendant, appellant.

JOHNSON, J. The relation of attorney and client rests on principles of agency, and not guardian and ward. While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld. See *Deitz v. Bolch,* 209 N.C. 202, 183 S.E. 384; *Bizzell v. Equipment Co.,* 182 N.C. 98, 108 S.E. 439; 5 Am. Jur., Attorneys at Law, Sections 91 and 92.

The defendant in apt time disavowed the plea of *nolo contendere* as tendered by counsel and continued to protest his innocence throughout the proceedings below.

On the record as presented we conclude he is entitled to his day in court before a jury. To that end the judgment below will be vacated and set aside and the cause remanded for trial on the defendant's plea of not guilty.

Reversed and remanded.

HAROLD JOHNSON v. G. K. HEATH, JR., AND CLIFTON HEATH, INDIVIDUALLY, AND T/A HEATH'S FISH MARKET.

(Filed 5 May, 1954.)

1. Automobiles § 8a: Animals § 2—

It is the duty of the driver of an automobile to keep a reasonably careful lookout in the direction of travel so as to avoid collision with animals, persons and vehicles on the highway.

2. Animals § 2—Evidence held to show contributory negligence as matter of law on part of motorist hitting mule on highway.

Evidence tending to show that plaintiff was driving his car on a bright moonlight night on a straight highway, that a mule grazing beside the road started walking across the highway when plaintiff was one hundred yards distant, that plaintiff, without slackening speed, drove on and collided with the mule when only her hindquarters and rear feet were on the hard surface, and that plaintiff was not meeting any oncoming traffic and had plenty of room to turn left and avoid the collision, *is held* to disclose contributory negligence on the part of plaintiff as a matter of law barring recovery for personal injury and property damage caused by collision of the automobile with the mule.

3. Appeal and Error § 38—

Appellant must not only show error, but also that the alleged error was prejudicial and not merely technical, and amounted to the denial of some substantial right.

4. Appeal and Error § 39c—

When plaintiff's own evidence discloses contributory negligence barring recovery as a matter of law, so that it is apparent he is not entitled to prevail in any view of the case, a new trial will not be awarded for mere technical error.

APPEAL by plaintiff from *Hubbard, Special Judge,* January Term 1954, of PITT.

Civil action to recover for personal injuries and property damage caused by a collision of an automobile plaintiff was driving, with a mule.

Plaintiff's evidence tended to show the following facts. The night of 5 July 1952 was a bright, moonlit night. About 9:00 or 9:30 p. m. that night plaintiff was driving his automobile between 45 and 50 miles an hour from Farmville to Greenville on U. S. Highway 264. His uncle, Alvin Johnson, who was riding with him, did not testify in the case. A loose mule of the defendants was grazing on the shoulder of the highway. The highway was straight one or one and a half miles from where the mule was grazing in the direction of Farmville. Plaintiff was meeting no car: nothing obstructed his view. The mule started across the highway, when plaintiff's car was 100 yards from her: she "took her time" walking across. Plaintiff without slackening his speed collided with the mule, whose front feet were off the highway and only her hindquarters and rear feet were on the pavement. There was plenty of room for plaintiff to turn to the left on the pavement and to miss the mule. Without objection a witness for the plaintiff, who saw the collision, testified "the headlights of the car picked up the mule when it was within 100 or 150 yards of the mule." Plaintiff's automobile was stopped by a tree 99½ feet from the point of collision. Plaintiff was knocked unconscious, and received injuries; Alvin Johnson was unhurt.

The plaintiff testified in substance as follows. On this night he drove to Farmville to see a ball game; did not see it; rode around "a little bit"; the last thing he remembers he was driving on the Greenville Highway; doesn't know how fast he was driving; didn't see a mule; doesn't remember the collision at all; woke up in the hospital.

The mule had been out of defendants' pasture twice within two or three weeks prior to the collision. Before the collision the defendant G. K. Heath, Jr. was told the fence would not keep the mule in the pasture, and said he was going to fix it, but did not. On the night of the collision a gap had been left down in the fence. An employee of the defendants that afternoon delivered blocks near a tobacco barn on defendants' farm. To get to this barn he had to take down a gap in the wire. The morning after the collision the defendant G. K. Heath, Jr. told a witness for the plaintiff the gap was down. It was stipulated the collision occurred in Stock Law territory.

The defendants offered no evidence.

Issues of negligence, contributory negligence and damages were submitted to the jury, who answered the first issue as to negligence No.

From judgment signed in accord with the verdict, the plaintiff appealed assigning error.

Robert D. Rouse, Jr., for Plaintiff, Appellant.
Albion Dunn and Louis W. Gaylord, Jr., for Defendants, Appellees.

PARKER, J. The facts in the recent case of *Kelly v. Willis,* 238 N.C. 637, 78 S.E. 2d 711, are different. In that case the mule suddenly emerged from the darkness north of the highway, trotted onto the highway and into the path of plaintiff's oncoming truck, which was only 15 feet away. The driver saw the mule just as it emerged from the darkness, promptly applied his brakes, but could not stop before striking the mule. He could not turn to the left to avoid striking the mule, because of an approaching automobile on that part of the roadway.

It is the duty of the driver of an automobile to keep a reasonably careful lookout in the direction of travel so as to avoid collision with animals, persons and vehicles on the highway. *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326. "He is held to the duty of seeing what he ought to have seen." *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

The plaintiff was operating his automobile on a straight public highway. It was a bright, moonlit night. He was meeting no car; nothing obstructed his view. The mule was grazing beside the road, and started walking across the highway when plaintiff was 100 yards away. Without slackening his speed plaintiff drove on, and collided with the mule, when

only her hindquarters and rear feet were on the pavement. There was plenty of room for him to turn to the left, and avoid the collision. One of plaintiff's witnesses, who saw the collision, testified without objection the headlights of the car picked up the mule when the automobile was 100 or 150 yards of the mule. Plaintiff's evidence compels the unescapable conclusion that he was not looking in the direction of travel, or if looking, he did not see the mule in time to turn to the left and avoid striking her. In either event, his own negligence, as a matter of law, proximately contributed to his injury, and plaintiff has proved himself out of court. *Presley v. Allen & Co.,* 234 N.C. 181, 66 S.E. 2d 789; *Cox v. Lee, supra; Sawyer v. R. R.,* 234 N.C. 164, 66 S.E. 2d 639; *Ovens v. Charlotte,* 159 N.C. 332, 74 S.E. 748.

Plaintiff makes these contentions: the court erred in excluding evidence that two days after the collision one defendant conveyed all of his property to his wife, and the other all of his property to his father; that the court erred in charging the jury there was no evidence that the defendants knowingly permitted the mule to run at large; and there was not sufficient evidence for the jury to consider whether an agent of the defendants permitted the mule to get out of the pasture. Conceding, but not deciding, there was technical error in the trial below; it was harmless, for if this action were returned for a new trial, the plaintiff could not recover.

Technical error is not sufficient to disturb the verdict and judgment. The burden is on the appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right; or to phrase it differently, to show that if the error had not occurred, there is a reasonable probability the result of the trial might have been materially more favorable to him. *Smith v. Oil Co.,* 239 N.C. 360, 79 S.E. 2d 880; *Freeman v. Preddy,* 237 N.C. 734, 76 S.E. 2d 159; *Rea v. Simowitz,* 226 N.C. 379, 38 S.E. 2d 194; *Smith v. Steen,* 225 N.C. 644, 35 S.E. 2d 888; *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863; *Wilson v. Lumber Co.,* 186 N.C. 56, 118 S.E. 797.

In *Freeman v. Preddy, supra,* the Court said "we have consistently held that when, upon a consideration of the whole record, it clearly appears that the appellant, under no aspect of the testimony, is entitled to recover and that the evidence considered in the light most favorable to him is such that the trial judge would have been fully justified in giving a peremptory instruction, or directing a verdict, against him on the determinative issue or issues, any error committed during the trial will be deemed harmless"—Citing many authorities.

Applying the rules of appellate practice, it becomes clear the case should not be sent back for a new trial.

No error.

G. S. DONNELL, T/A EASTERN OIL TRANSPORT COMPANY, v. E. R. COX AND MAMIE COLE COX, T/A COX AUTO SERVICE.

(Filed 5 May, 1954.)

1. Appeal and Error § 24—

An assignment of error to the findings of fact by the court below must be supported by an exception to such facts.

2. Appeal and Error § 40d—

When no exception is taken to the findings of fact it will be presumed that the findings are supported by the evidence.

APPEAL by defendant Mamie Cole Cox from *Burney, J.*, October Term, 1953, of NEW HANOVER.

This is a civil action to recover from the defendants the sum of $883.17 for petroleum products sold and delivered.

The defendants are citizens and residents of Richmond County. The summons purports to have been duly served on both defendants and a copy of the complaint delivered to them on 13 January, 1953. No answer was filed and judgment by default final was entered on 3 March, 1953, by the Assistant Clerk of the Superior Court of New Hanover County.

The defendant Mamie Cole Cox filed a motion before the Clerk of the Superior Court of New Hanover County on 9 July, 1953, to set aside the judgment on the ground that no summons had been served on her. The motion was denied and she appealed to the Superior Court.

The matter came on for hearing in the Superior Court and his Honor found the following facts: That the summons was duly "issued from the Superior Court in New Hanover County on the 12th day of January, 1953, directed to the Sheriff of Richmond County, and the Sheriff of Richmond County, through his duly appointed and qualified deputy sheriff, namely: J. J. Heeney, served upon the defendant, Mamie Cole Cox, on the 13th day of January, 1953, a copy of the summons and a copy of the duly verified complaint by reading the summons to and delivering a copy of the summons and a copy of the complaint to the defendant, Mamie Cole Cox."

Whereupon, the court denied the motion and affirmed the order of the Clerk of the Superior Court of New Hanover County. The defendant Mamie Cole Cox appeals, assigning error.

Stevens, Burgwin & McGhee for plaintiff, appellee.
M. C. McLeod for defendant, appellant.

PER CURIAM. The appellant assigns as error the findings of fact by the court below. However, the assignment is not supported by an excep-

tion to such findings, therefore, it is feckless. *Worsley v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467; *Wyatt v. Sharp*, 239 N.C. 655, 80 S.E. 2d 762. Moreover, when no exception is taken to findings of fact, they are presumed to be supported by the evidence and are binding on appeal. *Wyatt v. Sharp, supra*, and cases cited therein.

The ruling of the court below is

Affirmed.

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 19 May, 1954.)

1. Attorney and Client § 2: Administrative Law § 6—

Upon *certiorari* to review the action of an administrative board, the hearing in the Superior Court is solely upon the record of such board as certified, without the introduction of evidence in the Superior Court.

2. Statutes § 12—

Where a section of the Code is not brought forward in the General Statutes and does not come within the exceptions and limitations set forth in Chapter 164 of the General Statutes, such section of the Code is repealed and cannot be revived.

3. Appeal and Error § 8—

An appeal *ex necessitate* follows the theory of the trial.

4. Appeal and Error § 1—

Where the constitutionality of a statute is not raised in the lower court, the question cannot be raised for the first time in the Supreme Court on appeal.

5. Attorney and Client § 2—

A person does not have a natural or constitutional right to practice law; it is a privilege or franchise to be earned by hard study and compliance with the qualifications for admission to practice law prescribed by law.

6. Constitutional Law § 12—

By virtue of its police power a state is authorized to establish qualifications for admission to practice law in its jurisdiction.

7. Attorney and Client § 1—

An attorney at law is a sworn officer of the court indispensable to the administration of justice, and has an obligation to the public as well as to his clients.

8. Domicile § 1—

Whether the word "residence" is synonymous with "domicile" depends upon the nature of the subject matter as well as the context in which the word is used, and a person may have his residence in one state and his domicile in another.

9. Attorney and Client § 2—

The requirement of Rule Five of the Rules Governing Admission to Practice Law in North Carolina in regard to "residence" means "domicile."

10. Attorney and Client § 2—

The burden of showing that he has the qualifications prescribed by Rule Five of the Rules Governing Admission to Practice Law in North Carolina rests upon the applicant.

11. Same—Evidence held to support finding of Board of Law Examiners that applicant was not a resident of the State as required by Rule Five.

The evidence before the Board of Law Examiners was to the effect that while applicant was in the armed services his parents moved to a city in North Carolina, that upon his discharge from service he returned to his parents' home and resided there for a little over a month, that he then enrolled as a student in the university of another state, that after completing school he returned to his parents' home and remained there some five months, that applicant, having reached his majority, was then employed in Washington, D. C., and that this employment was terminated and applicant returned to his parents' home in North Carolina five months prior to the filing of his application and less than six months prior to the date of the examination. Applicant introduced no evidence that he had ever registered to vote or had voted in North Carolina, or had paid income tax here. *Held:* The evidence supports the finding of the Board of Law Examiners that applicant had not been a citizen and resident of North Carolina for 12 months next preceding the filing of his application as required by Rule Five, and therefore it was the duty of the Board to deny his application to take the examination, and the ruling will not be disturbed in the absence of anything in the record tending to show that the Board's action was arbitrary or capricious.

12. Constitutional Law § 18—

The right to practice law in the State courts is not a privilege or immunity of a citizen within the meaning of the Fourteenth Amendment to the Federal Constitution, nor has applicant shown a violation of any rights guaranteed by the State Constitution, Article I, Sec. 17.

13. Administrative Law § 6—

In reviewing an order of an administrative board, the findings of fact made by the board are conclusive when supported by the evidence before it, and are not reviewable by the courts.

14. Same—

An order of an administrative board supported by its findings of fact will not be interfered with by the courts except upon a showing of capricious, unreasonable or arbitrary action, or disregard of law.

15. Attorney and Client § 2—

The Board of Law Examiners of the State of North Carolina has been entrusted by statute with the duty of examining applicants for license and providing regulations for admission to the Bar. G.S. 84-24.

16. Administrative Law § 6—

The conclusiveness of findings of fact by an administrative agency or board is not affected by the fact a minority of its members disagree.

APPEAL by plaintiff from *Fountain, Special Judge,* March Civil Term (A) 1954 of WAKE.

This proceeding was commenced in the Superior Court of New Hanover County on 3 August 1953 to compel the defendants, The Board of Law Examiners of the State of North Carolina, to permit plaintiff to take 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. On the same date the Honorable W. C. Harris, Resident Judge of the Seventh Judicial District of North Carolina, and for the Fall Term 1953 presiding in his district, entered an order in chambers at Wilmington, North Carolina, directing the defendants to permit plaintiff to stand the examination; and on 5 August 1953 Judge Harris in chambers at Wilmington, North Carolina, entered another order, amending and revising his first order "so as not to require directly or by implication that the defendants shall grade and evaluate the plaintiff's examination for admission to practice law in North Carolina, and that no further action is required of the defendants until the legal rights of the parties have been determined."

Pursuant to the orders of Judge Harris the plaintiff took the examination, but the defendants have not graded his examination papers.

The defendants excepted to both orders of Judge Harris, and appealed to the Supreme Court, and the opinion of this Court is reported in *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757. This Court held that Judge Harris had no jurisdiction to enter the two orders, and that *mandamus* was not the proper way to present the matter for review by us. This Court after stating that the complaint of plaintiff, liberally interpreted, seems to allege that the defendants in considering the question of plaintiff's 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 said: "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.*" The orders of Judge Harris were reversed, and the proceeding

was remanded to the Superior Court for further proceedings in accord with our opinion.

On 27 January 1954 the Clerk of the Superior Court of New Hanover County entered an order by consent removing this action from the Superior Court of New Hanover County to the Superior Court of Wake County.

At the March Civil Term (A) 1954 of Wake, Judge Fountain, upon motion of the plaintiff, issued a writ of *certiorari* directing that the defendants certify forthwith to the court the application of plaintiff to take the bar examination in August 1953, and the record of all hearings, findings of fact, conclusions of law, orders and any other records now in their possession pertaining to such application for judicial review by the court, except the examination papers filled out by the plaintiff under Judge Harris' orders, but not graded by the defendants. The defendants promptly obeyed said writ.

The transcript of the proceedings certified by the defendants was read to the court. Plaintiff's application filled out by him in May and early June 1953, to be permitted to take the examination in August 1953 for admission to practice law, set forth these salient facts in respect to residence. He was born in Charleston, South Carolina, 5 January 1925, where he lived until October 1925. From October 1925 until 30 May 1931, he lived in Montgomery, Ala.; from 1 June 1931 until 14 December 1932, in Savannah, Ga.; from 15 December 1932 until 10 July 1942, in Dothan, Ala. (graduating from the High School there in 1942); from 11 July 1942 until 15 July 1943, in Jacksonville, Fla.; from 15 July 1943 until 1 Sept. 1944, in Tampa, Fla.; from 1 Sept. 1944 until 1 Feb. 1945, in Augusta, Ga.; from 1 February 1945 to date in Wilmington, North Carolina, and that Wilmington is his home and residence. His application further stated that he attended the University of South Carolina six years, receiving a B. S. Degree in 1949 and an L. L. B. Degree in 1950, and was licensed to practice law in South Carolina in 1950. His application further stated that he served in the U. S. Navy from May 1942 until Sept. 1946, and that he had been employed in the Office of Chief Counsel, Office of Price Stabilization, Washington, D. C. from March 1951 to March 1953. His application further says his parents' residence is Wilmington, North Carolina.

On 8 June 1953 the plaintiff was notified by letter by the secretary of the defendants that it appeared the plaintiff was not at this time, nor will be by June 15, a *bona fide* citizen and resident of North Carolina for one year preceding such date. On 21 July 1953 the plaintiff was advised by letter that the defendants desired to have him appear before them as a Board on 25 July 1953 at 9:30 a. m. The plaintiff appeared with his lawyer R. P. Upchurch, and testified in his own behalf. This is a sum-

mation of what he said in respect to "residence." He is single, and his domicile is in Wilmington with his parents; his automobile license is there; his hunting license is there; his vacations were spent there. On the records of the University of South Carolina Law School his residence is given as Wilmington, North Carolina. He accepted employment in Washington, D. C. to learn administrative law, and told them he could not work there over two years. He did not apply to take the North Carolina bar examination in 1951 and 1952 because he was working. His parents moved to Wilmington, North Carolina, 1 February, 1945.

On 27 July 1953 plaintiff was notified by letter by the secretary of the defendants that his application for admission to take the examination in August 1953 had been rejected, as he failed to satisfy the defendants as to his citizenship and residence as contemplated under Rule Five, and the money he paid to take the examination was returned to him.

On 28 July 1953 plaintiff by telegram requested a rehearing before the defendants, which was granted. On 3 August 1953 the plaintiff appeared again before the defendants with his counsel. He filed an affidavit, and testified orally. This is the substance of his evidence as to "residence." He enlisted in the U. S. Navy in Sept. 1943 when his parents were living in Tampa, Florida. On 1 February 1945 his parents moved to Wilmington, North Carolina. He served in the Navy until September 1946. On 1 August 1945 he returned to his parents' home in Wilmington on terminal leave from the Navy, and resided there until the middle of September 1946, when he enrolled as a student in the University of South Carolina, and remained there until September 1950. He then returned to his parents' home in Wilmington, and stayed there until 1 March 1951, when he accepted employment in Washington, D. C. He terminated this employment 15 March 1953, and returned to his parents' home, where he stayed until 8 June 1953 when he came to Raleigh to take a "refresher course" for the bar examination. He never had a domicile or legal residence, or home except with his parents, and has never intended or contemplated having a legal home other than North Carolina.

His income was more than $1,000.00. He did not file a North Carolina State Income Tax Return for 1951 and 1952. He filed a Federal Income Tax Return in Baltimore, Md.,—not in Greensboro. He did not pay poll tax in North Carolina in 1951, 1952 and 1953.

In respect to "residence" the defendant board made the following order dated 25 July 1953: "It appearing to the Board that William Samuel Baker, Jr. has filed certain papers with the Board as his application to take the examinations of this Board in August, 1953, and it appearing further that the said Baker was requested by this Board to appear in connection with his application and he did so appear before this Board on July 25, 1953, and it further appearing that said Baker was born in

Charleston, South Carolina, in 1925 and since that time has been a resident of various communities in the States of Alabama, Georgia and Florida, and it further appearing that he gives his residence at the present time and since 1946 as the City of Wilmington, North Carolina, but also shows that he has for a period of March, 1951, to March, 1953, been employed in and resided in the City of Washington, D. C., and has been engaged as an attorney at law, he having been admitted to the Bar in South Carolina in 1950, and that for a period of at least nine months during the one year period next preceeding (*sic*) June 15, 1953, has resided in the City of Washington, therefore, upon the application made to the Board and statements made in personal appearance before the Board, it appears that he has not been both a citizen and resident of the State of North Carolina for a period of one year next preceeding (*sic*) June 15, 1953, and the Board finds as a fact that he has not been both a citizen and resident of North Carolina for twelve months next preceeding (*sic*) June 15, 1953, and therefore has not met the requirements of Rule 5 of the Board and it is thereupon ordered that his application to this Board to take the 1953 examinations be and the same is hereby denied."

On 3 August 1953 the defendant Board made the following order: "Upon said rehearing the Board finds the following facts: That the applicant first heard prior to the examination of 1950 from the Secretary of the Board that his application should be filed before June 15 of that year and because he had not done so, applicant made no further attempt to stand that examination. That applicant first read the rules of the Board in May, 1953. That the Board had previously given examinations for which he might have applied in August, 1950, March, 1951, August, 1951, and August, 1952, but that applicant failed to apply to stand said examinations. That while applicant contends he was a resident of the State of North Carolina for one year prior to June 15, 1953, he was engaged in the practice of law for two years and 15 days prior to March 15, 1953, in the District of Columbia. That during said time applicant filed his federal income tax return with the collector of Internal Revenue at Baltimore, Maryland. That he filed no state income tax with the Commissioner of Revenue of North Carolina for the years 1951 and 1952, nor did he pay a poll tax to the State of North Carolina for the years 1951, 1952 and 1953, nor did he list the same. That the applicant is a single man and owns and maintains no home of his own in the State of North Carolina and he became of age on January 5, 1946. That upon consideration of the foregoing facts and orders heretofore entered by the Board in this case, it is considered and ordered that the order in this case made July 25, 1953, be affirmed for the reason that the applicant has failed to satisfy this Board that he has been a citizen and resident of the State of North Carolina for one year prior to June 15, 1953, as required by the rules of the Board . . ."

Judge Fountain signed a judgment adjudging that the evidence before the Board of Law Examiners on 25 July 1953 and on 3 August 1953 was sufficient to support the orders of the Board and the findings of fact upon which said orders of 25 July 1953 and of 3 August 1953 were based, and that said orders are in all respects sufficient in law and valid.

The plaintiff excepted to the judgment and appealed, assigning error.

R. P. Upchurch for Plaintiff, Appellant.

Bennett H. Perry for Defendants, Appellees.

PARKER, J. This case was predicated, and tried in the former appeal on the theory that the plaintiff had shown by evidence compliance with Rule Five of the Rules Governing Admission to Practice of Law in North Carolina. These rules are printed in 208 N.C. 857, *et seq.;* in 221 N.C. 608, *et seq.;* and in G. S. N. C., Vol. 4, p. 65, *et seq.* In his brief of 39 pages in the former appeal, he did not question the constitutionality of the statute giving authority to the defendant Board of Law Examiners to make Rule Five.

We held in our former opinion that there was in effect at that time no provision for an appeal from the Board of Law Examiners, and therefore under G. S. 1-269 authorized 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."* It clearly appears by the language of our former opinion, which we here emphasize, that the matter was to be heard in the Superior Court solely upon the Record, and the hearing should be limited to the *question* of residence of plaintiff within the State in connection with his application to take the examination. Therefore, many interesting questions discussed in plaintiff's brief are not relevant—*e.g.* his exceptions to the refusal of the trial judge to permit him to introduce in evidence his oral examination of Edward L. Cannon, Secretary of the Board of Law Examiners of the State, before Judge Fountain.

For the first time on this appeal the plaintiff seeks to raise the constitutionality of that part of Ch. 210, Public Laws of North Carolina 1933 (now codified as G. S. N. C. 84-15 *et seq.*), by virtue of which Rule Five was adopted and approved, on the ground that the General Assembly was without power to delegate its lawmaking power. The plaintiff contends that Rule Five is void, which leaves C. S. 196 in force, and that under that section the sole requirement as to residence of an applicant to take an examination to practice law in this jurisdiction is that the "applicant must be a *bona fide* resident of North Carolina."

C. S. 196 has been deleted from G. S. N. C. 1943—see G. S. N. C. 1943, Vol. 4, p. 130, where it is said C. S. 194-196 superseded by G. S. N. C. 84-24. C. S. 196 not being contained in General Statutes of North Carolina 1943 was thereby repealed by virtue of G. S. N. C. 164-2; it not coming within the exceptions and limitations set forth thereafter in Ch. 164, G. S. N. C. See *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322.

An appeal *ex necessitate* follows the theory of the trial. *In re Parker,* 209 N.C. 693, 184 S.E. 532; *Sawyer v. Staples,* 224 N.C. 298, 29 S.E. 2d 892; *Lyda v. Marion,* 239 N.C. 265, 79 S.E. 2d 726. As the plaintiff did not raise the question of constitutionality of that part of Ch. 210, Public Laws of 1933, giving the defendant Board of Law Examiners authority to make Rule Five, it may not be raised for the first time in this Court on the second appeal. *Bank v. Caudle,* 239 N.C. 270, 79 S.E. 2d 723; *Phillips v. Shaw, Comr. of Revenue,* 238 N.C. 518, 78 S.E. 2d 314; *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151; *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22; 11 Am. Jur., Constitutional Law, Sec. 93.

A person does not have a natural or constitutional right to practice law; it is a privilege or franchise to be earned by hard study and compliance with the qualifications for admission to practice law prescribed by law. *Seawell, Atty. Gen., v. Motor Club,* 209 N.C. 624, 184 S.E. 540; 7 C. J. S., Attorney and Client, Sec. 4 (b). By virtue of its police power a state is authorized to establish qualifications for admission to practice law in its jurisdiction. *In re Applicants for License,* 143 N.C. 1, 55 S.E. 635. An attorney at law is a sworn officer of the court with an obligation to the public, as well as his clients, for the office of attorney at law is indispensable to the administration of justice. *In re Dillingham,* 188 N.C. 162, 124 S.E. 130; 7 C. J. S., Attorney and Client, Sec. 4 (a). The purpose of the statute creating the North Carolina State Bar was to enable the bar to render more effective service in improving the administration of justice, particularly in dealing with the problem of admission to the bar, and of discipling and disbarring attorneys at law.

The pertinent part of Rule Five is as follows: "Citizenship, Character, Age, Residence. 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 . . ."

Whether the term "resident" as used in Rule Five means that "residence" is synonymous with "domicile" depends on the purpose of Rule Five, the nature of the subject matter, as well as the context in which the term is used. 28 C. J. S., Domicile, Sec. 2 (b); 17 Am. Jur., Domicil, Sec. 9.

The North Carolina Constitution provides in Art. VI, Sec. 2, as a prerequisite to the right to vote that an elector "shall reside in the State of North Carolina for one year and in the precinct, ward or other election district in which he offers to vote four months next preceding the election." This Court has held "without variation that residence within the purview of this constitutional provision is synonymous with domicile, denoting a permanent dwelling place to which the party when absent, intends to return." *Owens v. Chaplin*, 228 N.C. 705, 47 S.E. 2d 12 (where the authorities are cited). In *Roberts v. Cannon*, 20 N.C. 398, *Gaston, J.*, speaking for the Court said: ". . . by a residence in the county the Constitution intends a domicil in that county."

Hannon v. Grizzard, 89 N.C. 115, was a *quo warranto* proceeding. At a regular election held in November 1882 in and for Halifax County, the relator was chosen by a majority of the votes cast to the office of register of deeds, and it was so declared by the county canvassers. The board of county commissioners refused to permit him to qualify upon the ground of his want of qualification required by the Constitution in that he had not "resided in the State twelve months next preceding the election, and ninety days in the county." The relator was in the service of the federal government at Washington, D. C., as watchman under the Treasury Department, but continued to pay poll tax and vote in Halifax County, and spent a part of each year at his home in Halifax. This Court held that his constitutional residence remained unchanged in Halifax.

Winborne, J., speaking for the Court in *In re Hall*, 235 N.C. 697, 71 S.E. 2d 140, said: ". . . as a general rule, a student, although an adult, does not acquire a legal domicile at an educational institution where he resides with the ultimate intention of returning to his original home. 28 C. J. S., p. 28, Domicile 12 (g) 3." But an adult student, independent of parental control and support, may acquire a domicile at the place where a university or college is situated, if he regards the place as his home, or intends to stay there indefinitely, without any intention of resuming his former home. *Berry v. Wilcox*, 44 Neb. 82, 62 N.W. 249, 48 Am. St. Rep. 706; 28 C. J. S., Domicile, p. 29; 17 Am. Jur., Domicil, Sec. 74.

"The rule is settled that a student who goes to a college town with the intention of remaining there simply as a student, and only until his education is completed, and who does not change his intention does not acquire a domicil there." 17 Am. Jur., Domicil, Sec. 74. See also Anno. 37 A.L.R. 138.

If we should hold that the term "resident" as used in Rule Five, means that a person is a resident of the place where he has his actual place of abode, it would mean that a young man born, raised and domiciled in North Carolina, who went to Charlottesville, Virginia, with the intention

of remaining there as a student in the Law School of the University of Virginia, and only until his education was completed, and who does not change his intention, upon his graduation in June could not take the examination to practice law in North Carolina the following August. Such a narrow construction is not consistent with the purpose of Rule Five. In our opinion, the term "resident" as used in Rule Five means that "residence" is synonymous with "domicile."

One may be a resident of one state, although having a domicile in another. *Wheeler v. Cobb,* 75 N.C. 21; *Sheffield v. Walker,* 231 N.C. 556, 58 S.E. 2d 356; *Penfield v. Chesapeake, O. & S. W. R. Co.,* 134 U.S. 351, 33 L. Ed. 940; 17 Am. Jur., Domicil, p. 594.

The burden of showing that he had the qualifications to comply with the requirements of Rule Five rests upon the plaintiff. *In re Farmer and Duke, Applicants for License,* 191 N.C. 235, 131 S.E. 661; *Spears v. State Bar,* 211 Cal. 183, 294 P. 697, 72 A.L.R. 923 and Anno.; *Rosencranz v. Tidrington,* 193 Ind. 472, 141 N.E. 58, 28 A.L.R. 1136 and Anno.; 7 C. J. S., Attorneys at Law, p. 717.

If the proof offered by the plaintiff failed to satisfy the defendant Board of Law Examiners that he had the qualifications required by Rule Five, it was their duty to deny his application to take the examination in August 1953. *Spears v. State Bar, supra.*

In our opinion, there is sufficient competent evidence to support the detailed findings of fact made by the defendant Board of Law Examiners that the plaintiff has not been for the twelve months next preceding the filing of his application a citizen and resident of North Carolina, as required by Rule Five. Although one member of the defendant Board during the hearing stated that he considered residence to mean actual residence in North Carolina, it seems clear that the orders of the defendant Board of Law Examiners, acting as a Board, considered residence as used in Rule Five to be synonymous with domicile, for otherwise they would not have found that during the years 1951 and 1952 the plaintiff filed no State income tax return, and for the years 1951, 1952 and 1953 paid no poll tax. It is significant that the plaintiff offered no evidence that he ever registered to vote or voted in North Carolina. The findings of fact made by the defendant Board amply sustain the Board's conclusion that the plaintiff has not met the requirements of Rule Five, and their orders denying his application to take the 1953 examination. The Record is bare of anything tending to show that the findings and rulings of the defendant Board of Law Examiners are arbitrary or capricious, or that the same are erroneous and contrary to law, as asserted by the plaintiff. The Record shows that the plaintiff and his attorney were granted hearings before the defendant Board on 25 July and 3 August 1953.

The plaintiff in his brief contends that the action of the defendant Board denied him due process of law and the equal protection of the law in violation of the 14th Amendment to the U. S. Constitution. Even if that question were presented for decision, the Supreme Court of the United States in *Bradwell v. Illinois,* 83 U.S. 130, 21 L. Ed. 442 (quoted with approval in *Re Lockwood,* 154 U.S. 116, 38 L. Ed. 929) held that the right to practice law in the State Courts is not a privilege or immunity of a citizen of the United States within the meaning of the first section of the 14th Amendment of the Constitution of the United States. See interesting article "Myra Bradwell: First Woman Lawyer." 39 A.B.A. Journal 1080 (1953).

The plaintiff contends in his brief that the action of the defendant Board of Law Examiners violated his rights under Art. I, Sec. 17, of the North Carolina Constitution. Even if that question were presented for our decision, we know of no rights of plaintiff given under that part of our Constitution or any other part that have been violated; and plaintiff's counsel has cited us no case in our Reports to support his assertion.

In the former opinion in this case we said: "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." This statement of the law is in accord with the authorities elsewhere. 7 C. J. S., Attorney and Client, p. 719; *Spears v. State Bar, supra;* 42 Am. Jur., Public Administrative Law, Sec. 209 *et seq.,* where hundreds of cases of the U. S. and State Courts are cited.

In the former opinion we stated that plaintiff's complaint, liberally interpreted, seems to allege that the Board of Law Examiners acted under a misapprehension of what is in law "residence" within the purview of Rule Five. On the former appeal the record evidence of plaintiff's application, with supporting papers, to take the examination, and the evidence before the Board of Law Examiners was not before us. All that evidence is now before us on this appeal.

From what we have said above, it is our opinion that the Board "acted in the true light of the meaning of the term resident," and did not act under any misapprehension as to its meaning.

It may not be amiss to add that by virtue of Ch. 1012, Session Laws 1953, that in January 1954 Rule 20 in respect to Appeals, was added to the Rules and Regulations of the North Carolina State Bar. This rule has been published in 239 N.C. 718.

The General Assembly of North Carolina has entrusted to the Board of Law Examiners of the State of North Carolina by statutory enactment the duty of examining applicants and providing rules and regulations for admission to the Bar. G. S. N. C. 84-24.

The findings of fact made by the Board of Law Examiners supported by the evidence are conclusive upon us as a reviewing Court, and are not within the scope of our reviewing powers. 42 Am. Jur., Sec. 211, where great numbers of cases from the Federal and State Courts are cited. The fact that a statute provides for the judicial review of administrative decisions makes it evident that such decisions are conclusive as to properly supported findings of fact. *Social Security Bd. v. Nierotko,* 327 U.S. 358, 90 L. Ed. 718.

The conclusiveness of findings of fact by an administrative agency is not affected by the fact a minority of its members disagreed. *Baltimore & O. R. Co. v. U. S.,* 298 U.S. 349, 80 L. Ed. 1209; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.,* 220 U.S. 235, 55 L. Ed. 448.

This Court cannot substitute its judgment for that of the Board of Law Examiners in making findings of fact, and when the evidence warrants the conclusions of the Board of Law Examiners, we cannot review. *National Labor Relations Board v. Va. E. & P. Co.,* 314 U.S. 469, 86 L. Ed. 348; *U. S. v. New River Co.,* 265 U.S. 533, 68 L. Ed. 1165; 42 Am. Jur., Public Administrative Law, pp. 632-3.

Quaere: Can an examination given under compulsion of a void order or orders have any possible life or virtue?

It is ordered that the judgment of the lower court be

Affirmed.

DORIS ALLEN GRIFFITH (RAKE) v. ROBERT C. GRIFFITH.

(Filed 19 May, 1954.)

1. Divorce and Alimony § 19—

In awarding the custody of a minor child in a divorce action, the criterion is the best interest of the child, and all other factors, including the visitorial rights of the other parent and the common law preferential rights of the father, must be deferred or subordinated thereto.

2. Same—

If, upon a consideration of all relevant factors, the court determines that the mother is best fitted to give the child the home life, care and supervision that will be most conducive to its well being, the court should award the custody of the child to the mother, and should not hesitate to grant her subsequent application to remove the child to her out-of-state domicile, established upon her remarriage, upon finding that the best interest of the child will be served thereby, notwithstanding that this will preclude or make more difficult visitorial rights of the father, and notwithstanding that the father may be a fit and suitable person to have the custody of the child.

3. Same: Appeal and Error §§ 40d, 50—

Where the mother's application to remove the child in her custody from this State to her domicile in another state is denied upon misapprehension that such permission could not be granted except upon a finding that the father is an unsuitable person to have the custody of the child, the finding that the best interest of the child would be served by awarding its custody to the father will be set aside and the cause remanded to the end that the court may consider the evidence and find the facts in the light of correct legal principles.

APPEAL by plaintiff from *Hall, Special Judge,* at 15 March, 1954, Term of GUILFORD (High Point Division).

Motion in the cause to modify judgment in divorce action awarding custody of three-year-old girl.

The plaintiff mother instituted this action for divorce on the ground of two years separation. The defendant did not contest the divorce action, but both parents sought custody of the child, then living with the mother. The cause was heard at the October, 1953, Term of court. There was a jury verdict in favor of the mother in the divorce action. Following this, Judge Sharp, then presiding, heard evidence *pro* and *con* on the question of custody. All the evidence disclosed, and the father conceded, that the mother's character was good in every way and that she was "a fit and suitable person to have the care and custody" of the child. The father's opposition to the mother's continued custody arose out of the probability that she intended to take the child out of the State. He testified she told him she intended to remarry after the divorce and move to Ohio. These further facts were developed at the hearing: The plaintiff and the defendant were married 20 May, 1950. She was then 20 years of age, he 22. The child, Susan Leigh Griffith, was born 18 January, 1951. The parents separated by mutual assent 2 June, 1951. The plaintiff, with the baby, went back to the home of her mother, and the defendant father returned to the home of his parents. Both homes are in High Point. It was necessary for the plaintiff to work. She found employment at the County tax office. Her mother looked after the little girl during the day while plaintiff was at work. After the separation, the plaintiff met and later became engaged to marry Floyd Rake, Jr., a former resident of California, who had recently come to this State in the employ of Cleminshaw Company, of Cleveland, Ohio, specialists in the field of property appraisals, then in process of re-appraising the taxables of Guilford County. Rake testified he had been with this company since being graduated from the University of New Mexico in 1948; that during this time he had served the company on appraisal projects in several states, going from place to place as and when directed by the company; that he was making from $540 to $550 a month; and that he had plans to settle permanently in this State. He

testified that he loved the child and it was his "intention to give the child all the love and affection that a natural father could possibly give her." He further testified, as did the plaintiff mother, that they did not intend to take the child out of the State.

At the conclusion of the hearing, Judge Sharp found that the mother was a fit and suitable person to have custody of the child and that the best interests of the child would be served by awarding custody to the mother. Thereupon judgment was entered decreeing absolute divorce and directing that the child remain in the custody of the mother, subject to specified visitation privileges granted the defendant father, with further direction that "the plaintiff shall not take the child outside of the State of North Carolina."

At the March Term, 1954, the mother moved the court to modify the judgment so as to permit her to take the child outside the State of North Carolina to reside. At the hearing before Judge Hall, the evidence disclosed that the plaintiff and Floyd S. Rake, Jr., were married within ten days after the decree of divorcement in October, 1953; that Rake, with a view of giving up his appraisal work with the Cleminshaw Company, made efforts to secure a job in North Carolina, but could find nothing except at "a considerable decrease in salary"; that about 7 December, 1953, due in part to an accident in which two of the Cleminshaw partners were killed, there was a general shifting of personnel, and Rake was offered re-assignment to New Jersey as State Field Manager at an increased salary. He accepted the offer and immediately went to New Jersey. He has secured an apartment in a desirable section of the town of Passaic, with playroom and playground facilities, and also with a private room for the little girl. The plaintiff joined her husband in New Jersey the first week in January, 1954, leaving the child in High Point with her mother. After that, plaintiff spent two weeks at the apartment in New Jersey and then came back to High Point and remained there through the hearing.

It was further disclosed that since the child was born she has never stayed overnight with her father at the home of his parents. Nevertheless, his mother testified that should the court award custody to her son, she would "be very happy to have" the child and would do all she could for her, and "would assist Bob (the defendant) in taking care of the child." She said she had maid service and worked part-time at the office with her husband and sons, but that she did not have to work and would give it up and stay home with the child if need be. It was conceded that all members of the Griffith family are of good character and that the environment of their home is good. The plaintiff testified on cross-examination that her former husband "is not unfit to have the child," but she further said, "I do think that the health or welfare of the child would

be materially hurt by being in the custody of Bob for a length of time and his mother. . . . when she comes home the times they have had her I don't know whether it is dicipline or what . . . but there is a difference. . . . continuity is what a small child needs." The mother then went on to say that "they (the defendant and his mother) would be good to the child and I think they are fit to have her and it is a fit place for them to have her. I am familiar with the home. Yes, I said it would not hurt if he had part custody and I said at the last hearing that I planned to live somewhere in North Carolina. That is changed."

At the conclusion of the evidence defendant's counsel took the position, and requested the court to so hold, that in view of the admissions on the part of the mother to the effect that the father "is a fit and suitable person and that his home . . . is a fit and suitable place" and that "she is now residing with her husband in the State of New Jersey," the mother, as a matter of law, was no longer entitled to custody of the child.

The agreed case on appeal discloses that thereupon "the court took the position that he could not grant permission for the child to be taken out of the State of North Carolina," but stated "that he would grant the custody of said child to the plaintiff if he had power to do so and asked that briefs be filed on the subject."

The following excerpt from the agreed case on appeal discloses what happened next:

"After considering the briefs and arguments of counsel the court expressed the opinion that under the laws of the State of North Carolina he could not allow said child to go out of the State unless it would be dangerous to the child's welfare for the resident defendant to have custody and further that he could not give custody to the nonresident plaintiff. The court then entered . . . judgment set out in the record."

The judgment recites these essential findings of fact: (1) that the plaintiff is now a resident of the State of New Jersey, residing with her husband, Floyd S. Rake, Jr., who is permanently employed in that state; (2) that "both plaintiff and defendant are fit and proper persons to have custody, control and maintenance" of the child, with each having "a good and suitable home for the child," but that "the plaintiff's home is outside the jurisdiction" of the court; and (3) that "the interests of the child would be served best by granting . . . custody to the father, the defendant, within the State of North Carolina; that conditions have changed since the entering of the order of October 6, 1953."

Upon the foregoing findings judgment was entered awarding custody of the child to the father, subject to the mother's right to visit her at all reasonable times, with specific provision that the mother be permitted to visit with her for two weeks every month, provided all visits be "within

the confines of the State of North Carolina," and that the mother shall not take the child outside the State.

From the judgment entered the plaintiff appealed, assigning errors.

Haworth, Haworth & Walker, Byron Haworth, and Clifford Frazier, Jr., for plaintiff, appellant.

Schoch & Schoch for defendant, appellee.

JOHNSON, J. The judgment below seems to have been entered by the trial judge under the belief that as a matter of law he could not permit the mother to remove the child from the State in the absence of an affirmative showing that the resident father is unfit for custody. While this view is supported by statements appearing in some of the earlier decisions of this Court, the settled law of this State places no such burden on a parent custodian who requests leave to remove a child from the jurisdiction of the court. In such case we apprehend the true rule to be that the court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental, and moral faculties. All other factors, including visitorial rights of the other applicant, will be deferred or subordinated to these considerations, and if the child's welfare and best interests will be better promoted by granting permission to remove the child from the State, the court should not hesitate to do so. The criterion is not whether the resident parent or applicant does or does not possess the minimum of custodial fitness, but, rather, it is for the court to determine by way of comparisons between the two applicants, upon consideration of all relevant factors, which of the two is best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being. Naturally, no hard and fast rule can be laid down for making this determination, but each case must be determined upon its own peculiar facts and circumstances.

The foregoing formula is in accord with the decisions of this Court in *In re Means,* 176 N.C. 307, 97 S.E. 39, and *Clegg v. Clegg,* 187 N.C. 730, 122 S.E. 756, and is supported by the overwhelming weight of authority in this country, as shown by the collection of cases in these Annotations: 154 A.L.R. 552, and 15 A.L.R. 2d 432. See also *Harris v. Harris,* 115 N.C. 587, 20 S.E. 187.

The courts are being called upon more and more to decide these non-residence child-custody cases. The cause stems from the frequency with which divorced parents remarry and, as a natural incident to our ever-expanding interstate economy, move from place to place across state lines. The practical aspects of the forces at play are succinctly stated in the annotation in 154 A.L.R. at page 552:

"Frequently one of the divorced parents marries a nonresident; often a parent is employed by, or marries one who is employed by, a corporation which transfers him to another jurisdiction; at other times one obtains a position or business in another jurisdiction; at times it becomes necessary for the parent having custody of a child to live with relatives in another jurisdiction for economic reasons; and occasionally one parent moves to a second state while the other parent moves to a third state. In these and other instances the question arises whether the person having custody of a child or to whom custody would otherwise be granted is to be tied down permanently to the state which awards custody. The result of the decisions is that where the custodian has a good reason for living in another state and such course is consistent with the welfare of the child, the court will permit such removal or grant custody to the nonresident; but where such course is not consistent with the child's best interests, its removal will not be permitted, and the courts will not award custody to a nonresident."

The following are representative cases, selected from the mass of citations appearing in the foregoing annotations, in which courts of last resort have sanctioned child-custody awards to nonresidents, or approved removal of the child to another jurisdiction in which the custodian had established or intended to establish a new residence, where it was made to appear that such removal would better promote the welfare and interests of the child: *Worthy v. Worthy,* 245 Ala. 54, 18 So. 2d 721; *Roosma v. Moots,* 62 Idaho 450, 112 P. 2d 1000; *Duncan v. Duncan,* 293 Ky. 762, 170 S.W. 2d 22, 154 A.L.R. 549; *Lambeth v. Lambeth,* 305 Ky. 189, 202 S.W. 2d 436; *Welker v. Welker,* 325 Mass. 738, 92 N.E. 2d 373; *Campbell v. Campbell,* 156 Neb. 155, 55 N.W. 2d 347; *Butler v. Butler,* 83 N.H. 413, 143 A. 471; *Nash v. Nash,* 236 App. Div. 89, 258 N.Y.S. 313, affd. without op. 261 N.Y. 579, 185 N.E. 746; *Arnold v. Arnold,* 67 Ohio App. 282, 36 N.E. 2d 430; *Watkins v. Rose,* 115 S.C. 370, 105 S.E. 738; *West v. West,* 208 S.C. 1, 36 S.E. 2d 856; *Kirby v. Kirby,* 126 Wash. 530, 219 P. 27; *Bennett v. Bennett,* 228 Wis. 401, 280 N.W. 363.

In *Arnold v. Arnold, supra* (36 N.E. 2d 430), wherein it was made to appear that the divorced mother, to whom custody of the child had been awarded in her Ohio divorce action, had secured more remunerative employment in Florida, and that the welfare of the child would be best served by permitting it to live with the mother in Florida, it was held that such circumstances warranted modification of the former order so as to permit the mother to take the child to Florida.

In *Kirby v. Kirby, supra* (219 P. 27), wherein it appeared the child's mother had remarried and her second husband could improve his business connections and associations by removing from the state, it was held that

the beneficial effect which such better business connections would have upon the welfare of the child justified its removal from the jurisdiction.

In *Bennett v. Bennett, supra* (280 N.W. 363), wherein the father, to whom custody of the child had been granted in a divorce proceeding, had an opportunity for employment in another jurisdiction at a larger salary and with prospect of advancement, and it appeared that the welfare of the child would not be impaired in any way by the removal, an order authorizing removal of the child from the jurisdiction was held proper.

In *Campbell v. Campbell, supra* (55 N.W. 2d 347), the Nebraska divorce decree awarded custody of a twenty-eight months old boy to the mother. Eight months later the mother filed application requesting permission of the court to remove the child to another state, the basis of the application being economic necessity of the mother. The trial court entered a decree denying the application and awarding custody of the child to his father's parents and enjoining his removal from the jurisdiction of the court. On appeal the judgment was reversed, with the Court stating: "We find no reason whatever for depriving plaintiff of the child's custody or preventing his removal from the jurisdiction of the court to Idaho where apparently his best interests will be served."

Numerous well-considered decisions give emphasis to the proposition that when it is apparent the best interests of the child will be promoted by permitting removal from the state, the court should not hesitate to grant leave of removal by reason of the fact that the visitorial or part-time custodial rights of the other parent would be curtailed or eliminated thereby; *Roosma v. Moots, supra; Duncan v. Duncan, supra; Lambeth v. Lambeth, supra; Kane v. Kane,* 241 Mich. 96, 216 N.W. 437; *Butler v. Butler, supra; Nash v. Nash, supra; Arnold v. Arnold, supra; Bennett v. Bennett, supra.*

In *Duncan v. Duncan, supra* (170 S.W. 2d 22), it is stated: "The sole question presented by this appeal is whether the chancellor erred in modifying the judgment so as to permit Mrs. Duncan to remove to Pennsylvania and take the children with her. The only objection to the modification is that it will make the visitations of the father more difficult, but his convenience must give way to what is for the best interests of the children."

In *Lambeth v. Lambeth, supra* (202 S.W. 2d 436), wherein it was made to appear that it would be for the best interests of an infant girl to go with her divorced mother from Kentucky to the State of Mississippi to live with her close relatives, the mother was given custody notwithstanding the father would be deprived of week-end custody granted him in the former order.

In *Butler v. Butler, supra* (143 A. 471), wherein the trial court in New Hampshire awarded custody of five children to a custodian living

in Massachusetts, the appellate court, in affirming the judgment below, said: "While access to the child by the parent denied custody is an important right, it is one that must yield to the greatest good of the child."

In *Kane v. Kane, supra* (216 N.W. 437), it is said: "Access to the child by the parent denied custody is an important right. It is recognized that awarding custody to a nonresident parent may render the privilege of visitation impracticable in many cases. That privilege is not an absolute right, but one which must yield to the good of the child."

The former decisions of this Court cited and relied on by the defendant have been examined and carefully considered. They are distinguishable or not authoritative and controlling upon the facts here presented.

The defendant urges that, in the absence of a showing of unfitness on his part, he is entitled to custody of the child as a matter of law upon the authority of the following statement in *Latham v. Ellis,* 116 N.C. 30, 33, 20 S.E. 1012: "In North Carolina the father has always been entitled to the custody of his children against the claims of every one except those to whom he may have committed their custody and tuition by deed (Sec. 1562 of *The Code*); *or unless he is found to be unfitted to keep their charge and custody by reason of his brutal treatment of them, or his reckless neglect of their welfare and interests,* when their care will be committed to some proper person on application to the courts." (Italics added.) However, when the entire opinion in the cited case is read and considered contextually in the light of its factual background, it is apparent that the foregoing excerpts may well be treated as *obiter dicta* and disregarded as being at variance with the established rule that the welfare of the child is the paramount consideration to which all other factors, including common law preferential rights of the parents, must be deferred or subordinated, in accordance with principles enunciated in the oft-cited decision in *In re Lewis,* 88 N.C. 31 (decided more than ten years before *Latham v. Lewis, supra*), in which *Ruffin,* the younger, said: "As touching the right to the custody of children, the doctrines of the common law have been greatly weakened of late, and courts pay less regard to the strict legal rights of parents, even than they were wont to do, and look more to the interests, moral and physical, of the infants themselves—making it, indeed, their paramount consideration." And then, on authority of Hurd on *Habeas Corpus,* 528, the opinion goes on to say: ". . . where the custody of children is the subject of controversy, the legal rights of parents and guardians will be respected by the courts, as being founded in nature and wisdom, and essential to the virtue and happiness of society, still the welfare of the infants themselves is the polar star by which the discretion of the courts is to be guided; . . ." See also *Finley v. Sapp,* 238 N.C. 114, 76 S.E. 2d 350; *Brake v. Brake,* 228 N.C. 609, 46 S.E. 2d 643.

It is also noted that in *Latham v. Ellis, supra,* neither of the applicants was a nonresident. There, the custody of a 6-year-old girl was involved, in a contest between the child's father and her maternal grandparents, in whose home the little girl's father had lived with her and her older brother for about four years following the death of the children's mother, which occurred only ten days after the girl's birth. The father—shown to be a moral, temperate, and industrious man, possessed of a kind, affectionate nature, and fit and suitable to have custody of the child—remarried and moved away, taking with him the little boy two years older than the girl, and established a home several miles distant. The home so established was shown to be a suitable and proper place in which to rear the little girl. The lower court awarded custody to the father, and this Court affirmed, with the record on appeal disclosing conclusively that the well-being of the child would be best promoted by allowing her to be reared with her young brother in the home of her father, rather than requiring her to remain in the lonely home of her aged grandparents, notwithstanding they were shown to be "persons of good character," with affectionate attachment to the little girl and possessed of sufficient means to care for all her physical needs. It thus appears that the decision in the cited case may well have been rested on paramount considerations of the child's welfare and sustained on authority of the principles explained and applied in *In re Lewis, supra* (88 N.C. 31), rather than upon the preferential rights of the father under outmoded principles of the ancient common law.

Therefore, since the correct result was reached in *Latham v. Ellis, supra,* we do not overrule the decision. Instead, we disapprove the statement of principles upon which the decision was rested and treat such statement as *obiter dicta,* not to be followed or considered as authoritative, either in respect to the *Latham case* itself or any subsequent decision based on the disapproved statement of principles appearing therein. (See *In re Fain,* 172 N.C. 790, 90 S.E. 928, and other cases citing the *Latham case* shown in Shepard's North Carolina Citations.)

The defendant cites a number of decisions in which this Court (1) approved rulings below in declining to award custody to nonresident applicants or (2) disapproved rulings *contra.* (*In re Turner,* 151 N.C. 474, 66 S.E. 431; *Walker v. Walker,* 224 N.C. 751, 32 S.E. 2d 318; *In re De Ford,* 226 N.C. 189, 37 S.E. 2d 516; *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313). However, our examination of these cases discloses that the essence of the decisions is not that nonresidence is in itself a disqualification for custody, but rather that the child's welfare and interests would be better subserved and promoted with custody awarded to the applicant who perchance was a resident of this State. And it is noted that in *Harris v. Harris, supra* (115 N.C. 587), also cited by the defendant, the crucial factor is the failure of the nonresident applicant to carry the burden of

proof by showing she was in anywise more suitable than the resident parent. See Annotation: 15 A.L.R. 2d 432, at page 463.

Also, it is an established rule with us that in the absence of unusual circumstances the courts should not enter an order permitting a child to be removed from the State by one to whom unqualified custody has not been awarded. The reason for this rule rests on practical considerations of procedure as explained by *Barnhill, J.*, now *C. J.*, in *In re De Ford, supra* (226 N.C. 189). However, it is implicit in this rule that its application does not in anywise interfere with the operation of the principle which sanctions award of absolute custody to a nonresident applicant, with or without the right of visitation, when such is shown to be conducive to the best interests and welfare of the child. Where this is made to appear and an award is made in favor of a nonresident applicant against a resident parent of the child, we proceed upon the assumption that courts, properly established and having jurisdiction at the domicile of the nonresident custodian, may hear further and determine justly matters touching the care and control of the child upon such changed conditions, made to appear, as would require modification of the custodial status. *In re Means, supra* (176 N.C. 307); 17 Am. Jur., Divorce and Separation, Sec. 668; 39 Am. Jur., Parent and Child, Sec. 25. See also *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884; *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136; *Stout v. Pate,* 209 Ga. 786, 75 S.E. 2d 748.

We have not overlooked the fact that the judgment below contains a recital in the nature of a finding to the effect that the interests of the child would be served best by granting custody to the defendant father. Nevertheless, the record impels the conclusions that the case was heard and judgment was entered under a misapprehension of the pertinent principles of law. With us, the usual practice is to set aside facts which are found under misapprehension of the law, on the theory that the evidence should be considered in its true legal light. *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324, and cases there cited. See also *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477; *Credit Co. v. Saunders,* 235 N.C. 369, top p. 373, 70 S.E. 2d 176, bot. p. 179. It is so ordered here. Therefore, to the end that the plaintiff may have the evidence considered and the facts found in the light of correct legal principles, the judgment is reversed and the cause remanded.

Reversed and remanded.

MRS. MARY WILLINGHAM, WIDOW, AND MISS COTTIE B. WOODWARD, ADMINISTRATRIX OF THE ESTATE OF TOM WILLINGHAM, DECEASED, v. BRYAN ROCK & SAND COMPANY, TEXTILE INSURANCE CO., AND SALISBURY GRANITE INDUSTRIES, INC., SELF-INSURER.

(Filed 19 May, 1954.)

1. Master and Servant § 55d—

Objections and exceptions to the signing and to the rendition of the judgment and award of the Industrial Commission do not support an assignment of error that the award was erroneous because no claim was filed against appellant as required by G.S. 97-58, and the exceptions are insufficient to present to the Superior Court the sufficiency of the evidence to support the findings of the Industrial Commission, or any one of them, but presents the sole question whether the facts found by the Commission support the decision and award.

2. Appeal and Error § 6c (2)—

An exception to the signing and rendition of the judgment of the Superior Court affirming the award of the Industrial Commission presents the sole question of whether error in matters of law appear from the face of the record.

3. Master and Servant § 45: Appearance § 2—

Where the Industrial Commission, upon the hearing of a claim for compensation, joins another employer as an additional party defendant, notwithstanding that no notice or claim had been filed against such employer, *held:* The employer by appearing at the time and place of the hearing and stipulating that it was subject to the Compensation Act and joining in the hearing on the merits, makes a general appearance and submits itself to the jurisdiction of the Commission.

4. Master and Servant § 40f—

The evidence before the Industrial Commission *is held* sufficient to support the finding of the Industrial Commission that plaintiff's intestate, after the termination of his employment with one employer because of silicosis in the third degree, was employed by another employer for more than thirty working days, or parts thereof, within seven consecutive calendar months, and that he was last exposed to the hazards of the disease while in the employment of the second employer within the rule of liability under G.S. 97-57.

APPEAL by defendant Salisbury Granite Industries, self-insurer, from *Pless, J.,* at October Term, 1953, of ROWAN.

Proceeding under the North Carolina Workmen's Compensation Act, Chapter 97 of General Statutes, upon formal claim dated 21 December, 1950, filed with North Carolina Industrial Commission by Tom Willingham against Bryan Rock & Sand Company, employer, and its insurance carrier, for compensation, G.S. 97-57, for disablement from performing normal labor in the last occupation in which he was remuneratively em-

ployed, G.S. 97-54, because of the occupational disease of silicosis, G.S. 97-52 (26)—to which proceeding the hearing commissioner entered an order on 17 July, 1951, that Salisbury Granite Industries, Inc., of Salisbury, N. C., be made a party, and in which proceeding the claimant employee having died pending appeal of Salisbury Granite Industries, Inc., to the Full Commission, award is made to administratrix of the estate of claimant and to his dependent wife.

The case on appeal reveals these undisputed facts: (1) Tom Willingham was employed by Bryan Rock & Sand Company for fifteen or twenty years at its quarry at Woodleaf, in Rowan County, North Carolina. He was first examined by the Industrial Hygiene Section of the North Carolina State Board of Health in 1937 and at intervals through July of 1950. He was advised on 4 October, 1950, by letter from Dr. Otto J. Swisher, Jr., Chief, Industrial Hygiene Section, that the Advisory Medical Committee for the North Carolina Industrial Commission had reviewed all the physical examinations and X-rays so given to him by it through those years, and had arrived at a final diagnosis in his case "as that of silicosis in the third stage,"—and advised him that the Committee did not feel it advisable for him to continue in the dusty trades, and, that, therefore, the usual work card for further employment in any dusty trade or place where there was a dust hazard could not be issued to him. Copy of this letter was sent to, and received by the Industrial Commission on 10 October, 1950.

(2) Thereafter on 3 November, 1950, the Industrial Commission received a letter, dated 2 November, 1950, from attorney representing Tom Willingham, requesting that the case be set for hearing. Whereupon, on 24 November, 1950, the Industrial Commission furnished to the attorney copies of the Commission's Form No. 18, for his use in reporting the case. Thereafter on 27 December, 1950, the Commission received completed Form No. 18,—employee's first notice of accident to his employer, Bryan Rock & Sand Company, dated 21 December, 1950, signed by Willingham.

(3) Thereafter on 9 February, 1951, the Commission received from the Textile Insurance Company, High Point, North Carolina, compensation carrier for the Bryan Rock & Sand Company, an employer's report of claimant's alleged disability on account of silicosis, on which date of last exposure to dust was given as "12/22, 1950, 5 P. M."

(4) Thereafter on 25 June, 1951, the Industrial Commission sent to all parties then interested, due notice of hearing to be held in Salisbury, North Carolina, at 2 o'clock P. M., on 11 July, 1951, to determine what amount of compensation, if any, claimant was entitled to receive for silicosis. The case was called for hearing at said time and place,—present and appearing were attorney for claimant, and adjusters for defendants.

(5) Thereafter on 17 July, 1951, Robert L. Scott, Commissioner, entered an order which, after reciting appearances of attorney for claimant and of attorneys for defendants, reads as follows:

"When this case was called for hearing in Salisbury on 11 July, 1951, counsel for the parties conferred with the Hearing Commissioner and advised him that the claimant had left the employment of the defendant Bryan Rock & Sand Company in January, 1951; that since that time he has been employed during more than thirty working days by Salisbury Granite Industries, Inc., Salisbury; that it is the contention of counsel for both parties that the claimant may have been exposed to the hazards of silicosis within the meaning of the Act during that period, and for this reason counsel for both parties desired that Salisbury Granite Industries, Inc., and its carrier, if any, be made a party to this action. It is therefore

"Ordered that this case be continued at this time, that Salisbury Granite Industries, Inc., Salisbury, be made a party hereto, and that the case be reset upon the next visit of a Hearing Commissioner to Salisbury, due notice going to all parties at that time."

(6) The record on this appeal does not show that notice of the above order was served on Salisbury Granite Industries, Inc. But it does show that thereafter the Industrial Commissioner on 20 December, 1951, sent to Tom Willingham, employee, Bryan Rock & Sand Company, employer, Textile Insurance Company, insurer, and Salisbury Granite Industries, Inc., self-insurer, at their respective addresses, notice of a hearing to be held in the above case at (office of) Clerk Superior Court, Salisbury, N. C., at 9 o'clock A. M., on 9 January, 1952, by order of Commissioner Robert L. Scott to take additional evidence.

(7) Pursuant thereto, the case was heard before Deputy Commissioner W. Scott Buck at time and place shown in preceding paragraph,—attorney for claimant, attorneys for Bryan Rock & Sand Company and Textile Insurance Company, and attorneys for Salisbury Granite Industries, Inc., appearing. And the record shows:

(a) That defendant Bryan Rock & Sand Company, through its attorney, Mr. Wardlow, stipulated (1) that Tom Willingham was employed by it throughout 1949 and 1950 in North Carolina; (2) that Textile Insurance Company is the carrier for it; (3) that claimant's average weekly wage was $43.00; and (4) that the parties were subject to and bound by the terms of the Compensation Act.

(b) That the Salisbury Granite Industries, Inc., through its attorney, Mr. Hudson, Jr., stipulated that it is subject to the Act, and that it is a self-insurer; but that no stipulation is made at that time as to length of time Willingham worked for it.

And thereupon testimony was taken in respect to the periods during which Tom Willingham was employed by Bryan Rock & Sand Company

and by Salisbury Granite Industries, Inc., respectively, and as to the manner and character of his occupational exposure to silica or granite dust during those periods. And other witnesses including employees and quarry foreman of Salisbury Granite Industries were examined in respect to Willingham's occupational exposure to granite dust while employed by Salisbury Granite Industries, Inc. (The record shows that no objection was made to the hearing or to the taking of testimony.)

Thereafter the Deputy Commissioner hearing the case filed opinion, in which it is recited that the parties also stipulated that claimant had been exposed to silica dust in North Carolina for two years in the last ten years, and that he adopts stipulations of parties as findings of fact and conclusions of law, and that "based upon all of the competent evidence" he makes additional findings of fact, in pertinent part substantially as set forth hereinabove as uncontroverted facts; and, in respect to Salisbury Granite Industries, Inc., substantially the following:

That Tom Willingham was employed by Salisbury Granite Industries, Inc., from 1 February, 1951, to and through 27 June, 1951, as a flagman and general handy man at its quarry at Salisbury, N. C.; that between these dates he used drills in dry operations for short periods of time each day; that for more than thirty working days, or parts thereof, within seven consecutive calendar months he was injuriously exposed to the hazards of silicosis; that on 27 June, 1951, because of the disease of silicosis he became actually incapacitated from performing normal labor in the last occupation in which he was remuneratively employed; and that Salisbury Granite Industries, Inc., was made a party defendant to this cause by order filed by Commissioner Scott on 17 July, 1951.

And the said hearing commissioner also set forth conclusions of law in accordance with the above findings of fact,—holding, as a matter of law, (1) that the defendant Bryan Rock & Sand Company and its insurance carrier, Textile Insurance Company, must be discharged from liability to the plaintiff claimant, and (2) that "Salisbury Granite Industries, Inc., must be required to pay to the plaintiff claimant benefits prescribed by the Act."

And "based upon all of the findings of fact and conclusions of law," the said Hearing Commissioner entered an award, the pertinent portions of which are these (numbering supplied):

1. "The plaintiff's claim for compensation benefits as against Bryan Rock & Sand Company and its insurance carrier, Textile Insurance Company, is in all things denied, and the same dismissed.

2. "The defendant Salisbury Granite Industries, Inc., shall pay to the plaintiff compensation" as there specifically set forth.

Pursuant thereto the Commission entered formal award in accordance therewith. And only the Salisbury Granite Industries, Inc., through its

attorneys, in apt time, gave notice of appeal to the Full Commission, and requested review by it in respect to alleged errors on the part of the hearing commissioner:

"1. For that no claim has been filed against Salisbury Granite Industries, Inc., as required and contemplated by G.S. 97-58 (c).

"2. For that there was not sufficient evidence presented at the hearing to support the award in that no evidence was presented to support a finding that plaintiff was injuriously exposed to the hazards of silicosis while in the employ of Salisbury Granite Industries, Inc.

"3. For that there was no evidence upon which to base a finding that such exposure as did occur contributed in the slightest degree to plaintiff's disability and the award against this defendant is not justified under G.S. 97-57.

"4. For that none of the disability claimed by plaintiff arose out of or in the course of his employment by Salisbury Granite Industries, Inc.

"5. Should G.S. 97-57 be interpreted as imposing liability upon a second employer, where the total disability of the employee was sustained in a former employment, which are the facts in this case, then said section would be unconstitutional, as being in contravention and violation of the due process clauses of the Constitution of the United States and the Constitution of North Carolina."

(Note: The plaintiff did not appeal.)

Pending the appeal of Salisbury Granite Industries, Inc., to the Full Commission, it being made to appear that Tom Willingham had died, the Commission entered in this proceeding an order that Mary Willingham, widow of Tom Willingham, as his sole dependent, and Cottie B. Woodward, Administratrix of the estate of Tom Willingham, deceased, be and they were made parties plaintiff.

The case on appeal discloses that at hearing before the Full Commission on 20 January, 1953, there were present and appearing (1) attorney for plaintiffs, (2) attorneys for defendants Bryan Rock & Sand Company and Textile Insurance Company, and (3) attorneys for defendant Salisbury Granite Industries, Inc., and that (a) "counsel for all parties agreed that Mrs. Mary Willingham was the lawful wife and sole dependent of the deceased Tom Willingham"; (b) that "stipulations entered before and after the hearing before the Full Commission by all parties establish that Tom Willingham died 29 October, 1952, and that his widow is now a proper party to this action as a claimant claiming compensation for his death which is alleged to have resulted from silicosis," (c) and that "by stipulation entered subsequent to the hearing, it was established that Tom Willingham, the original claimant, died on or about 29 October, 1952, of pulmonary tuberculosis and cardiac failure of which silicosis in the third stage was the cause or contributing cause."

And the Full Commission concurred in and adopted the findings of fact and conclusion of the Deputy Commissioner against the Salisbury Granite Industries, Inc., on all grounds,—but amended same to conform to stipulation of the parties of the facts as to death of Tom Willingham, and cause of it,—and in respect to the widow being his sole dependent, and in respect to the administration upon his estate. Thereupon the Full Commission set out conclusions of law in the light of facts found, and as against Salisbury Granite Industries, Inc., awarded compensation to the administratrix for the period between 27 June, 1951, and 29 October, 1952, and thereafter to the widow subject to the statutory limitation of $6,000.00. G.S. 97-38, G.S. 97-41.

Thereafter in due time Salisbury Granite Industries, Inc., gave to the North Carolina Industrial Commission notice of its appeal to the Superior Court of Rowan County "for errors in findings of fact unsupported by any evidence in the record and for errors of law in the review made by the Full Commission on the 6th day of March, 1953 . . ."

The proceeding coming on to be heard at October Term, 1953, of Superior Court of Rowan County, and being heard upon the appeal by defendant Salisbury Granite Industries, Inc., from the award by the North Carolina Industrial Commission, and the presiding judge, being of opinion that the award should be affirmed, entered judgment in accordance therewith.

The record shows that "To the signing of the foregoing judgment affirming the award by the North Carolina Industrial Commission, defendant Salisbury Granite Industries, Inc., objects and excepts," and "objects to the entry and rendition of the judgment appearing in the record and excepts thereto and appeals to the Supreme Court," and assigns error.

T. G. Furr for plaintiff, appellee.

R. E. Wardlow and Pierce & Blakeney for defendants Bryan Rock & Sand Company and Textile Insurance Company, appellees.

Linn & Shuford and Hudson & Hudson for defendant Salisbury Granite Industries, Inc., appellant.

WINBORNE, J. At the outset let it be noted that no appeal was taken from the ruling of the North Carolina Industrial Commission that, upon the facts found by the hearing commissioner, and adopted by the Commission, it follows as a matter of law that the defendant Bryan Rock & Sand Company and its insurance carrier must be discharged from liability to plaintiff on his claim filed against it, and the claim be denied, and dismissed. So, this ruling is not presented for decision on this appeal. Indeed, attorney for claimant in brief filed here does not take issue with the ruling.

Now turning to appeal of Salisbury Granite Industries, Inc.: It is stated in brief of this appellant that the questions involved are these:

"I. Was notice given to and claim filed against the defendant, Salisbury Granite Industries, Inc., as required and contemplated by Section 97-58 of the General Statutes of North Carolina?

"II. If so, is there sufficient competent evidence in the record to support the award?"

These questions purport to be predicated upon assignments of error stated as follows: (1) "That the court erred in affirming and sustaining the award of the Industrial Commission for that no claim was filed against the defendant Salisbury Granite Industries, Inc., as required and contemplated by G.S. 97-58, and for that there is no evidence in the record to sustain the award, Exception No. 1, which is the defendant Salisbury Granite Industries, Inc.'s Assignment of Error No. 1 (R. pp. 53, 54, 55, 61, 62, 63)."

(2) "That the court erred in signing the judgment as appears in the record for that no claim was filed against the defendant Salisbury Granite Industries, Inc., as required and contemplated by G.S. 97-58, and for that there is no evidence in the record to sustain the award and the judgment of the court, Exception No. 2, which is the defendant Salisbury Granite Industries, Inc.'s Assignment of Error No. 2 (R. pp. 53, 54, 55, 61, 62, 63)."

However, the record and case on appeal fail to show exceptions as bases for these assignments. The exceptions to the award of the Full Commission are insufficient to present these matters to the Superior Court, and the exceptions to the judgment of the Superior Court are insufficient to present them to this Court. See *Worsley v. Rendering Co.,* and *Sugg v. Rendering Co.,* 239 N.C. 547, 80 S.E. 2d 467, and *Beaver v. Paint Co., post,* 328.

In the *Worsley case, Barnhill, C. J.,* recently restated the rules of procedure as approved in decisions of this Court as to appeals in Workmen's Compensation cases, (1) from the North Carolina Industrial Commission to the Superior Court, and (2) from the Superior Court to the Supreme Court. And in the *Beaver case, supra, Denny, J.,* amplifies the subject. What is so recently said in these cases is applicable to case in hand, and need not be rehashed. The decisions of this Court uniformly hold that when it is claimed that findings of fact made by the Industrial Commission are not supported by the evidence, the exceptions and assignments of error in relation thereto must specifically and distinctly point out the alleged error.

Hence on an appeal "for errors in findings of fact unsupported by any evidence in the record, and for errors of law in the review of the award by the Full Commission," as in the case in hand, the exceptions are too

general, and, therefore, are insufficient to challenge the sufficiency of the evidence to support the findings of the Commission or any one of them. Thus the appeal to the Superior Court presented for review the single question whether the facts found by the Commission support the decision and award. See *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488; also *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351, and cases there cited.

And on the appeal to Supreme Court the exceptions to the signing and rendition of the judgment of Superior Court raise only the question as to whether error in matters of law appear upon the face of the record. See *Culbreth v. Britt Corp.,* 231 N.C. 76, 56 S.E. 2d 15, and cases cited. See also *Burnsville v. Boone, supra,* and cases cited. Indeed, error is not made to appear.

And while it may be doubted that the North Carolina Industrial Commission had authority under the North Carolina Workmen's Compensation Act, by which it was created, to make the Salisbury Granite Industries, Inc., a party defendant to the proceeding as originally instituted, since at that time claimant had not filed nor asserted claim against it. But be that as it may, the Salisbury Granite Industries, Inc., responding to notice of hearing to be held in Salisbury on 9 January, 1952, appeared at the time and place of the hearing, and stipulated that it was subject to the Workmen's Compensation Act, and joined in the hearing on the question as to whether its employment of Tom Willingham was his last injurious exposure to the hazard of silicosis within the meaning of G.S. 97-57. This amounted to a general appearance whereby it submitted itself to the jurisdiction of the Commission. And there is presented to this Court no exception in this respect. See *In re Blalock,* 233 N.C. 493, 64 S.E. 2d 848.

Moreover, the stipulation by all parties, entered before and after the hearing before the Full Commission establishing the facts that Tom Willingham was dead, and that "his widow is now a proper party to this action as a claimant claiming compensation for his death which is alleged to have resulted from silicosis" constitutes a waiver of any procedural defect in respect to filing of her claim. G.S. 97-58. And it is on her claim that award is made.

Finally, it may be noted that if the Salisbury Granite Industries, Inc., had had Tom Willingham examined as it was authorized to do under provisions of G.S. 97-60, no doubt it would have ascertained before employing him that he was affected with silicosis in the third stage. But having employed him, it is not amiss to say that a reading of the evidence offered on the hearing at Salisbury on 9 January, 1952, is sufficient to admit of the finding of fact made by the Industrial Commission in respect to his injurious exposure to silica or granite dust while employed by Salisbury Granite Industries, Inc.

For reasons stated, the judgment below is
Affirmed.

THE STEPHENS COMPANY v. MARY PARKER LISK AND HUSBAND, C. D. LISK.

(Filed 19 May, 1954.)

1. Deeds § 16a—

Where a deed contains a covenant on the part of the grantee for himself, his heirs and assigns, agreeing to pay a proportionate part of the cost of improvements which the grantor or its successors or assigns might make along the street abutting the property, *held:* The grantee is the covenantor and by accepting the deed binds himself and his assigns to the agreement as a covenant running with the land. Therefore the covenant is enforceable by the grantor against a subsequent purchaser of the land from such grantee.

2. Deeds § 11—

A deed must be construed to ascertain and effectuate the intention of the parties as gathered from the language of the entire instrument.

3. Same: Contracts § 8—

While punctuation is ineffective as against the plain meaning of the language used by the parties to a contract or other instrument in writing, still the rules of punctuation may be used to assist in determining the intent of the parties.

4. Deeds § 16a—

The deed in question contained a covenant binding the grantee and his heirs and assigns to pay *pro rata* part of street improvements "in the event the party of the first part, or its successors or assigns, owner or owners of a major portion of the lots in said block" should decide to grade, pave, or otherwise improve the abutting streets. *Held:* The intent of the parties, clarified by the punctuation, was that the grantor was authorized to make improvements without the consent of a majority of the owners of lots in said block, and the consent of the owners of a majority of the lots in said block was required only in the event the grantor's successors or assigns undertook to make the improvements.

APPEAL by defendants from *Phillips, J.,* at 4 January, 1954, Extra Civil Term of MECKLENBURG.

Civil action to recover on contract set forth in certain deed, as hereinafter shown, for paving, and to have same declared a lien on certain property of defendant in city of Charlotte, N. C., heard upon stipulation of parties by which a jury trial was waived, and consent given that court pass upon and find the facts as well as determine the law in the case.

Thereupon the parties agreed that the following constitute the facts, and all the evidence upon which the case is to be tried:

"(a) The allegations set forth in paragraphs 1, 2, 3 and 4 of the complaint are admitted. (These are the allegations.)

"'1. The plaintiff, a North Carolina corporation, was duly organized under the laws of the State of North Carolina, and in the Spring of 1951 it was dissolved and this action is brought by the Directors and Trustees in Dissolution of the plaintiff.

"'2. That the defendants are citizens and residents of Mecklenburg County, North Carolina, and the defendant, C. D. Lisk, is the husband of Mary Parker Lisk.

"'3. That the defendant, Mary Parker Lisk, is the owner of a certain tract of land, being part of Lot 34 and of Lot 35 in Block 80 of Myers Park as shown on the map thereof recorded in Map Book 3, Page 470, Mecklenburg Registry, said property fronting 102.35 feet on the easterly side of Maryland Avenue, said property having been conveyed to the defendant Mary Parker Lisk (formerly Mary Parker Herring) and her former husband, L. O. Herring (now deceased) by two deeds—one from T. L. Kirkpatrick and wife, Eva C. Kirkpatrick, dated March 9, 1934, and registered in Book 1114, page 303, and the other from Troy Whitehead and wife, Dorothy West Whitehead, dated September 12, 1945, registered in Book 1158, page 206 in the office of the Register of Deeds for Mecklenburg County.

"'4. That The Stephens Company was the developer of Myers Park and caused the aforementioned map of Block 80 to be recorded.'

"(b) There is incorporated in this stipulation map of Block 80 of Myers Park recorded in Map Book 3, page 470, in the office of the Register of Deeds for Mecklenburg County and the revised map thereof which appears in Map Book 6, page 357.

"(c) The property of the defendant, Mrs. Mary Parker Lisk, referred to in paragraph 3 of the complaint was originally conveyed by The Stephens Company by two deeds, one to D. A. Matthews and wife, Nell Anderson Matthews, dated June 1, 1935, and registered in Book 869, page 110, and the other to J. E. Elrod and wife, Annette M. Elrod, dated June 21, 1935, and registered in Book 877, page 296, in the office of the Register of Deeds for Mecklenburg County. In each of said deeds the following provision is contained:

"'The above described property is conveyed as unimproved property without any obligation on the part of the grantor to improve same or the streets in or adjacent to said block, or to put in water or sewer lines or other conveniences for the benefit of said property, and nothing has been included in the purchase price to cover any such improvement. It is, therefore, covenanted by the parties of the second part for themselves,

their heirs and assigns, that in the event the party of the first part, or its successors or assigns, owner or owners of a major portion of the lots in said Block 80 facing on the proposed Maryland Avenue should decide to grade, pave or otherwise further improve the streets or sidewalks in or adjacent to said block, or to put in water or sewer lines or other improvements, the property hereby conveyed shall bear its part of the cost of said improvements, based upon frontage of the property so improved, or where a corner lot is involved, the cost of such improvement will be based upon frontage and side of the lot so improved; and if any grading in streets or sidewalk, it shall be proper to construct a fill or cut the slope of which shall encroach upon said property, the party of the first part, its successors or assigns, shall have and are hereby given the right to make the necessary encroachments for such purpose. This covenant shall run with the land, and the cost of improvements above referred to shall be a charge upon the same in whosever hands it shall be at the time of said improvements.'

"(d) In the Spring of 1950 the plaintiff caused Maryland Avenue along Block 80 to be graded and paved, providing water and sewer lines. At the time this was done the plaintiff was the owner of approximately 22% of the lots in Block 80 facing on Maryland Avenue, the remainder, or 78%, of said lots having previously been conveyed by the plaintiff. In the deeds conveying this 78% of said lots, an identical provision was contained in each deed as was contained in the aforementioned deeds registered in Book 869, page 110, and Book 877, page 296, hereinbefore referred to. At the time the plaintiff caused Maryland Avenue to be so improved, it did not consult with or obtain the prior consent of any of the owners of the 78% of said lots.

"(e) At the time Maryland Avenue was so improved the plaintiff was the owner of all of the property directly across Maryland Avenue from Block 80 of Myers Park, as shown on the map thereof recorded in Map Book 3, page 470, Mecklenburg Registry.

"(f) Based upon the entire cost of said improvements to Maryland Avenue adjacent to Block 80 of Myers Park, the costs of such improvements adjacent to the property of the defendant, Mary Parker Lisk, was $513.79, or $4.976 per foot.

"(g) The plaintiff paid for all of said improvements to Maryland Avenue and the defendant, Mary Parker Lisk, has paid the plaintiff nothing on account thereof."

Thereupon, the court finding the facts to be as above set forth, and concluding that the property of defendant, Mary Parker Lisk, described in the complaint, is chargeable with the sum of $513.79, entered judgment (1) in accordance therewith, (2) that the judgment be declared to be a lien upon said property, and (3) that to this extent plaintiff have judg-

ment against said defendant, together with the costs. And the court further appointed a commissioner to sell, and authorized sale of the property, etc.

Defendants except thereto, and appeal to Supreme Court and assign error.

Cochran, McCleneghan & Miller for plaintiff, appellee.
G. T. Carswell and James F. Justice for defendants, appellants.

WINBORNE, J. This is the question for decision here: Did the trial court err in concluding as a matter of law that, upon the stipulated facts, the property of *feme* defendant, described in the complaint, is chargeable for its proportionate share of the cost of improving Maryland Avenue as set forth in the judgment from which appeal is taken?

This is a question of law determinable by proper interpretation of the wording of the covenant as written in the deeds under which *feme* defendant acquired title to the lots constituting the property described in the complaint.

A covenant, as stated by *Battle, J.*, in *Kent v. Edmondson,* 49 N.C. 529, is defined to be "the agreement or consent of two or more, by deed in writing, sealed and delivered; whereby, either, or one of the parties, doth promise to the other, that something is done already, or shall be done afterwards. And he that makes the covenant is called the covenantor, and he to whom it is made, the covenantee."

Moreover, a conveyance of land with covenant on the part of the grantee, for himself, his heirs and assigns, such as in the case in hand, is a binding covenant running with the land, and is enforceable. *Ring v. Mayberry,* 168 N.C. 563, 84 S.E. 846. Indeed, in the *Ring case, Clark, C. J.*, speaking of a covenant running with the land, had this to say: "Aside from the express averment of the creation of the easement, the acceptance of the deed containing a covenant on the part of the grantee is equivalent to the grant of an easement by the defendant. Such covenants run with the land and are not at all unusual. They are good even against assignees in fee where the intention to create them is clear"—citing C.Y.C., and *Norfleet v. Cromwell,* 64 N.C. 1.

The covenant involved in this appeal is made expressly by the grantees, "the parties of the second part for themselves, their heirs and assigns," and it is expressly stated that "this covenant shall run with the land, and the cost of improvements above referred to shall be a charge upon the same in whosoever hands it shall be at the time of said improvements."

Hence by the acceptance of the deed containing the covenant, the grantees, for themselves, their heirs and assigns, became the covenantors, and those to whom the covenant is made the covenantees. And the obli-

gations assumed by the grantees in the covenant made are binding upon their assigns. The *feme* defendant is an assignee of the grantees, and the covenant made runs with the land, as expressly set forth.

And decisions of this Court uniformly hold that the courts are required to interpret a deed so as to ascertain and effectuate the intention of the parties as gathered from the entire instrument. In *Gudger v. White,* 141 N.C. 507, 54 S.E. 386, the Court, treating the subject of interpreting a deed, in opinion by *Walker, J.,* declared: "We are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it 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. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument 'after looking' as the phrase is, 'at the four corners of it.'"

This rule, variously expressed, is followed throughout subsequent decisions of this Court,—among which are these: *Featherston v. Merrimon,* 148 N.C. 199, 61 S.E. 675; *Triplett v. Williams,* 149 N.C. 394, 63 S.E. 79; *Price v. Griffin,* 150 N.C. 523, 64 S.E. 372; *Thomas v. Bunch,* 158 N.C. 175, 73 S.E. 899; *Acker v. Pridgen,* 158 N.C. 337, 74 S.E. 335; *Williamson v. Bitting,* 159 N.C. 321, 74 S.E. 808; *Eason v. Eason,* 159 N.C. 539, 75 S.E. 797; *Jones v. Sandlin,* 160 N.C. 150, 75 S.E. 1075; *Beacom v. Amos,* 161 N.C. 357, 77 S.E. 407; *Spencer v. Jones,* 168 N.C. 291, 84 S.E. 261; *Whichard v. Whitehurst,* 181 N.C. 79, 106 S.E. 463; *Ins. Co. v. Sandridge,* 216 N.C. 766, 6 S.E. 2d 876; *Lee v. McDonald,* 230 N.C. 517, 53 S.E. 2d 845.

In the *Spencer case, supra,* it is stated that "this doctrine applies to a covenant as to other contracts, and the intention of the parties, if discernible, will control in determining its meaning, which should be gathered from the entire instrument." And in the *Lee case, supra, Denny, J.,* writing for the Court, said, "the intent of the grantor in a deed . . . must be gathered from its four corners . . ."

And while punctuation is ineffective as against the plain meaning of the language used by the parties to a contract or other instrument of writing, still the rules of punctuation may be used to assist in determining the intent of the parties. 3 A.L.R. 1062 Annotation—Subject Punctuation as affecting construction of contract. *Allen v. U. S. F. & G. Co.,* 269 Ill. 234, 109 N.E. 1035; *S. v. Bell,* 184 N.C. 701, 115 S.E. 190.

In the *Bell case, supra,* the Court was interpreting a statute, and speaking through *Adams, J.,* said: "This we think is the rational interpretation . . . in accord not only with the spirit and reason of the law, but with the phraseology and punctuation. Punctuation, we admit, is not an infallible standard of construction; indeed some courts have held that it should be disregarded . . . But this is not the prevailing doctrine. In *Taylor v. Town,* 10 A. & E. Anno. Cas. 1082, it is said: 'There is no reason why punctuation, which is intended to and does assist in making clear and plain all things else in the English language, should be rejected in the case of interpretation of statutes. *Cessante ratione legis, cessat ipsa lex.*' "

Now in the light of these principles, we turn to the present case: The record of case on appeal does not incorporate the deeds here involved. But it is stated in the stipulation of facts that defendant Mary Parker Lisk is the owner of a certain tract of land, being part of Lot 34 and of Lot 35 in Block 80 of Myers Park as shown on the map thereof recorded in Map Book 3, page 470, Mecklenburg Registry, said property fronting 102.35 feet on the easterly side of Maryland Avenue, the same having been conveyed to her and her former husband by two certain deeds; that The Stephens Company was the developer of Myers Park, and caused the map of Block 80 of Myers Park to be recorded; and that the property of defendant, Mark Parker Lisk, was originally conveyed by The Stephens Company by two certain deeds, each of which contained the covenant hereinabove quoted.

In the light of these facts we look to the covenant: At the outset the premise of the covenant makes it clear that the parties mutually understood that the lots were conveyed as unimproved property without any obligation on the part of the grantor, The Stephens Company, to improve same or the streets in or adjacent to Block 80, or to put in water or sewer lines or other conveniences for the benefit of the property, and that nothing had been included in the purchase price to cover any such improvement. Since The Stephens Company was developing Myers Park, of which Block 80 was a part, and since Maryland Avenue, on which the lots faced, was proposed, it seems natural that the above common understanding should be expressed.

Moreover, it clearly appears from the plain language of the covenant that in the event the party or parties authorized so to do "should decide to grade, pave or otherwise further improve the streets or sidewalks in or adjacent to said block, or to put in water or sewer lines or other improvements, the property conveyed shall bear its part of the cost of said improvements, based upon the frontage of the property so improved . . . and the cost of improvements . . . be a charge upon the same (land) in whosoever hands it shall be at the time of said improvements."

Now, then, we focus attention to this portion of the covenant: ". . . that in the event the party of the first part, or its successors or assigns, owner or owners of a major portion of the lots in such Block 80 facing on the proposed Maryland Avenue should decide to . . . improve the streets . . . or to put in water . . . improvements, the property hereby conveyed shall bear its part of the cost . . ." The plaintiff, who is "the party of the first part," made the decision. And the effect of the judgment below is that it had the right so to do.

Defendants contend, on the other hand, that under the wording of the covenant, "the consent of the owner or owners of a majority of the lots in Block 80" was required.

Who, then, was given the right to make decision? To answer this question it is necessary to ascertain from the language used what was the intention of the parties at the time the covenant was made.

Reading the language, as it is phrased and punctuated, it seems clear that there are alternate classes of subjects of the sentence, one, "the party of the first part," and the other, "its successors or assigns, owner or owners of a major portion of the lots in such Block 80 facing on the proposed Maryland Avenue."

Grammarians say ordinarily put a comma before clauses introduced by such conjunctions as "and," "but," "or," "nor," if a change of subject takes place. But that such connectives between words or phrases used in conjunction do not require a comma. Therefore, the comma after the words "the party of the first part" and before the next word "or" correctly separates "the party of the first part" as one class, from the class which follows.

The grammarians also hold that "for parenthetical, adverbial, or appositional clauses or phrases, use commas to indicate structurally disconnected, but logically integral, interpolations." Hence, applying this rule, the comma after the words "its successors or assigns" and before the clause beginning "owner or owners" clearly indicates that the latter is appositional to the words "its successors or assigns." Thus the punctuation seems to be accordant with good English grammar. Indeed, it makes clear and plain the language used. And it appears to be a rational interpretation. For in the light of the phraseology, as punctuated, we have these alternates: (1) "in the event the party of the first part . . . should decide to grade . . ."; and (2) "in the event . . . its successors or assigns, owner or owners of a major portion of the lots in said Block 80 facing on the proposed Maryland Avenue should decide to grade . . ." Therefore the punctuation, having been properly used, must have been intended to assist in making clear and plain what the covenantors intended. Manifestly the covenantee, The Stephens Company, so understood it.

Finally, it is not amiss to observe that the findings of fact fail to show (1) that defendants made any complaint when The Stephens Company was making the improvements, or (2) that the amount of cost of the improvement sought to be recovered in this action is not the part of the cost allocable to the lots of defendants in accordance with the provisions of the covenant. Indeed it is agreed that it is the amount. Therefore no injustice appears.

The judgment below is

Affirmed.

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

(Filed 19 May, 1954.)

1. **Trespass to Try Title § 3—**

Where, in an action to recover damages for trespass, defendants admit plaintiffs' title to the land embraced within the description in plaintiffs' deeds, but dispute the location of the dividing line between plaintiffs' land and the land of defendants, plaintiffs are not required to prove title, but only that the disputed area lies within the boundaries of their tract.

2. **Same—Plaintiffs' evidence held sufficient for jury as to location of dividing line as contended by them.**

In this action for trespass, the issue in controversy was the location of the dividing line between the respective tracts of the parties. The description in plaintiffs' deeds called for defendants' northern line, and defendants' deeds called for the northern line of their track as beginning at a red oak near the run of a creek. Plaintiffs offered evidence tending to show that the red oak had vanished, leaving no reliable trace of its former location, and that one of defendants' predecessors in title had pointed out, prior to the controversy, a marked white oak and a succession of marked gums as the location of the line, which line was the true dividing line according to plaintiffs' contention. *Held:* Plaintiffs' evidence is sufficient to support a finding by the jury that the disputed area lies within the boundary of the tract admittedly owned by plaintiffs, and it was error for the court to nonsuit plaintiffs' action.

3. **Boundaries § 5d—**

In this action involving the location of a dividing line between the respective tracts of the parties, plaintiffs' witness testified that before dispute as to the dividing line, one of defendants' predecessors in title pointed out to the witness a line of marked trees as the true dividing line. The marked trees established the dividing line as contended for by plaintiffs. The

trees pointed out were not referred to in the deeds. *Held:* Even though the testimony may not be competent as a declaration concerning a private boundary, it is competent as a declaration against interest made by a former owner of the land during the time of his ownership.

4. Judgments § 33a—

A judgment of nonsuit will not support a plea of *res adjudicata* in a subsequent action between the same parties upon substantially different allegations and evidence.

5. Evidence § 42d: Attorney and Client § 6—

A casual, hasty or inconsiderate admission made by one of the attorneys for plaintiffs, which admission is in irreconcilable conflict with defendants' admission and the theory of plaintiffs' case, and which is repudiated in express terms by other counsel for plaintiff, is not binding on plaintiffs.

6. Adverse Possession § 19—

In this action involving the true dividing line between the respective tracts of the parties, plaintiffs' evidence of adverse possession of the disputed area *is held* sufficient to be submitted to the jury under claim of title by seven years adverse possession under color. G.S. 1-38.

APPEAL by plaintiffs from *Burney, J.*, at October Term, 1953, of PENDER.

Civil action between adjoining landowners involving the location of a tract of land admittedly owned by the plaintiffs.

For ease of narration, Hugh Porter is called by his surname, and all the other defendants are designated as the defendants.

The matters essential to an understanding of the questions arising on the appeal are summarized in the numbered paragraphs which follow.

1. The defendants claim title to a tract of land lying on the east side of Moore's Creek in Columbia Township, Pender County, as heirs of Edmond Newton who died in 1907. Edmond Newton occupied the tract during his lifetime under an unbroken chain of deeds going back to 1850. When they are read aright, these deeds describe the tract in this fashion: *Beginning at a red oak near the run of Moore's Creek, running south 88 east 375 poles to a stake in the back line;* thence south 55 poles to a stake; thence south 88 west 375 poles to a stake in the old line on the west side of Moore's Creek; thence along said line to the beginning, containing 121 acres, more or less.

2. The plaintiffs claim title to a parcel of land which lies immediately north of the tract described in the preceding paragraph. They claim under a connected chain of deeds, which run back to 1884 and describe the land in this wise: Beginning at a black gum, H. Wells' corner, and runs thence his line south 88½ east 350 poles to a stake, his corner, thence south 3 east 78 poles to a stake; thence east 44 poles to a stake; thence 3 west 26 poles to a stake; *thence with Edmond Newton's line north 88 1/2*

west 380 poles to an oak in Moore's Creek; thence as the run of said Creek meanders to the beginning, containing 101.7 acres, more or less.

3. Since the defendants claim under the senior deeds and the plaintiffs' deeds call for the defendants' northern line as the boundary between the two tracts of land, the true dividing line between the land covered by the plaintiffs' deeds and that embraced by the defendants' deeds is necessarily the defendants' northern line, which is thus defined in their deeds: "Beginning at a red oak near the run of Moore's Creek, running south 88 east 375 poles to a stake in the back line."

4. Shortly before the beginning of litigation, the still subsisting controversy arose between the plaintiffs and the defendants in respect to the actual location of the true dividing line upon the earth's surface. The plaintiffs pointed out a large white oak tree standing 138 feet east of Moore's Creek and a succession of gum-trees, and insisted that they marked the actual location of the true dividing line. The white oak and the gums allegedly bore ancient ax-marks indicating that they were line trees, and marked out a line whose course was virtually identical with the course of the defendants' northern line as called for in their deeds. The defendants asserted, however, that the true dividing line was located 224 feet north of the location assigned to it by the plaintiffs.

5. The controversy made it disputable whether the area lying between the two alleged locations of the true dividing line was embraced by the deeds of the plaintiffs or those of the defendants. This area consisted of 30 acres, of which 24 acres were woodland. The other 6 acres were old clearings, which took in the cattle-barn, the tobacco-barn, and the southern corner of the dwelling of the plaintiffs.

6. After the controversy had arisen, Porter, who acted in the premises under a license from the defendants, entered on the disputed area, and cut and removed a substantial part of the timber growing on the 24 acres of woodland.

7. A short time thereafter, to wit, on 9 November, 1949, the plaintiffs sued Porter and the defendants in a former action "involving substantially the same subject matter" as the present suit. The pleadings in the former action were construed, however, to put in issue both the title and the location of the tract of land described in paragraph 2 of this statement. The former action was heard before Judge Chester Morris and a jury at the March Term, 1952, of the Superior Court of Pender County.

8. Both sides offered evidence at the trial of the former action. The testimony of the defendants is not stated because it is not relevant to this appeal. The plaintiffs introduced two deeds, one dated 4 October, 1943, and the other dated 3 December, 1942, which were sufficient in form to afford them color of title to the tract of land described in paragraph 2 of this statement. The plaintiffs did not show, however, that the makers

of these deeds had had any previous connection of any character with any of the land mentioned in this statement. Moreover, the plaintiffs did not connect their claim with any of the instruments in their chain of deeds antedating the deed of 3 December, 1942. Since their title to the tract of land described in paragraph 2 of this statement was not admitted in the former action, and the two deeds constituting the color of title shown by them at that time were executed within the seven years next preceding the date of the commencement of the former action, the plaintiffs candidly and correctly conceded on the trial of the former action that they were then compelled to base their claim of ownership of the disputed area upon adverse possession without color of title for a period of 20 years under the statute codified as G.S. 1-40. The plaintiffs offered evidence at the trial of the former action tending to show that from 3 December, 1942, the date of the first of the two deeds constituting the color of title then shown by them, until 9 November, 1949, the date of the commencement of the former action, they farmed the 6 acres embraced by the old clearings and took firewood and other materials from the 24 acres included in the woodland under claim of right. Their evidence was not sufficient to show, however, that the requisite privity existed between them and the supposed former occupants, J. M. Newkirk and W. M. Gurganous, who had allegedly possessed the disputed area successively for more than 45 years before the plaintiffs' asserted occupancy began. Judge Morris concluded that the evidence did not permit the tacking of plaintiffs' alleged possession to that of the former occupants, and that for this reason at least the plaintiffs had failed to make out a *prima facie* title to the disputed area by twenty years' adverse possession. As a consequence, Judge Morris dismissed the former action upon a compulsory nonsuit. His ruling was affirmed by this Court at the Fall Term, 1952. *Newkirk v. Porter,* 237 N.C. 115, 74 S.E. 2d 235.

9. Subsequent to these events, to wit, on 23 March, 1953, the plaintiffs brought the present action against Porter and the defendants. The complaint alleged that the plaintiffs owned and possessed the tract of land described in paragraph 2 of this statement; that Porter, acting under license from the defendants, trespassed on the plaintiffs' tract, and cut and removed timber growing upon it; and that Porter and the defendants were about to commit further trespasses upon plaintiffs' tract for the cutting and removal of timber. The complaint prayed for damages for the timber cut and removed, and an injunction to prevent future trespasses. Porter and the defendants filed separate answers, alleging that the defendants owned the tract of land described in paragraph 1 of this statement. The answer of the defendants admitted that the plaintiffs owned "all of that tract of land described in . . . the complaint" lying "north of the northern boundary of the lands of these defendants," and the answer of

Porter conceded that the plaintiffs owned "the tract of land in Columbia Township, Pender County, North Carolina, adjoining the lands of Edmond Newton Estate." Porter's answer admitted that he had cut and removed timber standing on the defendants' land. Both answers denied that Porter had made any entry on the plaintiffs' tract, and pleaded the judgment in the former action as "*res adjudicata* of all matters and things involved in this action." The defendants prayed for an affirmative declaration that they owned the tract described in paragraph 1 of this statement.

10. The present action was heard by Judge John J. Burney and a jury at the October Term, 1953, of the Superior Court of Pender County. The plaintiffs offered evidence at that time substantially different in material aspects from the testimony presented by them at the trial of the former action. They introduced an unbroken chain of deeds going back to 1884, which were sufficient *in form* to convey the tract of land described in paragraph 2 of this statement to them in fee simple. The plaintiffs undertook to prove that the true dividing line between that tract and the tract described in paragraph 1 of this statement was delineated on the earth's surface by the marked white oak and the marked gums mentioned in paragraph 4 of this statement, and that their deeds, therefore, covered the disputed area of 30 acres. To this end, the plaintiffs did these things: First, they offered testimony tending to show that the "red oak near the run of Moore's Creek" mentioned in the defendants' deeds had long since vanished leaving no reliable trace of its former location; and, second, they called to the stand W. A. Gurganous, a legally disinterested witness, who testified that his father, W. M. Gurganous, one of those under whom the plaintiffs claim, resided upon and claimed the tract of land described in paragraph 2 of this statement during the boyhood of the witness; that Edmond Newton, under whom the defendants claim, resided upon and claimed the tract of land described in paragraph 1 of this statement at the same time; that there was then no dispute respecting the boundary between the two tracts; that Edmond Newton met the witness in the wooded area shortly before his death in 1907, and told the witness that he wanted to show him "the lines" because he was "getting old" and "old people" did not "live forever"; that Edmond Newton thereupon showed the witness the large marked white oak tree 138 feet east of Moore's Creek and the succession of marked gum-trees, and said "this is the line between me and your father"; and that the witness had known "that line" ever since he was "a kid." The plaintiffs offered other testimony indicating that during November, 1949, Porter entered upon the 24 acres of woodland in the disputed area, and cut and removed valuable timber growing upon them. The plaintiffs introduced additional evidence tending to show that the plaintiffs and those under whom they claimed did

these things successively without cessation or interruption throughout the 55 years next preceding Porter's entry upon the disputed area: (1) That they resided upon the tract described in paragraph 2 of this statement; (2) that they cultivated substantial portions of the tract, including the 6 acres embraced by the old clearings in the disputed area, in corn, cotton, tobacco, and other crops; (3) that they used the remaining portions of the tract, including the 24 acres of woodland in the disputed area, as sources for crossties, fuel, tar, and turpentine; (4) that they did these things openly and publicly to the knowledge of all persons in the vicinity under the claim that they owned the tract in fee simple under their deeds up to the exterior lines called for by those instruments; and (5) that they asserted that the true dividing line between the tract claimed by them and the tract described in paragraph 1 of this statement was delineated on the earth's surface by the large marked white oak 138 feet east of Moore's Creek and the succession of marked gums.

11. When the plaintiffs had introduced their evidence and rested their case, Judge Burney allowed the motion of Porter and the defendants for a compulsory nonsuit, and entered judgment accordingly. The plaintiffs excepted and appealed, assigning the entry of the compulsory nonsuit as error.

Rountree & Rountree and Wyatt E. Blake for plaintiffs, appellants.
Leon H. Corbett and Harry T. Fisler for defendants, appellees.

ERVIN, J. When the answers are read aright, they admit the plaintiffs' title to the tract of land described in paragraph 2 of the statement of facts. They merely put the actual location of the true dividing line between the plaintiffs' land and the tract claimed by the defendants in issue by alleging, in essence, that the disputed area is covered by the deeds of the defendants rather than the deeds of the plaintiffs. This being true, it was not obligatory for the plaintiffs to offer evidence sufficient to establish title by adverse possession or otherwise. But it was incumbent upon them to present testimony ample to show that the disputed area lies within the bounds of their tract. *Williamson v. Bryan*, 142 N.C. 81, 55 S.E. 77.

The true dividing line between the plaintiffs' land and the tract claimed by the defendants is the defendants' northern line, which is thus defined in their deeds: "Beginning at a red oak near the run of Moore's Creek, running south 88 east 375 poles to a stake in the back line."

The plaintiffs assert with complete correctness that the disputed area necessarily lies within the bounds of their tract if the true dividing line is delineated upon the earth's surface by the large marked white oak tree standing 138 feet east of Moore's Creek and the succession of marked gum-trees.

The plaintiffs undertook to prove at the trial that the marked white oak and the succession of marked gums fix the actual location of the true dividing line upon the earth's surface. To this end, the plaintiffs introduced evidence ample to establish these propositions: First, that the "red oak near the run of Moore's Creek" called for by the defendants' deeds had long since vanished from the earth leaving no reliable trace of its former location; and, second, that Edmond Newton, under whom the defendants claim, had declared, in substance, under the circumstances detailed by the witness W. A. Gurganous that the marked white oak and the succession of marked gums disclosed the actual location upon the earth's surface of the dividing line between the land now owned by the plaintiffs and the tract now claimed by the defendants.

This evidence is sufficient to support a finding by a jury that the disputed area lies within the bounds of the tract admittedly owned by the plaintiffs. As a consequence, it was error to nonsuit the action.

To be sure, it may be argued with much force that Edmond Newton's statement falls short of the requirements of the exception to the hearsay rule which admits declarations concerning private boundaries, because it does not refer to a monument of boundary or a natural object called for in the deeds. *Lumber Co. v. Triplett,* 151 N.C. 409, 66 S.E. 343; *Bland v. Beasley,* 140 N.C. 628, 53 S.E. 443. Be that as it may, the statement satisfies the requirements of the independent rule governing admissions by predecessors in interest, which declares that "any statement by a person holding or claiming an interest in property, which could have been used against him in litigation over such interest, is admissible to the same extent and for the same purposes against parties claiming under him." Stansbury on North Carolina Evidence, section 174. Under this independent rule, a declaration against interest made by a former owner of land during the time of his ownership respecting the location of the boundaries of the land is competent against one who claims under him any interest in the land acquired since the declaration was made. *Gray v. Coleman,* 171 N.C. 344, 88 S.E. 489; *Byrd v. Spruce Co.,* 170 N.C. 429, 87 S.E. 241; *Ellis v. Harris,* 106 N.C. 395, 11 S.E. 248; *Cansler v. Fite,* 50 N.C. 424; *Webb v. Hall,* 18 N.C. 278. See, also, in this connection: *Carr v. Bizzell,* 192 N.C. 212, 134 S.E. 462.

In reaching the conclusion that it was error to nonsuit the action, we do not overlook the circumstance that the defendants pleaded the judgment in the former action as "*res adjudicata* of all matters and things involved in this action," or the fact that one of the two lawyers who represented the plaintiffs at the trial made this statement to the presiding judge just before the entry of the nonsuit: "We will stand on adverse possession."

The plea of *res adjudicata* is without merit for the very simple reason that the allegations, the evidence, and the merits of the present action are substantially different from the allegations, the evidence, and the merits of the former action. *Hampton v. Spinning Company,* 198 N.C. 235, 151 S.E. 266.

The trial judge should have ignored the statement of one of the plaintiffs' trial counsel to the effect that the plaintiffs would "stand on adverse possession" as a casual, hasty, or inconsiderate admission not binding the plaintiffs. *Davidson v. Gifford,* 100 N.C. 18, 6 S.E. 718. The statement was in irreconcilable conflict with the defendants' admission of the plaintiffs' title, and the theory of the plaintiffs' case. Moreover, it was repudiated in express terms by the plaintiffs' other trial counsel.

The statement would not have warranted the compulsory nonsuit even if the answers of the defendants had denied the plaintiffs' title to the land embraced by their deeds and thus compelled the plaintiffs to "stand on adverse possession." The plaintiffs offered testimony on the trial of the present action tending to show that their deeds covered the disputed area. This testimony and the other facts in evidence would have sufficed to show that the plaintiffs and those under whom they claim had acquired title to the 30 acres in controversy by adverse possession under color of title for a period of seven years according to the statute embodied in G.S. 1-38 had the answers of the defendants denied the plaintiffs' title to the land embraced by their deeds.

For the reasons given, the compulsory nonsuit is

Reversed.

WESLEY G. HEATH v. ALBERT T. KIRKMAN AND L. JOHN KIRBY, T/A KIRK'S SINEATH MOTOR COMPANY, AND WILLIAM ATKINS.

(Filed 19 May, 1954.)

1. Pleadings § 19b—

If two or more causes of action are compounded in the complaint and not separately stated, demurrer should be sustained. G.S. 1-123, G.S. 1-127, Rule of Practice in the Supreme Court, No. 20 (2).

2. Same—

In this action to recover for personal injuries resulting from negligence, plaintiff alleged, in addition to the facts relied on as constituting the action for negligence, facts tending to show false arrest and malicious prosecution as bearing on the issue of damages, but demanded no separate recovery therefor, *Held:* The complaint states but a single cause of action and the intimations of additional causes of action will be treated as mere embellishments and not germane to the cause of action stated, and therefore demurrer for misjoinder of causes is properly overruled.

3. Negligence § 16: Pleadings § 30—

In this action to recover for negligent injury, allegations referring to the defendant driver of the vehicle by the nickname of "Wild Bill" and allegations by way of explanation as to how the driver acquired the nickname, unrelated to any allegations that defendant employers had knowledge that the driver customarily operated vehicles in a negligent manner and that they knowingly permitted him to operate the vehicle in question on the occasion referred to, were properly stricken upon motion.

4. Automobiles § 23b—

The owner of a motor vehicle who entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, is liable for such person's negligent operation of the vehicle upon the principle that the owner is negligent in entrusting its operation to such person.

5. Same: Negligence § 16: Pleadings § 30—

Where plaintiff alleges liability under the doctrine of *respondeat superior*, and also alleges liability on the principle that defendant employers were negligent in permitting a person to drive their vehicle who was known by them to be an incompetent and reckless driver, the allegations as to the known recklessness of the driver are relevant if the allegations relating to *respondeat superior* are denied, and such allegations will not be stricken upon motion prior to the filing of an answer, since upon such motion the court will not attempt to chart the course of the trial.

6. Damages § 6—

A person who has been injured by the negligent act of another is entitled to recover all damages naturally and proximately resulting from the negligent act in suit, including, ordinarily, injuries resulting from delay in receiving proper medical treatment as well as injuries caused by unsuccessful medical treatment which tend to aggravate the damages for which the wrongdoer is responsible.

7. Same: Negligence § 16: Pleadings § 30—

In an action to recover for negligent injury, allegations tending to show circumstances in respect to where the injured plaintiff was, and in respect to his physical condition from the time of his injury until the time he received proper medical treatment, may be competent for the purpose of establishing damages resulting from delay in receiving proper medical attention, but allegations tending to establish false arrest or malicious prosecution instigated by defendants, resulting in plaintiff being taken to jail after injury, should be stricken on motion as irrelevant to the cause of action for negligent injury.

8. Same: Damages § 7—

Punitive damages for personal injury depend upon the circumstances under which the injury was inflicted and not upon occurrences subsequent thereto, and therefore allegations relating to false arrest and malicious prosecution subsequent to the infliction of the injury cannot be germane to the issue of punitive damages.

CROSS-APPEALS by plaintiff and by defendants from *Clarkson, J.*, 1 March, 1954, Civil Term, of GUILFORD.

Civil action to recover damages for personal injuries.

The gist of the allegations of the complaint may be stated as follows:

1. Defendants Kirkman and Kirby, partners trading as Kirk's Sineath Motor Company, owned and used as part of their business equipment a motor vehicle described as a wrecker, which was operated by their employee, defendant Atkins, when answering service calls.

2. On 12 December, 1952, about 10:30 P.M., plaintiff, who was unable to start his automobile, telephoned Kirk's Sineath Motor Company, requesting that they send someone to help him start his car, advising that he would be waiting at a designated service station.

3. In response to plaintiff's request, defendant Atkins "was sent" out, operating the wrecker, to aid plaintiff; and he so operated the wrecker as employee of his codefendants within the scope of his employment and in furtherance of his employers' business.

4. Plaintiff was standing near the front of the designated service station, plainly visible to defendant Atkins as he approached and turned into the service station "in a normal, ordinary manner"; and "while plaintiff remained standing where he was, the driver of the wrecker . . . suddenly and without warning to the plaintiff and at a time when the front of the wrecker was so close to the plaintiff that it was impossible for the plaintiff to move and avoid being struck, carelessly, negligently and recklessly turned the wrecker toward the plaintiff, struck him and knocked him down, severely injuring him . . ."

5. As the proximate result of the wrongful conduct of defendants, plaintiff is entitled to recover compensatory damages in the amount of $146,155.70 and punitive damages in the amount of $10,000.00 The compensatory damages consist of medical, hospital, etc., bills and expenses of $4,830.70; loss of earnings of $3,825.00; prospective loss of earnings of $62,500.00; and pain and suffering, past, present and prospective, of $75,000.00.

Other allegations of the complaint will be set forth in the opinion.

Defendant, within the statutory time, moved to strike designated allegations of the complaint. Thereafter, also within the statutory time, defendants demurred to the complaint, specifying as ground for demurrer a misjoinder of parties and of causes of action and also a misjoinder of causes of action. The court below overruled the demurrer. Defendants excepted. The court below allowed the motion to strike in part and denied it in part. Plaintiff and defendants excepted to each adverse ruling.

From the orders of the court below, implementing these rulings, both plaintiff and defendants appealed, assigning errors.

Hines & Boren and Smith, Sapp, Moore & Smith for plaintiff, appellee and appellant.

Jordan & Wright for defendants, appellants and appellees.

BOBBITT, J. It is plain that the complaint states facts sufficient to constitute a cause of action for damages for personal injuries proximately caused by the negligence of defendants in operating the wrecker in such manner as to strike and injure plaintiff.

If more than one cause of action is stated, the complaint is subject to demurrer; for there is no attempt to state separately more than one cause of action. In instances where plaintiff may unite in the same complaint two or more causes of action, each cause of action must be separately stated. G.S. 1-123. Demurrer is proper when it appears upon the face of the complaint that, "5. Several causes of action have been improperly united." G.S. 1-127. The quoted provision has been considered frequently when demurrer has been interposed on the ground that two or more *separately stated* causes of action have been improperly united in the same complaint. It is equally applicable when a complaint alleges facts sufficient to constitute two or more causes of action but fails to state separately facts sufficient to constitute each cause of action. G.S. 1-123; Rule 20 (2), Rules of Practice in the Supreme Court, 221 N.C. 557; *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648; *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615; *Large v. Gardner,* 238 N.C. 288, 77 S.E. 2d 617. Too, each separately stated cause of action must be complete within itself; and it is not permissible to incorporate by reference allegations set forth in another separately stated cause of action. *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232; *Alexander v. Brown,* 236 N.C. 212, 72 S.E. 2d 522; *Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47.

In the words of *Rodman, J.,* in *Land Co. v. Beatty,* 69 N.C. 329: "On examining the complaint we find that it does not profess to state more than one cause of action. If in fact it states two it would be demurrable, because it compounds and does not state them separately." Unless the contrary plainly appears, it will be assumed that a complaint that does not set forth separate statements of more than one cause of action is intended to allege a single cause of action and that intimations of other causes of action are mere embellishments and not germane to the cause of action constituting the heart of the complaint.

"If there are several causes of action alleged, the defendant may demur to each one separately, or he may demur to some and answer to the others, and if the demurrer should be sustained to any one cause it would not affect the others; but if a demurrer is interposed to the whole complaint and any one of the causes of action is good, the demurrer will be overruled." McIntosh, N. C. P. & P. 463, and cases cited. Insistence upon

separate statement of each cause of action is required in order to give practical effect to the defendant's right to demur to one cause of action and answer another.

It may be that the demurrer here was interposed as a precautionary measure, prompted by an apprehension that the court might consider that the complaint alleged facts sufficient, if deftly separated, to constitute two or more causes of action. But in our view, only one cause of action is alleged, namely, that stated above. Plaintiff, in his brief, states that the complaint "tends to prove a single, general right, one for injury to the person of the plaintiff." The elements of compensatory damages alleged are such as proximately resulted from personal injuries inflicted upon plaintiff when struck by the wrecker. There being but one cause of action, the order of the court below overruling demurrer was correct.

Upon consideration of the motion to strike, we restrict our discussion to what appear to be the more significant allegations. The applicable rules for our guidance are summarized by *Johnson, J.*, in *Daniel v. Gardner, ante*, 249, 81 S.E. 2d 660.

Plaintiff, in paragraph IV, alleges: "That the defendant William Atkins, due to careless and reckless propensities well known to his employers and co-defendants in the careless and reckless operation of motor vehicles and particularly the careless and reckless operation of the Kirk's Sineath Motor Company wrecker, was and is known by the descriptive appellation and nickname, 'Wild Bill' Atkins." From that point on, throughout the complaint, plaintiff, dropping all formality and reserve, repeatedly and familiarly refers to the defendant Atkins by use of the sobriquet, "Wild Bill." A nickname may be appropriate or may have originated in jest. In any event, the incompetence or past recklessness of a person in respect of the operation of motor vehicles cannot be proven by evidence tending to show his nickname.

We recognize the principle that the owner of a motor vehicle who entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, thereby becomes *liable* for such person's negligence in the operation thereof; and in such case the *liability* of the owner is predicated upon his own negligence in entrusting the operation of the motor vehicle to such a person. 60 C.J.S. p. 1057, Motor Vehicles, sec. 431; 5 Am. Jur. 696, Automobiles, sec. 355; *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162; *McIlroy v. Akers Motor Lines,* 229 N.C. 509, 50 S.E. 2d 530. This principle is applicable only when the plaintiff undertakes to cast *liability* on an owner not otherwise responsible for the conduct of the driver of the vehicle. But evidence of reputation for negligence or of acts of negligence on prior unrelated occasions is not competent to show that the

driver was negligent on the occasion of plaintiff's injury. *Robbins v. Alexander*, 219 N.C. 475, 14 S.E. 2d 425.

Paragraph IV is so phrased that the allegations thereof do not purport to state facts relevant in themselves but only by way of explanation of how the defendant Atkins, according to plaintiff's allegations, acquired the nickname of "Wild Bill." Apparently, the pleader's zeal to put the label of "Wild Bill" on the defendant Atkins diverted him from alleging facts that might have been included, *e.g.*, that the defendant Atkins, to the knowledge of his codefendants, had operated motor vehicles, including the wrecker, in a negligent and reckless manner, and that his codefendants knowingly permitted him to operate their said wrecker on the occasion referred to in the complaint. But paragraph IV must stand or fall as plaintiff has phrased it. As presently phrased, it was properly stricken from the complaint.

However, we do not perceive that plaintiff has been prejudiced by the ruling, for there remains in the complaint, as subparagraph (d) of paragraph XII the allegations: "The defendants Albert T. Kirkman and L. John Kirby, trading as Kirk's Sineath Motor Company, were negligent in having and retaining in their employ William Atkins and entrusting to him the operation of their wrecker, knowing of his reckless habits and disposition in the operation of motor vehicles generally and of their wrecker in particular."

The allegations of the complaint are explicit to the effect that Atkins on the occasion of plaintiff's injury was acting within the scope of his employment by his codefendants and in furtherance of their business. Of course, we cannot assume that such allegations of agency will be admitted when answers are filed. If admitted, the *liability* of the defendant employers would rest upon *respondeat superior;* and subparagraph (d) of paragraph XII would become irrelevant and prejudicial and should be stricken upon motion then made. On the other hand, if the allegations invoking *respondeat superior* are denied, the plaintiff should be allowed to amend his complaint so as to allege additional ultimate facts, such as indicated above, in conformity with the theory of liability set forth in subparagraph (d) of paragraph XII.

Plaintiff, in paragraph VIII, alleges, in part: "Plaintiff requested, and . . . Atkins . . . agreed, to go to a nearby filling station . . . to telephone for help, the plaintiff requesting . . . to call for an ambulance.

". . . Atkins did not call for an ambulance but immediately reported . . . the occurrence to Kirk's Sineath Motor Company, . . . that, pursuant to the telephone report from . . . Atkins, the representative of . . . Kirk's Sineath Motor Company called the North Carolina State Highway Patrol and requested that they go to the scene where plaintiff lay injured.

"Within about 15 minutes the State Patrol automobile arrived and the two men, Patrolman Boone and Patrolman Moore, were advised by the plaintiff that the wrecker had struck him and that he was seriously injured and requested that they take him to the hospital; the information to the State Patrolman and the request that he be carried to the hospital were in the presence of . . . Atkins; the two State Patrolmen thereupon raised the plaintiff, helped him into their vehicle and started into Greensboro, North Carolina."

Then follow extended allegations as to conversations and transactions between plaintiff and the officers, the substance being that the officers took him to the city jail in Greensboro rather than to a hospital and that he remained in jail until taken to a hospital the following morning.

Plaintiff, in paragraph IX, alleges: "Plaintiff was charged, by warrant, with public drunkenness. Plaintiff believes and alleges that the charge was instigated and, therefore, instituted by defendants. That the charge was maliciously made by the defendants and was without probable cause and for the ulterior purpose of covering up the wrongful conduct and negligent and reckless action of 'Wild Bill' Atkins in causing plaintiff's injury as hereinbefore and hereinafter alleged; that plaintiff was later tried in the Municipal-County Court of Greensboro on the charges and found not guilty."

Plaintiff does not allege that he received any new injury on account of any of the circumstances narrated in the allegations quoted above. When stripped of allegations of evidential facts, as distinguished from ultimate facts, the allegations relevant to plaintiff's cause of action tend to show delay in receiving proper medical treatment for his injuries. To the extent that plaintiff attempts to graft on his stated cause of action allegations of complicity in relation to his arrest, imprisonment and prosecution, these are not germane to the cause of action presently before the court. If entitled to recover at all, plaintiff is entitled to recover all damages naturally and proximately caused by the injuries inflicted upon him by the defendants in the operation of the wrecker. Evidence tending to show certain circumstances in respect of where he was and in respect of his physical condition from the time he was injured until he received proper medical treatment would be competent. However, the competency of evidence, on direct and on cross-examination, cannot be determined with precision until the defendants have answered and the evidence is developed. Explanation of what occurred during the delay would throw light upon whether plaintiff received new injuries inflicted by other persons and hence bear upon the subject of proximate cause of his damages. These are evidential matters and not ultimate facts. But the liability of the defendants, if any, does not spring from these intervening events. It began and remains on the basis of consequential damages for injuries sus-

tained by plaintiff when struck by the wrecker; and if delay in receiving proper medical treatment aggravated his injuries the defendants are accountable on the basis of damages naturally and proximately resulting from the tortious conduct upon which the suit is grounded. Injuries resulting from delay in receiving proper medical treatment as well as injuries caused by unsuccessful medical treatment ordinarily tend to aggravate the damages for which the wrongdoer is responsible. *Lane v. R. R.*, 192 N.C. 287, 134 S.E. 855, 51 A.L.R. 1114; *Bost v. Metcalfe*, 219 N.C. 607, 14 S.E. 2d 648.

All of the elements of compensatory damages plaintiff seeks to recover are comprehended by the oft stated rule as to the measure of damages in personal injury cases based on negligence. *Ledford v. Lumber Co.*, 183 N.C. 614, 112 S.E. 421.

The allegations quoted from paragraphs IX and X are irrelevant and prejudicial and should have been stricken. If plaintiff has a cause of action for false arrest, malicious prosecution or otherwise springing from facts suggested by these allegations, he may bring an independent action therefor. In this action, the allegations tend only to divert attention from the real issues and generally to confuse rather than clarify the issues and trial.

The appeal does not present the question as to the sufficiency of the allegations to warrant submission of an issue of punitive damages. Suffice it to say, decision of this question depends upon the circumstances giving rise to the alleged cause of action and not upon what occurred subsequent to the infliction of the personal injuries.

The result is: Upon plaintiff's appeal: The portion of the order of the court below striking allegations from the complaint is affirmed. Upon defendants' appeal: The order of the court below overruling defendants' demurrer is affirmed. The part of the order of the court below denying defendants' motion to strike is reversed and the challenged allegations are stricken, except as to subparagraph (d) of paragraph XII; and in respect to said subparagraph (d) the order of the court below is affirmed.

Plaintiff's appeal: Affirmed.

Defendants' appeal: Affirmed in part, reversed in part.

STATE v. NICK BOURNAIS.

(Filed 19 May, 1954.)

1. Automobiles § 28e—

Evidence *held* sufficient to support verdict of guilty of manslaughter based upon culpable negligence in operation of automobile.

2. Automobiles § 28f: Homicide § 27e—

In a prosecution for involuntary manslaughter, an instruction to the effect that defendant would be guilty if he killed a human being without intent in doing a lawful act "in an unlawful manner," rather than "in a culpably negligent manner," *held* not to constitute prejudicial error when in other portions of the charge the court painstakingly distinguishes between civil and criminal negligence, and instructs the jury that the unintentional violation of safety statutes not involving actual danger to life, limb, or property would not constitute culpable negligence unless such violation was reckless or in wanton disregard of the safety and rights of others.

3. Criminal Law § 81c (2)—

An exception to an excerpt from the charge will not be sustained when the charge is free from prejudicial error when construed contextually.

APPEAL by defendant from *Armstrong, J.*, October Criminal Term, 1953, of GUILFORD (Greensboro Division).

This is a criminal prosecution tried upon a bill of indictment charging the defendant with manslaughter. The charge arose out of the defendant's alleged operation of an automobile in a culpably negligent manner, resulting in the death of one Henry M. Smith.

The evidence of the State tends to show the following facts: The accident occurred about noon on 17 March, 1953, on Highway No. 421, near Moriah Methodist Church, south of Greensboro, as a result of a collision between an automobile driven by the defendant and one driven by Henry M. Smith. Smith died two days later of injuries received in the collision, and William Earl Stowers, a passenger in the defendant's car, was instantly killed.

Smith was traveling south in his Plymouth car on his right-hand side of the highway at a speed of approximately 35 miles per hour, when his car was struck by the defendant's automobile which was traveling north at a speed of approximately 60 or 70 miles an hour. Immediately before the collision, the two right wheels of defendant's car had been off the pavement for a distance of approximately 238 feet, and when it cut back on the pavement it skidded sideways across the highway a distance of about 50 feet and hit the Smith car. One witness testified the defendant's car "just seemed to leap across the road and hit the Smith car." Another testified that defendant's Pontiac hit Mr. Smith's Plymouth, "turned it

right up on the back end and around to the right . . . and the Pontiac just jumped. It was off the ground after it hit Mr. Smith's car for, it looked like, 20 feet, or close to it." The defendant's Pontiac car came to rest some 15 or 20 feet from the road in a ravine about six feet deep, on the defendant's left-hand side of the highway.

According to the testimony of a highway patrolman, who reached the scene a few minutes after the accident, the right wheels of defendant's car began to skid on the dirt shoulder of the highway 106 yards south of the point where it came to rest; that the car cut back on the paved road a distance of approximately 80 feet south of the point where it came to rest; that after the car cut back on the pavement there were four skid marks across the road; that the skid marks on the road and the dirt shoulder of the road were traceable from the defendant's car for a distance of 318 feet; that at the point where the defendant's car cut back on the paved road, the shoulder and the pavement were approximately level.

The defendant testified that he was driving his car about 50 miles an hour and had a flat tire; that he was 50 or 60 feet from the Smith car when he applied his brakes; that he lost control of the car when he stepped on the brakes and the right side of his car struck the Smith car; that he was going sideways when he hit the Smith car.

From a verdict of guilty and the sentence imposed pursuant thereto, the defendant appeals, assigning error.

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

Rose & Sanford and Stacy Weaver, Jr., for defendant, appellant.

DENNY, J. The defendant does not challenge the sufficiency of the evidence to carry the case to the jury. In fact, there is ample evidence to support the verdict. *S. v. Huggins,* 214 N.C. 568, 199 S.E. 926; *S. v. Landin,* 209 N.C. 20, 182 S.E. 689; *S. v. Palmer,* 197 N.C. 135, 147 S.E. 817; *S. v. Gray,* 180 N.C. 697, 104 S.E. 647; *S. v. McIver,* 175 N.C. 761, 94 S.E. 682. However, he does except to and assign as error numerous portions of his Honor's charge to the jury, among them being the following: "In connection with this charge of involuntary manslaughter, . . . the Court instructs you that there are two types of manslaughter in North Carolina: voluntary and involuntary. Now, you are concerned in this case only with involuntary manslaughter; and the Court charges you that the crime of involuntary manslaughter for which this defendant is being tried as defined at the common law is the killing of a human being by another human being in doing some unlawful act not amounting to a felony nor likely to endanger human life and without intent to kill, *or where one kills another without intent to kill in doing a lawful act in an unlawful manner."* (Italics ours.)

The gravamen of the defendant's challenge to the correctness of the above instruction is limited to the portion thereof we have italicized.

The elements embraced in involuntary manslaughter as defined at common law are set out in *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155, in the following language. "This offense consists in the unintentional killing of one person by another without malice (1) by doing some unlawful act not amounting to a felony or naturally dangerous to human life; or (2) by negligently doing some act which in itself is lawful; or (3) by negligently failing or omitting to perform a duty imposed by law." The Court said this definition "includes unintentional homicide . . . from the performance of a lawful act done in a culpably negligent way, and from the negligent omission to perform a legal duty."

In the above case, the State relied upon the alleged breach of the statute which requires a motorist traveling on a servient highway to stop before entering a dominant highway. Public Laws of 1927, Chapter 148, section 21, now codified as G.S. 20-158. The statute, however, contains a provision to the effect that no failure so to stop before entering the dominant highway "shall be considered contributory negligence *per se* in any action at law for injury to person or property . . ." The Court conceded there was ample evidence of Satterfield's disregard of the statute and that his failure to obey the law was the negligent omission of a legal duty, citing *Ledbetter v. English,* 166 N.C. 125, 81 S.E. 1066, but held that mere proof of the failure of the defendant to obey this statute was insufficient to warrant his conviction; that to hold a person criminally responsible for a homicide his act must have been a proximate cause of the death. Whereupon the Court held the motion to dismiss should have been granted.

We concede that in the present case it would have been appropriate and required less explaining as to what was meant by "doing a lawful act in an unlawful manner," if the court in lieu of using the words "in an unlawful manner," had used the words "in a culpably negligent manner." *S. v. Satterfield, supra; S. v. Stansell,* 203 N.C. 69, 164 S.E. 580. See also *S. v. Cope,* 204 N.C. 28, 167 S.E. 456, where the late *Chief Justice Stacy* collected and classified the decisions applicable to negligence generally, including criminal or culpable negligence. But, in other parts of the charge, his Honor pointed out clearly the distinction between those statutes, the unintentional violation of which would not constitute culpable negligence, and those the violation of which would constitute such negligence. He likewise pointed out the difference between the unintentional violation of the common law rules of the road and the willful and wanton violation of such rules. For example, in this connection, his Honor charged the jury as follows: ". . . we have in North Carolina a number of rules and regulations which govern the operation of motor

vehicles on our public highways. Some of them are statutory laws enacted by the Legislature of this State for the protection of the life and limb of those who travel and use our highways commonly known and referred to as the motor vehicle laws. Then we have other rules which are known as common law rules . . . which today govern the operation of motor vehicles on our public highways. The Court charges you that the violation of these rules and regulations, whether done intentionally or otherwise, is in most instances negligence, that is, constitutes actionable negligence, and renders one civilly liable for damages if the violation proximately results in some injury or damage or death to another. On the other hand, members of the jury, I want you to clearly understand that the violation of these rules and regulations, whether statutory or common law—with the exception of the reckless driving statute, this is General Statutes of North Carolina, Section 20-140, and will be read and explained to you—which do not involve actual danger to life, limb or property, would not perforce, that is by force, of itself constitute criminal or culpable negligence such as this defendant is charged with. On the other hand, . . . I want you to clearly understand this: An intentional, willful or wanton violation of a statutory or common law rule or regulation designed for the protection of human life or limb or both, which proximately results in injury or death, is culpable negligence . . . On the other hand, members of the jury, the Court wants you to clearly understand this: An unintentional violation, that is, where a person does not intend to violate a statutory or common law rule of the road unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision—that means foresight—is not such as imports criminal or culpable negligence." The distinction between negligence that would and negligence that would not be culpable was emphasized throughout the charge and in our opinion, when it is considered contextually, as it must be, it contains no prejudicial error. *S. v. Davis,* 225 N.C. 117, 33 S.E. 2d 623; *S. v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Elmore,* 212 N.C. 531, 193 S.E. 713.

The above assignment of error forms the basis of the defendant's remaining exceptions and assignments of error. Therefore, in view of the conclusion we have reached, none of them should be sustained.

The charge of the court, when considered in its entirety, stated the applicable rules of law substantially in accord with the decisions of this Court. *S. v. Smith,* 238 N.C. 82, 76 S.E. 2d 363; *S. v. Swinney,* 231 N.C. 506, 57 S.E. 2d 647; *S. v. Hough,* 227 N.C. 596, 42 S.E. 2d 659; *S. v. Cope, supra; S. v. Gash,* 177 N.C. 595, 99 S.E. 337.

In the trial we find

No error.

CARLISLE THOMPSON AND ED GALLOWAY v. JAMES B. FOSTER AND WIFE, JO GRAHAM FOSTER.

(Filed 19 May, 1954.)

1. Brokers § 10—

Plaintiff brokers' complaint *held* sufficient to state a cause of action to recover commissions on the theory of *quantum meruit* upon allegations that defendant owners listed their property for sale at a stipulated price net to them, with the brokers to receive as commissions any amount in excess of the stipulated price which they could obtain for the property, and that plaintiff brokers obtained a prospect willing to pay a sum in excess of the stipulated price, but that through no fault of their own plaintiffs were prevented from effecting the sale because the owners took negotiations into their own hands and sold to plaintiffs' prospect for the stipulated price.

2. Pleadings § 15—

Upon demurrer, the allegations set out in the complaint will be taken as true, and liberally construed in favor of the plaintiffs.

APPEAL by plaintiffs from *Rudisill, J.*, at 1 February, 1954, Regular Civil Term of MECKLENBURG.

Civil action by real-estate brokers to recover compensation for services as alleged procuring cause of sale of land, heard below on demurrer to the complaint for failure to state facts sufficient to constitute a cause of action.

These in summary are the pertinent allegations of the complaint:

1. That at the times mentioned the plaintiffs were duly authorized real-estate brokers, registered as such, in Charlotte, North Carolina.

2 and 3. That at the times referred to the defendants, husband and wife, owned a certain tract of land located on East Boulevard in the City of Charlotte on which is situate a 13-unit apartment house.

4. That in the latter part of March, 1953, the plaintiffs met with the defendant James B. Foster, by appointment, at his home, at which time they were advised by Foster that he and his wife were desirous of selling their apartment property "for the sum of $50,000 net to them," and authorized the plaintiffs to procure a purchaser therefor on such basis.

5. That the plaintiffs thereupon entered into an extensive advertising campaign for the sale of the property and worked diligently to procure a purchaser. They received from one prospect an offer in the amount of $48,000. This offer was submitted to and refused by James B. Foster. Thereafter, on 18 May, 1953, one J. D. Crowder came to the plaintiffs' office in response to their advertisement for sale of the property in *The Charlotte Observer* of Sunday, 17 May, 1953. Crowder, after being shown the apartment property, stated he had some property on South

Boulevard which Lance, Inc., wanted to purchase but that he thought the long-term capital gain might prevent him from selling this property unless Lance, Inc., could trade some other property to him for it, the gain in such event under the provisions of the Internal Revenue Code not being recognized for income tax purposes.

6. Thereafter the plaintiffs saw Crowder several times with reference to the property.

7. In August, 1953, the plaintiffs talked with James B. Foster and told him the only two prospects to whom the property might be sold were the person whose offer of $48,000 had been refused in May, and J. D. Crowder, "who was quite interested in the purchase of the property but wanted to work out a three-way trade and had not made a cash offer therefor."

8. On 12 September, 1953, the plaintiff Carlisle Thompson called James B. Foster for an appointment to show the property to a third prospect. At that time Foster "told . . . Thompson . . . he had a man who would pay him $55,000 any time he agreed to sell and that he did not know whether he wanted to sell the property or not; . . ." Upon questioning, the defendant Foster told the plaintiff Thompson that the person who would pay $55,000 for the property was J. D. Crowder. Whereupon, the plaintiff Thompson told the defendant James B. Foster again that Crowder was plaintiffs' prospect, but that he wanted to work out a three-way trade for his South Boulevard property. The plaintiff Thompson further told "James B. Foster at that time that the plaintiffs would expect compensation from the defendants for their services on any sale of the property by the defendants to . . . Crowder."

9. That thereafter J. D. Crowder and the defendants agreed upon the sale of the property and in pursuance of the agreement deeds were executed as follows:

(a) On 28 September, 1953, the defendants conveyed to J. D. Crowder the apartment property, and on the same day Crowder and wife conveyed to the defendants the property on South Boulevard. The deeds, as recorded in the Public Registry of Mecklenburg County, show revenue stamps indicating a sale price in each instance of $10,000.

(b) On 29 September, 1953, the defendants by deed recorded in the Public Registry of Mecklenburg County conveyed to Lance, Inc., the property on South Boulevard which they had acquired from Crowder and wife, the revenue stamps on the deed indicating a sale price of $50,000.

10. As a result of the three-way transaction, "the property of the defendants was exchanged for property of . . . J. D. Crowder, and the defendants . . . received $50,000 from the sale of the property which had been conveyed to them by . . . Crowder and wife . . ."

11. That the plaintiffs commenced the negotiations with J. D. Crowder; that pending the negotiations, James B. Foster, unknown to plaintiffs, took the negotiations into his own hands and completed them and agreed with Crowder to enter into a three-way transaction with him and with Lance, Inc.; that in consequence, the defendants exchanged the apartment property with Crowder for the property he owned on South Boulevard and immediately sold the latter to Lance, Inc., thereby procuring $50,000 for their apartment property which had been placed in the hands of the plaintiffs for sale.

12. (Omitted as not being pertinent to decision.)

13. That the defendants had authorized the plaintiffs to sell the apartment property "for $50,000 net to them, agreeing to pay the plaintiffs . . . for their services . . . any sum in excess of $50,000; . . ."

14 and 15. That the plaintiffs were the procuring cause of the defendants' sale, and their services were worth $2,500, 5% of the purchase price received by the defendants; that the defendants are indebted to the plaintiffs in that amount, for which demand has been made and payment refused.

The trial court entered judgment sustaining the demurrer and dismissing the action. From the judgment so entered, the plaintiffs appealed.

Henry E. Fisher and Lelia M. Alexander for plaintiffs, appellants.
Kennedy, Kennedy & Hickman for defendants, appellees.

JOHNSON, J. The brokerage contract or listing here in suit does not purport to have conferred on the plaintiffs the exclusive right to sell the defendants' property. Therefore, the legal principles involved will be stated and discussed, and should be interpreted, against that factual background. See 8 Am. Jur., Brokers, Sections 57 and 192.

Ordinarily, where property is listed with a broker for sale at a stipulated price, out of which the broker's compensation is to be paid, and a sale is effected through the broker as a procuring cause, he is entitled to compensation, even though the final negotiations be conducted by the owner, who in order to make a sale accepts a price not exceeding or less than that stipulated to the broker, the theory being that the owner waives the stipulation regarding the price, and this being so, the law will not allow the owner of property sold to reap the benefits of the broker's labor without just reward. Therefore, in such case recovery may be had upon *quantum meruit. Lindsey v. Speight,* 224 N.C. 453, 21 S.E. 2d 371; *Trust Co. v. Goode,* 164 N.C. 19, 80 S.E. 62; *Martin v. Holly,* 104 N.C. 36, 10 S.E. 83; 8 Am. Jur., Brokers, Sections 172 and 190; Annotations: 43 A.L.R. 1103, 1104; 128 A.L.R. 430.

However, if the broker's contract provides for a stipulated net price to be paid the owner, with the broker's compensation being contingent upon payment out of whatever sum, if any, he is able to obtain for the property over and above the fixed sum to be obtained by the owner, the broker may not recover when the owner sells at the stipulated net price, or less, to a person to whom the broker first shows the property, unless the broker is able to show (1) that he was a procuring cause of the sale in the sense that he first called the purchaser's attention to the property and started the negotiations which culminated in the sale, and (2) that he, the broker, was prevented by fault of the owner from making a sale at a sum in excess of the stipulated net price. See 8 Am. Jur., Brokers, Sec. 190, p. 1102; Annotations: 43 A.L.R. 1103, 1111 *et seq.*, and 9 A.L.R. 1194. See also *Mallonee v. Young*, 119 N.C. 549, 26 S.E. 141; *Holcomb v. Stafford*, 102 Minn. 233, 113 N.W. 449; *Ball v. Dolan*, 21 S.D. 619, 114 N.W. 998; *Gilmore v. Bolio*, 165 Mich. 633, 131 N.W. 105; *Karr v. Moffett*, 105 Kan. 692, 185 P. 890.

In *Holcomb v. Stafford, supra*, the broker was to receive as his compensation all he could obtain for the property above $500. The property was afterwards sold by the owner to the broker's customer for that sum. On conflicting evidence the trial court found that the purchaser at all times refused to pay more than $500. The Court said: "Here the broker was entitled to the excess over and above the net price to the owner, and he was not entitled to a commission, except on procuring a purchaser ready, able, and willing to pay more than that price."

In *Gilmore v. Bolio, supra*, the defendant authorized the plaintiff to sell property for $1,400 net to defendant, and the prospective purchaser introduced by the plaintiff broker refused to buy on those terms, but about six weeks later purchased from the defendant for $1,300. Held, that the plaintiff was not entitled to recover, his right to compensation being dependent upon his ability to obtain a purchaser for a greater sum than $1,400.

Similarly, under the terms of the contract in the case at hand the plaintiffs' right to compensation was dependent upon their ability to obtain a purchaser for a sum greater than $50,000. They have alleged in substance that the defendants, after being advised that J. D. Crowder was a prospect, took over the negotiations with him, and that the defendants, after being offered $55,000 by Crowder, nevertheless closed the deal with him at $50,000.

These crucial allegations, with others set out in the complaint, when taken as true and liberally construed in favor of the plaintiffs, as is the rule on demurrer (*Scott v. Veneer Co., ante*, 73, top p. 77, 81 S.E. 2d 146), are sufficient to state a cause of action against the defendants on the theory that the plaintiffs were the procuring cause of the sale in the

sense that Crowder was their initial prospect and that they were prevented by fault of the defendants from making a sale at a sum in excess of the stipulated net price of $50,000. This overthrows the demurrer. The judgment below is

Reversed.

STATE v. CHARLES GALES.

(Filed 19 May, 1954.)

1. Criminal Law § 56—

Defects or irregularities in the drawing or organization of the grand jury may not be presented by motion in arrest of judgment.

2. Indictment and Warrant § 12—

Motion to quash the indictment as a matter of right on the ground of defect or irregularity in the drawing or organization of the grand jury must be made before arraignment and plea; such motion made after plea is addressed to the discretion of the court; after the petit jury is sworn and impaneled, the court has no discretionary power to entertain such motion.

3. Grand Jury § 2: Statutes § 12—

A Public-Local law providing for rotating grand juries in a designated county and repealing a part of a former law on the subject (Chapter 465 Public-Local Laws 1935; Chapter 104 Public Laws 1923), was in force on the effective date of the General Statutes, but through inadvertence was overlooked and the repealed statute was incorporated in the General Statutes (G.S. 9-25). *Held:* The Public-Local law remains in effect. G.S. 164-7.

4. Homicide § 17—

Testimony to the effect that defendant had intentionally assaulted the deceased, inflicting personal injuries, on an occasion antedating the fatal assault, *held* competent as bearing on intent, malice, motive, premeditation, and deliberation on the part of defendant.

5. Criminal Law § 78d (3): Trial § 15—

A defendant waives objection to the unresponsive part of the answer of a witness by failing to make a specific motion to strike out that particular part.

6. Homicide § 25—

Evidence in this case *held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree. G.S. 14-17.

APPEAL by prisoner from *Clifton L. Moore, J.*, and a jury, at January Term, 1954, of HOKE.

Criminal prosecution upon an indictment charging the prisoner with the first degree murder of his wife.

The State's evidence gave this version of the heart-rending tragedy:

1. The prisoner, Charles Gales, and the deceased, Lucille Gales, were husband and wife. They maintained a home for themselves and their small children upon a farm in Hoke County, where he pursued the calling of a tenant farmer.

2. The prisoner beat his wife several times during the year of the homicide. He was twice arrested and tried for so doing upon warrants issued by the Recorder's Court of Hoke County at her instance. At the first trial, which occurred in May, 1953, he was convicted and sentenced to a term on the roads; and at the second trial, which took place four or five days before the homicide, he was acquitted because his wife retracted in open court the matters stated in the criminal complaint upon which the warrant had been issued.

3. While he was confined in jail awaiting his second trial, the prisoner declared that "if his wife put him in jail any more, he was going to kill her."

4. After the midday meal on 1 October, 1953, the prisoner laid violent hands upon his wife and threatened "to kill . . . his oldest boy and . . . her."

5. The wife thereupon left the family dwelling, where this assault occurred; dispatched a neighbor to inform the judge of the Recorder's Court of the prisoner's conduct and threat; and repaired to a cotton patch, where she and the children undertook to pick cotton.

6. The prisoner followed his wife to the cotton patch, and charged her with having "sent for the law." When she denied the charge, he informed her that "he was leaving" and requested her to "go to the house with him and help him pack his clothes." She "said she was not going" because "he wanted to take her up there and fight her."

7. The prisoner afterwards confessed that he had determined to kill his wife before he went to the cotton patch, and that he sought to induce her "to go to the house with him" so he could kill her out of the sight of the children.

8. When his wife refused to accompany him, the prisoner went to the house, and armed himself with the detached barrel of a double-barreled shotgun.

9. The prisoner returned to the cotton patch with this weapon. His wife attempted to flee. He outran her, felled her, and beat her with the shotgun barrel until her brains exuded from her crushed skull and she died. He then kicked her lifeless body, and exclaimed: "Now, you damn bitch. I know you are dead."

10. The prisoner departed from the scene of the slaying at this juncture. Several hours later he surrendered to peace officers who were

searching for him. He told the officers that he had killed his wife. They asked him whether he meant to kill her. He replied: "I sure did." They asked him whether he knew his wife was dead when he quit beating her. He responded: "If I had not, I would have still been beating her."

11. The prisoner was a normal man at the times mentioned in paragraphs 3, 4, 5, 6, 7, 8, 9, and 10. Moreover, "he did not give any appearance of being drunk or under the influence of anything."

The prisoner offered evidence to the effect that "he did not play with other children" during his childhood; that "he was always slow in his learning," and for that reason did not advance beyond the fourth grade in school; that his mother died by her own hand in a fit of mental depression, and one of his uncles suffered at times from insanity; that he suffered a head-injury in a fall after attaining his maturity, and was not "in his right mind at times"; that four days before the date named in the indictment, he obtained 16 capsules from a drug store on the prescription of his physician for "congestion in the head" incident to a cold; that each of these capsules contained one-fourth of a grain of codeine, an alkaloid obtained from opium; that he took "6, 7, 8, or a handful" of these capsules at the same instant for the purpose of destroying himself while his wife and children were in the cotton patch picking cotton; and that he became unconscious a few minutes later and had no knowledge of anything that happened from that time "until he woke up . . . in the woods" just before he allegedly surrendered to the peace officers.

The trial judge charged the jury that it could return one of these verdicts: (1) Guilty of murder in the first degree; (2) guilty of murder in the first degree with recommendation that the punishment be imprisonment for life in the State's prison; (3) guilty of murder in the second degree; (4) guilty of manslaughter; or (5) not guilty.

The jury returned a verdict finding the prisoner guilty of murder in the first degree, but did not recommend that his punishment should be imprisonment for life in the State's prison. The trial judge entered judgment that the prisoner suffer death by the administration of lethal gas, and the prisoner excepted and appealed, assigning errors.

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

H. W. B. Whitley for the prisoner.

ERVIN, J. The prisoner asserts by his assignments of error that the trial judge erred in denying his motion to quash the indictment, in admitting certain testimony of the State's witness Gurney R. Lane, in refusing to withdraw from the petit jury the question of first degree murder, in charging the petit jury, in disallowing his motion for a vacation of the

verdict and a new trial, in overruling his motion in arrest of judgment, and in entering judgment.

The indictment was returned at the November Term, 1953, of the Superior Court of Hoke County by the grand jury of eighteen members, nine of whom were drawn at that term and nine of whom were drawn at the previous April Term.

After pleading "not guilty" to the charge, the prisoner moved to quash the indictment on the ground that the grand jury was drawn and organized in violation of this provision of G.S. 9-25: "At the April term of superior court held for the county of Hoke a grand jury shall be drawn, . . . and it shall serve until the following April term, Hoke superior court." He undertook to raise the same point a second time subsequent to the verdict by his motion in arrest of judgment.

An objection to an indictment based on defects or irregularities in the drawing or organization of the grand jury must be taken by a motion to quash the indictment. G.S. 9-26; *Miller v. State*, 237 N.C. 29, 74 S.E. 2d 513. It cannot be urged in arrest of judgment. *S. v. Sears*, 61 N.C. 146. The motion to quash must be seasonably made. These rules regulate the time for the motion: (1) An accused may make the motion to quash the indictment as a matter of right up to the time when he is arraigned and enters his plea; (2) the presiding judge has the discretionary power to permit the accused to make the motion to quash the indictment as a matter of grace after his plea is entered and until the petit jury is sworn and impaneled to try the case on its merits; and (3) the presiding judge has no power to entertain a motion to quash the indictment at all after the petit jury is sworn and impaneled to try the case on its merits. An accused waives any objection to the grand jury which indicts him on the ground of defects or irregularities in its drawing or organization unless he takes the objection by a motion to quash the indictment before entering a plea to the merits. *Miller v. State, supra; S. v. Banner*, 149 N.C. 519, 63 S.E. 84; *S. v. Gardner*, 104 N.C. 739, 10 S.E. 146.

The trial judge observed these principles in denying the motion to quash the indictment and the motion in arrest of judgment. The prisoner waived his objection to the grand jury by his plea to the merits. His subsequent motion to quash came too late.

We deem it not amiss to note in passing from this phase of the appeal that the grand jury was drawn and organized in conformity with Chapter 465 of the Public-Local Laws of 1935, which provides "for rotating grand juries in Hoke County" and was in force on the effective date of the General Statutes. The provision invoked by the prisoner was originally enacted as a part of Chapter 104 of the Public Laws of 1923, which was repealed by Chapter 465 of the Public-Local Laws of 1935. The com-

pilers of the General Statutes overlooked this repeal of Chapter 104 of the Public Laws of 1923, and inadvertently incorporated the provisions of the repealed statute in G.S. 9-25. Their action in so doing did not impair the validity of Chapter 465 of the Public-Local Laws of 1935 in any way because the General Assembly has decreed in express terms that "the General Statutes . . . shall not have the effect of repealing . . . public local statutes . . . if such statutes were in force on the effective date of the General Statutes." G.S. 164-7.

The State sought to draw from its witness Gurney R. Lane a description of personal injuries suffered by the deceased in a beating which the prisoner admitted he administered to her about 1 March, 1953. The solicitor propounded these questions to the witness and elicited these replies from him: "(Q.) When his wife came to your house, did you observe her? (A.) Yes. (Q.) What was her condition? (A.) She had a bruised place on her shoulder and on her leg down here. She had a bruised place on this leg, too. She walked and caught a ride from where they live to my house. She wanted to borrow some money." The prisoner objected generally to each question, but did not move to strike either answer in whole or in part. The evidence indicating that the prisoner intentionally inflicted personal injuries upon the deceased on an occasion antedating the homicide was responsive to the questions put to the witness. Moreover, it was admissible as bearing on intent, malice, motive, premeditation, and deliberation on the part of prisoner. *S. v. Ray,* 212 N.C. 725, 194 S.E. 482; *S. v. Horne,* 209 N.C. 725, 184 S.E. 470. The prisoner waived any objection to the unresponsive part of the second answer by failing to make a specific motion to strike out that particular part. 23 C.J.S., Criminal Law, section 1073. We note, moreover, that the prejudicial character of the unresponsive part is not manifest.

The trial judge rightly refused to withdraw from the petit jury the question of first degree murder. The State's evidence was sufficient to show that the prisoner committed a willful, deliberate, and premeditated murder within the meaning of the statute dividing murder into two degrees. G.S. 14-17; *S. v. Lamm,* 232 N.C. 402, 61 S.E. 2d 188; *S. v. Cockrell,* 230 N.C. 110, 52 S.E. 2d 7; *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277; *S. v. Wall,* 218 N.C. 566, 11 S.E. 2d 880; *S. v. Hawkins,* 214 N.C. 326, 199 S.E. 284.

The assignments of error relating to the charge have received consideration commensurate with the gravity of the case. They do not present any novel or unusual question requiring elaboration, or point out any error of commission or omission warranting a new trial.

The exception to the overruling of the motion for a vacation of the verdict and a new trial and the exception to the entering of the judgment are formal and require no discussion.

Prejudicial error has not been made to appear. Hence, the judgment of the trial court must be upheld.

No error.

JAMES J. CALDWELL, ADMINISTRATOR OF THE ESTATE OF FLORENCE C. BURROUGHS, DECEASED, v. H. D. MORRISON AND J. M. McMANUS, TRADING AS MOR-MAC MOTOR COURT, AND RULANE GAS COMPANY, A CORPORATION.

(Filed 19 May, 1954.)

1. Gas § 2—

Allegations to the effect that a liquefied petroleum gas company installed gas heating equipment at a motor court and supplied gas for the heaters, and that plaintiff's intestate, while a guest at the motor court, was killed by monoxide poisoning, without allegation that such installation was improperly or defectively made or that the material was defective or faulty, or that the appliances installed were defective or unsuited for their intended use, or allegations of contractual duty to repair, *held* insufficient to charge the gas company with the duty to inspect the equipment and heaters and keep them in proper repair, or to state a cause of action for negligence.

2. Same—

Allegations to the effect that defendant liquefied petroleum gas company installed in a motor court room a heater of such capacity and supplied it with gas at such pressure that it was capable of exhausting the oxygen in the room to the extent that the occupant thereof might suffer carbon monoxide poisoning, and that plaintiff's intestate while a guest in the room died as a result of carbon monoxide poisoning, *held* insufficient to allege that the heater was unsuitable for use in the room where it was installed, or that defendant gas company supplied the heater with gas at an improper pressure, so as to allege actionable negligence in these respects.

APPEAL by the defendant Rulane Gas Company from *Hubbard, Special Judge,* November Extra Civil Term, 1953, of MECKLENBURG.

This is a civil action instituted by James J. Caldwell, administrator of the estate of Florence C. Burroughs, in which he seeks to recover damages for the wrongful death of his intestate. The pertinent paragraphs of the complaint are as follows:

"7. On Monday night, March 10, 1952, at about 8 P. M., the plaintiff's intestate, accompanied by her husband, Clinton J. Burroughs, became a guest at the Mor-Mac Motor Court, and they were assigned to Room No. 8 in said Motor Court.

"8. Room No. 8 was furnished with a heater which burned liquified petroleum gas, the gas for same being supplied by the defendant, Rulane Gas Company, of Charlotte, N. C., through a central storage tank and a

system of connecting pipes, said Rulane Gas Company having installed the heater in question and the storage tank and pipes supplying it.

"9. The plaintiff's intestate and her husband were shown to their room by the defendant H. D. Morrison, then in charge of the Mor-Mac Motor Court; the said H. D. Morrison, upon admitting the plaintiff's intestate and her husband to their room, which was about 12 feet long and 10 feet wide, did not make any adjustment of the windows or ventilation in the room and did not give the plaintiff's intestate or her husband any instructions concerning the use or operation of the gas heater which was then burning in the room.

"12. Shortly after midnight of Tuesday, March 11, 1952, in the early hours of Wednesday, March 12, 1952, the lifeless body of the plaintiff's intestate was found in Room No. 8 by certain persons who broke into the room through a window.

"13. The plaintiff is informed and believes, and so alleges, that his intestate met her death from carbon monoxide poisoning as a result of improper combustion in the gas heater in Room No. 8, to which she had been assigned as a guest of the Mor-Mac Motor Court.

"14. The death of the plaintiff's intestate was due to, caused and occasioned by, and followed as a direct and proximate result of the joint and concurrent negligence of the defendants H. D. Morrison and J. M. McManus, partners trading as Mor-Mac Motor Court, and the agents and servants of the defendant Rulane Gas Company of Charlotte, N. C., acting in the scope of their employment, in that:

(Sub-paragraphs (a) through (d) do not apply to appellant.)

"(e) The gas heater in the room where the plaintiff's intestate died and the tanks, pipes and connections supplying gas to the heater, and the liquified petroleum gas which was supplied to said heater, were all instrumentalities under the exclusive supervision and control of the defendants, H. D. Morrison and J. M. McManus, trading as Mor-Mac Motor Court, and the defendant, Rulane Gas Company; said instrumentalities caused the death of the plaintiff's intestate;

"(f) The defendant Rulane Gas Company of Charlotte, N. C., installed the heaters, pipes, connections and gas storage tank at Mor-Mac Motor Court approximately one year prior to the death of the plaintiff's intestate, retaining title to the storage tank and leasing it to Mor-Mac Motor Court, and thereafter negligently failed to make any inspections or tests to ascertain whether the gas heating system so installed remained safe for use by guests of the Mor-Mac Motor Courts;

"(g) The defendant Rulane Gas Company negligently installed a gas burning heater in said Room No. 8 of such capacity and supplied it with gas at such pressure that it was capable of exhausting the oxygen in said room to the extent that occupants of said room might suffer carbon mon-

oxide poisoning from improper combustion of the heater, thereby creating an inherently dangerous condition of which it gave the plaintiff's intestate no warning."

The appellant filed a demurrer to the complaint in the court below on the ground that it does not state facts sufficient to constitute a cause of action against it, in that:

1. The facts alleged in the complaint do not show any negligence on its part; and

2. If any negligence is alleged against this defendant, the facts alleged in the complaint do not show that such negligence was the proximate cause or one of the proximate causes of the injury to, and the death of, the plaintiff's intestate.

His Honor overruled the demurrer and the Rulane Gas Company, a corporation, appeals, assigning error.

Bell, Horn, Bradley & Gebhardt for plaintiff, appellee.
Covington & Lobdell for defendant, appellant.

DENNY, J. We think this appeal turns on the answers given to the following questions: (1) Was it the duty of the appellant, under the facts alleged, to inspect the gas pipes and heaters of its customer, the Mor-Mac Motor Court, and to keep them in proper repair? (2) Where one installed a gas heater of *such capacity,* and supplied it with gas at *such pressure,* that it was *capable of exhausting the oxygen* in the room to the extent that the occupants thereof *might suffer* carbon monoxide poisoning from improper combustion of the heater, did such conduct, standing alone, constitute actionable negligence? In our opinion the answer to each of these questions must be in the negative.

In considering the allegations of the complaint we note that the plaintiff does not allege that the installation of the heaters, pipes, connections, and gas storage tank at Mor-Mac Motor Court, approximately one year prior to the death of plaintiff's intestate, was done in a negligent or defective manner, or that any of the material or equipment used was unsuitable for its intended use or that it was defective. On the other hand, it is alleged that after such installation was made the appellant negligently failed to make any inspections or tests to ascertain whether the gas heating system installed *remained safe* for use by guests of the Motor Court. We do not think this allegation can be interpreted as alleging that the heating equipment was unsafe for use by the guests of the Motor Court when it was installed. Moreover, the allegation with respect to the retention of title by the appellant to the storage tank and its use by the Motor Court implies that the remainder of the heating equipment did not belong to the appellant but to the Motor Court. Consequently, failure on the

part of the appellant to inspect the equipment thereafter would not constitute negligence on its part unless it was charged with the duty to inspect such equipment and to keep it in repair, and the complaint does not allege that the Rulane Gas Company was charged with such duty.

The mere fact that the appellant installed the pipes and appliances on the premises of the Motor Court for the owners thereof, in the absence of an allegation to the effect that such installation was improperly or defectively made, or that the material was defective or faulty, or that the appliances installed were defective or unsuitable for their intended use, would not be sufficient to fix the appellant with the duty to inspect and keep such equipment in repair. *Bryson v. Atlanta Gas Light Co.* (U.S.C.A. 5th Cir.), 170 F. 2d 91.

Ordinarily, where gas lines and appliances are installed on private property, in the absence of notice of a leaky or defective condition therein, the supplier of gas is under no duty to inspect such lines and appliances and to keep them in repair, in the absence of a contract to do so. 38 C.J.S., Gas, section 42 (d), page 735, *et seq.; Wilson v. East Gas Co.,* 68 Ohio App. 490, 42 N.E. 2d 180; *Ray v. Pacific Gas & Electric Co.,* 3 Cal. App. 2d 329, 39 P. 2d 812; *Bryson v. Atlanta Gas Light Co., supra.*

The complaint contains no allegation to the effect that the appliances were out of order at the time plaintiff's intestate met her death, or that the appellant had been notified that the equipment was in a defective condition. It is merely alleged that approximately one year prior to the death of plaintiff's intestate, the appellant installed a "gas burning heater in Room No. 8 of *such capacity* and supplied it with gas at *such pressure* that it was *capable of exhausting the oxygen* in said room to the extent that occupants of said room *might suffer* carbon monoxide poisoning from improper combustion of the heater, thereby creating an inherently dangerous condition of which it gave the plaintiff's intestate no warning." (Emphasis added.) These allegations would seem to fall short of alleging that the appellant installed a heater which was unsuitable for use in the room where it was installed or that it supplied the heater with gas at an improper pressure, thereby creating the condition which was the proximate cause or one of the proximate causes of the death of plaintiff's intestate.

In our opinion, the allegations of the complaint are insufficient to withstand the demurrer.

The cases of *Graham v. North Carolina Butane Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757; *Rulane Gas Co. v. Montgomery Ward & Co.,* 231 N.C. 270, 56 S.E. 2d 689, and similar cases relied on by the appellee, are not controlling on the question presented on this appeal.

The ruling of the court below is

Reversed.

H. L. BEAVER, EMPLOYEE, v. CRAWFORD PAINT COMPANY, EMPLOYER; PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL CASUALTY INSURANCE COMPANY, CARRIER.

(Filed 19 May, 1954.)

1. Appeal and Error § 24—

An assignment of error must ordinarily be based upon an exception duly and timely taken, and an exception to the signing of the judgment will not support an assignment of error purporting to challenge the sufficiency of the evidence to support the findings of fact.

2. Appeal and Error § 6c (2)—

An exception to the judgment presents the sole question of whether the facts found are sufficient to support the judgment, and does not present the sufficiency of the evidence to support the findings of fact.

3. Appeal and Error § 6c (3)—

In the absence of exception, the findings of fact are presumed to be supported by evidence and are binding on appeal.

4. Master and Servant § 40g—

The findings of fact of the Industrial Commission *held* sufficient to support an award of compensation for hernia.

APPEAL by defendants from *Sharp, Special Judge,* October Term, 1953, of GUILFORD (Greensboro Division).

This is a proceeding to recover compensation under the provisions of the Workmen's Compensation Act.

The full Commission, on appeal by the defendants from the hearing commissioner, set aside the findings of fact, conclusions of law and the award of the hearing commissioner, and, among other things, found the following facts: That on 12 May, 1952, and for approximately five years prior thereto, the claimant was employed by the Crawford Paint Company as a painter; that on the above date he undertook to remove a spray gun tank, weighing approximately 65 pounds, from a trailer by standing on the ground to the rear of the trailer and reaching over into the bed of the trailer; that he lifted the tank high enough to clear the board around the bed of the trailer which was about waist high; that he then twisted to one side to lower the tank to the ground; that this was the customary manner and method used by the claimant in removing the spray tank; that he had removed the spray tank many times in the same manner before; that as he started to lower the tank on this occasion and in this position, he felt a sudden sharp pain in his right groin; that he placed the tank on the ground at his side; that the pain was so severe that he was unable to work for approximately half an hour; . . . that the claimant continued to have pain in his right side but continued working; that

on 15 May, 1952, three days after the events above described, a small knot or swelling developed in his right groin and that this was caused by a hernia. That the claimant's hernia appeared suddenly; that it was accompanied by pain; that it immediately followed an accident; that there was an injury as hereinabove described resulting in hernia; and that it did not exist prior to the accident described on 12 May, 1952. That the claimant continued working with some moderate pain until about 14 July, 1952; that he lost no time as a result of his hernia until that date; that he underwent an operation for the correction of his hernia on 14 July, 1952; that he was temporarily totally disabled as a result thereof until 3 September, 1952; and that he has had no disability as a result thereof since that time.

Upon the above findings of fact the Commission concluded as a matter of law that the claimant sustained an accident that arose out of and in the course of his employment, and awarded compensation as provided by law.

The defendants appealed to the Superior Court and when the matter came on for hearing the court, on a review of the record, affirmed the award of the Industrial Commission and entered judgment accordingly. The defendants appeal, assigning error.

Adam Younce for plaintiff, appellee.
Jordan & Wright for defendants, appellants.

DENNY, J. The only exception entered in the Superior Court was to the signing of the judgment. However, the appellant assigns as error the ruling of the court below in affirming the award of the Commission, "for that the findings of fact and conclusions of law by the full Commission are not supported by the competent evidence offered." They likewise assign as error the ruling of the court below in affirming the award of the Commission, "for that the competent evidence offered is insufficient to establish that the injury alleged was by accident within the meaning of the North Carolina Workmen's Compensation Act."

An exception to the signing of a judgment will not support an assignment of error, purporting to challenge the sufficiency of the evidence to support the findings of fact. Such exception presents one question and one question only, and that is whether the facts found are sufficient to support the judgment. *Donnell v. Cox, ante,* 259; *Glace v. Throwing Co.,* 239 N.C. 668, 80 S.E. 2d 759; *Wyatt v. Sharp,* 239 N.C. 655, 80 S.E. 2d 762; *Worsley v. Rendering Co.,* 239 N.C. 547, 80 S.E. 2d 467; *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.

Moreover, it is the general rule that an assignment of error not based on an exception duly and timely taken, will not be considered on appeal. *S. v. Taylor, ante,* 117, 80 S.E. 2d 917, and cited cases.

In our opinion, the evidence disclosed on the present record does not support some of the findings of fact. Even so, where there is no exception taken to such findings, they are presumed to be supported by the evidence and are binding on appeal. *Wyatt v. Sharp, supra; 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.

It would seem that the facts as found are sufficient to support the judgment. *Edwards v. Publishing Co.,* 227 N.C. 184, 41 S.E. 2d 592; *Smith v. Creamery Co.,* 217 N.C. 468, 8 S.E. 2d 231. Consequently, this decision is made to rest upon a question of appellate procedure. Therefore, it becomes a precedent in that respect only and not upon the merits of plaintiff's claim.

The judgment of the court below is

Affirmed.

LYNWOOD McNAIR, AN INFANT, BY HIS NEXT FRIEND, ALEXANDER McNEIL, AND ALEXANDER McNEIL, v. THOMAS M. WARD AND J. CARL YOUNG, TRADING AND DOING BUSINESS AS COLONIAL FROZEN FOOD LOCKER COMPANY, AND MARVIN P. LORENZ.

(Filed 19 May, 1954.)

Master and Servant § 45—

Where the evidence discloses that the infant plaintiff was one of five or more employees in a business owned by two of defendants and conducted by the third defendant as general manager, and that he was injured in the performance of the duties of his employment, nonsuit is proper, since the evidence discloses that the cause is within the exclusive jurisdiction of the Industrial Commission, notwithstanding that the infant plaintiff may have been hired contrary to law. G.S. 97-3; G.S. 97-10; G.S. 97-2 (b).

APPEAL by plaintiffs from *Clifton L. Moore, J.,* at February Term, 1954, of CUMBERLAND.

Civil action to recover damages for personal injury allegedly suffered by infant plaintiff on account of actionable negligence of defendants.

For convenience of statement, Lynwood McNair is called the infant plaintiff; Thomas M. Ward and J. Carl Young, trading and doing business as Colonial Frozen Food Locker Company, are characterized as the

Locker Company; and the defendant Marvin P. Lorenz is designated by his surname.

The only evidence at the trial was that offered in behalf of the infant plaintiff. This evidence tended to show that the Locker Company owned a business or establishment at Fayetteville, which it conducted through the agency of its general manager Lorenz; that the Locker Company regularly employed the infant plaintiff and five or more other employees in its business or establishment; that the infant plaintiff suffered personal injury while engaged in the performance of the duties of his employment; and that the infant plaintiff brought the instant action against the Locker Company and Lorenz to recover damages of them for his personal injury on the theory that his injury was caused by their actionable negligence.

When the infant plaintiff had produced his evidence and rested his case, the Locker Company and Lorenz moved for a compulsory nonsuit on the ground that the evidence showed that the Superior Court had no jurisdiction under the exclusive remedy provision of the North Carolina Workmen's Compensation Act embodied in G.S. 97-10. The presiding judge sustained the motion, and entered judgment accordingly. The plaintiffs excepted and appealed, assigning the entry of the compulsory nonsuit as error.

Taylor & Mitchell for plaintiffs, appellants.
Robert H. Dye for defendants, appellees.

Ervin, J. The evidence calls into play the presumption that the infant plaintiff and his employers have accepted the provisions of the North Carolina Workmen's Compensation Act. G.S. 97-3; *Pilley v. Cotton Mills,* 201 N.C. 426, 160 S.E. 479. Consequently the presiding judge did not err in nonsuiting the action as to the employers (*Tscheiller v. Weaving Co.,* 214 N.C. 449, 199 S.E. 623; *Lee v. American Enka,* 212 N.C. 455, 193 S.E. 809; *Miller v. Roberts,* 212 N.C. 126, 193 S.E. 286; *Francis v. Wood Turning Co.,* 208 N.C. 517, 181 S.E. 628; *McNeely v. Asbestos Co.,* 206 N.C. 568, 174 S.E. 509), or as to Lorenz, who was conducting their business for them. G.S. 97-9; G.S. 97-10; *Warner v. Leder,* 234 N.C. 727, 69 S.E. 2d 6. The validity of these conclusions is not impaired in any degree by the fact that the employers may have hired the infant plaintiff contrary to law. G.S. 97-2 (b); G.S. 97-10; *Lineberry v. Mebane,* 219 N.C. 257, 13 S.E. 2d 429.

Affirmed.

STATE v. CARL STANTLIFF.

(Filed 19 May, 1954.)

1. Criminal Law § 79: Appeal and Error § 29—

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

2. Criminal Law § 78e (1): Appeal and Error § 6c (5)—

An exception to the charge which does not point out any particular statements or omissions objected to is ineffective as a broadside exception.

3. Criminal Law § 53f: Trial § 31e—

The mere fact that the court uses more words in the summation of the State's contentions than it does in the summation of the defendant's contentions does not in itself support an assertion that the court expressed an opinion on the evidence in violation of G.S. 1-180.

APPEAL by defendant from *Nimocks, J.*, September Criminal Term, 1953, of ROBESON.

Criminal prosecution upon bill of indictment charging that defendant, Carl Stantliff, on 31 July, 1953, did "unlawfully, wilfully and feloniously leave the scene of an accident, in which he, the said Carl Stantliff, was involved as the driver of a motor vehicle upon the highways of North Carolina, without stopping, leaving his name, address, operator's license number and the registration number of his vehicle with the person operating the other motor vehicle involved, and without rendering or offering to render reasonable assistance to a person seriously injured in said accident, in violation of G.S. 20-166 (a) and (c), against the form of the statute in such case made and provided and against the peace and dignity of the State."

Defendant pleaded not guilty. A jury trial ensued. Verdict: "Guilty as charged in the Bill of Indictment." The court pronounced judgment of imprisonment, from which defendant appeals.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

F. D. Hackett and Robert Weinstein for defendant, appellant.

BOBBITT, J. Plenary evidence was offered in support of each averment of the bill of indictment.

"Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." Part Rule 28, Rules of Practice in the Supreme Court of North Carolina. 221 N.C. pp. 562-563.

The only exception set out in appellant's brief appears in the record as follows: "Defendant excepts to the foregoing charge of the court. Exception 7." Upon this exception appellant bases his only assignment of error; and he asserts in support of this assignment that the trial judge stressed the State's contentions to such extent as to constitute an expression of opinion as to defendant's guilt in violation of G.S. 1-180. Neither the exception, nor the assignment of error, nor the assertion in the brief, calls attention to any particular statements or omissions in the court's summation of the respective contentions. All are broadside and are insufficient to draw into focus any assigned error of law. *S. v. Moore,* 120 N.C. 570, 26 S.E. 697; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175; *Poniros v. Teer Co.,* 236 N.C. 145, 72 S.E. 2d 9.

However, we have considered the charge. No error of law appears. Too, the trial judge stated the contentions of the State and of defendant accurately and fairly. The only possible basis for appellant's contention is the circumstance that more words are devoted to the summation of the State's contentions than to the summation of defendant's contentions. This circumstance, standing alone, does not support appellant's contention. *S. v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668; *Edgewood Knoll Apartments v. Braswell,* 239 N.C. 560, 80 S.E. 2d 653. This circumstance necessarily resulted from the fact that, in the absence of positive evidence in behalf of defendant, a summation of defendant's contentions rested on a very limited evidential base.

Defendant's assignment of error is without merit.

No error.

BILLY C. BRYANT, BY HIS NEXT FRIEND, C. O. BRYANT, v. ODELL WATFORD AND LEE SUMMEY.

(Filed 19 May, 1954.)

Automobiles §§ 8d, 18h (2), 18h (3)—

In this action to recover for damages resulting from a collision when plaintiff's car struck defendants' truck which was stopped on the highway without lights, the evidence *is held* sufficient to take the case to the jury and support the verdict establishing negligence on the part of defendants and the want of contributory negligence on the part of plaintiff.

APPEAL by defendants from *Clarkson, J.,* at February Civil Term, 1954, of DAVIDSON.

Civil action to recover for personal injury and property damage allegedly resulting from negligence of defendant in stopping and parking truck of defendant Watford, operated by defendant Summey at the request and

personal direction of defendant Watford, upon the paved and main traveled portion of State Highway 109 at night without lights or warning signal as required by law, when it was practicable to stop and park same off the paved and main traveled portion of the highway.

Defendants, answering, deny that they were negligent as alleged in the complaint of plaintiff, and plead his contributory negligence in bar of any recovery by him. And defendant Watford filed cross-action averring that plaintiff was negligent in several aspects which solely and proximately caused the collision and consequent damage to the truck.

Plaintiff filed reply denying that he was negligent as alleged in the cross-action.

Upon trial in Superior Court six issues were submitted to the jury. The jury answered the first, as to negligence of defendants, "Yes"; the second, as to contributory negligence of plaintiff, "No"; and the third, as to damages plaintiff is entitled to recover "$1,850.00." The other issues arising in respect to the cross-action were not answered.

On the verdict rendered judgment was signed in favor of plaintiff, and against defendants. Defendants appeal therefrom to Supreme Court, and assign error.

Hubert E. Olive and R. F. Van Landingham for plaintiff, appellee.
Walser & Brinkley for defendants, appellants.

PER CURIAM. Perusal of the case on appeal reveals that, as to the issues answered, the evidence offered upon the trial below is sufficient to take the case to the jury, and to support the verdict of the jury. Prejudicial error is not shown on the appeal.

Hence, in the judgment signed, this Court rules that there is

No error.

STATE v. FLETCHER McRAE.

(Filed 19 May, 1954.)

Criminal Law § 50d: Trial § 6—

In this case a new trial is awarded for interrogations of a witness by the court which went beyond a mere effort to clarify the witness' testimony and amounted to an expression of opinion on the facts by the court.

APPEAL by defendant from *Hubbard, Special Judge,* September-October Criminal Term, 1953, of ROBESON.

Criminal prosecution tried upon a four-count bill of indictment charging the defendant with the following offenses: (1) Unlawful possession of 18 gallons of nontax-paid whiskey; (2) unlawfully transporting 18 gallons of nontax-paid whiskey; (3) reckless driving of an automobile in violation of G. S. N. C. 20-140; and (4) unlawfully and willfully failing and refusing to stop his automobile operated upon the public highways upon the sounding of a siren by police officers and State patrolmen in violation of G. S. N. C. 20-157 (a).

Defendant pleaded Not Guilty. Verdict of guilty on all four counts as charged in the bill of indictment.

From judgment imposed on all four counts the defendant appealed, assigning error.

Harry McMullan, Attorney General, T. W. Bruton, Assistant Attorney General, and William P. Mayo, Member of Staff, for the State.

F. D. Hackett and L. J. Britt and Robert Weinstein for Defendant, Appellant.

PER CURIAM. The defendant's assignments of error are to the admission of evidence and to the judgment. His second assignment of error, based upon his exception 23, arose as follows. The defendant testified in his own behalf. The State in rebuttal called as a witness Paul McQueen, a deputy sheriff, who testified that he knew the general reputation of the defendant, and that the defendant had had the reputation for five or six years of making and selling whiskey. After the direct and cross-examination of this witness the presiding judge asked the witness the following questions: "Q. Have you made raids on this place? A. No, sir, haven't searched his house. Q. Does he have reputation of handling or manufacturing whiskey? A. He has a reputation of manufacturing it. Q. You have never searched his premises? A. No. sir. Q. Know whether other officers have? A. Not that I know of. Q. What does his reputation grow out of? A. Of wholesaling, manufacturing whiskey, reports coming to the office. Q. Does he have the reputation of selling liquor at his residence? Objection—overruled—exception. EXCEPTION NO. 23. A. No, sir."

The questions asked by the judge went far beyond an effort to obtain a proper understanding and clarification of the witness's testimony. Considering the question asked, and the answer given over the defendant's objection and exception, in connection with the other questions asked the witness by the judge, we are of the opinion that the conscientious trial judge unintentionally conveyed to the jury an impression that he had an opinion on the facts in evidence adverse to the defendant. The conclusion that such was its probable meaning to the jury seems apparent,

thereby prejudicing the defendant's right to a fair and impartial trial, and necessitating a new trial. G. S. N. C. 1-180; *S. v. Canipe, ante,* 60, 81 S.E. 2d 173; *S. v. Smith, ibid.,* p. 99, 81 S.E. 2d 263; *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *S. v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29.

It is ordered that the defendant be granted a

New trial.

LEXINGTON INSULATION COMPANY v. DAVIDSON COUNTY, NORTH CAROLINA, DEFENDANT. JAY NORWOOD HOWARD AND FIDELITY & DEPOSIT COMPANY OF MARYLAND, THIRD PARTY DEFENDANTS.

(Filed 19 May, 1954.)

Appeal and Error § 23—

On appeal from order striking two paragraphs and parts of six other paragraphs or allegations in the answer or further answer, an assignment of error to the ruling of the court "as to the individual section stricken" and to the orders of the court generally, and to the signing of the orders, is a broadside assignment of error presenting no question for decision.

APPEAL by defendant Howard from *Sink, J.,* November Term, 1953, DAVIDSON. Affirmed.

Civil action to recover on account for materials furnished and work done on County buildings, heard on motion of defendant Davidson County to strike certain allegations from the answer and further answer of defendant Howard.

The motion was allowed and the court below entered its order striking part of two allegations of the answer, two full paragraphs and four parts of other paragraphs (including Exhibit A) of the further answer. Defendant Howard excepted and appealed.

B. C. Brock for appellant Howard.

Charles W. Mauze for appellee Davidson County.

PER CURIAM. The appellant's one assignment of error is as follows: "Appellant . . . assigns as error the ruling of the Court as to the individual section stricken and to the orders of the Court generally and to the signing of the orders."

This is a general broadside assignment of error which specifieth nothing. It presents no question for decision by this Court. *Worsley v. Rendering Co.,* 239 N.C. 547, and cases cited. Even so, an examination of the record discloses that the order was well advised.

Affirmed.

CLINTON J. BURROUGHS v. H. D. MORRISON AND J. M. McMANUS, PARTNERS, TRADING AS MOR-MAC MOTOR COURT, AND RULANE GAS COMPANY, A CORPORATION.

(Filed 19 May, 1954.)

APPEAL by defendant Rulane Gas Company from *Hubbard, Special Judge,* November Extra Civil Term, 1953, of MECKLENBURG.

This is a civil action instituted by the plaintiff to recover for personal injuries sustained from the inhalation of monoxide poisoning while a guest of the Mor-Mac Motor Court.

The allegations against the appellant, with respect to its negligence, are identical with those set out and discussed in the case of *Caldwell, Admr., v. Morrison, et al.,* decided herewith.

The appellant demurred to the complaint on the same grounds set out in the above case. The demurrer was likewise overruled and it appeals, assigning error.

Bell, Horn, Bradley & Gebhardt for plaintiff, appellee.
Covington & Lobdell for defendant, appellant.

PER CURIAM. The ruling of the court below is reversed for the reasons set out in the opinion in *Caldwell, Admr., v. Morrison, et al., ante,* 324.

Reversed.

STATE v. JOE C. HINES
and
STATE v. DORA McPHAUL.

(Filed 19 May, 1954.)

APPEAL by defendants from *Clifton L. Moore, J.,* and a jury, at January-February Criminal Term, 1954, of ROBESON.

Criminal prosecutions commenced by two warrants issued out of the Robeson County Recorder's Court, St. Paul's District, charging each defendant with possession of nontax-paid whiskey for the purpose of sale. From convictions and judgments in the Recorder's Court, the defendants appealed to the Superior Court, where, after consolidation of the cases for the purpose of trial, they were tried *de novo* upon the warrants.

The jury returned a verdict of guilty as charged as to each defendant, and from the judgments pronounced, both of them appealed to this Court.

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

F. D. Hackett and Robert Weinstein for defendants, appellants.

PER CURIAM. This case involves no new question requiring extended discussion. A careful examination of the record leaves us with the impression it is free of prejudicial error. See *S. v. Rainey,* 236 N.C. 738, 741, 74 S.E. 2d 39, 41; *S. v. Honeycutt,* 237 N.C. 595, 599, 75 S.E. 2d 525, 527. The verdict and judgments will be upheld.

No error.

FRANCES W. GRAHAM, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 June, 1954.)

1. Master and Servant § 25b—

Where, in an action for wrongful death it appears that deceased was an employee of the defendant railroad company and was fatally injured while engaged in the discharge of his duties in interstate commerce, plaintiff's sole remedy is under the Federal Employers' Liability Act.

2. Pleadings § 22b—

Where the complaint alleges damages for wrongful death but the evidence shows that the deceased was an employee of a railroad company and was fatally injured while engaged in the discharge of his duties in interstate commerce, the court has power to allow plaintiff to amend so as to allege that the parties were engaged in interstate commerce and that plaintiff was the sole dependent of the deceased, so as to bring the action within the Federal Employers' Liability Act. G.S. 1-163.

3. Master and Servant § 29—

Plaintiff alleged a cause of action for wrongful death. The evidence disclosed that plaintiff's intestate was an employee of a railroad company and was fatally injured in the discharge of his duties in interstate commerce. More than three years after the death, amendment was allowed to bring the cause within the purview of the Federal Employers' Liability Act. *Held:* Whether the amendment introduced a new cause of action then barred by the Federal statute must be determined by the Federal law, and under the Federal decisions the facts constituting the asserted negligence being the same, the amendment does not introduce a new cause of action.

4. Master and Servant § 26—Evidence of defendant's negligence held sufficient for jury under Federal Employers' Liability Act.

The evidence tended to show that defendant employer dispatched two employees on a gasoline motorcar to repair a signal, giving the car a one hour clearance on the northbound track, that in less than an hour defendant dispatched an unscheduled freight onto the northbound track without giving those in charge of the freight information in regard to the motorcar, and that the freight struck and killed one of the employees as they were attempting to clear the motorcar from the track. There were also allegations as to the speed of the train, a blind curve in a cut south of the accident, and the failure to ring bell or blow whistle of the engine. *Held:* Plaintiff's basic position was that defendant was negligent in turning the freight onto the northbound track under the circumstances, and the evidence was sufficient to take the question to the jury, irrespective of the other allegations of negligence.

5. Master and Servant § 28—

The evidence disclosed that the intestate, with another, was dispatched on a motorcar along the northbound track to repair a signal, that the repairmen were given an hour's clearance on the northbound track, with no information in regard to clearance on the southbound track. The signal was repaired and the repairmen had time to return on the northbound track within the hour's clearance. *Held:* The failure of the repairmen to use a nearby railroad telephone for further report as to the clearance on the northbound track before attempting to return on that track, was not contributory negligence as a matter of law, but was properly submitted to the jury upon that issue.

6. Master and Servant § 28—Evidence of employee's contributory negligence held for jury under Federal Employers' Liability Act.

The evidence disclosed that defendant dispatched two employees on a motorcar on the northbound track to repair a signal, that the repairmen were given an hour's clearance on the northbound track, with no information in regard to the clearance on the southbound track, that they repaired the signal and were returning south on the northbound track within the hour when they met an unscheduled freight which had been turned onto the northbound track without warning to the crew that the motorcar was on the northbound track. The freight struck and killed one of the employees as they were attempting to clear the motorcar from the track. The evidence further permitted the inference that the repairmen would have reached the point where they intended to change the motorcar from the northbound to the southbound track, all within the one hour clearance given them. *Held:* Under the circumstances intestate was not guilty of contributory negligence as a matter of law in returning southward on the northbound track, but the evidence was properly submitted to the jury upon the question.

7. Same—

In order to recover under the Federal Employers' Liability Act, plaintiff must prove that defendant was negligent and that such negligence was the proximate cause, in whole or in part, of intestate's death.

8. Master and Servant § 28—

Under the Federal Employers' Liability Act, contributory negligence of the fatally injured employee does not bar recovery, but effects a diminution of recovery by the proportion of the damages attributable to the employee's contributory negligence.

9. Master and Servant § 33—

The effect of the 1939 amendment to the Federal Employers' Liability Act (45 U.S.C.A. 54) is to obliterate from the law every vestige of the doctrine of assumption of risk, and decisions prior to the amendment must be considered in relation to the rule as to assumption of risk then embodied in the law.

10. Master and Servant §§ 26, 28—Contributory negligence of employee held not to insulate defendant's negligence as a matter of law.

The evidence tended to show that two repairmen riding on a railroad motorcar southward on the northbound track, met an unscheduled northbound freight, that they stopped the motorcar and lacked only about 18 inches of clearing the car from the track when the engine struck the motorcar and one of the employees, the other employee having cleared his end of the motorcar from the track. *Held:* The acts of the deceased employee in attempting to save his employer's property and avoid possible injurious consequences to the train crew from a head-on collision with the motorcar, and his failure to have abandoned the motorcar and to have sought his personal safety is not contributory negligence as a matter of law, nor does it constitute a new and independent cause insulating the negligence of defendant in turning the unscheduled freight onto the northbound track without notice to its crew of the presence of the motorcar on the track, but the question was properly submitted to the jury, for it to determine on the basis of the standard of conduct of an ordinarily prudent man under the circumstances, whether intestate was contributorily negligent, and, if so, whether such contributory negligence was the sole proximate cause of the injury, in which event the negligence of the railroad company would not be a proximate cause.

11. Negligence § 7—

Where the negligence of defendant continues up to the moment of injury, it cannot be insulated by the contributory negligence of plaintiff.

12. Negligence § 10—

The doctrine of last clear chance, which presupposes both negligence and contributory negligence, relates to a person having charge of an instrumentality who can but fails to bring it under control and so avoid inflicting injury, and in this case the doctrine is inapplicable since the evidence disclosed defendant could not have avoided the injury after discovery of the peril.

13. Master and Servant § 30a—

In this action under the Federal Employers' Liability Act, the failure of the court in several instances to charge that the amount of the recovery should be diminished by the proportion of the damages attributable to the deceased employee's contributory negligence, *is held* prejudicial.

14. Appeal and Error § 39f—

Conflicting instructions upon a material phase of the case must be held for prejudicial error.

BARNHILL, C. J., dissenting in part.

WINBORNE, J., concurs in dissent.

APPEAL by defendant from *Nimocks, J.*, October 1953 Civil Term, of CUMBERLAND.

Action by administratrix to recover damages for benefit of dependent widow for alleged wrongful death of intestate, tried under provisions of the Federal Employers' Liability Act, 45 U.S.C.A. secs. 51-60.

D. B. Graham, the intestate, was the Chief Signal Man, in charge of maintenance of the railroad signal system along the section of defendant's main line here involved; and J. H. Gibson, witness for plaintiff, was his assistant. They lived at Parkton. About 2 p.m., Saturday, 8 July, 1950, Graham received telephone instructions from defendant's Train Dispatcher at Rocky Mount to "look after" a red signal on the northbound track of the main line about one mile south of Hope Mills. The Train Dispatcher gave him a "line-up" on this northbound track, advising him that #76, traveling north on the main line, was not due at Parkton until 3:25 p.m., and that the Bennettsville local (freight) was due to operate that day but had not operated and that he didn't know when it would. The Bennettsville freight, an unscheduled train, proceeds north from South Carolina stations and comes into the main line at Parkton.

Graham was in charge of a two-man gasoline motorcar weighing about 450 or 500 pounds which he and Gibson had used for five or six years in their signal maintenance work. Pursuant to the Train Dispatcher's instruction, they traveled by this motorcar along defendant's northbound track and came to the red signal. Realizing that the trouble was in the track between there and the next signal, they proceeded farther along the northbound track and came to the switch leading into the V. & C. S. Railroad crossroads in or near Hope Mills. There they found a latch hung, which had the circuit cut off and caused the signal behind them to be red. It took them three to five minutes to repair it. They felt sure that this was the cause of the trouble and that the signal behind them had changed from red to green.

After making the necessary repairs, about 2:40 p.m., Graham and Gibson proceeded in reverse, south along the northbound track, with the idea of moving the motorcar from the northbound to the southbound track and of turning it around at a public road crossing some 200-400 yards south of where the repairs were made. Looking south, an embankment where the main line tracks were on a curve obstructed their view of this public road crossing. They had proceeded about 100 yards from where

the repairs had been made, running about five miles per hour, when Graham exclaimed, "There's the train," stopped the motorcar, and pulled out the handle used for lifting the motorcar off the track. Gibson took hold of the south end and succeeded in lifting it off the track. Graham, having hold of the north end, lacked eighteen inches of lifting this part of the motorcar over the east rail. The Bennettsville freight struck the motorcar and Graham, causing immediate death.

The unscheduled Bennettsville freight arrived in Parkton about 2:30 p.m. It turned into and proceeded north on the main line after the conductor got orders to do so from the operator at Parkton. He (the operator at Parkton) was called by the Chief Dispatcher at Rocky Mount between 2 p.m. and 3 p.m. and instructed "to turn the Bennettsville train in on the main line." He had no information that Graham and Gibson had gone north on a motorcar. The Chief Dispatcher did not mention this in his instructions. In accordance with the Chief Dispatcher's instructions, he gave those in charge of the Bennettsville freight an order showing a clear track all the way to Fayetteville.

The train consisted of the locomotive and nine cars. The engineer shut the engine off, allowing it to drift downhill as the train approached Rock Fish Creek, south of the public road crossing. He testified that, when in the vicinity of the public road crossing, the fireman, who had better view of the track ahead when rounding a curve to the left, hollered that he saw a motorcar on their track and to put brakes in emergency; that he immediately did so, the engine being then about "right near on" the crossing; and that there was nothing else he could do to make the train stop more quickly. The grade was downhill to the place where the train struck the motorcar.

The fireman testified that the train had been going fifty miles per hour but was "going approximately 42 miles an hour" in the center of the cut; that the engine went by Graham's body approximately 1,000 feet; that the crossing was approximately 825 feet south of Graham's body; and that the train traveled approximately 1,825 feet after the brakes were put into emergency.

The evidence was conflicting as to whether the bell was rung or the whistle blown as the train approached the scene of collision.

The jury, under a peremptory instruction, found that Graham, at the time of his death, was engaged in interstate commerce; answered the negligence issue, "Yes"; answered, under a peremptory instruction, the contributory negligence issue "Yes"; and awarded damages in the amount of $36,334.00. Judgment in plaintiff's favor was entered on the verdict. Defendant appealed, assigning error.

Clark & Clark and Nance & Barrington for plaintiff, appellee.
Shepard & Wood and Rose & Sanford for defendant, appellant.

BOBBITT, J. The complaint discloses that Graham was chief maintenance man for a section of defendant's signal system along its main line; further, that while engaged in the performance of his duty, he was struck and killed on the main line by the train known as the Bennettsville freight. While these hints that Graham and the defendant were engaged in interstate commerce are discoverable, no allegations to this effect are included in the complaint. Nor is there any allegation with reference to the dependents of Graham. In short, the allegations are appropriate as a statement of a cause of action for damages for wrongful death under the North Carolina statutes now codified as G.S. 28-173, 28-174, and G.S. 60-64 *et seq.*

During the presentation of plaintiff's testimony it became apparent that both Graham and defendant were engaged in interstate commerce on the occasion of Graham's death. Hence, the plaintiff's sole remedy was under the Federal statute. *Mondou v. New York, N. H. & H. R. Co.,* 223 U.S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L.R.A. (N.S.) 44; *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335, 156 A.L.R. 922, and cases cited therein.

Defendant thereupon moved to dismiss the action "on the ground that the suit was brought as an intrastate action under the laws of North Carolina, whereas the evidence shows the case arises under the Federal Employers' Liability Act." The court overruled defendant's motion to dismiss and allowed plaintiff to amend her complaint so as to include allegations appropriate to an action under the Federal statute, principally allegations that both employee and employer were engaged in interstate commerce and that plaintiff, widow of Graham, was his sole dependent and as such was the beneficiary of any recovery. Defendant excepted and now urges that a new cause of action was introduced more than three years from the date of Graham's death and must be dismissed. 45 U.S.C.A. sec. 56.

These facts are noted. Graham's death occurred 8 July, 1950. The action was commenced 7 July, 1951. The trial was at October Term, 1953. The facts constituting the tort, the basis of defendant's liability, are alleged in the original complaint. The amendment introduces no new allegations in this field.

Upon the facts alleged, conceding that plaintiff initially was in error in believing that her remedy was under the State statute, can the court permit her, more than three years after Graham's death, to amend her complaint so as to conform to evidence plainly disclosing that the employee and the employer were engaged in interstate commerce on the occasion of Graham's death and so as to allege that the widow was the sole dependent of Graham and the beneficiary of any recovery according

to the rule of damages prescribed by the Federal statute? If so, is this a new cause of action as of the date of the amendment?

The power of the trial court under the State statute to allow the amendments is plain. G.S. 1-163. Whether these amendments introduced a new cause of action, then barred by the Federal statute, is governed by the Federal law. *Seaboard A. L. R. Co. v. Renn,* 241 U.S. 290, 293, 36 S. Ct. 567, 60 L. Ed. 1006; *New York C. & H. R. R. Co. v. Kinney,* 260 U.S. 340, 43 S. Ct. 122, 67 L. Ed. 294; *Williams v. Trustees of New York, N. H. & H. R. Co.,* 90 N.E. 2d 320 (Mass.).

In *Missouri, K. & T. R. Co. v. Wulf,* 226 U.S. 570, 33 S. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914 B, 134, suit was brought under the Kansas statute by the mother as sole heir and next of kin to recover on account of her son's death. After the time prescribed for commencement of an action under the Federal statute, she was permitted to amend so as to prosecute the action in her capacity as administratrix and to allege that her intestate and the defendant were engaged in interstate commerce on the occasion of his death.

In *New York C. & H. R. R. Co. v. Kinney, supra,* "after several trials and about seven years and a half after the suit was begun, the plaintiff was allowed to amend his complaint by alleging that, at the time of the collision, the plaintiff and the defendant were engaged in interstate commerce." The Court, speaking through *Mr. Justice Holmes,* held that these amendments did not introduce a new cause of action but, quoting from the *Renn case, supra,* "merely expanded or amplified what was alleged in support of the cause of action already asserted . . . and was not affected by the intervening lapse of time." The opinion also quotes from *Seaboard A. L. R. Co. v. Koennecke,* 239 U.S. 352, 36 S. Ct. 126, 60 L. Ed. 324, this trenchant sentence: "The facts constituting the tort were the same, whichever law gave them that effect." The great jurist neatly sums up the matter in these words: "Of course, an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of *specified conduct,* the reasons for the Statute of Limitations do not exist, and we are of the opinion that a liberal rule should be applied." (Emphasis added.)

While the earlier decisions may have afforded a plausible basis for defendant's position, the later decisions resolve all doubts adversely to defendant; and, upon the authoritative decisions cited, defendant's motion to dismiss by reason of the amendments was properly overruled. *New York C. & H. R. R. Co. v. Kinney, supra.*

Defendant excepted to the court's action in overruling its motion for judgment of involuntary nonsuit.

Adequate consideration of defendant's position necessitates an analysis of the pleadings. Plaintiff's basic position as to negligence is that defendant turned the unscheduled Bennettsville freight onto the northbound track of the main line at Parkton, giving the locomotive engineer an order showing a clear track all the way to Fayetteville, when it knew that Graham and Gibson had left just thirty minutes or so before by motorcar on said track to check a defective signal south of Hope Mills; and that no information to this effect was given to those in charge of the Bennettsville freight. True, there are allegations as to the speed of the train, the blind curve in the cut north of Rock Fish Creek, the failure to ring the bell or blow the whistle, etc. However, these allegations are made in combination with, rather than independent of, plaintiff's basic position that defendant was negligent under all the circumstances in turning the Bennettsville freight onto this section of the northbound track of the main line.

Defendant alleges contributory negligence on the part of Graham in these respects: (1) that, with knowledge that the Bennettsville freight was to run sometime that afternoon, he negligently failed to call the Train Dispatcher from a nearby railroad telephone for a further report as to "line-up" after completing the signal repair job and before returning to Parkton; and (2) that he negligently proceeded south on the northbound track when he could have removed the motorcar to the southbound track with greater safety at the place where the repair work was done and especially at a point some 600 yards to the north at the Hope Mills station. Defendant further alleges that Graham was negligent in that after he saw the approaching train he remained on the track when by the exercise of due care he could have got off and thus escaped injury and death; and that such negligence was the sole proximate cause of his death.

In this connection, it is noted that the Train Dispatcher at Rocky Mount who gave Graham the "line-up" for the "northbound" track about 2 p.m. testified that it was not necessary for Graham to call up again "under an hour" and that "they are safe in the line-up for an hour." There is also evidence tending to show that the Bennettsville freight left Parkton about 2:35 p.m. and that the motorcar and Graham were struck shortly after 2:40 p.m. Thus, there is evidence tending to support the view that Graham and Gibson could and would have got to the road crossing where they were to remove the motorcar from the northbound to the southbound track, some 200-400 yards south of where the repairs were made and several miles north of Parkton, within an hour from the time Graham at Parkton had the telephone instructions from the Train Dispatcher at Rocky Mount. Too, while Graham had the "line-up" on the northbound track, he had no information as to "line-up" on the southbound track.

In order to recover under the Federal Employers' Liability Act, plaintiff must prove that defendant was negligent and that such negligence was the proximate cause, in whole or in part, of Graham's death. *Tennant v. Peoria & P. U. R. Co.,* 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520. Contributory negligence of Graham would not bar a recovery by plaintiff. The effect would be that his dependent widow could not recover the full amount of damages sustained by her on account of his death but would be barred from recovery of the proportion of such damages attributable to Graham's contributory negligence. 45 U.S.C.A. sec. 53. And since the 1939 amendment to the Federal Employers' Liability Act, 45 U.S.C.A. sec. 54, Graham cannot be held to have assumed any risk of his employment when death results in whole or in part from the negligence of any of the agents of the railroad, the effect of the amendment being to obliterate from the law every vestige of the doctrine of assumption of risk. *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967. Decisions prior to the 1939 amendment must be considered in relation to the rule as to assumption of risk then embodied in the law. See *Delaware, L. & W. R. Co. v. Koske,* 279 U.S. 7, 49 S. Ct. 202, 73 L. Ed. 578; *Strunks v. Payne,* 184 N.C. 582, 114 S.E. 840. Thus, if the defendant's oncoming train, rounding the curve, through the cut, was turned onto this track through negligence of the Train Dispatcher, neither Graham's failure to anticipate its approach nor his inability to remove the motorcar under the circumstances of extraordinary known risk is a defense on the basis of assumption of risk.

Defendant's position is that its negligence, if any, and the contributory negligence of Graham, had spent themselves; and a new factual situation had arisen. Then, with knowledge of the danger, Graham and Gibson undertook to remove the motorcar when they could have abandoned it and escaped injury; that Gibson got out of the way of the oncoming train; that Graham could have done so; and that Graham's conduct in failing to abandon the motorcar and get off the track should be held to constitute the sole proximate cause of his death as a matter of law. Thus, defendant contends, its negligence, if any, was "insulated."

It must be borne in mind that the alleged negligence of defendant upon which plaintiff relies is the fact that the oncoming train had been turned into this section of track without warning to those in charge that Graham and Gibson were there with the motorcar, not the failure of the locomotive engineer to stop the train after he saw or could have seen them. Indeed, so far as the evidence discloses, the train, under the conditions then existing, could not have been stopped within a shorter distance. This alleged negligence, if established, continued to the moment of actual impact and so constituted a proximate cause of Graham's death. As stated by *Seawell, J.,* in *Henderson v. Powell,* 221 N.C. 239, 19 S.E. 2d

876: "No negligence is 'insulated' so long as it plays a substantial and proximate part in the injury. Restatement of the Law, Torts, sec. 447."

The defendant's contention seems to be that since Graham, by abandonment of the motorcar, could have avoided injury and death, he must be held solely responsible therefor notwithstanding defendant's negligence. The doctrine of last clear chance, which presupposes both negligence and contributory negligence, relates to a person having charge of an instrumentality who can but fails to bring it under control and so avoid inflicting injury. See *Wade v. Sausage Co.,* 239 N.C. 524, 80 S.E. 2d 150, and cases cited therein.

While there is some conflict in the decisions, we are in agreement with the rule supported by the greater weight of authority, namely, that it is for the jury to say whether, under the circumstances then existing, Graham failed to exercise due care for his own safety, under the rule of the ordinarily prudent man, in undertaking to remove the motorcar from the track and in failing to get out of the way of the approaching train, and, if so, whether such negligence was a contributing proximate cause or the sole proximate cause of his death. *Joice v. Missouri-Kansas-Texas R. Co.,* 354 Mo. 439, 189 S.W. 2d 568, 161 A.L.R. 383; *Moran v. Atchison, T. & S. F. Ry. Co.,* 48 S.W. 2d 881 (Mo.); *Newman v. Southern Ry. Co.,* 194 S.E. 237 (Ga.); *Owen v. Kurn,* 148 S.W. 2d 519 (Mo.); *Texas Cent. R. Co. v. Bender,* 75 S.W. 561 (Texas); *International & G. N. R. Co. v. McVey,* 81 S.W. 991 (Texas); *Dailey v. Burlington & M. R. R. Co.,* 78 N.W. 722 (Neb.); *Winczewski v. Winona & W. Ry. Co.,* 83 N.W. 159 (Minn.); *Mitchum v. Chicago, R. I. & G. Ry. Co.,* 173 S.W. 878 (Texas); *St. Louis, I. M. & S. Ry. Co. v. Morgan,* 171 S.W. 1187 (Ark.); *Illinois Cent. R. Co. v. Evans,* 186 S.W. 173 (Ky.).

Three cases, *Deere v. Southern Pac. Co.* (C.C.A. 9th), 123 F. 2d 438, and *Foreman v. Texas & New Orleans R. Co.* (C.C.A. 5th), 205 F. 2d 79, cited by defendant, and *Mathis v. Kansas City Southern Ry. Co.,* 74 So. 172 (La.), lend support to defendant's position. While each of these cases is distinguishable factually, principally on the ground of the failure to show negligence on the part of the railroad company, statements in the opinions are in accord with defendant's contentions here. But, after careful consideration, we adopt the majority view as stated above.

The case before us is distinguishable from those where an employee, in a position of safety, consciously exposes himself to imminent peril outside the line of his duty and injury or death results. *Johnson v. Terminal R. Asso.,* 8 S.W. 2d 891, 61 A.L.R. 572, Annotation, 61 A.L.R. 579 (Mo.). Compare, *Bobango v. Erie R. Co.* (C.C.A. 6th), 57 F. 2d 667.

Temple v. Hawkins, 220 N.C. 26, 16 S.E. 2d 400, cited by defendant, is not in point. The plaintiff there, whose truck stalled on the crossing,

could have but failed to get out and avoid injury. Under the State law his right to recover was barred by his contributory negligence.

We omit reference to decisions where the train ran down a motorcar or velocipede proceeding in the same direction for there the element of lack of knowledge of the train's approach until the time of impact is ordinarily the factor of greatest importance.

It appears now that if Graham had abandoned the motorcar when he saw the approaching train he would in all probability have escaped from his dilemma without injury. But he was and had been in charge of this particular motorcar. It was his employer's property, entrusted to him for use in the course of his employment. He owed a duty to his employer to exercise due care under all the circumstances to save it from damage or destruction by removing it from the path of the oncoming train. At the same time, he was under the duty to exercise due care for his own safety. While the company rules, offered by defendant, enjoined its employees to act always on the principle of safety first, Rule 3 specifically provides that "employees to whom motorcars are assigned are responsible for their use and condition"; and Rule 14 provides that "any violation of the foregoing rules will be regarded as cause for dismissal." Moreover, the probable consequences to the oncoming train and its crew, as well as to the motorcar and to him and Gibson, in the event of a head-on crash, were to be considered.

Nor can it be said as a matter of law that Graham did not have reasonable ground to believe that he and Gibson could complete the removal of the motorcar before the train got to it. The *Moran case, supra,* while referring to Moran's conduct in terms of the now obliterated doctrine of assumption of risk, contains this statement, apposite here: "There was evidence that Moran lacked only eight inches of being in the clear when the engine struck him. Evidence that he came so near getting in the clear tends to show that he had reasonable grounds for believing that he would have time to remove the motorcar from the track, and that he did not appreciate the near and dangerous approach of the train. . . . Under the circumstances shown we cannot judicially say that Moran did not act as an ordinarily prudent person would have acted under the same circumstances, and therefore decline to hold, as a matter of law, that he assumed the risk." And in the *Bender case, supra,* in relation to facts more favorable to defendant's position than the facts here, the Court said: "Nor did appellee forfeit his right to recover by trying to remove the handcar from the track. It is by no means clear from the evidence that a prudent man in his situation would have pursued a different course."

Whether, in attempting to save his employer's motorcar and to avoid the consequences of a head-on collision, Graham's actions were those of an ordinarily prudent person so situated, or were those of a foolhardy and

reckless person, indifferent to his own safety, could not be answered as a matter of law. It was for determination by the jury.

The conclusion we reach is that the issues of negligence and of contributory negligence were for the jury. If the jury had found that Graham's death was caused solely by his own negligence, this would have required a negative answer to the first issue, embracing as it does both negligence and proximate cause. The motion for judgment of involuntary nonsuit was properly overruled.

Even so, conflicting instructions to the jury on the issue of damages necessitate a new trial. It is noted that defendant's position as to matters set out below are duly presented by proper exceptive assignments of error.

The original complaint alleged that Graham's estate had been damaged by his wrongful death in the amount of $40,000.00. When the amendments were allowed, the complaint as amended alleged that Graham's widow as sole dependent and beneficiary had been damaged by his wrongful death in the amount of $40,000.00.

Upon reaching the issue as to damages, the court gave the jury full and correct general instructions on the subject of comparative negligence in relation to damages, to be applicable in the event the jury answered both the negligence and the contributory negligence issues in the affirmative, *i.e.,* that the plaintiff was entitled to recover for the benefit of the widow only such portion of her total damages resulting from Graham's death as was attributable to defendant's negligence and was not entitled to recover such portion as was attributable to Graham's negligence.

After these instructions the court reviewed at some length the plaintiff's evidence and her contentions thereon to the effect that she had been damaged by reason of Graham's *wrongful death* in the amount of $40,000.00. The court then says, by way of reviewing defendant's contentions: "The defendant further contends that the sum of $40,000.00 is an exorbitant price and, even should you come to consider the third issue, that you should not award damages in any large amount like that or any other substantial amount, but the defendant contends it only should be in some amount, if any at all, much less than the amount contended for and demanded by the plaintiff in the action."

In the review of contentions, nothing is said with reference to contentions as to diminution of total damages on account of Graham's contributory negligence, if any, by the proportion of total damages attributable to Graham's negligence. The failure to include the respective contentions of the parties on this subject, after having reviewed fully the plaintiff's evidence and contentions as to the damages the widow has suffered on account of the *wrongful death* of Graham, must be considered in the light of the court's final word and summary instruction to the jury, to wit:

"So, gentlemen, if you come to consider that third issue as to damages, and if you award plaintiff damages in the case, the Court instructs you that the damages recoverable, if any, is limited to the present cash value or present worth of such loss as results to the beneficiary occasioned by her, that is by the plaintiff, Mrs. Graham, being deprived of the reasonable expectancy of pecuniary benefit because of the alleged wrongful death of her deceased husband and the amount to be allowed is limited strictly to the financial loss thus sustained."

In the instruction, quoted above, the court, by inadvertence, instructed the jury that the plaintiff was to be awarded damages to compensate for the widow's loss "by being deprived of the reasonable expectancy of pecuniary benefit because of the alleged *wrongful death* of her deceased husband." (Emphasis added.) This final, positive and clear instruction obviously ignores the rule that, if Graham were guilty of contributory negligence (and a peremptory instruction on the contributory negligence issue had been given), the damages recoverable would be limited to the proportion of the total damages attributable to defendant's negligence. We are constrained to hold that this final, explicit instruction to the jury, which relates plaintiff's recoverable damages to the death of Graham rather than to the negligence of defendant, may have had a pervading influence on the minds of the jury and may well be reflected in their answer of the issue, "$36,334.00."

As stated by *Barnhill, J.* (now *C. J.*), in *S. v. Overcash,* 226 N.C. 632, 39 S.E. 2d 810: "When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted. We may not assume that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their guide. We must assume instead that the jury in coming to a verdict, was influenced by that part of the charge that was incorrect." See cases cited in *S. v. Overcash, supra; Dixon v. Brockwell,* 227 N.C. 567, 42 S.E. 2d 680; *Green v. Bowers,* 230 N.C. 651, 55 S.E. 2d 192; *In re Will of Kemp,* 234 N.C. 495, 67 S.E. 2d 672; *S. v. Howell,* 239 N.C. 78, 79 S.E. 2d 235.

A new trial is ordered. This renders unnecessary the consideration of other exceptive assignments of error brought forward by defendant. None of them may be pertinent upon the retrial of the cause.

New trial.

BARNHILL, C. J., dissenting in part: The majority, after analyzing the complaint, state that "the alleged negligence of defendant upon which plaintiff relies is the fact that the oncoming train had been turned onto this section of track (between Parkton and the signal tower to the north) without warning to those in charge (of the train) that Graham and

Gibson were there with the motorcar, not the failure of the locomotive engineer to stop the train after he saw or could have seen them." It is stated in effect that the allegations of speed, blind curve in the cut north of Rock Fish Creek, and the failure to ring the bell or blow the whistle constitute window dressing which alone would not support a recovery. I accept that interpretation of the complaint.

The testimony offered in support of this single alleged act of negligence presents these questions for decision: (1) Did the defendant, through its dispatcher, commit an act of negligence when it turned the unscheduled Bennettsville freight onto the northbound track within thirty minutes after having given Graham one-hour clearance for said track without giving any notice to those in charge of said freight that Graham and his companion had gone to repair the signal, and if so, (2) was such negligence one of the proximate causes of the death of plaintiff's intestate?

In the first place I cannot perceive that defendant breached any duty it owed the deceased when it let the freight proceed northward on the northbound track. The deceased needed clearance on the northbound track to make the trip to the signal tower. This he received. He had reached his destination when the freight entered upon the track. The dispatcher knew that the deceased had had ample time within which to reach his destination, and that it was the duty of deceased to make his return trip on the southbound track. There was no cause for the dispatcher to anticipate or foresee that the use of the northbound track by the freight would in any wise endanger either Graham or Gibson. He had reason instead to believe that they would return to Parkton on the southbound track.

If such conduct must be considered an act of negligence, it in no wise contributed to the death of plaintiff's intestate. It ceased to play "a substantial and proximate part" in the collision and resulting death so soon as the deceased discovered the approach of the train in ample time to stop the motorcar, leave the track, and reach a zone of safety. That he had ample time so to do is conceded. From that time on until the final crash, his life or death depended entirely upon what he should decide to do. Therefore, I am unable to perceive how it may be said that the action of the dispatcher in turning the train onto the northbound track without warning the train crew that the deceased and his companion were somewhere to the north was a proximate cause of the death of plaintiff's intestate.

But the majority hold that the deceased may be excused for his conduct on the ground that he owed his employer the duty to protect the property entrusted to his care against damage or destruction. To say that this duty was so impelling that he must perforce risk his life in its performance would seem to me to carry it to the extreme. Self-preservation is said to

be the first law of nature. To say that the rules of the company overrode this law and bound the deceased to risk his own life to protect the motorcar from damage or destruction or suffer the penalty of a discharge and excuses his failure to seek a place of safety in time to avoid injury or death is but to attribute to his employer—and the law itself—a stoneheartedness beyond my comprehension.

The law as I understand it required him, when in the presence of a known danger, to use diligence to avoid the threatened injury or death. All other considerations faded into insignificance.

The deceased was negligent in two material respects, and in my opinion such negligence on his part constitutes the sole proximate cause of his injury and death.

When he began his return trip, it was his duty to use the southbound track. A telephone was available so that he could get clearance on that track. He elected to proceed southward on the northbound track when he knew, or should have known, that the engineer of a train proceeding northward would have no cause to anticipate that he would meet another train or motorcar going in the opposite direction on the same track. Then he proceeded to narrow the gap between his motorcar and the approaching train to the point a collision between the two became inevitable.

The deceased discovered the presence of the approaching train in ample time to stop his motorcar, leave the track, and reach a zone of safety. The peril was apparent for sometime before the collision. The way of escape was open. The duty to get off the track, out of the way of the oncoming train, was impelling. Yet he elected to remain on the track until the very moment of the collision, and he did so knowing the engineer could not stop his train within the available distance so as to avoid striking him. It is not a case of last clear chance or hidden peril. Whatever his motives—and no doubt they were good—they did not, in my opinion, excuse his conduct or shift the blame to the defendant. If he first thought he had time to remove the motorcar, it soon became apparent he could not do so. Certainly this is so if the train was traveling as plaintiff's evidence tends to show.

The record, in my opinion, discloses that the conduct of the deceased evidenced a reckless indifference to his own safety, which conduct on his part was the sole proximate cause of his injury and death. I, therefore, vote to sustain the motion for judgment of involuntary nonsuit.

Passing the question of nonsuit, I agree that (1) the original complaint constitutes a defective statement of a good cause of action, and that the order allowing amendment thereof rested within the sound discretion of the presiding judge, and (2) the conflict in the charge on the question of damages requires a new trial.

WINBORNE, J., concurs in dissent.

STANCIL ALDRIDGE, A MINOR, BY HIS NEXT FRIEND, W. S. ALDRIDGE, v. CHARLIE HASTY AND E. S. BURNS.

(Filed 4 June, 1954.)

1. Bill of Discovery § 1c—

After the pleadings have been filed, application for examination of the adverse party can be for no legitimate reason other than to obtain evidence to be used at the trial, and is available to the applicant as a matter of right. G.S. 1-568.11.

2. Same—

After the pleadings have been filed, an application for examination of the adverse parties alleging that the parties to be examined are residents of a specified county and requesting that the examination be had at the courthouse of that county, discloses sufficient reason for the designation of the place for the hearing. G.S. 1-568.11 (b) (4).

3. Bill of Discovery § 6—

Where order for examination of the adverse party after pleadings have been filed is issued on proper application, and notice of the examination is served on the adverse party, G.S. 1-568.14, and the adverse party appears in person and by counsel and participates in the examination, the deposition is admissible against him, subject to his right to except to the competency, relevancy, or materiality of the testimony. G.S. 1-568.23; G.S. 1-568.24.

4. Automobiles § 8a—

The duty of a motorist to observe traffic regulations is a duty owed not only to others using the highways, but also to every person on or about the highways who may suffer injury to his person or damage to his property as a natural and proximate result of a violation thereof.

5. Automobiles § 7—

Where the violation of a safety statute constitutes a criminal offense, such violation is negligence *per se*, but in order to constitute the basis for recovery in a civil action such violation must be shown to be the proximate cause of the injury, including the essential element of foreseeability.

6. Negligence § 9—

That the injury be foreseeable is an essential element of proximate cause.

7. Automobiles § 18b—

Evidence that defendant in attempting to enter a filling station on the left side of the highway, drove his vehicle across the highway to his left directly in the path of a car approaching from the opposite direction at a time and under circumstances which rendered a collision inevitable, G.S. 20-154, 20-140, and that the driver of the other car swerved to his left, sideswiping the right of defendant's car, deflecting the course of the other car so that it went outside the bounds of the highway on its left side and struck plaintiff, who was standing between two cars parked in a private driveway, *is held* to warrant the inference that plaintiff's injury could have been foreseen as the natural and proximate result of defendant's negligence.

8. Appeal and Error § 39a—

Where there is no error relating to the issue of damages and there is no reasonable ground to anticipate that a retrial would result in a verdict more favorable to defendant on the issue of liability, a new trial will not be ordered merely to afford defendant an opportunity to try and induce another jury to reduce the amount of the recovery.

9. Automobiles §18b—Whether defendant's negligence was proximate cause of injury held for determination of jury upon the evidence in this case.

The evidence tended to show that while defendant was driving on his right side of the highway a car approached from the opposite direction, turned across the highway in front of defendant's lane of travel when defendant was only 20 to 25 feet away, that defendant swerved his vehicle to the left, hit the right side of the other vehicle in a sideswiping manner, went out of the bounds of the highway, and struck plaintiff who was standing in a private driveway on defendant's left of the highway. There was also evidence that defendant's vehicle was traveling at an excessive and unlawful speed, G.S. 20-141. *Held:* While the speed of defendant's car was not a proximate cause of the collision, since it was insulated by the unforeseeable and unlawful conduct of the operator of the other car, whether such excessive speed was the proximate cause of plaintiff's injury, in that it resulted in defendant's inability to control his vehicle after the collision or stop it before striking plaintiff, is a question for the jury.

10. Bill of Discovery § 6½ : Evidence § 16—

Since the amendment of G.S. 1-568.25 (a) and (b) by Chapter 885, Session Laws of 1953, the party introducing the deposition of a witness does not make the party examined his witness and is not bound by adverse statements made by the witness during his examination, and upon motion to nonsuit only so much of the pretrial testimony as tends to establish plaintiff's cause of action or explain other testimony offered in plaintiff's behalf is to be considered.

11. Trial § 22c—

Upon motion to nonsuit, the Court must consider all the testimony, but in doing so must draw the conclusion most favorable to plaintiff and leave it for the jury to reconcile any inconsistent, conflicting, or contradictory testimony.

12. Automobiles §§ 18g (5), 18h (2)—Physical facts at scene held sufficient for jury on question of excessive speed.

Defendant driver testified that he did not know what happened after the collision between his car and the car of another. He also testified as to the course of his vehicle after the collision. The physical evidence at the scene indicated that after the right fender of his car sideswiped the right side of a car approaching from the opposite direction, defendant's vehicle crossed to the left of the highway, climbed an embankment from 12 to 20 inches high, hurtled into a yard and struck two automobiles, parked in a private driveway, and plaintiff, who was standing between the cars, knocking one of the cars 20 feet and hurling defendant some 59 feet, and then ploughed into a wet field and came to rest some 99 feet from the driveway. *Held:* The facts and circumstances are sufficient to support a finding by the jury that defendant's loss of control of his vehicle and his

inability to stop within a reasonable distance was due to excessive speed and not to his loss of consciousness.

13. Trial § 32—

A party who aptly tenders written request for instructions on a point of law arising on the evidence is entitled to have the court give in substance the requested instruction as law coming from the court. Merely giving it as a statement of a contention of the party will not suffice.

APPEAL by both defendants from *Rudisill, J.,* October Term 1953, STANLY.

Civil action to recover compensation for personal injuries sustained by plaintiff when struck by the automobile of defendant Hasty.

About 1:20 p.m. on 23 December 1951, defendants were traveling in opposite directions on Highway 52, about two miles south of Albemarle, in Stanly County. The highway at that point extends in a north-south direction and is straight for several hundred yards in both directions. The Aldridge home is located on a one-acre lot on the west side of the highway with a 300-foot frontage on the highway. There is the usual road ditch and embankment. The height of the embankment in front of the residence was variously estimated to be from twelve to twenty inches. Two automobiles were parked in the Aldridge driveway to the north of the residence. Another was parked on the shoulder of the road. Plaintiff, at the time he was struck, was standing between the two automobiles parked in the driveway. On the east side of the highway there is a filling station about 100 yards south of the Aldridge residence.

Defendant Burns was traveling south on a station wagon, and Hasty was going north on a Chevrolet automobile. As Burns approached the filling station, he turned his vehicle to the left, diagonally across the road, to enter the north driveway of the filling station. He turned directly in front of Hasty's vehicle in the east lane of travel when Hasty's automobile was only 20-25 feet away. Hasty swerved to the left in an attempt to avoid a collision, and the right front fender of his vehicle struck the right side of the Burns station wagon in a glancing or sideswiping manner, went across the road, up into the Aldridge yard, struck plaintiff and the two automobiles in the driveway, and stopped in a wet, plowed field about one hundred feet beyond, mired to the bottom. Burns drove on into the filling station yard. His vehicle was only slightly damaged. He said he did not see the Hasty automobile.

Other pertinent facts are stated and amplified in the opinion.

In the trial below appropriate issues were submitted to and answered by the jury in favor of plaintiff and against both defendants. The court entered judgment on the verdict, and both defendants excepted and appealed.

Morton & Williams and F. Grainger Pierce for defendant appellant Hasty.

R. L. Smith & Son for defendant appellant Burns.

Brown & Mauney for plaintiff appellee.

BARNHILL, C. J. After the pleadings were filed, the plaintiff sought and obtained leave to examine both defendants prior to trial as provided by General Statutes ch. 1, art. 46. The defendant Burns, at the time the examination was had and in the trial below, moved to suppress the examination of Hasty for the reason that "the application therefor sets out no facts specifying the information sought or the purpose therefor," and "that the Clerk making the order for the examination found no such facts." The motion was overruled, and the plaintiff offered said examination in evidence as against both defendants.

APPEAL OF BURNS.

This defendant excepted to the denial of his motion to suppress the examination of Hasty and to the admission of the same in evidence as against him. These exceptions are made the bases of exceptive assignments of error and are duly brought forward and discussed in this appellant's brief. They present for decision the only questions of sufficient merit to require discussion.

In 1951 the General Assembly, by the adoption of ch. 760, S.L. 1951, now General Statutes ch. 1, art. 46, repealed our old statute which provided for the examination of adverse parties and substituted in lieu thereof a new statute which in many respects is entirely different in substance and in the procedure provided. Under the terms of the Act a litigant may examine any other party to the action: "(1) For the purpose of obtaining information necessary to prepare a pleading or an amendment to a pleading, or (2) For the purpose of obtaining evidence to be used at the trial, or at any hearing incident to the trial, or (3) For both purposes." G.S. 1-568.3.

We are interested here only in those provisions of the Act which relate to the examination of a party after the pleadings have been filed.

After the "examining party" and "the party to be examined" have both filed their pleadings, "an examination is a matter of right and may be had as provided by G.S. 1-568.11." The examining party must apply to the clerk or judge for an order for the examination and his "application must be in the form of, or supported by, an affidavit showing: (1) That the action has been commenced; (2) That the applicant has filed complaint, petition or answer; (3) That the applicant desires to examine a designated person who has filed a petition, complaint or answer or on whose behalf a petition, complaint or answer has been filed; (4) That the exami-

nation should be held at a place designated in the affidavit, together with facts showing the reasons therefor." G.S. 1-568.11.

"If the judge or clerk finds that the facts are as set out in the affidavit, he shall make an order: (1) Appointing a commissioner to hold the examination; (2) Fixing the time and place of the examination, subject to the provisions of G.S. 1-568.5, and (3) Directing the person to be examined to appear before the commissioner at such time and place for examination." G.S. 1-568.11 (c). G.S. 1-568.5, in so far as it is pertinent here, provides that the time and place of the examination may be changed by agreement of the parties or "for good cause shown," by the order of the clerk.

The application filed by the plaintiff is verified and contains all the information thus required by the statute other than the "facts showing the reasons" for requesting that the examination be held at the courthouse in Stanly County as required by G.S. 1-568.11 (b) (4), that is, it alleges no facts in support of that request other than the allegation that Burns and Hasty are residents of Stanly County.

We are not quite sure we comprehend the underlying purpose of the provision contained in G.S. 1-568.11 (b) (4). If the Legislature intended to require the applicant to state the reasons why he desires the examination or the information he seeks to obtain, it failed to use language which gives expression to that intent. After the pleadings are filed, the examination is available to the applicant as a matter of right. And there could be no legitimate reason therefor—after the parties have pleaded—other than to obtain evidence to be used at the trial. Furthermore, the language relied on is a part of subsection (b) (4). It relates exclusively to, and is a part of the "showing" to be made by the petitioner as required by that particular subsection. The "reasons" to be alleged are the reasons for naming the place for the hearing designated in the petition.

It is alleged in the petition that the parties to be examined are residents of Stanly County. The courthouse is the place provided for judicial hearings. These are, we think, sufficient reasons for requesting that the examination be had at the courthouse of the county of defendants' residence. And, in any event, we hold that, under the circumstances of this case, the failure to state other and additional reasons—if indeed such exist—does not constitute a fatal defect in the application.

Notice of the examination was served on both Burns and Hasty as required by G.S. 1-568.14. Both appeared in person and by counsel and participated in the examination. Hence the deposition was admissible in evidence as against Burns, G.S. 1-568.24, subject to his right to except to the competency, relevancy, or materiality of the testimony as provided by the statute, G.S. 1-568.23, 1-568.24. This right on his part was fully protected by the court below.

Even so, he contends all the evidence tends to show that at the time of the collision he had passed some distance beyond plaintiff who was standing outside the bounds of the highway, and that therefore he owed no duty to plaintiff the breach of which would give rise to liability on his part for the injuries inflicted by the Hasty automobile; and that, even if he violated a traffic regulation, neither the injury suffered by plaintiff nor any such like injury was reasonably foreseeable as a result thereof.

These contentions present squarely for decision three questions: (1) Did this defendant breach any legal duty he owed the plaintiff; (2) where the negligence relied on by plaintiff is the violation of a criminal statute, is foreseeability a condition of liability, and, if so, (3) does the evidence offered warrant and support the inference that defendant, under the facts here disclosed, could and should have foreseen that the injury suffered by plaintiff or some like injury was likely to result?

Our motor traffic regulations are not intended merely to protect those who are using the highways. They are designed to protect the life, limb, and property of any and every person on or about the highway who may suffer injury to his person or damage to his property as a natural and proximate result of the violation thereof. Therefore, this defendant owed to plaintiff and all other persons similarly situated the duty to observe and obey the positive mandates of our motor vehicle traffic regulations.

Strictly speaking, a violation of a criminal statute constitutes a positive, affirmative tort which perhaps should never have been put in the category of negligence. It would seem that this view prevails in some jurisdictions where it is held that foreseeability is not a condition of liability. In these jurisdictions the rule that the tort-feasor is liable for any consequence that may flow from his unlawful act as the natural and probable (or proximate) result thereof, whether he could foresee or anticipate it or not, prevails. It is presumed that he intended whatever resulted from his unlawful act. Cooley on Torts, sec. 50.

In the past this rule has received the sanction of this Court by direct decision as well as by way of *obiter dicta*. *Drum v. Miller*, 135 N.C. 204; *Starnes v. Manufacturing Company*, 147 N.C. 556; *Leathers v. Tobacco Company*, 144 N.C. 330; *McGowan v. Manufacturing Company*, 167 N.C. 192, 82 S.E. 1028; *Hodges v. R. R.*, 179 N.C. 566, 103 S.E. 145; *Watson v. Construction Company*, 197 N.C. 586, 150 S.E. 20.

But the trend of our decisions since the advent of the automobile has been to treat the breach of a criminal law as an act of negligence *per se* unless otherwise provided in the statute. *Godfrey v. Coach Company*, 201 N.C. 264, 159 S.E. 412; *James v. Coach Company*, 207 N.C. 742, 178 S.E. 607; *Whitaker v. Car Company*, 197 N.C. 83, 147 S.E. 729; and *Albritton v. Hill*, 190 N.C. 429, 130 S.E. 5 (exceeding speed limit); *King v. Pope*, 202 N.C. 554, 163 S.E. 447, and *Norfleet v. Hall*, 204 N.C.

573, 169 S.E. 143 (reckless driving and speeding); *Hoke v. Greyhound Corporation,* 226 N.C. 692, 40 S.E. 2d 345, and *Gillis v. Transit Corporation,* 193 N.C. 346, 137 S.E. 153 (failure to keep to the right); *Burke v. Coach Company,* 198 N.C. 8, 150 S.E. 636 (parking on highway); *Holland v. Strader,* 216 N.C. 436, 5 S.E. 2d 311 (failure to give hand signal).

"All of the decisions of this State since *Ledbetter v. English,* 166 N.C. 125, 81 S.E. 1066, concur in the view that the violation of an ordinance or of a statute designed for the protection of life and limb is negligence *per se.* Notwithstanding, the same decisions do not permit recovery for the mere violation of the statute, unless there was a causal relation between the violation and the injury." *Ham v. Fuel Company,* 204 N.C. 614, 169 S.E. 180; *Holland v. Strader, supra.*

"According to the uniform decisions of this Court, the violation of a statute imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety has been held to constitute negligence *per se,* but before the person claiming damages for injuries sustained can be permitted to recover he must show a causal connection between the injury received and the disregard of the statutory mandate . . ." *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740.

The conclusion that the violation of a criminal statute designed and intended to protect citizens against injury to their persons or damage to their property constitutes a wrongful act which may be made the basis of an action founded on allegations of negligence is sound. Negligence is the breach of some duty imposed by law. This is the commonly accepted brief and general definition of negligence, and the violation of a motor vehicle traffic regulation is a breach of a duty imposed by law for the protection of individuals and their property.

When the action is for damages resulting from the violation of a motor vehicle regulation, does the doctrine of foreseeability apply? We are constrained to answer in the affirmative.

Whatever the conflict of decision in other jurisdictions on this question may be, it is uniformly held that to entitle a plaintiff to recover in an action bottomed on the violation of a criminal statute it must be made to appear that the injury or damage complained of was the natural and probable result of such violation.

Causal connection between the unlawful act committed and the injury or damage sustained must be shown; that is to say, proximate cause must be established. And we relate foreseeability to proximate cause as an essential element thereof.

"Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." *Osborne v. Coal Company,* 207 N.C. 545, 177 S.E. 796, and

cases cited; *Wood v. Telephone Co.*, 228 N.C. 605, 46 S.E. 2d 717; *Shaw v. Barnard*, 229 N.C. 713, 51 S.E. 2d 295.

Consequently, in this as in most jurisdictions, to establish proximate cause foreseeable injury must be made to appear.

We should note, however, for the benefit of Bench and Bar, that when the plaintiff relies on the violation of a motor vehicle traffic regulation as the basis of his action that, unless otherwise provided in the statute, the common law rule of ordinary care does not apply. The statute prescribes the standard, and the standard fixed by the Legislature is absolute. 38 A.J. 831, sec. 160. Proof of the breach of the statute is proof of negligence. In essence, that is the meaning of *per se*.

The violator is liable if injury or damage proximately results, irrespective of how careful or prudent he has been in other respects. No person is at liberty to adopt other methods and precautions which in his opinion are equally or more efficacious to avoid injury. 38 A.J. 831, sec. 160; *Northern Indiana Transit v. Burk*, 89 N.E. 2d 905.

The evidence is such as to compel the conclusion that Burns violated the express provisions of G.S. 20-154 and G.S. 20-140. He drove his vehicle to the left across the lane of traffic of Hasty's approaching automobile at a time and under circumstances which rendered a collision inevitable. He knew, or should have known, that his conduct in so doing would probably deflect the course of Hasty's vehicle and cause it to go outside the bounds of the highway and injure some bystander. That was the natural and proximate result of his unlawful conduct which he could have reasonably foreseen and for which he must answer in damages.

The other exceptive assignments of error are without substantial merit. On this record this defendant has no reasonable cause to cherish the hope that a retrial would result in a verdict more favorable to him on the issue of negligence, and, in the absence of error on the issue of damages, we do not grant a new trial merely to afford the defendant an opportunity to try to induce another jury to reduce the amount of recovery. As to this defendant, the judgment must be affirmed.

APPEAL OF HASTY.

This brings us to the one decisive question presented by the appeal of defendant Hasty. Did the court below err in denying his motion for judgment as in case of involuntary nonsuit?

That Hasty was not guilty of any actionable negligence which would make him liable to Burns or a passenger on the Burns vehicle, *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808, does not necessarily mean that the evidence exculpates him as to the plaintiff. The relations between Burns and Hasty on the one hand, and Hasty and plaintiff on the other, were quite different.

This defendant was traveling in the eastern or northbound lane of travel which was his right side of the highway. Burns cut his station wagon to the left diagonally across and upon the Hasty lane of travel at a time when Hasty's vehicle was only twenty or twenty-five feet away. The road was straight. It was in the daytime. The scene was in the rural section of the county, and no special hazards existed which required Hasty to reduce his speed below the maximum provided by law. And in the absence of warning, he was not required to anticipate and guard against the negligent conduct of Burns. Under these circumstances, irrespective of his speed, Hasty could not have avoided a collision with the Burns station wagon. Even if he was operating his vehicle at an unlawful rate of speed, as between him and Burns or a passenger on the Burns vehicle, his conduct in so doing may not be deemed a proximate cause of the collision. The conduct of Burns rendered the collision unavoidable, insulated any prior negligence of Hasty, and must be held to be the sole proximate cause of the original collision. On this phase of the case, the line of decisions represented by *Butner v. Spease, supra,* is controlling.

Neither may plaintiff recover judgment against this defendant on the theory his violation of our statute regulating the speed of motor vehicles, G.S. 20-141, was one of the proximate causes of the Burns-Hasty collision.

But plaintiff's cause of action is not made to depend on this one allegation. He asserts that, even if it be held—as we do hold—that the unlawful conduct of Burns insulated any prior negligence on the part of Hasty in respect to, and constituted the sole proximate cause of, the original collision, this defendant was operating his vehicle at such an excessive rate of speed that he was unable thereafter to control his automobile or to stop before striking plaintiff, who was standing outside the bounds of the highway several hundred feet ahead; that the loss of control of his vehicle and his inability to stop within a reasonable distance without leaving the highway was due to his excessive speed and not to his loss of consciousness. In support of these contentions, he relies on the line of cases represented by *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197.

Non constat Hasty's negligence, if any, was not one of the proximate causes of the original collision, has plaintiff offered evidence sufficient in probative force to require the submission of an issue of negligence as against him? On this question we concur in the view of the plaintiff that *Riggs v. Motor Lines, supra,* and like decisions of this Court are controlling, and that this question must be answered in the affirmative.

Hasty testified, in part, that he did not remember a thing after the collision until his car stopped; that he was "stove up"; that he does not remember hitting the bank; and that it was the collision "and the bank and all the rest of the hits" that caused him to be "stove up," and unable

to remember what happened. He repeated these statements in various forms on his pretrial examination.

The original Act, ch. 760, S.L. 1951, provides that any party using the examination of an adverse party thereby makes the party examined his witness, G.S. 1-568.25 (a), and denies him the right to cross-examine such adversary when and if he becomes a witness at the trial, G.S. 1-568.25 (b). This section, however, was amended by ch. 885, S.L. 1953. This latter Act deletes the provision that "the party who introduces the deposition in evidence . . . does make such person his witness" in subsection (a), and revises the language of subsection (b). Under this amendment, the examining party may cross-examine his adversary whose deposition he has used, if and when such adversary becomes a witness in his own behalf at the trial, and may contradict him but "may not impeach his credibility except by the showing of prior inconsistent statements upon proper foundation laid." Ch. 885, S.L. 1953.

So then, under the statute as it now exists, the plaintiff, by introducing his deposition, did not make Hasty his witness and is not bound by the adverse statements made by him during his examination. Instead, we are to consider only so much of the pretrial testimony of Hasty as tends to establish plaintiff's cause of action or to explain other testimony offered in plaintiff's behalf. *Hartley v. Smith,* 239 N.C. 170. We must consider all the testimony, but in so doing we must draw the conclusion most favorable to the plaintiff and leave it for a jury to reconcile the inconsistent, conflicting, or contradictory testimony. *Maddox v. Brown,* 232 N.C. 244, 59 S.E. 2d 791; *Sessoms v. McDonald,* 237 N.C. 720, 75 S.E. 2d 904; *Jackson v. Hodges, Comr. of Insurance,* 232 N.C. 694, 62 S.E. 2d 326; *Emery v. Insurance Co.,* 228 N.C. 532, 46 S.E. 2d 309.

When so considered, does it explain the movements of the Hasty automobile, the damage it did, and the distance it traveled after the collision so as to compel the one conclusion that it was all attributable to Hasty's condition produced by the original collision and not to his speed, or is there other conflicting evidence tending to prove that Hasty was traveling at an excessive rate of speed, and that such unlawful speed was at least one of the proximate causes of the injuries suffered by plaintiff?

For us to accept as determinative and conclusive this defendant's oft-repeated statement that he did not know what happened after his right front fender came in contact with the right front side of the station wagon; and to hold that it explains what happened after he collided with the Burns vehicle and completely exonerates him from any liability to plaintiff would perforce require us to ignore other contradictory statements and disregard the testimony which tends to show that the defendant was traveling at an excessive rate of speed.

This defendant testified that immediately after his right front fender came in contact with the Burns vehicle, he went to his left of the highway, across the western shoulder thereof, up an embankment, into the Aldridge yard; that there was "just a 'lam bamming' " when he hit the automobiles in the driveway, and that he "just came to a easy stop" in the plowed field. These are facts he could not know and about which he could not testify if he was unconscious at the time.

When his car stopped he got out and "hollered for his children"; went to look after his wife who apparently had been hurled from the vehicle when it struck the embankment, and then walked down the road to the filling station and talked to Burns.

After the impact the Hasty vehicle crossed to the left side of the road, traveled some distance down the highway ditch, and climbed the highway embankment. When it climbed or jumped the embankment, it hurdled through the air several feet off the ground from the walkway to the driveway—a distance of forty or fifty feet. There it struck the two parked automobiles, knocking one of them twenty feet and completely around. It also struck plaintiff who was standing at the parked cars and hurled him fifty-nine feet. It knocked off plaintiff's left shoe and cast it forty-six feet beyond plaintiff's body. It then plowed through the wet field until it came to rest ninety-nine feet from the driveway. It stopped only when it had mired so deep it could go no further. ". . . the further the car the deeper the ruts."

Witnesses testified that as he approached and passed through the Aldridge yard, he was traveling very fast and, as some expressed it, "was flying." While no witness undertook to give the distance from the point of the original collision to the point where the Hasty vehicle finally stopped, other testimony as to distances makes it appear that it must have been several hundred feet. The filling station is one hundred yards south of the Aldridge residence, and it is at least 140 feet from the Aldridge walkway to the point where the car stopped.

These facts and circumstances about which the plaintiff offered evidence are sufficient to support a finding that this defendant's loss of control of his vehicle and his inability to stop within a reasonable distance was due to excessive speed and not to a loss of consciousness. At least the jury may so find—and that is the question we are required to decide.

Non constat Hasty could not reasonably foresee, and was not required to anticipate, the wrongful and unlawful conduct of Burns, if he was at the time operating his automobile at an unlawful speed and such unlawful speed was the reason, or one of the reasons, why he could not stop within a reasonable distance and without traveling outside the bounds of the highway, crashing into the two automobiles, and striking plaintiff, then and in that event his unlawful speed constitutes at least one of the proxi-

mate causes of the injuries suffered by plaintiff. If the jury should so find, then the conduct of Burns did not break the line of causation as to plaintiff but merely accelerated the result of his (Hasty's) negligence. As between Hasty and plaintiff, the conduct of Burns was only a contributing or concurring cause. *Riggs v. Motor Lines, supra; Banks v. Shepard,* 230 N.C. 86, 52 S.E. 2d 215.

This subject is fully discussed in *Riggs v. Motor Lines, supra.* Further discussion at this time would serve no useful purpose. Suffice it to say that the line of cases represented by that decision is controlling here.

The physical facts at the scene of a collision may disclose that the operator of a vehicle involved in the accident was traveling at an excessive speed. *Riggs v. Motor Lines, supra.* We conclude, therefore, that the evidence of the physical facts and other testimony offered by plaintiff is sufficient to repel this defendant's motion for judgment of nonsuit. It is for a jury to say whether defendant's inability to stop before colliding with plaintiff was due to his alleged loss of consciousness or to his alleged excessive speed, or to the conduct of Burns and notwithstanding the fact he (Hasty) was traveling at a lawful speed.

This appellant in apt time prayed the court to charge the jury that he was under no duty of anticipating the negligent and unlawful conduct of Burns and that, instead, he had a right to assume and to act upon the assumption that Burns would exercise ordinary care for his own safety and the safety of others on the highway. The prayers for instruction are in amplified form. As the principle of law incorporated therein and not the exact wording thereof determines the materiality and propriety of the proposed instruction, we need not quote it verbatim. Reference to the principle of law he sought to have applied to the facts in the case is sufficient.

The court gave the substance of the prayers for instructions but it did so in the form of a contention made by this appellant. This will not suffice. He was entitled to the instructions coming from the judge as the law in the case, applicable to the facts relating to the circumstances of the original collision. As it will be somewhat difficult for a layman, in any event, to distinguish between the effect of the negligence, if any, of Hasty as it relates to the original impact on the one hand, and to the injuries suffered by the plaintiff on the other, we deem the failure of the court to instruct the jury fully on this principle of law as requested sufficiently prejudicial to entitle this defendant to a new trial.

As to defendant Burns—No error.

As to defendant Hasty—New trial.

STATE v. JOSEPH M. FRAYLON.

(Filed 4 June, 1954.)

1. Insurance § 25½—

In presenting a false claim and proof in support of such claim for payment of loss, or other benefits upon a contract of fire insurance, a defendant must have acted willfully and knowingly in order to be convicted under G.S. 14-214. The term "willfully and knowingly" defined.

2. Same—

The existence of unreported liens or other insurance upon the property is a civil matter governed by G.S. 58-178, 58-180, but does not tend to show criminal intent in connection with the filing of proofs of claim. G.S. 14-214.

3. Same—Evidence held insufficient to show that defendant willfully and knowingly presented fraudulent claim and proofs in support thereof.

In this prosecution under G.S. 14-214, the State offered witnesses, none of whom were contractors or experienced builders, and some of whom admitted they were not qualified to testify as to the cost of labor and materials, who testified as to their opinion of the value of the property at the time of the fire in an amount substantially less than the insurance on the property, and evidence that defendant filed claim for the total amount of the insurance in the sum of $18,500. Defendant introduced testimony to the effect that the cost of replacement would be from $16,128 to $19,600, evidence as to cost of improvements made upon property prior to the fire, etc., that defendant had secured a contract for sale of the property at $25,000, and other evidence as to rental value of the property prior to the fire. Defendant made conflicting estimates of the value of the property at the time of the fire, between $23,000 and $25,000. *Held:* The evidence is insufficient to raise more than a suspicion or conjecture as to the good faith of defendant in fixing the value of the damaged structure at the time of the fire at $23,000 in his proofs of claim for loss, and therefore the evidence is insufficient to show that the defendant willfully and knowingly presented a false and fraudulent claim and proof in support of such claim, and his motion for judgment as of nonsuit should have been allowed.

4. Same—

The procuring of overinsurance is not a crime, though it may be a civil wrong under certain circumstances.

APPEAL by defendant from *Armstrong, J.*, October Term, 1953, of GUILFORD (Greensboro Division).

Criminal prosecution tried upon indictment charging the defendant with willfully and knowingly presenting false and fraudulent claims and false and fraudulent proof of such claims, for the payment of a loss upon two contracts of fire insurance on a building located at 1303 Willow Road, in the City of Greensboro, with the fraudulent intent to collect insurance.

The evidence in pertinent part is set out in the numbered paragraphs below.

1. The defendant is a citizen and resident of Charlotte, North Carolina, and purchased the property in question in 1946 or 1947 from J. A. Bigelow for $2,500. The building on the lot at 1303 Willow Road, at the time the property was purchased by the defendant, consisted of four rooms with a shed. The property was condemned by the Assistant Building Inspector of the City of Greensboro on 6 July, 1951. The house was occupied at the time and continued to be for a month or more thereafter.

2. On 21 August, 1951, the defendant obtained a permit to repair the condemned property and to remove a small house adjacent thereto and known as 1303½ Willow Road.

3. According to the State's evidence the defendant, prior to the fire on 11 March, 1953, had remodeled and enlarged the house to fourteen or sixteen rooms; that it was a two-story dwelling, frame construction, composition roof, sheet rock on the inside but incompleted, partially wired—the rough wiring being completed, but the fixtures and outlets were not in; it was partially painted on the outside; no plumbing or heating equipment had been installed.

4. The defendant, on 7 January, 1953, wrote the Wimbish Insurance Company, Greensboro, North Carolina, that he owned a fifteen-room, two-story frame house at 1303 Willow Road, Greensboro, North Carolina, a three-room frame house at 1301 Willow Road, and a nine-room house and a two-car garage at 1111 Willow Road. He stated the fifteen-room house was new and requested that it be insured for $8,500, the three-room house for $1,000, the nine-room house for $5,000, and the two-car garage for $1,000. C. C. Wimbish, of this insurance agency, testified that after receiving the letter he immediately issued a binder and later called the defendant at his home in Charlotte in order to obtain certain "additional information which I would have to have . . ., meaning the amount of the mortgage, if any, the values and whether or not he had adequate insurance." The defendant asked him what he thought he should have; that he told him he should have eighty per cent of the value; that the defendant said the property at 1303 Willow Road was worth around $10,000 and he thought $8,500 would be adequate; that there were no mortgages and no other insurance on the property. This agency issued and mailed to the defendant a policy in the amount of $15,500 covering the defendant's properties in the respective amounts requested, for and on behalf of The Royal Exchange Assurance of Royal Exchange, London, England, dated 8 January, 1953. The policy contained an endorsement thereon as follows: "Other insurance permitted." This witness also testified that he did not see the property or have it inspected before he issued the policy. After the fire, he requested the defendant to get some estimates on what it would cost to "reproduce" the property.

5. W. D. Seawell, witness for the State, who was the rental agent of the defendant at the time the property was condemned in 1951, testified that early in January, 1953, the defendant came to his office and told him he had done considerable remodeling on his Willow Road property; that he had bought several thousand dollars worth of materials and wanted his firm to insure it for $10,000; that he and his brother went out and inspected the property and did not insure it; that in his opinion the house at that time was worth between $4,000 and $4,500. On cross-examination this witness testified that before the property was condemned and immediately thereafter, his firm collected rents from the four-room house, including the property at 1303½ Willow Road which rented for $7.50 per month, as follows: March 1951, $100.00; April 1951, $90.00; May 1951, $111.50; and in July 1951, $90.00. That he was sure his firm had the property insured at that time but he could not find his records on it.

6. Clarence Winchester, a real estate and insurance man in Greensboro, testified that as agent of Bankers Fire Insurance Company of Durham, North Carolina, he issued to the defendant a policy on 30 January, 1953, insuring the property at 1303 Willow Road in the sum of $10,000. That he went to see the defendant and talked to him about insurance. That he was the rental agent of the defendant before and at the time the policy was written. That when he wrote the policy the defendant told him there was a mortgage on the property and gave him the required information about it. That the same day the fire insurance policy was written, he rented the property to Robert Booker, 407 Best Street, Greensboro, North Carolina, for $30.00 per week. That Booker agreed to purchase the property for $25,000 on or before 1 February, 1954, and to make a cash payment thereon of $5,000, the balance of the purchase price to be payable at $25.00 per week, plus interest at six per cent, payable weekly. After the payment of $5,000, all the rents theretofore paid were to be credited on the balance due. The defendant secured the purchaser and took him to Winchester's office. That the witness prepared the contract of rental and sale. The State introduced this agreement in evidence. Winchester further testified that Booker lived in the Willow Road house from 30 January, 1953, until the fire on 11 March, 1953, and that he paid his rent in accordance with his agreement. That the witness was familiar with the property and in his opinion, just before the fire, it was worth $7,000; that it was a two-story frame house, fifteen or sixteen rooms. That "the rooms were average size, maybe one or two extra small ones. . . . no plumbing, it had stoves for heating." On cross-examination this witness was questioned as to why he issued a $10,000 policy on a building worth only $7,000. He testified, "I did not know there was other insurance on the house when I issued the policy . . . I knew it didn't make any differ-

ence what amount it was insured for, that the most a person could recover for damage or loss was the value of the property. . . . I put the insurance on what I thought it was going to be worth. This policy was issued at the same time I had this transaction with Booker."

7. Clark Little, an insurance adjuster, testified that he knew the defendant Rev. Joseph M. Fraylon; that the first time he saw him was the day after the fire at 1303 Willow Road; that he inspected the premises; that the building was not completely destroyed by the fire. From his inspection after the fire he could at that time determine what kind of construction had been there before the fire. That he made such an inspection and in his opinion the building before the fire was worth $6,000, "but it would take $6,380.00 to put it back." That he had a conversation with the defendant about how much insurance he had on the property, and the defendant informed him that the two policies were all the insurance he had. The witness informed him that he thought he had it insured for about three times its worth, and Fraylon said he valued the house at $25,000. Later the adjuster mailed to the defendant forms on which to file his proofs of loss. The claims were duly executed on 10 April, 1953, for the full amount of insurance in force, and mailed to the respective insurance companies who in turn forwarded them to the adjuster. The proofs of claim fixed the value of the building at the time of the fire at $23,000.

8. R. L. Turnage, an investigator for the State Insurance Department, made an investigation of this fire. He testified that he had a conversation with the defendant and asked him if he knew where Booker was at that time, and he said he did not; that he had not seen him since the day after the fire; that Booker had told the defendant that he expected to get the down payment for the purchase of the property from an uncle; that he then told the defendant that he had talked with Booker in jail in Charlotte where he was being held for failure to comply with a sentence imposed in the Domestic Relations Court which required him to pay a certain sum for the support of his family. The defendant stated that he knew nothing of Robert Booker's personal affairs; that the defendant also told him he had paid L. H. Smith approximately $8,000 for labor that had gone into the building; that Rev. J. A. Bigelow had also done some work on the property but he didn't give the extent of his work. He stated that the majority of the materials had been purchased from the New Home Building Supply of Greensboro. This witness further testified that he had talked with L. H. Smith, who lives on Route 2, Kannapolis, North Carolina, and had obtained a verbal statement from J. A. Bigelow.

9. The State introduced as exhibits the policies of insurance, the proofs of claim, and a subpoena for L. H. Smith that was issued 3 November,

1953, and had not been served. Other evidence bearing on the value of the property was also introduced on behalf of the State.

10. The defendant introduced one James Clark who testified that he was foreman for some time during the remodeling of the defendant's property. That he and four other carpenters worked on the house; that they lived in Charlotte and brought five or six loads of lumber on a two and a half ton truck from Charlotte consisting of framing, sheeting and roofing, and that the materials went into this building.

11. The defendant offered three local contractors who testified as to the cost of rebuilding the damaged property. According to their testimony, the workmanship on the damaged building was inferior; that the carpenters were inexperienced; that their estimates were based on a new building, similar in size, but completed in a first-class workmanlike manner; that the present structure was damaged beyond repair. One estimate was $16,128, and the other two estimated that it would cost $19,600 to rebuild the apartment house.

12. The defendant offered in evidence a subpoena that had been duly issued by the Clerk of the Superior Court of Guilford County to the Sheriff of Cabarrus County, to summon L. H. Smith to appear in the Superior Court of Guilford County on 3 November, 1953, and testify in behalf of the defendant in the case of *State v. Joseph M. Fraylon*, showing a return by the Sheriff of Cabarrus County that it had been received on 30 October, 1953, and served on the same day. The said L. H. Smith had been called in open court by the defendant as a witness and had failed to respond when called.

From a verdict of guilty the defendant appeals, assigning error.

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

Brock Barkley for defendant, appellant.

DENNY, J. The defendant has brought forward twenty-five assignments of error based on exceptions duly taken in the course of the trial below, among them being his assignment of error based upon exceptions to the failure of the trial judge to sustain his motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. If this assignment of error is sustained it will be unnecessary to consider or discuss the remaining ones.

The pertinent parts of the statute which the defendant is charged with having violated read as follows: "Any person who shall willfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon a contract of insurance; . . . shall be punishable by im-

prisonment for not more than five years or by a fine of not more than five hundred ($500.00) dollars, or by both . . . within the discretion of the court." G.S. 14-214.

It follows, therefore, that the real question to be determined in considering the defendant's motion for judgment as of nonsuit is whether the evidence in the trial below, when considered in the light most favorable to the State, tended to prove that defendant "willfully and knowingly" presented "a false and fraudulent claim" and presented "proof in support of such claim," or did it merely raise a suspicion or conjecture as to his guilt of the charge contained in the bill of indictment. *S. v. Stephenson,* 218 N.C. 258, 10 S.E. 2d 819; *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730.

The above question is so vital to the disposition of this assignment of error, we think it is proper to analyze the evidence adduced in the trial below.

The testimony of the State's witnesses tended to show that the defendant purchased the property in question, known as 1303 Willow Road, in 1946 or 1947 for $2,500. At that time a house consisting of four rooms and a shed and an additional small building were located on the lot. Before making any improvements on the property, W. D. Seawell, rental agent for the defendant, was renting the property in 1951 at the time it was condemned, for an average monthly rental of $97.88. That thereafter, on 21 August, 1951, the defendant applied for and obtained a permit from the City of Greensboro to remove the small house on the lot and to repair the other house. That the defendant rebuilt and enlarged the house to contain fourteen or sixteen rooms; that he claimed to have spent several thousand dollars for materials, and to have paid one L. H. Smith $8,000 for labor on the building; that in addition thereto one J. A. Bigelow had also done some work on the property; that the majority of the materials used in the building had been purchased from the New Home Building Supply in Greensboro; and that the agent of one of the insurance companies involved requested the defendant to obtain estimates on what it would cost to "reproduce" the property; that in January, 1953, the property was rented to a tenant who had entered into a written contract to purchase it for $25,000 on or before 1 February, 1954, and that the defendant said he valued the house at $25,000.

The defendant offered evidence tending to show that certain carpenters from Charlotte were employed for sometime in remodeling and enlarging the building involved, and that they brought five or six loads of lumber on a two and a half ton truck from Charlotte consisting of framing, sheeting, and roofing, and that this lumber went into the building. The defendant also offered three witnesses who had made and submitted estimates on behalf of two local contractors as to the cost of rebuilding the damaged property. These witnesses testified that the workmanship on

the damaged building was inferior; that the carpenters who constructed it were inexperienced; that their estimates were based on a new building, similar in size, but completed in a first-class workmanlike manner. One estimate was $16,128, and the estimate made and submitted on behalf of the other contractor was $19,600. The letter containing this latter proposal reads as follows: "We propose and agree to rebuild the apartment house at 1303 Willow Road as it existed before it was destroyed by fire for the sum of NINETEEN THOUSAND, SIX HUNDRED DOLLARS ($19,600)."

The first policy of insurance was written on the defendant's various properties for a total of $15,500 and included the sum of $8,500 on the damaged building. This policy was written without an inspection of the property as required by law, G.S. 58-175.1, and carried an endorsement thereon to the effect that other insurance was permitted. The second policy for $10,000 was not applied for by the defendant but was solicited by the insurance agent, who knowingly wrote it, according to his testimony, for more than the value of the property. This same agent prepared the lease and sale agreement. He testified that he inspected the property and wrote the policy for what he thought the house was going to be worth. It appears he made no inquiry about other insurance, testifying that he knew it made no difference what amount it was insured for, that the insured could only recover the value of the loss or damage sustained. In this connection, it is not clear as to how much work, if any, was done on the damaged building after the insurance policies were written.

The State points out that when the first policy was written the defendant stated there were no mortgages outstanding against the property, but he informed the agent otherwise when the second policy was written. Be that as it may, the State offered no evidence tending to show that there were any liens outstanding against the property on 8 January, 1953, the date of the first policy. Even so, the fact that certain liens were set out in the proofs of claim filed with the respective insurance companies does not tend to show criminal intent in connection with the filing of proofs of claim. Moreover, the effect unreported liens or other insurance will have as to the validity of a fire insurance policy, in the event of a loss, is a civil matter governed by statute. G.S. 58-178 and G.S. 58-180.

The State introduced no evidence tending to contradict the statements of the defendant in respect to the cost of labor in constructing the house, or to show the actual cost of the various materials purchased from the New Home Building Supply of Greensboro, which materials were used in the construction of the building. It contented itself in this respect by introducing witnesses who gave their opinion as to the value of the house at the time of the fire. None of these witnesses fixed the value in excess of $7,000. However, the State offered no evidence bearing on the cost of

rebuilding the damaged building except opinion evidence by witnesses who were not contractors or experienced builders, some of whom frankly admitted that they were not qualified to testify as to the cost of the labor and materials necessary to construct the damaged building.

It must be conceded, we think, that the evidence disclosed raises a serious doubt or suspicion as to the good faith of the defendant in fixing the value of the damaged building at the time of the fire at $23,000 in his proofs of claim for loss. But, in light of the following facts, we do not think the filing of the proofs of claim for the full amount of the insurance sufficient to show that the defendant "willfully and knowingly" violated the statute involved for the purpose of collecting a false claim: (1) That while the building was damaged by fire beyond repair, its outer walls were still intact and the character of its construction and kind of materials used therein were available for all to see, (2) the insurance adjuster had made his inspection of the damaged property, arrived at his final determination of the value of the building at the time of the fire, and was in serious disagreement with the defendant as to its value before he furnished him the forms upon which to file his proofs of claim, (3) all the evidence relied upon by the State had been obtained before the proofs of claim were filed, and (4) the proofs of claim contain no information that conflicts with the defendant's contention with respect to the value of his property at the time of the fire, except he listed the value of the damaged building as being $23,000 instead of $25,000 as he had theretofore contended. Where the facts are available to all parties, the question as to the value of a damaged building at the time of a fire resolves itself largely into a matter of opinion by qualified witnesses. "Value is necessarily a matter of judgment, and, furthermore, a matter of judgment in which each person is prone to err in overestimating his own. Of course, overvaluation is an evidence of fraud, but it does not amount to fraud where it expresses the *bona fide* opinion of the insured." Cooley's Briefs on Insurance, 2nd Edition, Volume 7, page 5851.

It is true that in this case, as in the case of *S. v. Stephenson, supra,* the defendant made various contradictory statements as to the value of his property. But the question is: Did the defendant willfully and knowingly intend to violate the statute for the purpose of collecting a false claim? As to the meaning of "willfully and knowingly," *Winborne, J.,* in speaking for the Court in the last cited case, said: "The word 'willfully' as used in this statute means something more than an intention to commit the offense. It implies committing the offense purposely and designedly in violation of law. *S. v. Whitener,* 93 N.C. 590; *Foster v. Hyman,* 197 N.C. 189, 148 S.E. 36. The word 'knowingly' as so used, means that defendant knew what he was about to do, and with such knowledge, proceeded to do the act charged. These words combined in the

phrase 'willfully and knowingly' in reference to violation of the statute, mean intentionally and consciously."

It is not a crime to procure overinsurance; it may be under certain circumstances a civil wrong. Appleman on Insurance Law and Practice, Volume 19, Section 10534, page 238; 44 C.J.S., Insurance, section 90, page 604, *et seq.* Neither does one "willfully and knowingly" violate a statute when he does that which he believes he has a *bona fide* right to do. *S. v. Whitener, supra; S. v. Crosset,* 81 N.C. 579; *S. v. Ellen,* 68 N.C. 281; *S. v. Hanks,* 66 N.C. 612.

The defendant is not charged with a conspiracy to procure excessive insurance on his property and with having burned it or causing it to be burned in order to collect the insurance. Neither is he charged with burning the property, but only with willfully and knowingly filing a false claim for the purpose of collecting upon the policies of insurance issued to him.

In view of the conclusion we have reached, the judgment of the court below is

Reversed.

OTIS E. ROBERTS v. ARTHUR E. HILL, HENRY N. FOSTER, JR., ELSIE MAE MILLER, AND BOBBY HILL.

(Filed 4 June, 1954.)

1. Parties § 12—

Where the complaint makes no allegations against one of the parties named in the captions of the summons and complaint as a defendant, the name of such party is mere surplusage and should be stricken.

2. Automobiles § 23b: Trial § 37—

Where plaintiff seeks to recover of one defendant solely upon the theory that such defendant had control of an automobile and permitted another to drive with knowledge that such other was an incompetent and reckless driver, the issue of *respondeat superior* does not arise upon the pleadings and evidence and should not be submitted to the jury.

3. Automobiles § 23b—

Where the owner of an automobile hires or lends it to another, knowing that such other is an incompetent and reckless driver and likely to cause injury to others in its use, the owner is liable for injuries caused by the borrower's negligence, not under the doctrine of imputed negligence, but on the ground of his personal negligence in entrusting the automobile to one he knows is apt to cause injury, and therefore whether the relationship of employer and employee exists between the owner and driver at the time the injuries are inflicted is irrelevant to this theory of liability.

4. Same: Automobiles § 24½ (e)—G.S. 20-71.1 does not raise presumption that incompetent driver was operating car with knowledge and permission of owner.

The purpose of G.S. 20-71.1 is to establish a ready means of proving agency in cases in which it is charged that the negligence of a nonowner-operator caused damage to property or injury to the person of another, and therefore where plaintiff seeks to hold one of defendants liable on the theory that such defendant, as manager of a used car lot, permitted an employee who was known to him to be an incompetent and reckless driver to operate the car, but does not seek recovery on the doctrine of *respondeat superior*, the statute cannot have the effect of supplying plaintiff's lack of evidence that the defendant manager permitted the employee to use the car or had any knowledge of the employee's reputation as a reckless driver.

5. Automobiles §§ 23b, 24a—

Where there is no evidence that the manager of a used car lot permitted an employee to drive one of the cars or had any knowledge of such employee's reputation as a reckless and incompetent driver, the defendant owner of the business cannot be held liable under the doctrine of imputed negligence.

6. Trial § 51—

A motion to set aside the verdict on the ground of insufficient evidence presents a question of law identical with that presented by motion for involuntary nonsuit, which is whether the evidence is lacking in sufficient probative force to require its submission to a jury, and the court having denied motion to dismiss as in case of nonsuit, is without authority after verdict to set it aside for insufficiency of the evidence.

7. Same—

The court may set aside the verdict as a matter of law for errors of law committed during the trial, in which case he should specify in his order the error of law which prompts his action.

8. Trial § 49—

A motion to set aside the verdict on the ground that it is contrary to the greater weight of the evidence, as distinguished from a motion to set it aside for insufficiency of the evidence, is addressed to the court's discretion, and the court has the discretionary power to set the verdict aside on this ground to prevent injustice notwithstanding the evidence be sufficient to require the submission of the issue to the jury, and the court's determination of such motion is not reviewable.

9. Appeal and Error § 38—

The action of the court in setting aside the verdict as a matter of law will be presumed correct, and where the record fails to show upon what matter of law the court acted, no error is made to appear.

10. Appeal and Error § 50—

Where it is impossible to determine from the record whether the court below set aside the verdict as to one of defendants for insufficiency of the evidence, which the court had no power to do, or whether the court set aside the verdict as contrary to the greater weight of the evidence in the

exercise of its discretion, which order is not reviewable, the cause will be remanded for a new trial.

APPEAL by plaintiff from *Gwyn, J.*, February Term 1954, FORSYTH.

Civil action to recover compensation for personal injuries and property damage resulting from the collision of two automobiles.

In December 1952 defendant Bobby Hill was engaged in the business of selling secondhand or used automobiles under the business or trade name of Broad Street Motors. Defendant Arthur E. Hill was manager in active charge of the business. Defendant Henry N. Foster, Jr., was an employee.

On Saturday night, 13 December 1952, there was stored on the lot used for that purpose by Bobby Hill a 1946 Chevrolet automobile. The keys thereto were in the office maintained in connection with the business. About 6:00 p.m. Arthur Hill locked the door to the office and left. Foster was required to open the office for business each morning and carried a key to the office. On Sunday morning, 14 December 1952, Arthur Hill discovered that the Chevrolet was not on the lot. He later learned that it had been involved in a wreck on U. S. Highway 52 about 12:45 a.m. while it was being operated by Foster. The plaintiff's automobile, being operated by his wife, and the Chevrolet had collided, and plaintiff received injuries to his person, and his automobile was badly damaged.

There is evidence that the negligence of Foster was the proximate cause of the collision and the resulting injuries suffered by plaintiff, and that Bobby Hill knew that Foster had lost his driver's license.

As to Arthur Hill, the plaintiff alleges:

"He knowingly entrusted the aforesaid 1946 Chevrolet automobile to the care of the defendant, Henry N. Foster, Jr., although he well knew that the said Henry N. Foster, Jr., was irresponsible and incompetent to be entrusted with the care and operation of a motor vehicle, and that he well knew, or in the exercise of ordinary care, should have known that serious bodily injury to others and great damage to the property of others would be a likely and probable result if he permitted the defendant, Henry N. Foster, Jr. to have the use of said automobile."

The allegation of negligence on the part of Bobby Hill is as follows:

"That in all of the foregoing acts the defendant, Arthur E. Hill, was acting in behalf of his employer, the said Bobby Hill, as agent of said defendant, Bobby Hill, trading as Broad Street Motors, and within the scope of said agency and within the scope of his employment as manager of the business of said defendant, Bobby Hill, trading as Broad Street Motors."

At the conclusion of plaintiff's evidence in chief, the action was dismissed as to Arthur Hill as in case of involuntary nonsuit. Bobby Hill

then offered evidence tending to show that Foster was not permitted to operate any vehicle belonging to the business, even when he was on duty; that Arthur Hill had been instructed "not to let anyone take a car off that lot, not even demonstrating;" that signs were posted in the office to that effect; and that neither one of the Hills gave Foster permission to use the Chevrolet. He likewise offered evidence tending to show that Foster surreptitiously obtained the keys and took the Chevrolet from the lot during the nighttime, after the office was closed and locked, on the afternoon preceding the wreck, without the knowledge, consent, or approval of either Arthur or Bobby Hill, in violation of G.S. 20-105; and that Foster was on a mission of his own at the time of the collision.

In rebuttal, plaintiff offered evidence that Foster has a long criminal record including various violations of the motor vehicle traffic laws. This evidence was excluded as to Bobby Hill.

While Bobby Hill, at the conclusion of the testimony, renewed his motion for judgment as in case of involuntary nonsuit, he did not except to the denial of the motion.

Issues were submitted to and answered by the jury as follows:

"1. Was the plaintiff Otis E. Roberts injured and damaged by the negligence of the defendant Henry N. Foster, Jr., as alleged in the complaint? Answer: Yes.

"2. At the time of the alleged injury was the defendant Henry N. Foster, Jr., the agent of the defendant Bobby Hill and as such acting within the scope of his employment? Answer: No.

"3. Was the plaintiff Otis E. Roberts injured and damaged by the negligence of the defendant Bobby Hill as alleged? Answer: Yes.

"4. What amount, if any, is the plaintiff entitled to recover?

"(a) for personal injury? Answer: $3,000.00

"(b) for property damage? Answer: $1,000.00."

Upon the rendition of the verdict the plaintiff tendered judgment thereon. The court declined to sign the same and plaintiff excepted. The court then entered judgment:

"That the verdict rendered by the jury in the above entitled case as it relates to Bobby Hill be, and the same is hereby set aside and a new trial ordered as to the said Bobby Hill.

"That the plaintiff recover judgment against the defendant Henry N. Foster, Jr. in the sum of $4,000 . . ."

Plaintiff excepted and appealed.

Johnson & Randolph for plaintiff appellant.

Spry & White for defendant appellees.

BARNHILL, C. J. The plaintiff makes no allegation against the defendant Elsie Mae Miller. No reference is made to her in the body of the complaint. Therefore, her name, appearing in the captions of the summons and pleadings as a defendant, is mere surplusage. It should be stricken so as to keep the record straight.

While plaintiff alleges that defendant Foster was an employee of Bobby Hill, he neither alleged in his complaint nor attempted to prove at the trial that Foster, at the time of the collision, was then about his master's business so as to render the defendants, or either of them, liable under the doctrine of *respondeat superior* for his negligent operation of the Chevrolet.

The plaintiff states in his brief filed in this Court that "the complaint sets forth a cause of action against the defendant Arthur E. Hill for negligently entrusting to an incompetent person the care and operation of a motor vehicle. The basis of liability of this defendant is NOT predicated upon the theory of *respondeat superior,* that is, upon the theory that Foster was the agent of the defendant, Arthur E. Hill. It is based upon the negligent act in entrusting the automobile to one whom the defendant knows, or by the exercise of ordinary care should have known, would be likely to cause injury to others on account of the use of said automobile."

His counsel made a similar statement in the course of the oral argument in this Court. Thus, it appears that neither the pleadings nor the evidence raises the issue of fact incorporated in the second issue. It should not have been submitted to the jury. Even so, the answer thereto puts at rest the question of the applicability of G.S. 20-71.1.

Plaintiff's cause of action, as set forth in his complaint, is not bottomed on the master-servant relationship as between Foster and the Hills. It is bottomed on an entirely different and independent rule of the law of negligence.

Where the owner of an automobile hires or lends it to another, knowing that the latter is an incompetent, careless or reckless driver and likely to cause injury to others in its use, the owner is liable for injuries caused by the borrower's negligence, on the ground of his personal negligence in entrusting the automobile to one who he knows is apt to cause injury to another in its use. *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162.

When the owner of a motor vehicle lets or loans his automobile to a person known to him to be an incompetent, careless or reckless driver, he does so at his own peril and is liable for any resulting injury or damage proximately caused by the negligence of the bailee. *Bogen v. Bogen, supra,* and cases cited.

Under this doctrine, the liability of the owner of a motor vehicle is made to rest upon proof of (1) ownership of the automobile, (2) the incompetency, or habitual carelessness or recklessness of the bailee to

whom its operation is entrusted to operate it properly and safely, (3) the owner's timely knowledge of such incompetency, carelessness or recklessness, and (4) injury to a third person resulting proximately from the negligence, incompetency or recklessness of the bailee. *Bogen v. Bogen, supra.*

While the party injured must prove that the injuries to his person or damage to his property proximately resulted from the negligence of the bailee-driver, the owner is not held liable under the doctrine of imputed negligence but for his independent and wrongful breach of duty in entrusting his automobile to one who he knows or should know is likely to cause injury. *Bogen v. Bogen, supra; Taylor v. Caudle,* 210 N.C. 60, 185 S.E. 446; *Cook v. Stedman,* 210 N.C. 345, 186 S.E. 317; *Heath v. Kirkman, ante,* p. 303; *McIlroy v. Motor Lines,* 229 N.C. 509, 50 S.E. 2d 530. Proof of negligence of the bailee-driver merely furnishes the causal connection between the primary negligence of the owner and the injury or damage.

The owner is held liable for his own negligence and not for the negligence of his agent or employee. Hence proof that the employer-employee relationship existed between the owner and the driver at the very time the injuries were inflicted is not required. See Anno. 36 A.L.R. 1148, 68 A.L.R. 1013, and 100 A.L.R. 923.

At the time plaintiff rested his case there was not a scintilla of evidence tending to show that Arthur Hill permitted Foster to use the Chevrolet, or that he had any knowledge of Foster's reputation as a reckless driver and a frequent violator of the motor vehicle traffic laws, or that he is liable under the doctrine of *respondeat superior.*

But plaintiff earnestly contends that G.S. 20-71.1 is applicable in a case bottomed on the negligence alleged in the complaint as well as in cases where plaintiff relies on the doctrine of imputed negligence, and that it furnishes the missing link in his evidence. He asserts that the provisions of the Act should be extended to embrace an admitted agent who "had full custody of the lot" and complete control over the automobiles, including the right to permit others to operate them. In short, he contends that the statute makes out for him a *prima facie* showing that Foster was operating the Chevrolet at the time of the collision "with the authority, consent and knowledge of" both of the Hills.

These arguments advanced by counsel for plaintiff evidence a careful study of the Act, G.S. 20-71.1, in an attempt to give it a sound and logical construction which would embrace an authorized agent within the word "owner" as used in the Act.

But we find ourselves unable to concur. A careful consideration of the original Act, ch. 494, S.L. 1951 (of which G.S. 20-71.1 is a codification), including its caption, leads us to the conclusion that it was designed and

intended to apply, and does apply, only in those cases where the plaintiff seeks to hold an owner liable for the negligence of a nonowner operator under the doctrine of *respondeat superior.* "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 and was not intended to have any other force or effect.*" *Hartley v. Smith,* 239 N.C. 170. (Emphasis added.) This language appearing in the *Hartley case* was used advisedly. We adhere to what is there said.

It is not here alleged that Foster was operating the vehicle "within the course and scope of his employment." G.S. 20-71.1. Hence the statute has no application to the cause of action alleged or to the facts disclosed by this record. The judgment dismissing the action as to Arthur Hill must be affirmed.

There is neither allegation nor evidence that Bobby Hill entrusted the Chevrolet to Foster. It is alleged instead that Arthur Hill as agent of Bobby Hill committed the act of negligence relied on by plaintiff. It was judicially determined in the court below that the evidence offered is not such as would require the submission of any issue of negligence as against Arthur Hill, and we affirm. That being true, there was no negligence on the part of the agent to be imputed to the master or principal.

Here again, however, the plaintiff seeks to invoke the provisions of G.S. 20-71.1. But the court below set aside the verdict as against Bobby Hill. For that reason the question thus raised is not before us for decision. Even so, we may assume that when this cause comes on for rehearing, the presiding judge will take note of our disposition of the same question raised on the appeal as against Arthur Hill.

The act of negligence alleged by plaintiff under the doctrine of negligence relied on by him is primary and personal to the owner. Whether it may be committed by proxy is likewise a question we must, for the same reason, leave open for decision until it is properly presented.

The merits of plaintiff's exception to the order of the court below setting aside the verdict as to the defendant Bobby Hill is the one and only question presented for authoritative decision as it relates to him. On this question the record is somewhat ambiguous.

This defendant moved to set aside the verdict for that it "was against the greater weight of the evidence and that there was not sufficient evidence to support a verdict against the said defendant Bobby Hill." The court, "being of the opinion that the defendant Bobby Hill was entitled to have the verdict set aside as a matter of law and that the motion should be sustained," granted the motion. The foregoing is set forth in the preliminary recitals contained in the judgment. In the body of the

adjudication the court set the verdict aside and ordered a new trial without stating whether it did so as a matter of law or in its discretion.

Did the court set the verdict aside for the reason the evidence was insufficient or because it was against the greater weight of the evidence? If the order was based on some error the court conceived it had committed during the progress of the trial, what was the error? In other words, what was the "matter of law" which prompted the court to vacate the verdict? On this record we are unable to answer any one of these questions with any degree of satisfaction. We shall, therefore, assume the court set the verdict aside as a matter of law.

In relation to a motion to set aside a verdict, there is a very distinct and vital difference between the terms "insufficiency of the evidence" and "against the greater weight of the evidence."

"Insufficient evidence" means evidence lacking in sufficient probative force to require its submission to a jury. Therefore, a motion based on the alleged insufficiency of the evidence again raises the identical question of law which was decided on the motion to nonsuit. Having denied a motion to dismiss an action as in case of nonsuit, the judge is without authority, after verdict, to set the verdict aside, as a matter of law, for that the evidence is insufficient to support a verdict in favor of the plaintiff. *Mewborn v. Smith,* 200 N.C. 532, 157 S.E. 795; *Lee v. Penland,* 200 N.C. 340, 157 S.E. 31; *Price v. Insurance Co.,* 200 N.C. 427, 157 S.E. 132; *Batson v. Laundry Co.,* 202 N.C. 560, 163 S.E. 600.

Motion to dismiss for insufficient evidence must be disposed of before verdict. *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822. After verdict the judge is limited, on this point, to the exercise of his discretion. *Lee v. Penland, supra; Mewborn v. Smith, supra.* In addition, he may set aside the verdict as a matter of law for errors of law committed during the trial, *Mewborn v. Smith, supra,* in which case he should specify in his order the error of law which prompts his action.

Even though there is sufficient evidence to require its submission to a jury, it may be that in the opinion of the presiding judge the evidence offered by the defendant has greater probative force than does that offered by the plaintiff—that the verdict is against the greater weight of the evidence—and that to let the verdict stand would work an injustice. He is therefore vested with the discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony. As a motion to set aside a verdict for that it is against the greater weight of the evidence requires his appraisal of the testimony, it necessarily invokes the exercise of his discretion. It raises no question of law, and his ruling thereon is irreviewable. *Anderson v. Morris,* 203 N.C. 577, 166 S.E. 527; *Query v. Insurance Co.,* 218 N.C. 386, 11 S.E. 2d 139; *King v. Byrd,* 229 N.C. 177,

47 S.E. 2d 856; *Trust Co. v. Ellen,* 163 N.C. 45, 79 S.E. 263; *Riley v. Stone,* 169 N.C. 421, 86 S.E. 348; *Goodman v. Goodman,* 201 N.C. 808, 161 S.E. 686; *Brink v. Black,* 74 N.C. 329.

"When a Judge presiding at a trial below grants or refuses to grant a new trial because of some question of 'law or legal inference' which he decides, and either party is dissatisfied with his decision of that matter of law or legal inference, his decision may be appealed from, and we may review it. But when he is of the opinion that, considering the number of witnesses, their intelligence, their opportunity of knowing the truth, their character, their behavior on the examination, and all the circumstances on both sides, the weight of the evidence is clearly on one side, how is it practicable that we can review it, unless we had the same advantages? And even if we had, we cannot try facts. *Vest v. Cooper,* 68 N.C. 132; *Watts v. Bell,* 71 N.C. 405." *Brink v. Black, supra; Goodman v. Goodman, supra.*

Furthermore, "an exception to an order setting aside a verdict as a matter of law cannot be sustained unless error is shown, because the order is presumed to be correct." *Godfrey v. Coach Co.,* 200 N.C. 41, 156 S.E. 139. Since the record fails to disclose with any degree of satisfaction upon what matter of law the court below acted, no error is made to appear.

If the court set aside the verdict for the insufficiency of the evidence, it was without authority to do so. If he considered the verdict against the greater weight of the evidence, and for that reason set it aside, he was exercising his irreviewable discretion however his action may be labeled in the motion and judgment.

As we are unable to determine from this record the exact basis of the court's action, we deem it advisable to vacate the verdict as to Bobby Hill and remand the cause for a new trial as was done in *Godfrey v. Coach Co., supra,* and *Watkins v. Grier,* 224 N.C. 334, 30 S.E. 2d 219, and like cases.

This disposition of the appeal as against this defendant gives plaintiff no just cause to complain. His action should have been dismissed. Here he is still in court and has an opportunity to "mend his licks" if he can discover additional evidence.

We call attention to the fact that while the court sustained the motion of Arthur Hill for judgment of involuntary nonsuit, no formal judgment dismissing the action as to him appears of record.

As to defendant Arthur E. Hill—affirmed.

As to defendant Bobby Hill—new trial.

W. G. INGLE AND WIFE, MRS. W. G. INGLE; B. W. FITCH AND WIFE, MRS. B. W. FITCH, v. C. C. STUBBINS.

(Filed 4 June, 1954.)

1. **Deeds § 16b—**

In construing restrictive covenants in a deed, the meaning of each covenant must be determined from a consideration of and in relation to the other covenants in 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—Resubdivision of lots does not justify disregard of minimum setback lines as prescribed in restrictive covenant.**

The restrictive covenants running with the land involved in this suit restricted the use of each lot to a single family dwelling, fixed minimum size of each lot as to total area and width, and stipulated the minimum setback lines of 50 feet on the front and 10 feet on the side. Two lots facing a street at an intersection were resubdivided so as to form three lots facing on the other street. The purchaser of the resubdivided lot at the intersection began the erection of a dwelling, the site of which was located nearer than the prescribed minimum distance from the street upon which the lots originally faced. *Held:* While the restrictive covenants do not preclude resubdivision so long as the covenants are complied with, resubdivision does not alter the covenants as to the original front and side lines, and the location of defendant's residence nearer than 50 feet to the street on which it originally fronted violates the covenants.

6. **Injunctions § 1b—**

While a mandatory injunction ordinarily will not issue as a preliminary order, it is the proper remedy in apposite cases to compel compliance with a judgment in the nature of an execution against a private person.

7. **Same: Deeds § 16b—Where defendant deliberately violates restrictive covenants, mandatory injunction will lie to compel modification of building to comply with restrictions.**

It appeared that defendant purchased his lot with knowledge of the existence of restrictive covenants, that plaintiffs sought to restrain him from erecting a dwelling in alleged violation of the restrictions, but that

the temporary order issued when only the foundations and subflooring had been completed was not renewed for plaintiffs' failure to give bond, and that pending the hearing on the merits, defendant completed the dwelling. *Held:* Upon determination that the dwelling violated restrictive covenants, plaintiffs are entitled to a mandatory injunction compelling defendant to remove the structure so that it conform to the covenants, and to prevent further construction of any building in violation of the covenants.

APPEALS by plaintiffs and by defendant from *Patton, S. J.*, January Civil Term 1954, of ALAMANCE.

Civil action to enjoin defendant from erecting a dwelling house upon a certain lot No. 11 in "Brookwood, Trollinger Section" in Burlington, N. C., in violation of restrictive covenants, and for mandatory injunction or for damages.

Upon trial in Superior Court the parties to this action, waiving a jury trial, submitted to the court an agreed statement of facts to which to apply the law, and to enter judgment in accordance therewith, etc. The facts agreed are substantially as follows:

1. During the month of September 1937 Mrs. Cora Trollinger subdivided a tract of land in Alamance County, then without and now within the corporate limits of the city of Burlington, N. C., into 61 lots and prepared a plat thereof, which was duly recorded in the office of the register of deeds of said county in Plat Book 2, at page 130, which plat is hereby by reference incorporated herein and made a part and parcel of the agreed statement of facts. Exhibit 1. (Note: The subdivision is known as "Brookwood-Trollinger Section.")

2. On 7 February, 1941, Mrs. Cora Trollinger and one W. Burton Hair and his wife, who had become the owners of lot No. 32 in said subdivision, made and executed a certain indenture, designated as Exhibit 2, which was duly recorded in office of register of deeds of Alamance County on 14 February, 1941, in Deed Book 133 at p. 113-114, the pertinent parts of which are these:

"Know all men by these presents, that Cora M. Trollinger, widow, and W. Burton Hair and wife, Virginia D. Hair, hereby covenant and agree to and with all persons, firms or corporations, now owning or hereafter acquiring any property in the area hereinafter described, that all of the lots shown upon the map of the property known as the Trollinger Section of Brookwood, as shown by plat recorded in the office of the register of deeds for Alamance County, North Carolina, in book of plats #2 at page 130, except lots numbered 44 to 46 inclusive, of said subdivision which are covered by different restrictions mentioned below, are hereby subjected to the following restrictions as to the use thereof, running with said properties by whomsoever owned, to wit:

"1. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them until January 1, 1970.

"2. All lots in the tract of land above described shall be known as residential lots. No structures shall be erected, altered, placed, or permitted to remain on any residential building plot other than one detached single family dwelling not to exceed two and one-half stories in height and a private garage for not more than three cars and other outbuildings incidental to residential use.

"3. No building shall be located on any of lots numbered 29 to 34 inclusive nearer than 60 feet to the front line of said lots, nor nearer than 10 feet to any side street line; and no building, except a detached garage or other outbuilding located 100 feet or more from the front line shall be located nearer than 10 feet to any side lot line.

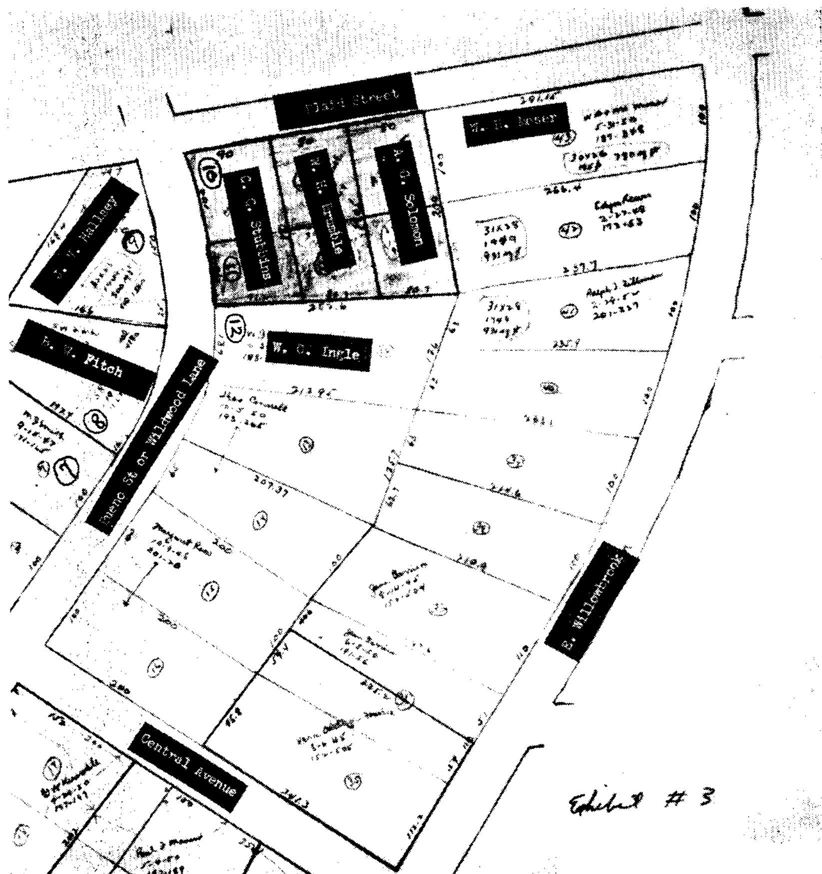
"4. No building on any of the other lots of the said subdivision shall be located nearer than 50 feet to the front line, nor nearer than 10 feet to any side street line; no building except a detached garage or other outbuilding located 100 feet or more from the front line shall be located nearer than 10 feet to any side lot line.

"5. No residential structure shall be erected or placed on any building plot, which plot has an area of less than 10,000 square feet, nor a width of less than 60 feet at the front building set back line. . . .

"8. No dwelling costing less than $4,000 shall be permitted on any lot in the tract."

3. Among the lots shown on said plat there were five lots designated as numbers 8, 9, 10, 11 and 12, all fronting on Bueno Street or Wildwood Lane,—8 and 9 were adjoining lots on the west side, and 10, 11 and 12 were adjoining lots on the east side thereof. Lot 9 was on the southwest corner and south of the intersection of Bueno Street or Wildwood Lane and Plaid Street. Lot 8 was located south of lot 9. And lot 10 was on the southeast corner of said intersection, and lot 11 adjoined lot 10 on the south, and lot 12 adjoined lot 11 on the south. Lot 10 had frontage of 100 feet on Bueno Street or Wildwood Lane, and extended easterly between parallel lines along the south line of Plaid Street 250 feet to lot 43, and then approximately south with the west line of lot 43. Lot 11 had frontage of 70 feet on Bueno Street or Wildwood Lane, and extended easterly to the west line of lot 42. And lot 12 had frontage of 68.1 feet, and extended easterly to west lines of lots 41 and 40.

4. Prior to 10 February, 1947, L. M. and G. M. Newlin, spelled also Newland, acquired lots 10 and 11 by *mesne* conveyance from Mrs. Trollinger, and on 10 February, 1947, purchased lots 8, 9 and 12 from her and obtained deeds therefor from her. Each of these deeds contained by reference the restricting covenants described in paragraph 2 hereinabove.



5. Thereafter L. M. and G. M. Newland subdivided lots 10 and 11 into three lots so that instead of facing on Bueno Street or Wildwood Lane, as shown on the original subdivision, they faced on south side of Plaid Street, as shown by an unrecorded diagram and plat hereto attached as a part hereof. The westerly lot has frontage of 90 feet, the center lot 80 feet, and the easterly lot 80 feet on Plaid Street,—and each extends across lots 10 and 11 to the north line of lot 12, as shown on original plat.

6. On 6 February, 1947 the Newlands conveyed the center of the three lots referred to in paragraph 5 to W. H. Brumble, by warranty deed without reference to restrictions; and on 11 March, 1947, they, the Newlands, conveyed the easterly lot to A. G. Solomon, by warranty deed containing the restrictive covenants, and on 5 August, 1947, they, the Newlands, conveyed the westerly lot to Clyde W. Cable, by warranty deed

containing the building restrictions, and on 10 September, 1951, Cable conveyed it to defendant C. C. Stubbins, by deed containing same reference to building restriction.

7. On 12 August, 1947, the Newlands conveyed parts of lots 8 and 9 to plaintiff B. W. Fitch and wife by warranty deed, containing the restrictive covenants.

8. On 31 October, 1949, the plaintiffs Wm. G. Ingle and wife obtained by *mesne* conveyance said lot 12. The deed to them contained no reference to restrictions. They have erected on this lot 12 a residence building, seventy-five (75) feet from their property line on Bueno Street or Wildwood Lane.

9. *As to Buildings on Lots 8, 9, 10 and 11.*

That before the plaintiff Ingle purchased his lot, as above stated, a residence, fronting on Plaid Street and less than 50 feet from Bueno Street, or Wildwood Lane, had been built upon a portion of lot 9. It is owned and occupied by one Hallsey.

Also prior to the date plaintiff Ingle acquired lot No. 12, a residence had been constructed on those parts of lots 10 and 11, referred to as the Brumble and Solomon lots, (see paragraph 6 hereinabove), but these residences are not nearer than 50 feet to Bueno Street or Wildwood Lane. They front on, and are 35 feet from Plaid Street.

And "upon lot 43 W. H. Moser has constructed a residence which does not set back on Central Avenue." (Note: Referring to the original plat —lot 43 fronts on E. Willowbrook Drive, and not on Central Avenue.)

10. Also lots 17 and 18, as shown on original plat and subdivision facing on Bueno Street or Wildwood Lane, and lots 33 and 34, facing East Willowbrook Drive, have been subsequently re-subdivided so that the rear portions of said lots have been formed into another lot facing on Central Avenue. (Note: The north lines of lots 17 and 34 as originally shown run with south line of Central Avenue.) And it is agreed that this re-subdivision of these lots was done and made after Mrs. Trollinger had sold the lots now owned by the parties hereto.

11. Exclusive of lots 10 and 11, there are nine vacant lots facing on Bueno Street or Wildwood Lane, and twenty-four in the whole subdivision.

12. Subsequent to the erection of a residence by plaintiff W. G. Ingle on lot 12, the defendant erected a dwelling house on a portion of lot 11 located 30.5 feet from Bueno Street or Wildwood Lane; that before defendant erected the house, he applied on 9 April, 1952, and obtained from the city of Burlington, a building permit, subject to this statement endorsed by the City Building Inspector, on the back of the application: "Permit 4276 is issued on the condition that it must meet the requirements of the Zoning Ordinance of the city . . . and the restrictions and

covenants on file for the Brookwood-Trollinger Section subdivision as recorded in Plat Book 2, page 130 and Deed Book 133 at pages 113-114, dated September 1937." That at the time of the issuance of the building permit "said lot, as re-subdivided faced on Plaid Street and the Building Inspector concluded that the placing of the house 50 feet from Plaid Street was a compliance with the regulations of the original restriction, as shown by the permit," which is made a part and parcel of the agreed statement. And the dwelling constructed on the front portion of lot 11, *according to the original plot of said subdivision, is located 112 feet from* Plaid Street. The size of the house is 32 x 26 feet. It is a modern house costing more than $5,000; and is so framed as to permit the cutting of a door into the side of the dwelling nearest to Bueno Street.

13. That at the time this action was instituted, 10 May, 1952, an order was issued to defendant to show cause a week later why he should not be enjoined from constructing this dwelling on lot 11 of the original subdivision. On that date the dwelling had been completed only to the extent of the foundation and sub-flooring; that defendant continued to construct the dwelling; that on return day the court signed a temporary order of injunction for one week; and defendant complied therewith. When the matter came on for later hearing upon application of plaintiff for a longer injunction, the court denied the injunction because plaintiffs were unable to furnish bond, but provided that the denial should be without prejudice to either party. After this order was entered, defendant continued the construction of said dwelling on lot 11, and completed the same pending this action. After doing so, and pending this action, defendant commenced to erect a structure 40 x 28 feet upon lot 10 of the original subdivision, 31 feet and 4 inches from the front line of lot 10 on Bueno Street, and 50 feet from Plaid Street—completing the erection of foundation and foundation wall. Defendant discontinued the construction upon the issuance of a warrant pertaining thereto issued on basis of violation of the building code of the city of Burlington, and permit for construction of building on lot 10 has been vacated by the city.

14. That plaintiff Ingle and plaintiff Fitch each lives in houses on their lots, and defendant lives on the opposite corner in the same section of the town.

When the cause came on for hearing upon the agreed facts, the court being of opinion (1) that the restrictive covenants referred to are and were in full force and effect at the time of the institution of this action, (2) and that defendant has violated the restrictive covenant mentioned in paragraph four of the agreed statement of facts by placing buildings less than 50 feet from the front line of his lots, (3) and that plaintiffs have a right to maintain this action for a breach of said restrictive covenant, (4) and that plaintiffs are not entitled to relief by means of a

mandatory injunction, but are entitled to have damages, if any they have sustained, fixed by a jury, and that the cause should be returned to the trial docket of Alamance County for that purpose, entered judgment in accordance therewith.

To the signing and entering of the judgment (a) defendant excepts (Defendant's exception #1), and plaintiffs also except in so far as the judgment fails to grant injunctive relief in regard to lot 11 (Plaintiffs' Exception #1), and lot 10 (Plaintiffs' Exception #2) as prayed for in the complaint. Both parties appeal to Supreme Court and assign error.

W. R. Dalton, Jr., for plaintiffs.

Thos. C. Carter and Clarence Ross for defendant.

DEFENDANT'S APPEAL.

WINBORNE, J. The sole question presented by the appeal of defendant, as stated in brief of attorneys filed in this Court for him, is whether or not the construction of the residence building on the lot in question nearer than fifty feet to Bueno Street or Wildwood Lane,—a fact agreed,—is in violation of the restrictive covenants here involved. The trial court ruled that it was violation of paragraph four. And this Court now approves.

The subject of restrictive covenants has been recently considered and treated by this Court in opinion by *Johnson, J.*, in the case of *Callahan v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619. There the restrictive covenants are almost parallel in purpose and phraseology to those in the instant case. And they were considered in respect to a proposed plan for partial re-subdividing of four lots into smaller units.

It is there said (omitting citations), that "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 . . . 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 . . . 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 . . . 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 limitations on use . . . Therefore, restrictive covenants clearly expressed may not be enlarged by implication or ex-

tended by construction. They must be given effect and enforced as written . . . 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 . . ." For rule as to interpretation, see also *Stephens v. Lisk, ante*, 289.

In the light of these rules of interpretation, we turn to the covenants now in hand, and parallel the reasoning and decision reached in the *Callahan case*.

The covenants that control decision here are contained in paragraphs 2, 4, 5 and 8 of the restrictive covenants.

Paragraph 2 designates the lots as residential lots, and restricts the use of the property to residential purposes, and provides that not more than one detached single family dwelling shall be placed on any residential building plot.

Paragraph 4 establishes the minimum building set back lines, both front and side. And this means the front and side as each existed at the time the covenant was made. See *Rhinehart v. Leitch,* 107 Conn. 400, 140 A. 763; *Tear v. Mosconi,* 239 Mich. 242, 214 N.W. 123.

Paragraph 5 fixes the minimum size of the building plot. 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 60 feet at the front building set back line. And the minimum area is 10,000 square feet. Therefore a lot 90 feet wide and 170 feet deep, the dimensions of the westerly lot of the re-subdivision of lots 10 and 11, exceeds the minimum standard so fixed as to width and size. But the area of the parts of said westerly lot within the lines of lots 10 and 11 respectively fail to meet the minimum standard of 10,000 feet so fixed. Hence, while the area of the westerly lot is adequate for a single family dwelling unit, it is not sufficient for two, and the erection of two-family dwelling units thereon would be and is in violation of the restrictive covenant in this respect.

Moreover, it is noted that the three lots into which lots 10 and 11, as shown on the original map, were subdivided each contains areas largely in excess of 10,000 square feet, and none of them is less than the minimum width. Therefore, as held in the *Callahan v. Arenson case,* the covenant fixing minimum standards as to width and area authorizes re-subdivision of the original lots 10 and 11 as made by the Newlands.

Nevertheless there is nothing in the covenants that authorizes the change of original front line in respect to requirements as to building set back distances. Indeed, in *Tear v. Mosconi, supra,* the Supreme Court of Michigan, in opinion by *Clark, J.,* said: "A builder may not treat the side line of the lot as a front line, and by so doing avoid the restrictions." Hence in case in hand, any building erected on the westerly lot of the re-

subdivision is required to be located not nearer than 50 feet to such original front line, that is the east line of Bueno Street or Wildwood Lane, or not nearer than 10 feet to the side street line—Plaid Street. And it being admitted that the building proposed to be erected, and erected pending this action, is located 30.5 feet from Bueno Street or Wildwood Lane, such location of the building is in violation of the covenant fixing the set back building line. Therefore, the ruling of the trial court so holding is correct, and is hereby affirmed.

PLAINTIFFS' APPEAL.

This appeal of plaintiffs challenges the correctness of the ruling of the trial court in denying to them relief by mandatory injunction. The court having found that defendant has violated the restrictive covenant as to building set back line in the construction of a dwelling house within fifty feet of Bueno Street or Wildwood Lane, as appears on defendant's appeal, this Court, after considering the equities involved in the light of statement of agreed facts, is constrained to hold that the denial of relief by mandatory injunction is error.

"A mandatory injunction requires the party enjoined to do a positive act, and since this may require him to destroy or to remove certain property, which upon a final hearing he may be found to have the right to retain, it is not so frequently used as a temporary or preliminary order. As a rule such an order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable and clearly established, or the party has done a particular act in order to evade an injunction which he knew has been or would be issued. As a final decree in the case it would be issued as a writ to compel compliance in the nature of an execution. The mandatory injunction is distinguished from a *mandamus,* in that the former is an equitable remedy operating upon a private person, while the latter is a legal writ to compel the performance of an official duty." McIntosh's N. C. P. & P. in Civil Cases, Sec. 851, p. 972; also *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452; see also *R. R. v. R. R.,* 237 N.C. 88, 74 S.E. 2d 430.

In 14 American Jurisprudence 672, we find this comprehensive statement of pertinent case law: "Mandatory injunction has been frequently granted to compel the removal of a building or a part thereof which has been erected in violation of some restrictive covenant as to the use of land. The issuance of a mandatory injunction to compel the removal of a building erected in violation of a restrictive covenant depends upon the equities between the parties. The most frequent use of mandatory injunction as a remedy for the violation of real property restrictions has been to effect the removal of some erection which encroaches over a building line. Unless the injury is so slight as to be within the maxim *'de minimis,'*

mandatory injunction will issue to compel removal of encroachments. In the case of one who deliberately violates a building restriction, a mandatory injunction to compel the modification of his building so as to comply with the restrictions cannot be avoided on the theory that the loss caused by it will be disproportionate to the good accomplished." See Annotations: 57 A.L.R. 336; 23 A.L.R. 2d 527.

Applying these principles to facts of case in hand, the defendant acquired the property with notice of the restrictions imposed upon lots 10 and 11 as originally platted. His attention was directed to these restrictions when he applied to the city for a building permit, and such permit was granted subject to the restrictive covenants. When he began the erection of building, plaintiffs sought in this action to enjoin him from proceeding. The court granted a temporary injunction which he obeyed. But when the plaintiffs could not furnish the bond required as condition for continuance of the injunction, defendant proceeded to take his chances as to the effect of his conduct upon plaintiffs' rights. Speaking to a like factual situation the Massachusetts Supreme Judicial Court in *Sterling Realty Co. v. Tredennick,* 162 A.L.R. 1095, 64 N.E. 2d 921, declared: "Upon similar facts it has been the practice of the courts to grant a mandatory injunction." While this statement of the principle is not binding on this Court, it is here appropriate, and is most persuasive. Hence, this Court holds that plaintiffs are entitled to mandatory injunction to require defendant to remove the building so that it shall not be nearer than fifty feet to Bueno Street or Wildwood Lane. Moreover, mandatory injunction is appropriate to prevent further construction of the building, foundation for which it appears has been laid by defendant.

Therefore, on plaintiffs' appeal the case will be remanded for further proceedings in accordance with this opinion, and as to justice appertains and the law directs.

On defendant's appeal—Affirmed.

On plaintiffs' appeal—Error and remanded.

ELIZABETH B. REESE v. PIEDMONT, INC.

(Filed 4 June, 1954.)

1. Negligence § 4f—

The owner of a building renting a floor thereof to a private hospital is under duty to exercise ordinary care to keep the restroom on the floor in a reasonably safe condition for the use of the doctors' patients, and to warn them of hidden perils or unsafe conditions in entering or leaving the restroom which are known to the lessor or ascertainable by it by reasonable

inspection and supervision, but the lessor is not an insurer of the safety of such patients, and the mere fact that a patient falls in the restroom to her injury raises no inference of negligence.

2. Same—

The owner of a building is under no duty to warn invitees of a danger which is obvious to any person of ordinary intelligence using his faculties in an ordinary manner.

3. Same—

The construction of a floor in a restroom on two levels, with a step from one level to the other, is not negligence unless, because of the character, location, or surrounding conditions, a reasonably prudent person would not be likely to expect the step or see it.

4. Same—Evidence held insufficient to show negligence on part of lessor in maintenance of restroom.

The evidence considered in the light most favorable to the plaintiff tended to show that she was a patient of a private hospital which rented a floor of the building from defendant, that the restroom maintained on the floor was about 14 feet long, that three feet and eight inches from the entrance door there was a step seven and three-quarter inches high to the back of the room where the toilets were located, that there was a rubber mat on the lower level extending from about two inches in front of the step-up to about four inches from the entrance door, that at the back there was a small window with translucent glass, that there was a light burning in the rear of the room but that the bulb in the fixture over the step was not burning, and no bulb was in the fixture on the right wall near the washbasin, and that plaintiff was helped to the toilet by a nurse, but in returning to the door some 10 or 15 minutes later, failed to see the step-down and fell to her injury. *Held:* Defendant's motion to nonsuit was properly allowed, since defendant was not under legal duty to prevent persons inattentive to their own safety from hurting themselves, and the evidence discloses that plaintiff must have become aware of the step on her trip to the toilet, and that there was enough light to which plaintiff's eyes must have become adjusted for her to have seen the step-down had she exercised due care for her own safety.

5. Appeal and Error § 39e—

Where it is determined on motion to nonsuit that the plaintiff's evidence, taken as true, is insufficient to be submitted to the jury, the exclusion of corroborative evidence cannot be prejudicial.

6. Same—

Where it is determined that the light burning in lessor's rest room at the time of the injury was sufficient for plaintiff invitee to have seen the step-down had she looked, the exclusion of evidence bearing on the regularity of inspection and maintenance of other lights in the restroom cannot be prejudicial.

7. Same—

Since the maintenance of a rest room with two floor levels and a step between the levels is not negligence unless the location and conditions are such that a reasonably prudent person would not be likely to expect a step

or see it, where the evidence discloses that there was sufficient light in the rest room to have enabled the plaintiff to see the step-down had she looked, the evidence does not disclose that the rest room presented a dangerous condition, and therefore evidence tending to show that lessor had knowledge of the condition of the rest room prior to the injury is properly excluded.

APPEAL by plaintiff from *Sharp, Special Judge,* September Civil Term 1953 of GUILFORD—Greensboro Division.

Civil action for damages for personal injuries sustained in a fall in a ladies' rest room in a building owned and operated by defendant.

The plaintiff's evidence tends to show the following facts: About 9:30 a. m. on 26 September 1951 the plaintiff, Mrs. Elizabeth B. Reese, for the purpose of having X-ray pictures made, went to the offices of Dr. E. T. Walker on the second floor of a building owned and operated by the defendant, Piedmont, Inc. The building has four stories; on the first floor are a drug store, barber shop, stairway and elevators; the second floor is devoted to office space, and the two upper stories are used by a private hospital. The plaintiff is a 50 year old woman. She was accompanied by Mrs. Frank Gartland. The plaintiff put on an examining gown, and was given a barium enema. After the X-ray picture was made, Dr. Walker told her to go to the ladies' rest room across the hall to evacuate the enema, and to return to his office for an X-ray picture after the evacuation.

This rest room is maintained by the defendant for the use of the second floor tenants of the defendant and their patients. The rest room is about 6 feet, 3 inches wide, and about 14 feet, 2 inches long. The floor of this rest room is on two different levels. 3 feet, 8 inches from the entrance door into the room is a step 7¾ inches high to a higher floor level, which extends 10 feet, 6 inches to the back of the room. There is a wash basin on the right-hand wall on the higher level, and there are two toilets, enclosed in stalls, on the higher level at the back of the room. To the right over the right-hand toilet is a window approximately 12½ inches wide by 54 inches high, with a dark ripple glass, non-transparent. A portion of the building obstructs the light coming in the window. Both floor levels are covered with black and white tile. The walls of this room have white rectangular tiling. There was a black rubber mat on the floor on the lower level of the room about 2 inches in front of the step-up, and about 4 inches from the entrance to the room. This mat covered most of the area of the lower level. Plaintiff noticed this mat when she went in the rest room. The riser of the step is marble.

There were three light fixtures in the rest room—one overhead at the rear of the room above the toilet stalls, one overhead above the step, and one on the right wall near the wash basin. During the time plaintiff was

in the rest room, the light in the rear of the room was burning; the fixture over the step contained a bulb, but it was not burning, and the fixture on the side wall had no light bulb. The room was dimly lighted by the window and the burning light in the rear.

Plaintiff opened the door and went into this rest room. She had not been in it before. She testified: "When I went into this room, I did not observe that the floor of the rest room was on two different levels. I evidently must have stepped up after entering the rest room to get to the higher level, but I did it unconsciously, and went to the toilet. . . . At the time that I went into this rest room and proceeded to the toilet, I did not notice the height of the step on the higher level, and I did not notice how far the distance of the step was from the door."

After staying in a toilet stall 10 or 15 minutes plaintiff prepared to leave. She was neither dizzy nor nauseated. She opened the toilet door, and looking straight ahead at the door to the rest room she started walking to leave the room. The floor looked to her like it was on the same level. There was no sign in the room telling of the step-down. Plaintiff testified: "I was looking straight at the door as I was walking out. As I started to walk towards the exit door to go out of this rest room, naturally, I glanced at the door and looked straight at the door. I looked down and I looked at the door, and was walking towards the door, and the light was so poor that I couldn't see very well, and I walked off and fell. I did not observe any change in the level of the floor as I was leaving. It all looked the same." In the fall plaintiff's hip was broken, and she suffered other injuries.

No wax, water, oil, trash or debris were on the floor. A dull light came through the window. On cross-examination plaintiff said: "I didn't see any defect in the floor of any kind. I didn't see any holes. I didn't see anything wrong with the top of that riser."

Plaintiff's husband was notified of his wife's fall, and went to Dr. Walker's office. While there he went in the rest room. On cross-examination he testified: "The glass in that window appeared to be this kind of glass that is translucent that is used in bathroom windows very frequently, yes sir. It appeared to be ordinary rest room window glass. It may have been painted. I am not positive. It appeared to be sort of glazed glass. In other words, you couldn't see through it. It was kind of designed to let light through, but not be able to see through."

Mrs. Frank Gartland entered the rest room immediately before the plaintiff did. Her testimony tended to show that conditions in the rest room were as described by plaintiff. After using the toilet she started out, and at the step-down "walked off into space" and fell.

The day plaintiff fell was a bright, sunny day.

We deem it unnecessary to state the defendant's evidence.

From judgment of nonsuit entered at the close of all the evidence, the plaintiff appeals, assigning error.

Falk, Carruthers & Roth for Plaintiff, Appellant.
Jordan & Wright and Perry C. Henson for Defendant, Appellee.

PARKER, J. The mere fact that plaintiff fell and suffered injuries in leaving the rest room when she stepped from the higher to the lower level of the floor of the rest room raises no inference of negligence against the defendant. *Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493; *Harris v. Montgomery Ward & Co.,* 230 N.C. 485, 53 S.E. 2d 536; *Fox v. Tea Co.,* 209 N.C. 115, 182 S.E. 662; *Parker v. Tea Co.,* 201 N.C. 691, 161 S.E. 209; *Bowden v. Kress,* 198 N.C. 559, 152 S.E. 625.

The defendant was not an insurer of her safety while using the rest room. *Barnes v. Hotel Corp.,* 229 N.C. 730, 51 S.E. 2d 180; *Bowden v. Kress, supra; Bohannon v. Stores Co.,* 197 N.C. 755, 150 S.E. 356.

It was the legal duty of the defendant to exercise ordinary care to keep the rest room in a reasonably safe condition for the use of the doctors' patients entering or leaving the rest room, and to warn them of hidden perils or unsafe conditions in entering or leaving, known to it, or ascertainable by it through reasonable inspection and supervision. *Fanelty v. Jewelers, supra; Drumwright v. Theatres, Inc.,* 228 N.C. 325, 45 S.E. 2d 379.

We said in *Benton v. Building Co.,* 223 N.C. 809, 28 S.E. 2d 491: "Any danger incident to the difference in the levels of the two floors necessitating the step down being obvious to one who looked, there was no duty resting upon the defendants to give notice thereof. The law imposes no duty upon one to give notice of a dangerous condition to another who has eyes to see and an unobstructed view of such condition, but fails to take time to see such danger. Generally, in the absence of some unusual condition, the employment of a step by the owner of a building because of a difference between levels is not a violation of any duty to invitees. Where a condition of premises is obvious to any ordinarily intelligent person, generally there is no duty on the part of the owner of the premises to warn of that condition. *Sterns v. Highland Hotel Co.,* 307 Mass., 90, 29 N.E. 2d 721. There is no duty resting on the defendant to warn the plaintiff of a dangerous condition provided the dangerous condition is obvious. *Mulkern v. Eastern S. S. Lines,* 307 Mass., 609, 29 N.E. (2d), 919."

"Different floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons. The construction is not negligent unless, by its character, location or surrounding conditions, a reasonably prudent person

would not be likely to expect a step or see it." *Garret v. W. S. Butterfield Theatres, Inc.*, 261 Mich. 262, 246 N.W. 57. To the same effect see *Boyle v. Preketes*, 262 Mich., 629, 247 N.W. 763; *Dickson v. Emporium Mercantile Co., Inc.*, 193 Minn. 629, 259 N.W. 375; *Cleary v. Meyer Bros.*, 114 N. J. Law 120, 176 A. 187; *Haddon v. Snellenburg*, 293 Pa. 333, 143 A. 8; *Matson v. Tip Top Grocery Co.*, 151 Fla. 247, 9 So. 2d 366.

Plaintiff's counsel candidly state in their brief: "This Court has frequently held that the mere existence of a step in a public place is not evidence of negligence." However, plaintiff contends the real significance of her case lies in the conjunction of all the facts and circumstances tending to show negligence on defendant's part. Plaintiff argues: (1) The step down was unexpected; (2) the floor and walls on both levels were uniformly of the same color and materials; (3) the rubber mat did not cover the entire lower level, and did not indicate a step; (4) the upright part of the marble rising of the step did not connote a step; (5) there were no warning signs; (6) the room was inadequately lighted.

The plaintiff contends uniformity in colors and materials on two different levels has a camouflaging effect, and cites in support of her position *Mulford v. Hotel Co.*, 213 N.C. 603, 197 S.E. 169; *Touhy v. Owl Drug Co.* (Cal.), 44 P. 2d 405 and *Crouse v. Stacy-Trent Co.* (N.J.), 164 A. 294.

The facts in the *Mulford case* are completely different. The plaintiff came out of a brilliantly lighted room into a dimly lighted basement. In that case the defendant's negligence was admitted. Here it is denied. In reference to plaintiff's contention, *Seawell, J.*, in the opinion said in substance, flat surfaces, under lighting conditions, may present an appearance of continuity.

The *Touhy case* was decided by a district court of appeals. In the *Touhy case* and in the *Crouse case* there was uniformity of materials and colors on the different floor levels. In the instant case plaintiff's evidence shows there was a large black rubber mat covering most of the floor of the lower level, and there was black and white tiling on the upper level. Uniformity of colors was not present as in the *Touhy* and *Crouse cases*.

There were three light fixtures in the room and a window at the back. Plaintiff fell in the morning. According to her evidence it was a bright, sunny day and some daylight came through the window. The light over the toilet stalls was burning. The light over the step was not, though there was a light bulb in the socket. There is no evidence as to whether this light was turned on or off, or whether it had burned out. If it had burned out, there is no evidence, as to when it did, other than the testimony of Mrs. Gartland that she was in the rest room immediately before plaintiff fell, and this light was not burning. The light fixture on the wall near the wash basin had no light bulb, but there is no evidence as to

how long this condition existed. Plaintiff's evidence shows the rest room was for the use of the doctors on the second floor and their patients. It is common knowledge that light bulbs burn out unexpectedly and frequently. There is no evidence that defendant caused the fixture near the wash basin to have no light bulb, or the condition that the light bulb over the step was not lighted. Upon plaintiff's evidence the defendant cannot be charged with express or implied notice of such condition. *Pratt v. Tea Co.,* 218 N.C. 732, 12 S.E. 2d 242; *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652.

Plaintiff entered the rest room in the morning. No wax, water, oil, trash or debris were on the floor. There were no defects in the top of the step or in the floor. On the lower floor level was a large black rubber mat covering a large part of the area, about 4 inches from the entrance and extending to within about 2 inches of the step. The riser was of marble. The upper level had black and white tiling. 3 feet, 8 inches from the entrance door was a step 7¾ inches high. The conclusion is unescapable that she was aware of the step, and stepped up to the higher floor level, for if she had not, she would have fallen or stumbled over the step going in. The step was obvious. She had eyes to see. Her safe passage from the entrance of the rest room to the toilet is an indubitable fact. In leaving she testified she looked down, and the light was so poor she couldn't see very well, and did not observe any change in the floor level. She looked at the door, walked on, and fell at the step-down to the lower level. The situation contained no element of a trap or hidden peril. Plaintiff had been in this dimly lighted, as she contends, rest room for 10 or 15 minutes. Her eyes had been adjusted to the light there. The facts speak louder than the words of the witness that there was enough light for her to see the step-down, if she had looked, for there was light enough for her to see and step up 7¾ inches to the higher floor level in entering. The defendant is not under a legal duty to prevent persons inattentive to their safety from hurting themselves. Considering the evidence most favorably for the plaintiff, we think the defendant was not negligent on the evidence before us. This does not conflict with *Drumwright v. Theatres, Inc., supra,* relied upon by plaintiff, because in that case the Court said: "There were no floor lights or seat lights in the aisle or on the steps. At least none were lighted."

The fact that Dr. Walker's nurse testified for the defendant that she assisted plaintiff into the rest room and back to the toilet, holding her by the arm does not change our opinion. Plaintiff contends that if the nurse's testimony is more favorable to the plaintiff, (even though it is in flat contradiction to hers) it must be accepted on the motion for nonsuit. We do not consider the nurse's testimony more favorable to plaintiff on the question of defendant's negligence, for even according to that testi-

mony plaintiff must have known of the 7¾ step-up to the higher floor level, as she did not stumble or fall over it.

The plaintiff contends that the trial court erred in excluding evidence that the condition of the lighting in the ladies' rest room existed for two days after plaintiff fell in the same condition as the day she fell, and that four days after plaintiff fell the light over the step was burning. The plaintiff contends that (1) it corroborates her testimony, (2) has a definite bearing on the regularity of inspection, and (3) on the assiduity of maintenance.

The exclusion of this evidence in so far as it corroborates plaintiff's testimony was harmless, for on a motion for nonsuit we accept the plaintiff's evidence as true.

Plaintiff has cited no authority for her contention that the excluded evidence has a definite bearing on the regularity of inspection and the assiduity of maintenance. It is unnecessary for us to pass upon this question, for we deem the exclusion of this evidence harmless in this case, because there was light enough from the light burning and the window for plaintiff not to fall or stumble over the step when she entered, and went to the toilet.

Plaintiff contends that the trial court erred in excluding the testimony of H. C. Umfleet that in 1948 and 1949 he was maintenance manager in the Piedmont Hospital or Piedmont Building; that he was employed by J. J. Jones, who was building manager; that the condition of the rest room the day plaintiff fell was the same as in 1948 and 1949, except that all three lights in the room in those years were burning; and that while Umfleet worked there he recommended to Jones that a sign be placed on the inside of the room to warn people there was a step-down when leaving, because he recognized it was dangerous, and it was very easy for someone to fall and get hurt. Afterwards Jones told him his recommendation was being considered, but no sign, as he recommended, was placed. Umfleet testified Jones worked for the Board of Directors of the hospital, and so far as he knew the Board of Directors for the hospital was the same as the Board of Directors for the whole building, but he might be wrong.

Plaintiff's counsel in their brief state: "This testimony is admittedly not competent to prove that the rest room presented a dangerous condition; but it is certainly competent to prove that if the rest room presented a dangerous condition, the defendant had notice of this fact."

It is very doubtful if plaintiff's evidence tends to show that Jones was an employee of the defendant. Conceding, but not deciding, that he was, we think that the rest room did not present a dangerous condition. *Benton v. Building Co., supra; Garret v. W. S. Butterfield Theatres, Inc., supra.* Therefore, it would appear from statement in brief of plaintiff's

counsel quoted above, the evidence was properly excluded. The cases relied upon by plaintiff are distinguishable.

The judgment of nonsuit is correct.

Affirmed.

WADE O. LEWTER, HUSBAND, LIBBY JEANNE LEWTER, DAUGHTER, MRS. WADE O. LEWTER, DECEASED EMPLOYEE, PLAINTIFFS, v. ABERCROMBIE ENTERPRISES, INC., SHELBY MUTUAL CASUALTY COMPANY, CARRIER,—DEFENDANTS.

(Filed 4 June, 1954.)

1. Appeal and Error § 6c (7)—

On appeal from judgment of the Superior Court affirming or reversing an award of the Industrial Commission, the Supreme Court will review only such exceptive assignments of error as are properly made to rulings of the Superior Court alone.

2. Same—

Where the appellants from an award of the Industrial Commission request the Superior Court to rule upon their exceptions duly entered to the proceedings before the Commission, and except to the action of the Superior Court in declining to make rulings on each of such exceptions, and appeal from the judgment affirming the award, *held*, the action of the Superior Court in refusing to rule on the exceptions is in effect an overruling of each and all of them, and the record presents for review each of the alleged errors of law thus designated.

3. Master and Servant § 55d—

In reviewing an assignment of error to the findings of fact of the Industrial Commission, the courts will review the evidence to determine as a matter of law whether there is competent evidence tending to support the findings, in which event the findings are conclusive.

4. Same—

Where there is an exception to a finding embracing a mixed question of fact and law, the finding of fact is conclusive if supported by evidence, leaving the question of law alone for review.

5. Master and Servant § 40a—

In order to recover for the death of an employee under the Workmen's Compensation Act, plaintiff must show that death resulted from an injury by accident which arose out of and in the course of deceased's employment by defendant, and that it did not result from a disease in any form unless such a disease resulted naturally and unavoidably from the accident. G.S. 97-2 (f) and (j).

6. Master and Servant § 37—

The North Carolina Workmen's Compensation Act is an industrial injury act, and not an accident and health insurance act, and must be so construed by the courts.

7. Master and Servant § 40c—

The term "arising out of" within the meaning of the Compensation Act imports that the injury must arise out of the work or service the employee is to perform and be a risk incidental thereto, so that the employment be a contributing cause of the injury.

8. Master and Servant § 40d—

The term "in the course of" as used in the Compensation Act refers to the time, place and circumstances under which the accident occurs.

9. Master and Servant § 40f—

Ordinarily, heart disease does not result from an injury by accident arising out of or in the course of employment unless it results from an unusual or extraordinary exertion incident to the employment, nor is it an occupational disease compensable under the Workmen's Compensation Act.

10. Same—Evidence held not to support finding that cerebral hemorrhage resulted from injury incident to employment.

The evidence in this case tended to show that the employee was engaged as a cashier in the ticket booth of a moving picture theatre, that she was overweight and had suffered from high blood pressure for several years prior to her death, that a fire broke out in the ladies' rest room on the second floor of the theatre, and that the employee warned patrons in the theatre to leave and refunded their money or gave them passes, that she seemed extremely excited, and that about an hour after the employee had been told of the fire and after it had been put out, she collapsed and died the following morning, without regaining consciousness, of a cerebral hemorrhage. There was testimony, also, that her excitement could have aggravated her condition to such an extent as to cause a cerebral hemorrhage. *Held:* The evidence is insufficient to show that the employee's death resulted from an injury within the meaning of the Compensation Act, and compensation should have been denied.

APPEAL by defendants from *Carr, J.*, December Term 1953 of DURHAM.

Proceeding under Workmen's Compensation Act to determine liability of defendants to the widower and infant daughter, sole surviving dependents of Mrs. Wade O. Lewter, deceased employee.

The facts essential to a decision of this appeal found by the hearing Commissioner are stated below (division by numerals ours):

One, the deceased employee on 11 December 1951 received an injury by accident arising out of, and in the course of her employment with the defendant employer, as cashier, in the ticket booth at its theater, where she worked regularly.

Two, the deceased employee and another employee at the candy bar were the only persons on duty that afternoon; a passer-by in the street notified Mrs. Lewter the theater was on fire—the fire was in the ladies' rest room on the second floor.

Three, Mrs. Lewter went into the theater and notified all the patrons to leave, refunding their money. During this time she was highly nervous

and excited. There was a lot of smoke about the entrance of the theater where Mrs. Lewter worked; that firemen put out the fire.

Four, about one hour after Mrs. Lewter was notified of the fire and before the firemen left, she collapsed. She was carried unconscious to a hospital where she died the next morning.

Five, Mrs. Lewter had been treated for high blood pressure some time prior to her death, which was caused by a cerebral hemorrhage.

The hearing Commissioner concluded as a matter of law that the deceased employee received an injury by accident arising out of and in the course of her employment resulting in her death, and the North Carolina Industrial Commission awarded compensation to the widower and minor daughter of Mrs. Lewter. Whereupon the defendants made application to the Industrial Commission for a review of the award and the opinion of the hearing Commissioner.

The Full Commission being of the opinion that the evidence supports the facts found by the hearing Commissioner, and that such facts support his conclusions and the award, adopted as its own the findings of fact, conclusions of law and award (the award was corrected by six cents a week), and affirmed.

The defendants appealed "for errors of law in the review of award made by the Full Commission" to the Superior Court, and requested the Superior Court to make rulings, based on 31 objections to the proceeding before the Full Commission.

The Superior Court declined "to make a ruling on each of the foregoing 31 requests for a ruling for the reason that the court is of the opinion that there is competent evidence in the record to support the conclusions of law of the Commission and a ruling on each of said requests is unnecessary." To the action of the Superior Court in declining to make a ruling on each of the requests for a ruling, the defendants excepted.

The Superior Court entered judgment affirming the award of the Industrial Commission.

The defendants excepted to the judgment and appealed assigning error.

W. J. Brogden, Jr., for Plaintiffs, Appellees.

Egbert L. Haywood and Emery B. Denny, Jr., for Defendants, Appellants.

PARKER, J. On appeal from a Superior Court's judgment affirming or reversing an award made by the Full Workmen's Compensation Commission, we review only such exceptive assignments of error as are properly made to the judgment of the Superior Court alone. *Glace v. Throwing Co.,* 239 N.C. 668, 80 S.E. 2d 759; *Worsley v. S. & W. Rendering*

Co., 239 N.C. 547, 80 S.E. 2d 467; *Rader v. Queen City Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609. Our review is limited to a consideration of the assignments of error as to matters of law in the trial in the Superior Court. *Worsley v. S. & W. Rendering Co., supra; Sprinkle v. Reidsville*, 235 N.C. 140, 69 S.E. 2d 179; *Wilson v. Charlotte*, 206 N.C. 856, 175 S.E. 306.

After the Superior Court declined to make a ruling on each of the 31 objections taken and preserved in the proceedings before the Full Commission, the appellants excepted to the action of that court in declining to make a ruling on each of the 31 objections. The lower court then entered judgment affirming the award, and the appellants appealed. The appellants excepted to the judgment, and this exception is their assignment of error No. 22. The appellants have 21 assignments of error as to the refusal of the Superior Court to rule upon each of their 31 objections to the proceedings before the Full Commission.

The plaintiffs contend that the appellants have failed to base their first 21 assignments of error on specific rulings of the Superior Court; that, therefore, their only assignment of error is to the signing of the judgment. This contention is not supported by the Record, for the appeal from the Superior Court points out, and designates in detail and with particularity in the first 21 assignments of error the particulars in which errors of law are assigned. It seems to be a substantial compliance with our practice, so as to present for review appellants' first 21 assignments of error. *Fox v. Mills, Inc.*, 225 N.C. 580, 35 S.E. 2d 869. In *Worsley v. S. & W. Rendering Co., supra*, it is said in reference to appeals from the Industrial Commission to the Superior Court the Judge of that court "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." See also *Stewart v. Duncan*, 239 N.C. 640, 80 S.E. 2d 764.

We do not consider it necessary to remand this proceeding because the Superior Court Judge declined to rule upon the 31 requests for rulings for the reason that he was of the opinion that there is competent evidence in the Record to support the conclusions of law of the Full Commission, and a ruling on each request was unnecessary, which in reality was an overruling of each and all of the 31 requests.

The defendants' assignments of error challenge the validity of the Superior Court on two grounds: (1) That the decision of the Full Commission is not sustained by its findings of fact; and (2) that such findings of fact are not supported by the evidence before the Commission. *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265.

When the assignments of error bring up for review the findings of fact of the Commission, we review the evidence to determine as a matter of

law whether there is any competent evidence tending to support the findings; if so, the findings of fact are conclusive on us. *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173; *Riddick v. Cedar Works*, 227 N.C. 647, 43 S.E. 2d 850; *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294.

If a finding of fact is a mixed question of fact and law, it is conclusive also on us, if there is sufficient evidence to sustain the facts involved. If a question of law alone, we review. *Perley v. Paving Co.*, 228 N.C. 479, 46 S.E. 2d 298; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515; *Thomas v. Gas Co.*, 218 N.C. 429, 11 S.E. 2d 297.

To establish their claim plaintiffs must show (1) death resulting from an injury by accident, (2) arising out of and in the course of decedent's employment by the defendant, and (3) not including a disease in any form, except where it results naturally and unavoidably from the accident. G. S. N. C. 97-2 (f) (j); *Matthews v. Carolina Standard Corp.*, 232 N.C. 229, 60 S.E. 2d 93; *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668; *Taylor v. Wake Forest*, 228 N.C. 346, 45 S.E. 2d 387. The legislative intent seems clear that our Workmen's Compensation Act is an industrial injury act, and not an accident and health insurance act. We should not overstep the bounds of legislative intent, and make by judicial legislation our Compensation Act an Accident and Health Insurance Act.

Our Compensation Act uses the words "injury by accident arising out of and in the course of the employment." G. S. N. C. 97-2 (f). We said in *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680, " '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; *Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97."

Adams, J., said in *Hunt v. State, supra*, " 'in the course of' refer to the time, place and circumstances under which the accident occurs, and the words 'out of' to its origin and cause;" words quoted many times in our decisions, *e.g. Vause v. Equipment Co., supra.*

Where the death cannot fairly be traced to the employment as a contributing proximate cause, it does not arise out of the employment. *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751; *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 342; *Walker v. Wilkins, Inc.*, 212 N.C. 627, 194 S.E. 89.

For the death of Mrs. Lewter to be compensable, her death must have resulted from an injury by accident arising out of and in the course of her employment. *Berry v. Furniture Co., supra; Gilmore v. Board of Education*, 222 N.C. 358, 23 S.E. 2d 292; *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324.

In *Neely v. Statesville*, 212 N.C. 365, 193 S.E. 664, a fireman of the defendant fighting a fire came out of the attic of a burning building to a

landing at the head of a stairway to seek fresh air. Shortly thereafter he collapsed, and died from a heart attack. The deceased for more than two years had suffered from a chronic cardiac condition. We held there was no evidence of an accident saying "the work in which the deceased was engaged was the usual work incident to his employment."

Ordinarily a death from heart disease is not an injury by accident arising out of and in the course of the employment, nor an occupational disease, so as to be compensable under our statute. *Duncan v. Charlotte,* 234 N.C. 86, 66 S.E. 2d 22; *West v. Dept. of Conservation,* 229 N.C. 232, 49 S.E. 2d 398; *Neely v. Statesville, supra.* In the *West case* a game warden died of a coronary occlusion shortly after he had arrested three persons for fishing without a license, and had taken them before a magistrate, where they were fined. The deceased looked rather flushed; he seemed high strung. A doctor testified the exertion or excitement of the trial and the other incidents of the morning could easily have caused the coronary occlusion and resulting death. The Industrial Commission denied recovery, and in affirming the denial we said: "The record is devoid of any evidence tending to show that the deceased died as the result of an injury by accident."

In *Gabriel v. Newton,* 227 N.C. 314, 42 S.E. 2d 96, we affirmed the Industrial Commission's award in a death from heart disease. The facts were as follows: A policeman in good health arrested a young man drunk, who violently resisted. The jail elevator was out of order, and the deceased and another officer carried the prisoner up three flights of steps. The deceased collapsed with an acute dilation of the heart due to the unusual exertion; this heart injury was chronic and progressive. Some ten months later the deceased suffered a fatal heart attack.

The place of disease in Workmen's Compensation Laws is a troublesome question, with most of the difficulty stemming from the accident requirement. Apparently, a majority of jurisdictions hold, if the strain of the employee's usual exertions causes death or collapse from heart weakness, back weakness, hernia and the like, the injury is compensable. Larson Workmen's Compensation Law, Vol. One, p. 516 *et seq.,* where the cases are cited. See also 58 Am. Jur., p. 756. It seems a very substantial minority of jurisdictions require a showing that the exertion was in some way unusual or extraordinary. Larson, *ibid.,* p. 516 *et seq.,* where the cases are cited; 71 C.J., Workmen's Compensation Acts, p. 619.

From our cases cited above it is clear that in *heart cases* our decisions require a showing that the exertion was in some way unusual or extraordinary. These cases are in accord with ours: *Pierce v. Phelps Dodge Corp.,* 42 Ariz. 436, 26 P. 2d 1017; *Cleary Brothers Const. Co. v. Nobles,* 156 Fla. 408, 23 So. 2d 525; *Brooks-Scanlon, Inc. v. Lee* (Fla.), 44 So. 2d 650; *O'Neil v. W. R. Spencer Grocer Co.,* 316 Mich. 320, 25 N.W. 2d

213; *Stanton v. Minneapolis Street Ry. Co.,* 195 Minn. 457, 263 N.W. 433; *State ex rel. Hussman-Ligonier Co. v. Hughes,* 348 Mo. 319, 153 S.W. 2d 40; *Hamilton v. Huebner,* 146 Neb. 320, 19 N.W. 2d 552; *Rose v. City of Fairmont,* 140 Neb. 550, 300 N.W. 574; *Lohndorf v. Peper Bros. Paint Co.,* 134 N.J.L. 156, 46 A. 2d 439, affirmed 135 N.J.L. 352, 52 A. 2d 61; *Temple v. Storch Trucking Co.,* 2 N. J. Super. 146, 65 A. 2d 70; *Seiken v. Todd Dry Dock, Inc.,* 2 N.J. 469, 67 A. 2d 131; *Cope v. Philadelphia Toilet Laundry & Supply Co.* (Pa. Super.), 74 A. 2d 775; *Powell v. Hills Garage,* 150 Pa. Super. 17, 27 A. 2d 773; *Good v. Penn. Dept. of P. & S.,* 346 Pa. 151, 30 A. 2d 434; *Cooper v. Vinatieri* (S.D.), 43 N.W. 2d 747; *Frank v. Chicago, M. & St. P. Ry. Co.,* 49 S.D. 312, 207 N.W. 89; *Gerich v. Republic Steel Corp.,* 153 Ohio St. 463, 92 N.E. 2d 393; *Crispin v. Leedom & Worrall Co.,* 341 Pa. St. 325, 19 A. 2d 400; *Manikowski v. Morris Run Coal Min. Co.* (Pa.), 60 A. 2d 344; *Hiber v. City of St. Paul* (Minn.), 16 N.W. 2d 878; *Sokness v. City of Virginia* (Minn.), 42 N.W. 2d 551.

The hearing Commissioner cited in support of his opinion *Patrick v. J. B. Ham Co.,* 119 Me. 510, 111 A. 912, 13 A.L.R. 438, and *Crosby v. Thorp, Hawley Co.,* 206 Mich. 250, 172 N.W. 535, 6 A.L.R. 1253. Both cases were decided by divided courts, and Maine apparently follows a different rule from ours. Larson Workmen's Compensation Law, Vol. One, p. 521.

Plaintiffs' evidence tended to show these facts. Mrs. Lewter consulted a doctor for high blood pressure on 29 January 1948. She was then overweight, and her blood pressure was 230/110. There had been a history of high blood pressure in her family. From then on she consulted two doctors, and received treatment; she had high blood pressure several years before her death. On the afternoon of 11 December 1951 she was engaged in her usual work as cashier in the ticket booth of defendant's theater. A passer-by in the street told Mrs. Ferrell the theater was on fire, and she told Mrs. Lewter. The fire was in the ladies' rest room on the second floor, which is separated by a large wall from where the people sit. Three employees were present, Mrs. Lewter, Mrs. Ferrell at the candy bar, and a man in the projector room. A small number of spectators were in the theater. Mrs. Lewter went in the theater, walked up and down the aisles and up in the balcony, told the spectators there was a fire, and asked them to leave. The spectators left calmly and without undue haste. Mrs. Lewter went back in the box office, and gave the spectators refunds or passes. In giving out the refunds Mrs. Lewter was excited; she got the money mixed up in making the refunds.

A policeman testified the spectators were out of the theater when he arrived. He saw Mrs. Lewter twice run back and forth from the office to the cashier's box. He saw some tickets in her hands. In his opinion

she was very highly excited. The office is about 15 or 20 feet from the cashier's box. When this officer left, the firemen were clearing up the hose preparing to leave. Mrs. Lewter had not been stricken then.

The fire was in the ladies' rest room on the second floor. As to the building, only the window frame and the window in the rest room were damaged, rugs and draperies in the rest room were damaged. There were no flames in the theater part or the lobby. The smoke was upstairs where the ladies' rest room was, and in the stairway, banking back into the lobby. The damage was about $6,000.00. The assistant chief of the Durham Fire Department, a witness for plaintiffs, testified, our record has the fire classified by someone smoking, and dropping a cigarette into a stuffed chair, setting off the curtains.

About one hour after Mrs. Lewter was told of the fire, she collapsed unconscious, apparently in the ticket booth. The following morning, without regaining consciousness, she died in a hospital. The cause of her death was cerebral hemorrhage, due to hypertension.

There was medical evidence to the effect that the fire and Mrs. Lewter's excitement would have aggravated her condition to such an extent as to cause the cerebral hemorrhage from which she died.

In our opinion, there is no evidence tending to show that Mrs. Lewter died as the result of an injury, as those words are used in our Workmen's Compensation Act. This is in accord with our decisions in *Neely v. Statesville, supra; Gabriel v. Newton, supra; West v. Dept. of Conservation, supra; Duncan v. Charlotte, supra.*

It is common knowledge that blood vessels in the human system, weakened by disease, often burst, even when the victim is sleeping in bed. The evidence is clear that Mrs. Lewter's death cannot fairly be traced to her employment as a contributing proximate cause. It seems plain that because of Mrs. Lewter's high blood pressure for many years, the time appointed for her to die had come, irrespective of the fire; the finger of death touched her, and she sleeps till the Great Day of Judgment.

The judgment of the lower court is

Reversed.

EUGENE R. NELSON v. ISAAC W. SIMPKINS AND POWER BRAKE COMPANY, INC.

(Filed 4 June, 1954.)

1. Trial § 3—

Findings to the effect that in the hearing of a "clean-up" calendar, plaintiff's cause was nonsuited, without notice to plaintiff or his attorney, for failure of plaintiff to appear and prosecute his action, that plaintiff has a

good cause of action, and that plaintiff himself was guilty of no negligence, *is held* sufficient to support the court's order reinstating the cause on the civil issue docket for trial upon the merits.

2. Appeal and Error § 6c (2)—

An exception to the judgment and to the conclusions of law set out therein presents for review only whether the facts found are sufficient to support the judgment and does not present for review the findings of fact or the evidence upon which they are based.

3. Trial § 3—

Judgment of nonsuit for failure of plaintiff to appear was entered during the hearing of a "cleanup" calendar. At a subsequent term the judgment of nonsuit was set aside and the cause reinstated on the civil issue docket. At a still later term defendants moved to strike out the order of reinstatement on the ground that it was entered without notice. *Held:* Even if the order of reinstatement was without effect because entered without notice, the matter was before the court at the later term, and the court at this later term had jurisdiction to hear the motion for reinstatement, and its order reinstating the cause on the civil issue docket upon supporting findings, was without error.

4. Trial § 1—

Where judgment of nonsuit for failure of plaintiff to appear and prosecute his cause has been entered, but at a later term the judgment of nonsuit is set aside, the cause is properly subject to be calendared for trial, and when placed upon the calendar the cause is before the court and it has jurisdiction to hear and determine a motion therein.

5. Appeal and Error § 6c (3)—

The refusal of the court to find the facts tendered in writing by defendants is not made to appear erroneous when the record fails to contain the evidence before the lower court.

APPEAL by defendants from *Rousseau, J.*, at 2 November, 1953, Regular Term of MECKLENBURG.

Civil action commenced 7 June, 1947, for an accounting for royalties on certain inventions, and to have certain agreements in respect to these inventions declared void, as set forth in complaint filed, and as amended, to which on 14 August, 1947, defendants filed answer denying in material aspect the allegations of the complaint, and praying that the action be dismissed and that they go hence without day and to recover their costs to be taxed, etc.

The record proper discloses the following:

1. That on 2 October, 1950, a judgment of nonsuit was signed by Phillips, Judge Presiding, in which after reciting that "the plaintiff having been called in open court and warned to come into court and prosecute the action against the defendant or the case would be nonsuited, and having failed to so appear and prosecute the action against the defendant" it was

ordered that "plaintiff be nonsuited and taxed with the costs of the action and the action dismissed from the docket."

2. That on 31 January, 1951, attorneys for plaintiff filed a petition to reinstate the action on the civil issue docket of Mecklenburg, supporting same by affidavit as to circumstances under which the judgment of nonsuit was entered on call of a "clean-up calendar."

3. That thereupon, on same day, 31 January, 1951, an order was entered, reinstating the case on the civil issues docket, reading:

"This matter coming on to be heard before the Honorable Harold K. Bennett, Judge presiding, upon the call of the calendar for this term on which the above entitled action was placed for trial, and it appearing to the court that on October 2, 1950, a judgment of nonsuit was entered in the above entitled action, the case having been called and the plaintiff not appearing, and it further appearing to the court upon representation of counsel for the plaintiff that said nonsuit was entered in their absence and without their knowledge, and that the same was unknown to counsel for plaintiff until Saturday, January 27, 1951; and it further appearing to the court that the plaintiff has a right to file a new action upon the same cause of action for one year after said nonsuit was entered, which time has not expired, and that the ends of justice will be met by reinstating said action upon the civil issue docket;

"It is therefore Ordered that said nonsuit be set aside and that this cause be reinstated upon the civil issue docket for trial at this term or at such time hereafter as the court shall direct."

"This 31st day of January 1951. Harold K. Bennett, Judge Presiding."

4. That thereafter on 21 February, 1951, defendants filed an answer to the petition of plaintiff to reinstate, denying right of plaintiff to such reinstatement.

5. That thereafter on 28 October, 1953, defendants, through their attorneys filed in court a motion to strike out and declare void the order of 31 January, 1951, setting aside and striking out the judgment on nonsuit theretofore granted, stating these as reasons therefor:

"1. That the record shows that this order was granted on the same day that the petition to reinstate the case and to strike out the nonsuit was filed, which was also January 31, 1951.

"2. That the record fails to show any legal notice to counsel for the defendants or to the defendants of any hearing upon the petition to reinstate this case.

"3. That the order striking out the judgment of nonsuit was improvidently granted as these defendants had no knowledge that any order had been signed upon the petition to reinstate the case until on or about September 3, 1953 when the present counsel for the plaintiff advised by

letter that an order to reinstate the case had been entered. Until that time these defendants were led to believe that the case had been nonsuited, and a motion to strike out the nonsuit was pending to be heard upon motion and answer and pleadings filed therein to said motion.

"4. That these defendants have been guilty of no neglect, or if there was any, it was excusable neglect, surprise and inadvertence to the order reinstating the judgment of nonsuit in this case.

"5. That when it was ascertained that a motion had been made in the cause to reinstate the case by striking out the judgment of nonsuit, time was granted to file an answer and other papers upon which a motion would be heard, and that no hearing upon said motion has ever been had, and the signing of the order attempting to reinstate the case was an inadvertence, a mistake and was improvidently granted."

6. That on same day, 28 October, 1953, attorneys for defendants addressed a notice to attorneys of record for plaintiff, notifying them that the "motion is set down for hearing . . . before the Judge Presiding over the Civil Term of Mecklenburg Superior Court for the 9th day of November, 1953, at 10 A. M." It appears of record that this notice, with a copy of the motion was served upon the attorney to whom it was addressed by the Sheriff of Mecklenburg County by a deputy.

7. That on 5 November, 1953, the Honorable J. A. Rousseau, Judge Presiding, signed a judgment in words and figures as follows:

"This cause coming on to be heard and being heard before the undersigned Judge, presiding over the November 2, 1953 Regular Term of Civil Court for Mecklenburg County, North Carolina, upon the motion of the defendants filed in this cause on the 28th day of October, 1953, to set aside an order entered by this Court in this case on the 31st day of January 1951, setting aside a judgment of nonsuit theretofore entered herein and reinstating this cause of action; Wm. H. Booe, Esq. appearing for the plaintiff and Guy T. Carswell, Esq. and Paul B. Eaton, Esq. appearing for the defendants, and each of them;

"It Appearing to the court from the evidence presented and from the argument of counsel for both parties and the court finds as a fact that a 'Clean-up' calendar was prepared, upon which the above entitled action appeared, for the Superior Court of Mecklenburg County, for the month of May 1950, that the same was not called but was postponed; that said 'Clean-up' calendar was ultimately called in October 1950; that a letter was presented to the court at this hearing from Mr. H. B. Campbell, Chairman of the Mecklenburg Calendar Committee, which was in response to a letter from Mr. Guy T. Carswell, part of which read as follows: (Under date of September 15, 1950, the following notice was sent to all attorneys of the Mecklenburg County Bar and to all other attorneys who had cases on the Clean-up Calendar. This notice, in addition, was

placed on the bulletin board of the Law Building. The notice was as follows: September 15, 1950, NOTICE TO ATTORNEYS. The Clean-up Calender, which was prepared during the Spring Term, and copy of which you received, will be called on Monday, October 2nd, during the Extra Civil Term presided over by Judge Phillips. All cases will be called and nonsuited or otherwise disposed of on Monday, and if announced as ready for trial, will be set during the remainder of the week. CALENDAR COMMITTEE.)

"It further appearing to the court and the court finds as a fact that no evidence was presented to the court by the defendants that a copy of said 'Clean-up' calendar or said notice was sent either by mail or personal delivery to counsel for plaintiff, but evidence was presented by the plaintiff that counsel for the plaintiff did not receive either the notice or the calendar; that said 'Clean-up' calendar was ultimately called in October 1950; that neither the plaintiff nor his counsel had actual notice or knowledge of the calling of said 'Clean-up' calendar; that judgment of nonsuit was entered in this cause as a result of said 'Clean-up' calendar on October 2, 1950, declaring that the plaintiff had been called in open court and having failed to appear and prosecute his action, and that judgment of nonsuit was entered; that said judgment of nonsuit was entered in the absence of both the plaintiff and his counsel and without their knowledge;

"It further appearing to the court and the court finds as a fact that this action appeared on the trial docket calendar at the request of counsel for the plaintiff, at the January 29, 1951 Term of Superior Court for Mecklenburg County; that counsel for the plaintiff had no knowledge of the entry of said judgment of nonsuit until Saturday, January 27, 1951; that the plaintiff filed a petition in this cause on January 31, 1951, and during the said term this cause appeared on the docket for trial, praying the court that the said judgment of nonsuit be set aside and this cause be reinstated, and said petition alleging among other matters that the plaintiff was not guilty of any neglect by reason of said judgment having been entered; that an order setting aside said judgment of nonsuit and reinstating this cause was entered by this court on January 31, 1951, reciting, among other matters, that 'upon the call of the calendar for this term on which the above entitled action was placed for trial, it appearing that judgment of nonsuit was heretofore entered in this cause, and that the same was entered in the absence of counsel for the plaintiff and without their knowledge and same was unknown to them until Saturday, January 27, 1951, and it further appearing plaintiff has a right to file a new action upon the same cause of action for one year after said nonsuit was entered, which time has not expired and that the ends of justice will be met by reinstating said action'; that the defendants nor their counsel had written

notice of said order being entered, but that counsel for the defendants were apprised in open court that the court was considering said action, that counsel for the defendants filed answer to the petition to reinstate on February 21, 1951, denying said allegations;

"It further appearing to the court and the court finds as a fact that the plaintiff had reputable counsel in Mecklenburg County, where this action was pending, representing him at the very time the judgment of nonsuit was entered, and was in any event guilty of no negligence himself; that the judgment of nonsuit entered against the plaintiff on October 2, 1950, was taken against the plaintiff through the mistake, inadvertence, surprise or excusable neglect of the plaintiff's counsel; that this cause of action of the plaintiff, among other matters, consists of an action for an accounting of royalties from certain patents which the plaintiff was instrumental in inventing, which the defendants have had control of, and for which the plaintiff has never had an accounting, and that the plaintiff has a meritorious cause of action; and that the ends of justice will be met by allowing the plaintiff to have his day in court, and the defendants will not be prejudiced on the merits of this cause thereby;

"Now, therefore, it is ordered, adjudged and decreed that:

"1. The motion of the defendants to strike said order of reinstatement by this court be, and it hereby is denied;

"2. The order of this court entered on January 31, 1951, setting aside said judgment of nonsuit and reinstating this cause action be, and it hereby is in all respect confirmed;

"3. That the judgment of nonsuit heretofore entered in this action on October 2, 1950 be, and it hereby is set aside and stricken from the record;

"4. That this cause of action be, and it hereby is reinstated and ordered to be placed upon the civil docket for trial on its merits."

8. Appeal entries were made in pertinent part as follows:

"To the entering of this order denying the motion of the defendants to set aside the order of reinstatement of January 31, 1951; confirming said order; setting aside the judgment of nonsuit heretofore entered in this action on October 2, 1950 and ordering that this cause of action be reinstated and placed upon the Civil Docket for trial on its merits, the defendants except and appeal to the Supreme Court of North Carolina.

"To the refusal of the presiding judge to find the facts tendered in writing by the defendants under date of November 4, 1953, the defendants except and appeal to the Supreme Court of North Carolina. Notice of appeal given in open court and further notice waived . . ."

Wm. H. Booe for plaintiff, appellee.

Guy T. Carswell and Paul B. Eaton for defendants, appellants.

WINBORNE, J. The questions involved on this appeal, as stated in brief of appellants, are these: Did the court err:

(1) "In entering the order denying motion of defendants to set aside the order of reinstatement of January 31, 1951?

(2) "In confirming the order entered on January 31, 1951, setting aside the judgment of nonsuit and reinstating this cause of action?

(3) "In setting aside and striking from the record the judgment of nonsuit entered in this action on October 2, 1950?

(4) "In reinstating this cause of action and ordering it to be placed upon the civil docket for trial on its merits? and

(5) "In refusing to find the facts tendered in writing by the defendants under date of November 4, 1953?"

Careful consideration of the record on appeal leads to the decision that the facts found in the judgment from which appeal is taken are sufficient to support the conclusion there reached. And there is no exception to any finding of fact so made.

Exception to the judgment, and to the conclusions of law set out in the judgment, present only questions whether facts found are sufficient to support the judgment, that is, whether the court correctly applied the law to the facts found. Such exceptions are insufficient to bring up for review the findings of fact or the evidence upon which they are based. And when the judgment entered is supported by the finding of fact, it will be affirmed. See, among numerous other cases, *Roach v. Pritchett*, 228 N.C. 747, 47 S.E. 2d 20.

Moreover, if it be conceded that the order of 31 January, 1951, was entered without notice, and without waiver of notice, the whole matter was before the Honorable J. A. Rousseau, Judge presiding over the Civil Term of Mecklenburg Superior Court upon the motion of defendants entered upon general appearance, pursuant to notice to attorney of record for plaintiff dated 28 November, 1953.

Defendants were contending that the order of 31 January, 1951, made upon motion of plaintiff was without force and effect, and that, hence, the motion, answered by defendants 21 February, 1951, remained as if no action had been taken upon it. Therefore if the order of 31 January, 1951, were set aside, consideration of the motion, as answered by defendants, would still be for disposition.

Furthermore, defendants concede in their brief that "plaintiff attempted to place the case on the calendar for trial at the November 1953 Term of Mecklenburg Superior Court." And plaintiff, in his brief, says that "on Friday, October 23, 1953, the Calendar Committee for the Mecklenburg Bar Association set this case as the first case for trial at the November 2, 1953 Term of Civil Court for Mecklenburg County." Whether right or wrong, the judgment as of nonsuit had been set aside,

and the case was properly subject to be calendared for trial at term time when defendants' motion was made and heard. And the Judge presiding having taken general jurisdiction over the case, it will be assumed that he acted with authority. Thus the whole case was before the court. And if the Judge erred in affirming the order of 31 January, 1951, he found sufficient facts to support his own action in setting aside the judgment as of nonsuit and reinstating the case.

Lastly, since the evidence before the Court is not contained in the record on appeal, error is not made to appear in the matter to which the fifth question above stated relates.

The judgment below is
Affirmed.

J. P. BADDERS v. HENRY H. LASSITER.

(Filed 4 June, 1954.)

1. Negligence § 5—

Contributory negligence need not be the sole proximate cause of injury to bar recovery; it is sufficient for this purpose if it contribute to the injury as a proximate cause, or one of them.

2. Automobiles § 8i—

A driver along a servient street is required, in compliance with G.S. 20-158, to bring his vehicle to a stop in obedience to a stop sign lawfully erected, and not to proceed into an intersection with the dominant highway until, in the exercise of due care, he can determine that he can do so with reasonable assurance of safety. G.S. 20-154.

3. Same: Automobiles § 18h (3)—Evidence held to disclose contributory negligence as matter of law on part of driver in starting across intersection with dominant highway.

The evidence favorable to plaintiff tended to show that his wife was driving his family purpose automobile along a servient street, that she stopped at the sign located on the servient street 10 or 12 feet from the intersection with the dominant street, that she saw defendant's automobile about a block away, and that she then changed to low gear and went on across the intersection at a speed of five miles per hour and did not again look to her right, and did not see or hear anything until the impact. There was no evidence that defendant's vehicle was being driven at excessive speed. *Held:* Plaintiff's own evidence discloses contributory negligence as a matter of law in the failure of plaintiff's wife to keep a reasonably careful lookout and in starting across the intersection without reasonable assurance that she could traverse the intersection in safety.

4. Trial § 25—

Nonsuit of plaintiff's cause of action upon defendant's motion effects a voluntary nonsuit on defendant's counterclaim.

ERVIN, J., dissents.

APPEAL by defendant from *Fountain, S. J.*, at 18 January, 1954, Civil Term of WAKE.

Civil action to recover property damage sustained in automobile collision allegedly resulting from actionable negligence of defendant.

The record discloses that about 3:20 p.m. on 30 May, 1952, plaintiff's Ford automobile operated by his wife in southern direction on Woodburn Road was in collision with defendant's Chevrolet automobile, operated by him in an eastern direction on Clark Avenue, at the intersection of Woodburn Road and Clark Avenue in Cameron Village, in the city of Raleigh, North Carolina; that defendant, answering, denied liability to plaintiff for that he avers he was not negligent, but that the operator of plaintiff's car was negligent; and that under the family-purpose doctrine, he pleads her negligence as a contributing cause of the collision, imputable to plaintiff, and sets up a cross-action to recover for damage to his automobile sustained in the collision; and that to this, plaintiff filed reply denying in material aspect all averments constituting defendant's further answer and counterclaim, and reiterating his allegations as to negligence of defendant, and as to it being the proximate cause of the collision.

The uncontroverted evidence tends to show these facts and circumstances at the scene and time of the collision here involved: Woodburn Road, a paved subservient street, thirty feet wide, running north-south direction, intersects with Clark Avenue, a paved street forty-four to fifty feet wide, running in east west direction. Daniels Street, which also intersects with Clark Avenue, is the next street, a block west of, and parallel to Woodburn Road. In the block between Woodburn Road and Daniels Street there is nothing to obstruct from the view of one traveling south on Woodburn Road, traffic moving east on Clark Avenue, or to obstruct from the view of one traveling east on Clark Avenue, traffic moving south on Woodburn Road. The terrain is level. The weather was sunshiny and the streets dry.

Upon trial in Superior Court the parties stipulated:

1. That at the time alleged in the pleading in this action, the automobile operated by plaintiff's wife, belonged to him and was maintained by him as a family-purpose car.

2. That going south approaching the intersection of Woodburn Road and Clark Avenue, there is a Stop sign erected, pursuant to authority, by the city of Raleigh.

3. That both parties may offer evidence of repair bills to their respective motor vehicles as substantive evidence of damages alleged.

Also upon the trial in Superior Court, plaintiff's wife, as a witness for him, gave this narrative pertinent to this appeal: ". . . 30 May, 1952, at about 3:20 in the afternoon . . . I had started home, went out Woodburn Road . . . As I approached the intersection of Woodburn Road and

Clark Avenue going south I stopped because there was a stop sign there . . . ten or twelve feet from the intersection. After I stopped I looked to the left and no car was coming and then looked to the right and Mr. Lassiter's car was a city block away, approximately, and I changed to low gear and went on across the street . . . Mr. Lassiter's car was just past Daniels Street intersection when I saw it . . . and after my front wheels were on the curb of Clark Avenue across the street I was hit. The rear all the way to the door . . . was struck on the right side by Mr. Lassiter's automobile. It was quite an impact. It knocked my car completely around . . . facing west and hit a post . . . on the sidewalk . . . on the west side of Woodburn Road and south side of Clark Avenue." Then the witness was asked these questions to which she gave answers as indicated: "Q. Did you have occasion to look again after you had started across Clark Avenue? A. No, I did not. Q. Why didn't you look again? A. Well, I was quite sure he was a distance so that I had plenty of time to get across the street." The witness also testified that after the collision, defendant said to her: "To tell you the truth, I didn't see you until I hit you."

Then on cross-examination the witness continued: ". . . The car was in good condition, the horn would blow and the brakes were all right. If I had applied my brakes I could have stopped almost instantly . . . I do not know how far the stop sign is back from the curb line of Clark Avenue . . . I was traveling . . . on my side of the street and I stopped just below the stop sign . . . When I came up here and stopped, Mr. Lassiter's car was just this side of Daniels Street when I saw him and I proceeded to go across the street . . ." Then these questions were asked, to which the witness answered as indicated: "Q. You didn't look any more? A. Not after I started, no, I did not . . . Q. . . . Was there anything to cause you to think he was going fast? A. Not at the time, no. Q. And then you came on across this intersection? A. That's right. Q. And coming across this wide intersection you didn't look again to your right? A. No, because I was sure I had time to cross . . . Q. In other words, you misjudged the distance and the speed? A. I sure did the speed . . . Q. How fast were you traveling across the intersection? A. I would say about five miles an hour. I did not change gears . . . I did not increase my speed at any time across the wide intersection . . . I did not hear the car before I was hit . . . My windows were up on that side . . . I didn't hear or see anything until the impact occurred . . ."

C. T. Poole, an officer, as witness for plaintiff, testified: That he had occasion to investigate the collision on 30 May, 1952; that the skid marks from defendant's car were 25 feet straight, leading up to the point of impact; that there were no skid marks made by plaintiff's car, except sideways—approximately 5½ to 6 feet from the south curb line of Clark

Avenue; that Clark Avenue is 44 feet wide and Woodburn Road is 30 feet wide; and that the stop sign on Woodburn Road is about 15 or 20 feet from Clark Avenue.

Defendant, reserving exception to denial of his motion for judgment as of nonsuit, made at close of plaintiff's evidence, offered evidence. And as a witness for himself he testified: ". . . I knew there was a stop sign on Woodburn Road at a point where it intersects with Clark Avenue. I came into Clark Avenue from Oberlin Road. As I proceeded on Clark Avenue . . . and when I got approximately 50 feet from the intersection of Woodburn Road and Clark Avenue, to my left I noticed a car approaching, and when I got, I would say, approximately 30 feet from the intersection, I saw that the car was not going to stop. I was traveling at a rate of speed between 20 and 25 miles an hour . . . The first time I observed that motor vehicle on Woodburn Road, it was approximately 30 feet from the intersection and it was traveling at about 15 miles per hour . . . The car did not stop at the stop sign. When I approached the intersection, I was of the opinion that the car would slow down and come to a stop, but it didn't . . . I applied my brakes and pulled to the right . . . My car moved straight forward at the time it was skidding . . . The front end of my vehicle hit Mrs. Badders' vehicle in the side near the door . . ." And in answer to the question, "And you didn't tell her that you didn't see her until you hit her, did you?", defendant answered, "No, sir."

And under cross-examination defendant testified substantially as he had on direct examination, and, continuing, he said: "The impact did not take place when the front of Mrs. Badders' car was crossing the curb line of Clark Avenue. It was further up into the intersection when I hit her . . . it was approximately 10 feet from the curb." Then defendant was asked these questions to which he answered as indicated: "Q. It is an open field across there . . . wasn't it? A. That's right, it was.

"Q. But you didn't see her, you say, until she was some 30 feet from the intersection? A. Approximately 30 feet from it.

"Q. Why didn't you see her before that, had you looked? A. I don't know why I didn't see her. I did not look up that street at any point prior to the time I saw her 30 feet from the intersection . . . I do not know how fast my car was going when the cars collided . . ."

At the close of all the evidence, "defendant renewed motion for judgment as of nonsuit, and moved for a directed verdict on the second issue. Denied. Defendant's exception No. 3."

The case was submitted to the jury upon six issues as to (1) negligence (2) contributory negligence, and (3) damages, all in respect to plaintiff's alleged cause of action; and (4) negligence, (5) contributory negligence, and (6) damages, all in respect to defendant's counterclaim. The jury

for verdict answered the first issue "Yes," the second "No," and the third "$396.52," and did not answer the 4th, 5th and 6th issues. In accordance therewith the court entered judgment for plaintiff. Defendant excepted thereto, and appeals to Supreme Court and assigns error.

Smith, Leach, Anderson & Dorsett for plaintiff, appellee.
Teague & Johnson and Wright T. Dixon, Jr., for defendant, appellant.

WINBORNE, J. The determinative question here is whether or not the trial court erred in denying defendant's motions for judgment as of nonsuit, and this question is determinable by the answer to another question as to whether or not the evidence offered by the plaintiff upon the trial below shows, as a matter of law, that, at the time and place of the collision here involved, plaintiff's wife was contributorily negligent in the operation of plaintiff's family-purpose automobile.

Conceding that the evidence offered upon the trial in Superior Court, as shown in the case on appeal, pertaining to the issue as to negligence of defendant, is sufficient to take the case to the jury, *Johnson v. Bell,* 234 N.C. 522, 67 S.E. 2d 658, this Court is constrained to hold that the uncontradicted testimony of plaintiff's wife, as witness for him, leads inevitably to the conclusion that she was negligent in the operation of plaintiff's family-purpose automobile, and that such negligence was at least a contributing cause of the collision. G.S. 20-158 (a), *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361. Plaintiff's negligence need not be the sole proximate cause of the injury to bar recovery. It is enough if it contribute to the injury as a proximate cause, or one of them. *Marshall v. R. R.,* 233 N.C. 38, 62 S.E. 2d 489.

The statute, G.S. 20-158, declared that (a) The State Highway and Public Works Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, and that wherever any such sign has been so erected, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. And the same section of the statute also declares that "No failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether plaintiff in such action was guilty of contributory negligence." *Johnson v. Bell, supra.* See also *Sebastian v. Motor Lines,* 213 N.C. 770, 197 S.E. 539; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Nichols v.*

Goldston, 228 N.C. 514, 46 S.E. 2d 320; *Lee v. Chemical Corp.*, 229 N.C. 447, 50 S.E. 2d 181.

"The purpose of highway stop signs," as stated by this Court in opinion by *Devin, J.*, later *C. J.*, in the *Matheny case, supra*, "is to enable the driver of a motor vehicle to have opportunity to observe the traffic conditions on the highways and to determine when in the exercise of due care he might enter upon the intersecting highway with reasonable assurance of safety to himself and others . . . And the statute G.S. 20-154 also requires that before starting from a stopped position and moving into the line of traffic the driver shall first see that such movement can be made in safety."

And in the *Matheny case* the Court went on to say that "Since at the intersection described in the case at bar the driver of an automobile approaching the intersection from the north was required (G.S. 20-158) to bring his automobile to a complete stop, the right of way, or rather the right to move forward into the intersection would depend upon the presence and movement of vehicles on the highway which he intended to cross. The rule as to right of way prescribed by G.S. 20-155 applies to moving vehicles approaching an intersection at approximately the same time . . . Where the driver has already brought his automobile to a complete stop, thereafter the duty would devolve upon him to exercise due care to observe approaching vehicles and to govern his conduct accordingly. One who is required to stop before entering a highway should not proceed, with oncoming vehicles in view, until in the exercise of due care he can determine that he can do so with reasonable assurance of safety . . . Generally when the driver of an automobile is required to stop at an intersection he must yield the right of way to an automobile approaching on the intersecting highway . . ., and unless the approaching automobile is far enough away to afford reasonable ground for the belief that he can cross in safety he must delay his progress until the other vehicle has passed." See also *Cooley v. Baker*, 231 N.C. 533, 58 S.E. 2d 115; *S. v. Hill*, 233 N.C. 61, 62 S.E. 2d 532; *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 23.

Moreover, the Court further declared in the *Matheny case* that "the right of one starting from a stopped position to undertake to cross an intersection would depend largely upon the distance from the intersection of approaching vehicles and their speed, and unless under the circumstances he would reasonably apprehend no danger of collision from an approaching vehicle it would be his duty to delay his progress until the vehicle has passed."

Furthermore, it is a general rule of law that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances.

And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. *Adams v. Service Co.,* 237 N.C. 136, 74 S.E. 2d 332, and cases cited.

And it is said in *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330, "It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel, and he is held to the duty of seeing what he ought to have seen . . ." See also *Henson v. Wilson,* 225 N.C. 417, 35 S.E. 2d 245.

In the light of the statutes, and these principles of law, applied to the evidence in hand, these questions arise: Did plaintiff's wife, before entering Clark Avenue, the designated highway, in the exercise of due care determine that she could do so with reasonable assurance of safety? And did she exercise due care in the operation of the automobile in crossing the intersection? She admits that she misjudged the speed of defendant's automobile. And she says that she stopped at the stop sign located 10 or 12 feet from the intersection; that she saw defendant's automobile about a block away; that she then changed to low gear and went on across the street at a speed of five miles per hour; and that she did not look again to her right, and did not "hear or see anything until the impact occurred." Manifestly, her decision to start across the intersection lacked reasonable assurance of safety, and the operation of the automobile by her in traversing the intersection without keeping a reasonably careful lookout, establishes lack of ordinary care.

Hence the motion of defendant for judgment as of nonsuit should have been allowed. For defendant, by moving for judgment as of nonsuit, in effect, submitted to a voluntary nonsuit on the counterclaim set up by him. *Bourne v. R. R.,* 224 N.C. 444, 31 S.E. 2d 382.

The judgment below is
Reversed.

ERVIN, J., dissents.

EMMA K. TROXLER, EXECUTRIX OF THE ESTATE OF J. F. TROXLER, DECEASED, v. CENTRAL MOTOR LINES, INC., BOBBIE R. WYRICK AND MRS. HALLIE F. LEFLER.

(Filed 4 June, 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 does not admit conclusions or inferences of law.

2. Same—

Upon demurrer the allegations of the complaint must be liberally construed with a view to substantial justice, giving the pleader the benefit of every reasonable intendment in his favor, and the demurrer should be overruled unless the pleading be fatally defective. G.S. 1-151.

3. Automobiles § 8i—

It is the duty of a motorist, when faced by a red light in a traffic control signal properly maintained by a municipality, to stop, and his failure to do so constitutes negligence as a matter of law.

4. Same—

A motorist who has stopped in obedience to a traffic control signal is under duty not only to refrain from putting his vehicle in motion until the green light faces him, but is also under duty not to make a right turn into the intersection until he determines, in the exercise of due care, that such movement can be made in safety. G.S. 20-154.

5. Same—

Where the traffic control signal shows a red light to vehicles along one street, it may be inferred that vehicles along the intersecting street are faced with the green light.

6. Same: Automobiles §§ 18a, 18d, 18h (4)—Allegations held to show that negligence of one defendant insulated alleged negligence of the other.

Plaintiff's allegations were to the effect that a driver of a car drove across an intersection, that the driver of a truck along the intersecting street stopped in obedience to the red light of a traffic control signal, that the driver of the truck then undertook to make a right turn before the light had turned green, and hit the rear of the automobile before it had cleared the intersection, causing the driver of the car to lose control so that it inflicted the property damage in suit. It was further alleged that neither driver had a clear green signal light and that both were in the intersection at the same time, and further, that the driver of the car proceeded through the intersection at an excessive rate of speed. *Held:* The demurrer of the driver of the car on the ground that the driver of the truck was guilty of intervening negligence independently and proximately producing the injury should have been allowed, since even if it be inferred that the driver of the car entered the intersection as the light was in process of changing, she was not under duty of anticipating the negligence of the truck driver, and it is not alleged that her rate of speed was the cause of her losing control of her car.

7. Negligence § 9½—

A person is not under duty of anticipating negligence on the part of others.

8. Automobiles § 18a—

Allegations that defendant was driving recklessly, without specifying wherein the defendant was reckless, relate to conclusions of law not admitted by demurrer.

APPEAL by defendant Mrs. Hallie F. Lefler from *Armstrong, J.,* at 23 November, 1953, Civil Term of GUILFORD, Greensboro Division.

Civil action to recover for damages to real and personal property growing out of an automobile collision at the intersection of South Elm Street and East Lee Street in the city of Greensboro, N. C., as the result of alleged joint and concurrent negligence of defendants Bobbie R. Wyrick and Central Motor Lines, Inc., on the one hand and Mrs. Hallie F. Lefler on the other, heard upon demurrer to the complaint, and motion to strike portions of the complaint filed by defendant Mrs. Hallie F. Lefler.

Plaintiff alleges in her complaint these facts as of the time, 29 May, 1952, and at the scene of the collision to which reference is made above:

(1) South Elm Street runs almost due north and south, and Lee Street almost due east and west, and both are paved. Lee Street intersects South Elm Street almost at right angles, and the portion of Lee Street east of the intersection is known as East Lee Street.

(2) The city of Greensboro had established and was maintaining an electric traffic control signal at this intersection above described, the signal being located about the center of the intersection, and "the rights and duties of motor vehicles entering and crossing said intersection are governed by law and particularly by ordinances of the city of Greensboro."

(3) The estate of J. F. Troxler, Emma K. Troxler, Executrix, was the owner of a retail grocery business, conducted under the name of Troxler Brothers Grocery, and of the premises upon which the grocery business was conducted, at 735 S. Elm Street, in the city of Greensboro, N. C.,—the store building being located at the northeast corner of the intersection, fronting on the east side of South Elm Street, and running back along the north line of East Lee Street.

(4) It is also alleged in the complaint (a) that on 29 May, 1952, at about 12:45 p.m., the defendant Bobbie R. Wyrick, as the agent, servant and employee of defendant Central Motor Lines, Inc., and within the scope of his agency and employment, drove a 2-ton 1951 Dodge truck, owned by defendant Central Motor Lines, Inc., westwardly along E. Lee Street, and approached the intersection of South Elm Street and East Lee Street, and (b) that at about the same time defendant Hallie F. Lefler was driving her 1951 Oldsmobile club coupe in a northwardly direction

along South Elm Street, and approached the intersection at about the same time as did the defendant Bobbie R. Wyrick, who was driving the Dodge truck as aforesaid.

(5) It is alleged in paragraph XV of the complaint, "That the defendant Hallie F. Lefler proceeded to drive her automobile across the intersection . . .; that . . . the defendant Bobbie R. Wyrick had come to a stop at the stop-light as he was traveling westwardly on East Lee Street, the light emitting a red signal; that . . . the said defendant Bobbie R. Wyrick then undertook to make a right turn, northwardly in South Elm Street; that . . . both the defendant Hallie F. Lefler and the defendant Bobbie R. Wyrick proceeded into the intersection of said streets without having a clear green light or a Go sign from the electric traffic control signal at the intersection . . .; that both vehicles were thus in the intersection . . . at the same time; that the front of the Dodge truck driven by defendant Bobbie R. Wyrick struck the rear of the automobile being driven by the defendant Hallie F. Lefler; that the said Hallie F. Lefler apparently lost control of her automobile, and that said automobile thereupon turned in an eastwardly direction and careened across the sidewalk on the east side of South Elm Street in front of the plaintiff's store building and continued to travel through the door and plate glass windows into the front portion of the store building; that said automobile . . . was entirely within the premises before it came to rest."

(6) Then it is alleged in paragraph XXII that the damages sustained by plaintiff were caused solely and proximately by the joint and concurrent negligence of the defendants in the operation of their respective vehicles in that:

As to Bobbie R. Wyrick, he (a) "operated the truck . . . upon a public highway carelessly and heedlessly in wilful and wanton disregard of the rights and safety of others without due caution or circumspection, all in violation of" G.S 20-140; (b) "before turning from a direct line and entering said . . . intersection" (he) "failed to first ascertain that the movement could be made in safety and . . . to give any sign or signal of his intention to make a right-hand turn, in violation of" G.S. 20-154; (c) "entered the intersection . . . when there was not sufficient space on the other side of the intersection to accommodate his vehicle in violation of the Code of the city of Greensboro, Chapter 7, Article 6, Section 3"; (d) "carelessly and negligently struck the right rear and side of the automobile being driven by the defendant Hallie F. Lefler"; (e) "failed to keep his vehicle under proper control and . . . to keep a proper lookout for other traffic upon the highway"; and (f) "failed to use due care and precaution in the operation of his motor vehicle as he undertook to drive his said vehicle from a stopped position into the intersection . . ." And as to Hallie F. Lefler, she (g) "operated her automobile upon the

public highway carelessly and heedlessly in wilful and wanton disregard of the rights and safety of others, without due caution or circumspection, all in violation of" G.S. 20-140, and (h) "drove through said intersection at an excessive rate of speed and came in front of the truck driven by the defendant Bobbie R. Wyrick."

And as to both defendants, they (i) "operated their said vehicles carelessly and negligently, causing the automobile owned and operated by the defendant Hallie F. Lefler to careen across the street and sidewalk in front of the plaintiff's store and through the front of . . . and into the store," all as hereinabove set out; and (j) "failed to obey the traffic signal at the intersection . . . in violation of the ordinances of the city of Greensboro."

(7) Plaintiff, after making allegation in respect to the damage done to the property of the estate, of which she is executrix, further alleged: In paragraph XX, that certain personal property of Pet Dairy Products Company was in the store, and was damaged in certain amount, and that the Pet Dairy Products Company has made a written assignment of its claim to the plaintiff; and in paragraph XXI, that certain personal property of J. Balderacchi, t/a G. P. Food Distributors, was in the store and was damaged in certain amount, and that he has assigned his claim in writing to the plaintiff: And in paragraph XXIII, it is alleged that the joint and concurrent negligence of the defendants was the sole and proximate cause of the damages so sustained by the estate of J. F. Troxler and by Pet Dairy Products Company and G. P. Food Distributors, the claims for which have been assigned to the plaintiff.

The defendant Hallie F. Lefler in apt time filed a motion to strike certain allegations from the complaint of plaintiff, in pertinent part, all of paragraphs XX and XXI, and portion of XXIII, all pertaining to damage to personal property of Pet Dairy Products Company and of J. Balderacchi, t/a G. P. Food Distributors, and the assignments of their respective claims therefor to plaintiff.

And thereafter defendant Hallie F. Lefler demurred to the complaint of plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action against her, in that it appears from the face of the complaint (1) that she was not negligent on the occasion complained of; (2) that the negligence of defendants Bobbie R. Wyrick and Central Motor Lines, Inc., was the sole proximate cause of the collision and resulting damage; and (3) that her negligence, if any, was insulated by the negligence of defendants Bobbie R. Wyrick and Central Motor Lines, Inc., and was not a proximate cause of the collision and resulting damages to plaintiff, if any.

When the cause came on for hearing, first, upon the motion to strike as set forth hereinabove and, then, upon the demurrer, the judge presiding

entered orders: First denying the motion to strike the portions of the complaint above recited, and, then, overruling the demurrer.

To the rulings of the court in each respect defendant Hallie F. Lefler objected and excepted, and to the entry of each order she excepted, and appeals to Supreme Court and assigns error.

York & Boyd and A. W. Flynn, Jr., for plaintiff, appellee.

Jordan & Wright and Perry C. Henson for defendant Hallie F. Lefler, appellant.

WINBORNE, J. While appellant Mrs. Hallie F. Lefler brings forward two assignments of error for consideration on this appeal, the one based upon exception to the action of the court in overruling her demurrer to the complaint presents the determinative question. The demurrer challenges the sufficiency of the facts alleged in the complaint to state a cause of action against her.

For this purpose the truth of the allegations contained in the complaint are admitted, and "ordinarily relevant inferences of fact necessarily deducible therefrom" are also admitted. But the principle does not extend to admissions of conclusions or inferences of law. *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761. See also *McLaney v. Motor Freight, Inc.,* 236 N.C. 714, 74 S.E. 2d 36; *Hollifield v. Everhart,* 237 N.C. 313, 74 S.E. 2d 706, and cases there cited.

Also it is provided by statute, G.S. 1-151, that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with the view to substantial justice between the parties." And decisions of this Court interpreting and applying the provisions of this statute require that every reasonable intendment must be in favor of the pleader. The pleading must be fatally defective before it will be rejected as insufficient. See *Ins. Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369, and cases there cited. See also *McLaney v. Motor Freight, Inc., supra,* and *Hollifield v. Everhart, supra.*

In the light of the provisions of the statute, as so interpreted and applied, admitting the truth of the facts alleged in the complaint, this Court concludes as a matter of law that the allegations in respect to appellant the defendant Mrs. Hallie F. Lefler, are fatally defective upon the grounds on which the demurrer is predicated. Indeed, it affirmatively appears upon the face of the complaint that the property damage of which plaintiff complains, was, as stated by *Stacy, C. J.,* in *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108, "independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person," to wit, the defendant Bobbie R. Wyrick, in the operation of the truck of defendant Central Motor Lines, Inc. See *Mintz v. Murphy,* 235

N.C. 304, 69 S.E. 2d 849; *Alford v. Washington,* 238 N.C. 694, 78 S.E. 2d 915; *Baker v. Lumberton,* 239 N.C. 401, 79 S.E. 2d 886. See also *McLaney v. Motor Freight, Inc., supra,* and *Hollifield v. Everhart, supra,* where the principle was recently applied, and supporting authorities cited. Hence the demurrer of Mrs. Lefler, the appellant, should have been sustained.

Bearing in mind that it is alleged in the complaint: That South Elm Street runs about due north and south; that Lee Street runs almost due east and west; that Lee Street intersects South Elm Street almost at right angles,—the portion of Lee Street east of this intersection being known as East Lee Street; and that the city of Greensboro had established and was maintaining an electric traffic control signal at, and about the center of this intersection: It is further alleged that at about 12:45 p.m. the defendant Wyrick drove the truck westwardly along East Lee Street and approached the intersection; "that at about the same time" defendant Lefler was driving the club coupe northwardly along South Elm Street; that "the said defendant" (Lefler) approached the intersection "at about the same time as the defendant Wyrick . . ."; "that the defendant Lefler proceeded to drive her automobile across the intersection . . ."; "that the defendant Wyrick had come to a stop at the stop light . . . the light emitting a red signal"; "that the said defendant Wyrick then undertook to make a right turn, northwardly into South Elm Street"; "that both . . . proceeded into the intersection . . . without having a green light or go sign from the electric traffic control signal . . ."; "that both were thus in the intersection . . . at the same time"; that the front of the Dodge truck . . . struck the rear of the automobile; "that the said . . . Lefler apparently lost control of her automobile," and that the automobile thereupon turned in an eastwardly direction and careened across the sidewalk on east side of South Elm Street in front of plaintiff's store building, etc.

The allegations of the complaint justify the inference that when the electric traffic control light, installed and maintained by the city at the intersection, showed red on one street, it showed green on the other. Thus from these allegations that when Wyrick and Lefler approached the intersection, Wyrick was faced with a red light on East Lee Street, it is logical and reasonable to infer that as Lefler approached the intersection she was faced with the green light on South Elm Street. Then it is alleged that faced with the red light, Wyrick stopped his truck before entering the intersection. Under such circumstances it was his duty to stop. For "a motorist is negligent as a matter of law if he fails to stop in obedience to a red traffic light as required by the ordinance . . ." *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25. See also Blashfields Cyclopedia of Automobile Law and Practice, Sec. 2685, Vol. 4, p. 185. And before

starting again, Wyrick should not only have the green light or go sign facing him, but he should also see and determine in the exercise of due care that such movement could be made in safety. G.S. 20-154. *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361. It is alleged that he entered the intersection without a green light or go sign. And it may be inferred that if he had looked he would have ascertained that the Lefler automobile was already in the intersection.

On the other hand, Lefler, having the green light as she approached the intersection, it seems clear that she had the right to proceed. It is alleged she did proceed into the intersection. But if it be inferred from the allegation that she entered the intersection as the light was in process of changing, she was not under any duty of anticipating negligence on the part of Wyrick, but in the absence of anything which gave or should give notice to the contrary, she was entitled to assume, and to act on the assumption, that he, Wyrick, in the exercise of ordinary care, would not proceed into the intersection until after he had the green light, and she had cleared the intersection. See *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239.

Moreover, while it is alleged that defendant Lefler drove through the intersection at an excessive rate of speed, it is not alleged that speed was the cause of her losing control. And the allegations as to reckless driving without specifying wherein defendant Lefler was reckless, are conclusions of law which are not admitted.

This case is distinguishable from *Aldridge v. Hasty, ante,* 353.

The judgment from which appeal is taken is

Reversed.

SAMUEL F. GANTT, ANCILLARY ADMINISTRATOR OF PIERCE BUTLER, DECEASED, v. DONALD CHASE HOBSON, G. S. ADKINS, J. E. BROUSSARD, AND DORIS B. BENTLEY, ADMINISTRATRIX OF THE ESTATE OF GEORGE F. BENTLEY, DECEASED.

(Filed 4 June, 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 does not admit conclusions or inferences of law.

2. Same—

Upon demurrer the allegations of the complaint must be liberally construed with a view to substantial justice, giving the pleader the benefit of every reasonable intendment in his favor, and the demurrer should be overruled unless the pleading be fatally defective. G.S. 1-151.

3. Same—

The office of a demurrer to a pleading and the office of a demurrer to the evidence are different in purpose and result, and an adjudication of the sufficiency of the allegations upon demurrer to the complaint does not foreclose or circumscribe the consideration of the evidence adduced in support of the allegations.

4. Automobiles § 8i—

The driver of a vehicle entering a highway from a filling station or private driveway is under duty to yield the right of way to all vehicles approaching on the highway, and in the discharge of this duty is required to look for vehicles approaching on the highway at a time when this precaution may be effective. G.S. 20-156 (a).

5. Automobiles § 12a—

The operator of a motor vehicle should not drive at a speed so slow as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or required by law. G.S. 20-141 (h).

6. Automobiles § 9b—

The operator of a truck at nighttime on the public highways of the State is required to have burning on the rear of the vehicle a red light plainly visible under normal atmospheric conditions for a distance of five hundred feet to the rear, and other lights and reflectors required by G.S. 20-129 (d).

7. Automobiles §§ 8i, 18a, 18d, 18h (4)—Complaint held to allege negligence of demurring defendant which concurred with negligence of co-defendant.

Allegations of the complaint were to the effect that the driver of a truck entered the highway from a filling station on the north side thereof, crossed the westbound traffic lane and entered the eastbound traffic lane, and thereafter drove said truck at a speed not exceeding 10 miles per hour, and did not have lights burning on the rear of the truck as required by G.S. 20-129 (b), although it was after dark, and that the operator of a car in which intestate was riding as a guest, traveling east on the highway, collided with the rear of the unlighted truck, fatally injuring intestate. *Held:* Upon the allegations, the alleged negligence of the driver of the car in driving at such speed that he was unable to stop within the radius of his lights, G.S. 20-141, and failing to keep a proper lookout, did not constitute intervening negligence insulating the alleged negligence of the driver of the truck, and the demurrer of the driver and owner of the truck was properly overruled.

APPEAL by defendants Donald Chase Hobson and G. S. Adkins from *Carr, Judge* Resident of the 10th Judicial District of North Carolina.

Civil action to recover for alleged wrongful death of Pierce Butler as a result of injuries sustained in an automobile collision allegedly caused by the joint and concurrent negligence of defendants, heard upon demurrer to the complaint entered by defendants Donald Chase Hobson and G. S. Adkins.

The amended complaint alleges (1) that Pierce Butler, late of Cook County, State of Illinois, died in the State of North Carolina, and plaintiff Samuel F. Gantt has been duly appointed, and is duly and lawfully acting as ancillary administrator of the estate of Pierce Butler in the State of North Carolina.

(2) That defendant Doris B. Bentley, now resident of Orange County, North Carolina, is administratrix of the estate of George F. Bentley, who died on or about 26 March, 1953, in Alamance County, having been duly appointed on 7 April, 1953, by Clerk of Superior Court of Orange County.

(3) That defendants, Donald Chase Hobson and G. S. Adkins, are citizens and residents of Alamance County, North Carolina, and defendant J. E. Broussard is a citizen and resident of New Iberia, Louisiana.

And the amended complaint alleges also substantially these facts and circumstances at the time of and concerning the said collision:

"4. That the plaintiff . . . alleges that the defendant, J. E. Broussard, is and was . . . the owner of the 1952 Pontiac coach driven by George F. Bentley . . . in which Pierce Butler . . . was riding as a passenger, and said George F. Bentley was driving as his agent and within the scope of his agency.

"5. That the plaintiff . . . alleges that the defendant, G. S. Adkins, is and was . . . the owner of the motor vehicle being driven by the defendant, Donald Chase Hobson, in the collision herein described.

"6. That the plaintiff . . . alleges that on or about the 26th day of March 1953, George F. Bentley invited Pierce Butler, who was then living at the University of North Carolina in Chapel Hill, North Carolina, . . . to go with him as his guest to drive from Chapel Hill, North Carolina, to Burlington, North Carolina, and return; that in making this trip, said George F. Bentley was driving a 1952 Pontiac coach owned by his father-in-law, said J. E. Broussard; that on the return trip to Chapel Hill, while said George F. Bentley was driving said Pontiac coach in an easterly direction along U. S. Highway 70 approximately three miles west of Burlington, North Carolina, at approximately 8:30 P. M. on the 26th day of March, 1953, said Pontiac coach ran with great force and violence into the rear of a 1947 auto car truck also headed in an easterly direction on U. S. Highway 70, and being at said time and place in charge of the defendant, Donald Chase Hobson; that as a result of said collision, said Pierce Butler received serious bodily injuries which resulted in his death on the 28th day of March 1953.

"7. That the plaintiff . . . alleges that at the time and place of the collision hereinabove described, said defendant, Donald Chase Hobson, was driving said automobile and was in charge of said automobile as a servant and agent of the defendant, G. S. Adkins, and within the scope of his employment.

"8. That the defendants, Donald Chase Hobson and G. S. Adkins, were negligent at the time and place of the collision complained of in the following respects:

"(a) The defendant Hobson, acting for and on behalf of the defendant, G. S. Adkins, as aforesaid, drove said auto car truck from a service station on the north side of said U. S. Highway 70 across the north traffic lane of said highway and on to the south traffic lane of said highway, proceeding in an easterly direction, without first ascertaining whether the condition of traffic on said U. S. Highway 70 was such as to permit such entry and crossing of said highway at said time and place and particularly failing to observe the oncoming automobile being driven by the defendant, George F. Bentley, traveling in an easterly direction on the south traffic lane of the said highway, and that such entry and crossing of said highway at such time and place was negligent and careless in that it endangered other vehicles traveling on said highway and, specifically the vehicle being operated by George F. Bentley, and also failed to yield the right of way to said oncoming vehicle in violation of North Carolina General Statutes 20-156 (a).

"(b) After making said turn into U. S. Highway 70, the defendant Hobson thereafter drove said auto car truck at a speed not exceeding ten miles per hour, which speed was one which would impede or block the normal and reasonable movement of traffic, in violation of North Carolina General Statutes, Section 20-141 (h).

"(c) Said defendants, Donald Chase Hobson and G. S. Adkins, operated and caused to be operated said auto car truck on said U. S. Highway 70 immediately prior to and at the time of said collision without having on said truck at the rear thereof a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of said vehicle and other lights and reflectors required by the laws of the State of North Carolina and, more specifically, by North Carolina General Statutes, Section 20-129 (d) and said defendants operated said auto car truck on the highways of the State of North Carolina at the time and place complained of although the highway was not lighted and the night was dark.

"(9) The defendant, George F. Bentley, was negligent at the time and place of the collision complained of in the following respects:

"(a) He failed to operate the automobile he was driving that night in such manner and at such speed as would enable him to stop within the radius of his lights and as might be necessary to avoid colliding with other vehicles on said highway at said time and place, in violation of the laws of the State of North Carolina in such cases made and provided and, specifically, G.S. 20-141.

"(b) He failed to keep a proper and careful lookout.

"10. That the combined and joint negligence of the defendants as set forth in paragraphs 8 and 9 above was the proximate cause or causes of the collision herein described and of the injuries received by this plaintiff's intestate, Pierce Butler, which injuries resulted in said Pierce Butler's death," all to great damage to his estate.

The defendants, Donald Chase Hobson and G. S. Adkins, demurred "to the amended complaint for that same does not state facts sufficient to constitute a cause of action against them, in that it appears upon the face of the complaint:

"1. That the sole proximate cause of the motor vehicle collision in question was the negligence of the defendants, J. E. Broussard and George F. Bentley, intestate of the defendant Doris B. Bentley, Administratrix.

"2. That if these defendants were guilty of any act of negligence the same was insulated and rendered inoperative by the negligence of the defendant J. E. Broussard and that of George F. Bentley, intestate of the defendant, Doris B. Bentley, Administratrix."

When the cause came on to be heard before Carr, Resident Judge of the Tenth Judicial District, on 12 December, 1953, upon the demurrer filed, and having been heard, after notice, the Judge ordered and adjudged that the demurrer be overruled, and that defendants be allowed 30 days within which to file answer.

The defendants, Donald Chase Hobson and G. S. Adkins, except to the foregoing order, and appeal to Supreme Court, and assign error.

Edwards, Sanders & Everett for plaintiff, appellee.

Cooper, Long, Latham & Cooper and Barnie P. Jones for defendants, appellants.

WINBORNE, J. The demurrer of the defendants, the appellants Hobson and Adkins, presents for decision the question as to whether or not the facts alleged in the complaint are sufficient to constitute a cause of action against them. For the purpose of considering such question, the truth of the allegations contained in the complaint is admitted, and "ordinarily relevant inferences of fact necessarily deducible therefrom are also admitted. But the principle does not extend to admissions of conclusions or inferences of law," *Stacy, C. J.*, in *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32; *McLaney v. Motor Freight, Inc.,* 236 N.C. 714, 74 S.E. 2d 36; also *Stribbling v. Lamm,* 239 N.C. 529, 80 S.E. 2d 270, and cases cited.

Too, it is provided by statute, G.S. 1-151, that in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with the view to substantial justice between the parties. And decisions of this Court interpreting and applying the pro-

visions of this Statute require that every reasonable intendment must be in favor of the pleader. The pleading must be fatally defective before it will be rejected as insufficient. See *Ins. Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369; also *Bumgardner v. Fence Co., supra.*

In the light of the provisions and principles of the statute, as so interpreted and applied, consideration of the facts alleged in the complaint in the instant case, leads this Court to conclude, as did the Judge on hearing below, that the allegations in respect to the defendants, Hobson and Adkins, are not so fatally defective, as a matter of law, as to require the sustaining of the demurrer on the ground upon which it is based. As was said in the *Bumgardner case, supra,* the factual situation may be fully developed upon the trial in Superior Court. Then the court may consider the case in the light of the evidence adduced by the respective parties. And such consideration will not be foreclosed or circumscribed by decision now made on the demurrer. See *Montgomery v. Blades,* 222 N.C. 463, at page 469, 23 S.E. 2d 844; *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320, and cases cited.

In the *Lewis case, supra,* in opinion by *Barnhill, J.,* now *C. J.,* it is said that "a demurrer to a complaint, G.S. 1-127, and a demurrer to the evidence, G.S. 1-183, are different in purpose and result. One challenges the sufficiency of the pleadings, the other the sufficiency of the evidence," citing cases.

Nevertheless, it is appropriate to say that appellants in brief filed in this Court present two main topics for consideration: (1) That the facts alleged in the complaint fail to show that the death of plaintiff's intestate, Pierce Butler, resulted from negligence on the part of Hobson; and (2) that the complaint shows on its face that any negligence on the part of Hobson was insulated and rendered inoperative by the intervening negligence of Bentley.

As to the first, it may be noted that the complaint of plaintiff alleges that at the time and place of the collision here involved the defendants Hobson and Adkins were negligent in three aspects as set forth in paragraph 8, subsections (a), (b) and (c).

The first (a) charges that Hobson, acting for and in behalf of Adkins, drove the auto car truck at a time and in a manner violative of the provisions of G.S. 20-156 (a). In this statute it is provided that "the driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public highway." And in order to comply with this statute, the driver of such vehicle is required to look for vehicles approaching on such highway, and this "is required to be done at a time when this precaution may be effective," as expressed by *Stacy, C. J.,* in *Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598, citing cases. See also *Garner v. Pittman and Sipe,* 237

N.C. 328, 75 S.E. 2d 111, a case somewhat similar in factual situation to the one in hand.

However, the *Garner case* came up on appeal from judgment as of nonsuit entered at the close of all the evidence. The collision there involved was between an automobile owned and operated by defendant Pittman, in which plaintiff was riding, and an automobile owned and operated by defendant Sipe. The Sipe automobile was traveling east on a street, and in the line and lane of eastbound traffic thereon, and the Pittman car had just emerged from a private driveway located on the north side of the street and was proceeding across the street, turning to left, that is, east, to get into the line and lane of eastbound traffic. And while the factual situation there is not identical to that in present case, the Court discussed the statute and applied the pertinent principles of law. This may be done in instant case when the ultimate facts alleged are developed by evidence at the trial in Superior Court.

The second (b) charges that, after making the turn into the highway, Hobson drove the auto car truck at a speed not exceeding ten miles per hour under existing conditions in violation of G.S. 20-141 (h). This statute provides that no person shall drive a motor vehicle at such slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law.

And the third (c) charges that Hobson operated the auto car truck on a public highway without having on, and at the rear of it, a red light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear, and other lights and reflectors required by G.S. 20-129 (d).

These allegations (b) and (c) admit of proof in respect thereto—which when introduced, may be judged in the light of applicable principles of law.

This Court holds that the facts as alleged are not sufficiently definite to point to a single inference in respect to the contention of appellants that defendants Bentley and Broussard were negligent as alleged, and that such negligence insulated any negligence of which the defendants Hobson and Adkins may have been guilty.

This necessitates a trial in Superior Court where the facts may be developed by evidence within the framework of the pleading, and then the evidence considered in the light of applicable principles of law.

Hence the judgment below is

Affirmed.

STATE v. ALDON MATHEAY.

(Filed 4 June, 1954.)

1. Larceny § 7—

Evidence tending to show that an automobile was stolen from where it was parked in front of the owner's house, that some 82 days thereafter defendant was apprehended driving an automobile of the same make and color and the same motor registration number, but with license plates that had been issued for a different vehicle, *is held* sufficient to be submitted to the jury in a prosecution for larceny.

2. Larceny §§ 5, 8—Possession raises no presumption of guilt if time intervening after theft is too long.

The State's evidence tended to show the theft of a car from its owner and that defendant was apprehended some 82 days thereafter in possession of the car. The State offered no evidence tending to show how long defendant had been in possession of the car prior to his arrest. *Held:* The elapse of time between the theft and the arrest of defendant was too long under the circumstances for the mere possession of the property to infer guilt of defendant, but was only a circumstance, without presumptive significance, to be considered by the jury with the other facts and circumstances in determining whether the State had carried the burden of satisfying the jury beyond a reasonable doubt of defendant's guilt, and an instruction on such evidence as to the presumption of guilt arising from "recent possession" is prejudicial.

APPEAL by defendant from *Nimocks, J.*, February Criminal Term, 1954, of DURHAM.

Criminal prosecution tried upon a bill of indictment charging the defendant with the larceny in Durham County, on 20 October, 1953, of a 1953 Ford Deluxe automobile of the value of $2,200, the property of one David E. Womble.

The State's evidence tends to show the following: On 20 October, 1953, David E. Womble was the owner of a 1953 Ford Deluxe automobile, royal blue in color, with two doors, which had a reasonable market value of $1,845, having been purchased about six months prior thereto at a cost of $2,200. On the night of 19 October, 1953, Womble's wife parked the car in front of their home on Shenandoah Avenue in the City of Durham. At five o'clock the next morning, David E. Womble missed the car. He testified that no one except his wife and himself had the authority to drive the car and that he had not given the defendant or any other person the right to remove the car from the place where it was parked on the night preceding the discovery of its loss.

The registration certificate was introduced in evidence showing the ownership of the car in David E. Womble of 2517 Shenandoah Avenue, Durham, North Carolina, and the registration number as B3NG-121392.

On 9 January, 1954, H. W. Pridgen, a State Highway Patrolman, arrested the defendant approximately eight miles west of New Bern, North Carolina, on U. S. Highway No. 70, about 2:15 p.m., driving a blue two-door Ford Deluxe automobile later identified as the car of David E. Womble which had been stolen on 19 or 20 October, 1953. The license plate on the car at the time of defendant's arrest had been issued for a 1948 Ford automobile and not for the car of David E. Womble to which it was attached.

The defendant offered no evidence and 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 William P. Mayo, Member of Staff, for the State.

Taylor & Mitchell for defendant, appellant.

DENNY, J. The defendant assigns as error the denial of his motion for judgment as of nonsuit, but we think the evidence produced by the State was sufficient to carry the case to the jury.

The defendant's assignment of error, however, based on exceptions to those portions of the charge which deal with the presumption of guilt arising from "recent possession," must be sustained.

The parts of the charge complained of were taken almost verbatim from charges which this Court approved in the cases of *S. v. White,* 196 N.C. 1, 144 S.E. 299, and *S. v. Baker,* 213 N.C. 524, 196 S.E. 829. But the facts with respect to "recent possession" in those cases were substantially different from those in the present case. In the *White case,* a watch was stolen in Pasquotank County from the bedroom of the prosecuting witness on the night of 18 October, 1927. On 24 February, 1928, the defendant was arrested for peeping into the windows of a residence in Elizabeth City. When taken to prison he was searched and the watch of the prosecuting witness was found in his possession. The State offered evidence to the effect that the watch was in the possession of the defendant prior to 1 November, 1927. In the *Baker case,* the defendant was charged with the larceny of a cow. The cow was stolen in Edgecombe County on the night of 28 October, 1937, and found in the possession of the defendant in Wayne County on 3 November, 1937. The defendant testified that he bought the cow from the truck of an unknown man just outside of Smithfield in Johnston County on 1 November, 1937.

In the present case, the automobile of David E. Womble was stolen in Durham on the night of 19 October, 1953, and found 82 days later, on 9 January, 1954, in possession of the defendant, near New Bern, North Carolina. However, the State offered no evidence tending to show how

long the defendant had been in possession of the stolen property prior to his arrest, as it did in the case of *S. v. White, supra.* Also, the defendant in *S. v. Baker, supra,* had possession of the stolen cow so soon after it was stolen that the possession gave rise to a presumption of guilt. But, under our decisions, the time that elapsed in this case between the theft and the arrest of the defendant was too long under the circumstances revealed on the record for the mere possession of the property to infer guilt on the part of the defendant or to create a presumption thereof. *S. v. Absher,* 230 N.C. 598, 54 S.E. 2d 922; *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725; *S. v. Rights,* 82 N.C. 675.

In the last cited case, the Court said: "It is a general rule that whenever the property of one, which has been taken from him without his knowledge or consent, is found in the possession of another, it is incumbent on that other to prove how he came by it, otherwise the presumption is that he came by it feloniously. But in applying this rule due attention must be paid to the circumstances by which such presumption may be weakened or strengthened, depending on the length of time intervening between the theft and the finding of the goods in the possession of the party accused. . . . Ordinarily it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of a considerable time before a possession is shown in the accused, the *law* does not infer his guilt, but leaves that question to the jury under the consideration of all the circumstances."

In applying our decisions to the facts in this case, in our opinion, the possession of the car in question, in the absence of evidence as to when or under what circumstances the defendant came into possession of it, is only a circumstance, without presumptive significance, to be considered with the other facts and circumstances by the jury in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. *S. v. Absher, supra; S. v. Holbrook, supra; S. v. McFalls,* 221 N.C. 22, 18 S.E. 2d 700; *S. v. Lippard,* 183 N.C. 786, 111 S.E. 722; *S. v. Anderson,* 162 N.C. 571, 77 S.E. 238; *S. v. Rights, supra.*

In the case of *S. v. Absher, supra,* an automobile was stolen in Elkin in Surry County on 8 March, 1948. Three months later, on 7 June, 1948, in North Wilkesboro, in the adjoining County of Wilkes, the defendant Absher was found in the possession of an automobile, the body of which was identified as having originally been a part of the automobile stolen in Surry County on 8 March, 1948, but the chassis and motor had belonged to a different vehicle. On appeal to this Court, we held there was error in the court's charge to the jury in permitting it to take into consideration, in arriving at its verdict, inferences of guilt arising from the

possession of the stolen property. *Devin, J.*, (later *Chief Justice*), speaking for the Court, said: "In so charging we think the court inadvertently submitted to the jury a point of view more favorable to the State than the facts warranted. The jurors were permitted to consider the circumstances of this case in the light of the doctrine of the recent possession of stolen goods as creating an inference or presumption of guilt, and, under the principle of law, to give added weight to the evidence of the possession of the stolen property in North Wilkesboro, as ground for rendering verdict of guilty, when according to the evidence three months had elapsed from the time of the larceny of the automobile to the time a part of it was found in possession of the defendant in North Wilkesboro. Under the circumstances here this would not warrant submitting this principle to the jury as the basis for a verdict of guilty as charged in the bill. *S. v. Cameron,* 223 N.C. 449, 27 S.E. 2d 81; *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725; *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *S. v. Jones,* 227 N.C. 47, 40 S.E. 2d 458."

It may be noted further that while the State did show that the defendant was operating the stolen car with an improper license plate attached thereto, being one issued for a 1948 Ford automobile, it did not show to whom the license for the 1948 automobile was issued by the Department of Motor Vehicles.

The defendant is entitled to a new trial and it is so ordered.

New trial.

MILTON JULIAN AND WIFE, VIRGINIA E. JULIAN, v. EDGAR H. LAWTON AND CHARLES W. COKER, EXECUTORS AND TRUSTEES OF THE ESTATE OF W. C. COKER, DECEASED, LOUISE V. COKER, CORNELIUS O. CATHEY, BEULAH PROCTOR CATHEY, AND WALTER D. TOY.

(Filed 4 June, 1954.)

1. Deeds § 16b—

Covenants restricting the free use of property are not favored, and the terms of such covenants will not be enlarged by construction beyond the plain and unmistakable meaning of the language employed.

2. Same—

A covenant providing that no residence should be erected on the lot conveyed until the type and exterior lines of the structure had been approved by the developer, or an architect selected by him, creates a covenant personal to the developer which he may exercise in person or through the architect he selects, and therefore such covenant terminates upon the death of the developer and cannot be enforced by the executors and trustees of the developer, nor the owners of other lots in the development on the theory that it was a covenant intended for their benefit.

3. Principal and Agent § 4—

Where the developer of a subdivision inserts in the deed to each lot that no residence should be erected thereon unless the exterior lines were approved by the developer or by an architect selected by him, and thereafter the developer executes an instrument designating the architect to pass on the question, *held*, such architect is merely the agent of the developer for the purpose stipulated, and such agency is terminated by the death of the developer.

APPEAL by defendants from *Sharp, Special Judge,* at February Special Term, 1954, of ORANGE.

Proceeding under the Uniform Declaratory Judgment Act for a declaration in respect to the construction and validity of a covenant in a deed.

The matters necessary to an understanding of the legal question arising on the appeal are stated in the numbered paragraphs set forth below.

1. Dr. W. C. Coker, famed and long-time professor of botany at the University of North Carolina, owned a tract of land near Chapel Hill, which he subdivided into numerous building lots for residential purposes and placed upon the market as a restricted residential district under the name of "the Rocky Ridge Development."

2. On 12 May, 1946, Dr. Coker sold and conveyed one of the lots, namely, Lot 57, to Cornelius O. Cathey and Beulah Proctor Cathey by a deed containing this covenant: "And the said Cornelius O. Cathey and wife, Beulah Proctor Cathey, parties of the second part, as a part of the consideration of this deed, covenant for themselves, their heirs and assigns, with the said W. C. Coker and wife, Louise Venable Coker, parties of the first part, and their heirs and assigns, as to the land herein described, that not more than one dwelling house shall be placed upon this tract, with the provision that the dwelling house shall cost not less than $6,000.00; and *that no dwelling house or other building shall be erected on the tract until the type and exterior lines of the building to be erected shall have been approved by W. C. Coker or by an architect selected by him;* that no building upon the said property shall be erected nearer the Chapel Hill-Nelson Road than 60 feet and that no building shall be erected nearer the side and rear lines of the lot than 25 feet except with the written consent of the then owner of the adjoining property affected thereby; and that no cows or pigs shall be kept upon the premises, provided, however, that the restrictions herein as to the dwelling house shall not prohibit the erection and use of servant's quarters on the premises when erected and used in connection with the garage erected on the property."

3. Dr. Coker sold and conveyed many other lots of the Rocky Ridge Development to others. As a consequence, he retained only a few of the lots at the time of his death. All of Dr. Coker's grantees took title to

their lots under deeds containing covenants identical with the covenant quoted in the preceding paragraph. The plaintiffs Milton Julian and wife, Virginia E. Julian, had full notice of the existence and terms of such covenants when they accepted the deed mentioned in the next paragraph.

4. On 28 October, 1949, Cornelius O. Cathey and Beulah Proctor Cathey sold and conveyed Lot 57 of the Rocky Ridge Development to the plaintiffs by a deed containing this stipulation: "This deed was executed, delivered, and accepted subject to the restrictions and conditions contained in a prior deed for this same land from W. C. Coker and wife, Louise V. Coker, to Cornelius O. Cathey and wife, Beulah Proctor Cathey, dated March 12, 1946." Cornelius O. Cathey and Beulah Proctor Cathey owned other property in the subdivision, which they still retain.

5. On 17 March, 1953, Dr. Coker executed a subsequently recorded instrument whereby he designated "Walter D. Toy . . . as the architect selected by him to pass upon and approve or disapprove . . . plans and specifications and plot plans" for dwelling houses and other buildings to be erected upon lots in the Rocky Ridge Development.

6. On 27 June, 1953, Dr. Coker died testate, and title to the unsold lots in the Rocky Ridge Development passed to Edgar H. Lawton and Charles W. Coker, the executors and trustees named in his will, subject to the marital rights of his widow, Louise V. Coker. The executors and trustees and the widow still retain their respective interests in the unsold lots.

7. The plaintiffs propose to erect on Lot 57 of the Rocky Ridge Development a dwelling house conforming to all the specific restrictions spelled out in tangible form in the covenant in the deed whereby Dr. Coker conveyed the lot to their grantors Cornelius O. Cathey and Beulah Proctor Cathey.

8. The plaintiffs submitted plans for their proposed dwelling house to Walter D. Toy, who declined to approve the type and exterior lines of the contemplated structure.

9. Subsequent to this event, the still existing controversy arose between the parties in respect to the meaning and validity of the covenant whereby the plaintiffs' grantors Cornelius O. Cathey and Beulah Proctor Cathey agreed that no dwelling house or other building should be erected on Lot 57 until the type and exterior lines of the structure had been "approved by W. C. Coker or by an architect selected by him." The controversy may be summarized in this fashion: The plaintiffs assert that the covenant in question was a personal one inserted in the deed for the benefit of Dr. Coker alone; that the covenant in question ended, therefore, with the death of Dr. Coker; and that consequently the plaintiffs possess an absolute legal right to erect their proposed dwelling on Lot 57 regard-

less of whether Walter D. Toy approves it as to type and exterior lines. The defendants insist, however, that the covenant in question survived Dr. Coker, and that it precludes the plaintiffs from erecting any dwelling house or other building on Lot 57 until the type and exterior lines of the structure have been approved by Walter D. Toy as the architect selected by Dr. Coker. The defendants advance two arguments to sustain their position. They assert primarily that the covenant in question was made for the benefit of the successors in interest to Dr. Coker as well as for the benefit of Dr. Coker himself; that the covenant in question imposed an express contractual obligation upon the plaintiffs' grantors to obtain the prior approval of Dr. Coker or of an architect selected by him; that the plaintiffs are equitably bound to observe the contractual obligation of their grantors because they took title to Lot 57 with notice of the covenant in question; and that the executors and trustees and the widow, as the successors in interest to Dr. Coker, are entitled to compel the plaintiffs to obey their equitable duty to observe the contractual obligation of their grantors. The defendants maintain secondarily that the covenant in question was inserted in the deed to the plaintiffs' grantors pursuant to a general building scheme for the development of the Rocky Ridge Development, and that the covenant in question is, therefore, enforceable against the plaintiffs by the defendants or any other persons owning lots in the Rocky Ridge Development.

10. On 30 September, 1953, the plaintiffs brought this proceeding against the defendants under the Uniform Declaratory Judgment Act for a declaration that the covenant in question ended with the death of Dr. Coker, and that they are, therefore, at liberty to erect a dwelling house on Lot 57 without obtaining the approval of Walter D. Toy or any other architect as to the type and exterior lines of the structure. The defendants entered general appearances, demanding a contrary declaration and accordant injunctive relief.

11. The pleadings on both sides reveal the truth of the factual matters stated above. When the cause was heard at the February Special Term, 1954, of the Superior Court of Orange County, the presiding judge allowed the motion of the plaintiffs for judgment on the pleadings, and entered a judgment declaring that the plaintiffs are entitled to erect a dwelling house on Lot 57 "without obtaining the approval of Walter D. Toy or any other architect as to the type and exterior lines of the building." The defendants excepted and appealed, assigning this declaration as error.

William S. Stewart and Emery B. Denny, Jr., for plaintiffs.

John T. Manning for defendants.

ERVIN, J. We take it for granted without so deciding for the purpose of this particular case that the covenant in question was valid in law at the time of its insertion in the deed to the plaintiffs' grantors. Since we indulge this assumption, our decision must turn on the construction of the relevant documents.

The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports. *Starmount Co. v. Memorial Park,* 233 N.C. 613, 65 S.E. 2d 134, 25 A.L.R. 2d 898.

When the plaintiffs' grantors agreed that no dwelling house or other building should be erected on Lot 57 until the type and exterior lines of the structure had been "approved by W. C. Coker or by an architect selected by him," they made this twofold covenant in plain and unmistakable language: First, that Dr. Coker should possess the absolute power to determine the type and exterior lines of any building to be erected on Lot 57 unfettered by any external or revealed standards or limitations whatsoever; and, second, that Dr. Coker could exercise this absolute power in person or through "an architect selected by him."

It is manifest that this covenant and the similar covenants in the deeds to Dr. Coker's other grantees were designed to make effectual a desire on the part of Dr. Coker that the external appearances of buildings on lots in the Rocky Ridge Development should harmonize with his aesthetic sense. This being true, the covenant in question was personal to Dr. Coker, and ended when death put out his candle. *Jennings v. Baroff,* 104 N. J. Eq. 132, 144 A. 717, 60 A.L.R. 1219; *Harrington v. Joyce,* 316 Mass. 187, 55 N.E. 2d 30; *Melfi v. Doscher,* 164 S.C. 111, 161 S.E. 859; *Allison v. Greear,* 188 Va. 64, 49 S.E. 2d 279; 14 Am. Jur., Covenants, section 205; 21 C.J.S., Covenants, section 33.

The notion that the covenant in question was intended to benefit the successors in interest to Dr. Coker or the purchasers of lots in the subdivision ignores the crucial circumstance that it is, in essence, without existence or meaning apart from the brain of Dr. Coker or that of "an architect selected by him."

The ruling of the presiding judge is sound for another reason. "An agent is one who acts for or in the place of another by authority from him." 2 C.J.S., Agency, section 1. When he designated Toy as the "architect selected by him" within the purview of the covenant in question, Dr. Coker made Toy his agent, and nothing more. Toy's authority ended at Dr. Coker's death under the rule that the death of the principal terminates the authority of the agent. *Parker v. Trust Co.,* 229 N.C. 527, 50 S.E. 2d 304; *Fisher v. Trust Co.,* 138 N.C. 90, 50 S.E. 592; *Wainwright v. Massenburg,* 129 N.C. 46, 39 S.E. 725; *Duckworth v. Orr,* 126

N.C. 674, 36 S.E. 150; Williston on Contracts (Rev. Ed.), section 279; Restatement of the Law of Agency, section 120; 2 C.J.S., Agency, section 86.

For the reasons given, the judgment is

Affirmed.

LENOIR T. MONTSINGER v. CHARLES W. WHITE, ADMINISTRATOR OF THE ESTATE OF HOMER E. MONTSINGER, JR., DECEASED.

(Filed 4 June, 1954.)

1. **Husband and Wife § 14½: Executors and Administrators § 15c—**

   Where the purchaser assumes an existing mortgaged indebtedness on the land and endorses the note secured thereby, and thereafter transfers the land to a third person who reconveys it to him and his wife so as to create an estate by the entireties, *held*, the creation of the estate by the entireties does not affect the liabilities on the note, nor does the acquisition of the property by the wife by survivorship release the husband's estate from liability for the debt.

2. **Executors and Administrators § 15h—**

   The holder of a secured claim against an estate must first exhaust the security and apply the same on the debt before he may file a general claim against the estate for the balance due, if any, G.S. 28-105.

3. **Subrogation § 2: Husband and Wife § 14½—**

   The surviving wife who pays mortgaged notes on lands theretofore held by them by entireties, is subrogated to the rights of the mortgagee, and is entitled to all the rights and remedies which were available to the mortgagee, but acquires no right or claim beyond those available to him.

4. **Husband and Wife § 14½: Executors and Administrators § 15e—**

   Where the surviving wife pays notes upon which the husband alone was liable, which notes were secured by mortgage on lands theretofore held by entireties, she is subrogated to the rights of the mortgagee, but since the mortgagee could assert no claim against the estate of the husband until he had exhausted the security, the widow, as subrogee of the mortgagee, may not assert a general claim against the husband's estate for any amount in the absence of a contention that the property is worth less than the amount she paid to discharge the mortgage lien, the note not being paid for the benefit of the husband's estate, but to exonerate her own property from the lien.

ERVIN, JOHNSON, and BOBBITT, JJ., dissent.

APPEAL by defendant from *Fountain, Special Judge,* April Term, 1954, of DURHAM.

This is an action instituted by the plaintiff against the administrator of her husband's estate to recover $6,499.44 paid by her on a note held

by the Home Building and Loan Association of Durham, North Carolina, and secured by a deed of trust on premises held by the plaintiff and her husband, at the time of his death, as tenants by the entirety. The following facts are set out in the complaint and admitted in the answer:

1. Homer E. Montsinger, Jr., purchased the property in question and received a deed therefor dated 9 January, 1950, which contains the following: "The party of the second part (the intestate) hereby assumes and agrees to pay, and this property is conveyed subject to the balance due the Home Building and Loan Association under the terms of a Deed of Trust which is recorded in Mortgage Book 377, page 191 . . ."

2. A few weeks after making the above purchase, the intestate married the plaintiff and thereafter conveyed the property to Mrs. Bertha T. Sharpe, who simultaneously therewith conveyed it to Homer E. Montsinger, Jr., and his wife, Lenoir T. Montsinger, thereby creating in the grantees an estate by the entirety.

3. Contemporaneously with the receipt of the deed to the property in question, dated 9 January, 1950, Homer E. Montsinger, Jr., was required by the Home Building and Loan Association to endorse the note held by it and secured by the deed of trust on said property.

4. The husband of plaintiff died intestate on 1 October, 1953, leaving plaintiff widow and three children, one of the children, James Lee Montsinger, being the child of the deceased husband by a former marriage. The plaintiff paid several installments on the note after her husband's death, and the final balance due thereon, totaling $6,499.44. She duly presented her claim to the defendant administrator for the above amount which was rejected. There are insufficient assets in the estate of Homer E. Montsinger, Jr., to pay in full all the general claims filed against it, including the one sued upon herein.

When this cause came on for hearing, the plaintiff moved for judgment on the pleadings. The motion was allowed and his Honor held, upon the pleadings and admissions therein, that the defendant is indebted to the plaintiff in the sum set out in the complaint as a general claim against the estate, and entered judgment accordingly. The administrator appeals, assigning error.

Albert W. Kennon for plaintiff, appellee.

White & White and Daniel M. Williams, Jr., for defendant, appellant.

DENNY, J. The question to be determined on this appeal is simply this: Did the plaintiff, who neither assumed nor agreed to pay the note secured by the deed of trust on the property held by her and her deceased husband, as tenants by the entirety, but whose deceased husband did assume and

agree to pay the note, have the right to pay the balance due thereon at his death and to file a claim against his estate for the amount paid?

The fact that the plaintiff became the owner of the property as the surviving tenant in an estate by the entirety, did not thereby release the estate of her husband from liability for the debt. *In re Kershaw's Estate,* 352 Pa. 205, 42 A. 2d 538; *Black's Estate,* 341 Pa. 264, 19 A. 2d 130; *Pieretti v. Seigling,* 134 N. J. Eq. 105, 34 A. 2d 286. Moreover, the character of the estate held by the plaintiff and her husband prior to his death, had no significance in respect to the liability of the parties on the note secured by the deed of trust thereon. *Trust Co. v. Black,* 198 N.C. 219, 151 S.E. 269. But in this jurisdiction when husband and wife execute a note jointly and severally, promising to pay for money loaned to them, or for the purchase of property, and such indebtedness is secured by property held by them as tenants by the entirety, each is primarily liable, jointly and severally, and upon the death of either, his or her estate becomes liable for one-half of the unpaid balance of the secured debt at the time of his or her death even though the decedent's estate gets no part of the property pledged for the debt. *Underwood v. Ward,* 239 N.C. 513, 80 S.E. 2d 267; *Trust Co. v. Black, supra; In re Dowler's Estate,* 368 Pa. 519, 84 A. 2d 209; *In re Kershaw's Estate, supra.*

Furthermore, in receiverships and assignments for the benefit of creditors, a secured creditor may prove his claim for the whole amount before exhausting his collateral security. *Rierson v. Hanson,* 211 N.C. 203, 189 S.E. 502; *Corporation Commission v. Trust Co.,* 200 N.C. 808, 158 S.E. 925; *Bank v. Jarrett,* 195 N.C. 798, 143 S.E. 827; *Milling Co. v. Stevenson,* 161 N.C. 510, 77 S.E. 676; *Winston v. Biggs,* 117 N.C. 206, 23 S.E. 316; *Merrill v. Bank,* 173 U.S. 131, 43 L. Ed. 640. *Cf. Guaranty Co. v. Hood, Com'r. of Banks,* 206 N.C. 639, 175 S.E. 135. The foregoing decisions, however, do not apply generally to secured claims held at the time of the death of a debtor. When a debtor dies, the administration laws, G.S. 28-105, step in and determine the settlement of his estate. In such case, the holder of a note executed or assumed by the deceased, and secured by a deed of trust or mortgage, must first exhaust the security and apply the same on the debt, and may then file a claim against the estate for the balance due, if any. But the holder of such note may not file claim and receive *pro rata* dividend on the basis of the full claim. *Rierson v. Hanson, supra; Chemical Co. v. Walston,* 187 N.C. 817, 123 S.E. 196; *Moore v. Dunn,* 92 N.C. 63; *Creecy v. Pearce,* 69 N.C. 67.

Therefore, in the instant case, the Home Building and Loan Association would not have been permitted, under our decisions, to prove a claim against the estate of Homer E. Montsinger, Jr., until it first exhausted its security, and then only for the balance that might have remained

unpaid after applying as a credit on the indebtedness the net proceeds realized from the foreclosure sale.

The plaintiff was under no legal obligation to pay the note held by the Home Building and Loan Association, and it could not have obtained a personal judgment against her on the note. But when she paid off the note for the purpose of exonerating her own estate from the outstanding lien, she obtained no better position in relation to the debt as against the estate of her husband, than the Building and Loan Association had prior thereto. Even so, by making such payment she became subrogated to its rights. The applicable law governing subrogation in respect to mortgage liens, is succinctly stated in 50 Am. Jur., Subrogation, section 124, page 763, as follows: "A subrogee to a mortgage lien, like other subrogees, is generally entitled to be placed in the precise position of the one to whose rights he is subrogated, and is entitled to all the rights and securities and to the benefit of all the remedies which were available to such person for payment of the debt. But one subrogated to a mortgage lien has no right and no claim beyond those possessed by the creditor. If the creditor acquires by the mortgage only the right to look to the mortgaged property for payment, such right only is acquired or transmitted by subrogation, and the subrogee cannot assert a personal claim or recover a personal judgment against the original mortgagor." *Dowdy v. R. R.* and *Burns v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639; *Parsons v. Leak*, 204 N.C. 92, 167 S.E. 567; *Martin v. Hickenlooper*, 90 Utah 150, 59 P. 2d 1139, 107 A.L.R. 762, and cited cases. See also Anno.—Subrogation—Extent, 107 A.L.R. 785, *et seq.*

Consequently, since there is no contention that the property now held by the plaintiff, exonerated from the lien, is worth less than the amount she paid to discharge the lien, she has no claim she can assert against her husband's estate. The note was not paid for the benefit of his estate, but to release her own property from the lien which was primarily liable for the payment of the debt secured thereby. Hence, the judgment of the court below is

Reversed.

ERVIN, JOHNSON, and BOBBITT, JJ., dissent.

STATE v. DAVID WILLIAM TOLBERT.

(Filed 4 June, 1954.)

1. Criminal Law § 42f—

The State is not precluded from showing the facts to be otherwise than as stated in the declarations of a defendant, even though the State itself introduces testimony of such declarations, but when the State offers no evidence *contra*, it presents such declarations as worthy of belief.

2. Criminal Law § 52a (2)—

The introduction by the State of testimony of exculpatory declarations made by the defendant does not warrant nonsuit when the State introduces substantive evidence in contradiction of such declarations, but when the State offers no evidence in contradiction of the wholly exculpatory declarations or statements of defendant, the defendant is entitled to avail himself of such defense by demurrer to the evidence under G.S. 15-173.

3. Homicide § 25—Evidence held insufficient to sustain verdict of guilty of manslaughter.

The State's evidence tended to show that deceased was fatally injured by blows on the head with a blunt instrument, with evidence of a struggle near the scene where the body was found, and that defendant made contradictory statements as to whether he knew deceased, and as to the clothes defendant was wearing on the night in question. The State further introduced testimony of defendant to the effect that defendant was driving deceased around in his car to sober him up, that he drove to a place near the scene where the body was found, turned his car around, and that there, after an altercation, defendant struck deceased in the face with his fists four or five times, but that defendant then drove off in his automobile, leaving deceased standing in the woods. *Held:* Whether defendant was the person who thereafter assaulted deceased with the blunt instrument is left to conjecture, and in the absence of evidence tending to prove that defendant was at the scene of the homicide at or about the time it was committed, in contradiction of his declarations, defendant's demurrer to the evidence should have been sustained.

APPEAL by defendant from *Armstrong, J.*, November Criminal Term 1953, GUILFORD (Greensboro Division).

Criminal prosecution under a bill of indictment in which it is charged that defendant did feloniously kill and murder one Clarence Tate Newman.

On the night of 23 May 1953, the defendant, Burton Eugene Grubb, and Newman, the deceased, were together in Greensboro, looking for women they could "pick up" and drinking beer. Newman became perceptibly intoxicated. About 11:30 p.m. he and defendant got on defendant's car parked near the A & C Grill. Defendant tried to persuade him to get out, but he would not do so. Defendant then drove off to give him some fresh air and "sober him up."

The next morning Newman was found at the foot of a fill on Phillips Avenue, about ten feet from the north side of the Avenue, near a small stream that runs through a culvert under the Avenue. The stream was not flowing. There was a pool of water about twenty steps from the fill. Bushes on the side of the fill were twisted and disturbed by tracks sliding down the fill. Whether the tracks on the side of the fill were fresh tracks is not disclosed. "It looked like some large object had been wallowed around in the hole." His face, particularly on the left side, had been badly bruised with some blunt instrument about the size of a two-by-four. His ears were red and puffed up. There was a brush wound on his shoulder and shoulder blade. Except for this last wound, there was no evidence of violence below his shoulder. He died on 25 May.

Acting on information furnished by defendant, the officers located a dirt road near the fill that leads off from the north side of Phillips Avenue and the place where an automobile had backed and turned around, some 67 steps from the highway. The road was rough and there was a mud puddle about ten feet long, full of water, in the middle of the road. About nine steps from where the auto had turned "the ground was torn up; that is, roughed up. The pine needles were pushed back in several places. Something had been dragged from the little pine tree out across the road." Just across the road they found a blood spot two or three inches in size. There were tracks—not too visible—across honeysuckle. "Then, at this creek bank, there were a lot of bushes that had been pushed down, and the little bank where the water had accumulated there was messed up . . . there were no tracks between the body of water and the body—no scuffed-up marks of any kind. Mr. Newman's body was wet. It had been soaking wet . . . The body was not lying in water at the time I found it. It was up on a little rock . . . There was mud on his clothing."

Defendant told the officers he did not know Newman, and did not know he had been beaten up; that he had been riding around with some men, but did not know their names; that they had been drinking. He later admitted he knew Newman. He made a false statement about the clothes he wore the night before. While officers were talking to defendant, his father asked him if Newman was the man who had taken $50 from him on a former occasion.

The coroner, a medical expert, made a post-mortem examination of Newman's body and testified that he died from a severe hemorrhage of the frontal and temporal lobes of his brain.

The foregoing is a summary of all the material evidence of facts and incriminating circumstances the State could produce aside from statements made by defendant to which reference will be made in the opinion.

The jury returned a verdict of "Guilty of Manslaughter." The court pronounced judgment on the verdict and defendant appealed.

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

T. Glenn Henderson, Percy Wall, and Robert S. Cahoon for defendant appellant.

BARNHILL, C. J. It is axiomatic with us that when a complete defense is made out by the State's evidence, a defendant should be allowed to avail himself of such defense on a demurrer to the evidence under G.S. 15-173. This is true even when the exculpating evidence is in the form of statements of defendant offered in evidence by the State. *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740.

The State, by offering evidence of the declarations or admissions of a defendant, is not precluded from showing that the facts are other than as related by him. *S. v. Robinson, supra.* And when the substantive evidence offered by the State is conflicting—some tending to inculpate and some tending to exculpate the defendant—it is sufficient to repel a demurrer thereto. *S. v. Edwards,* 211 N.C. 555, 191 S.E. 1; *S. v. Todd, supra; S. v. Robinson, supra.*

When, however, the State's case must rest entirely on declarations made by defendant, and there is no evidence *contra* which does more than suggest a possibility of guilt or raise a conjecture, demurrer thereto should be sustained. *S. v. Robinson, supra,* and cases cited. In such case, the declarations of the defendant are presented by the State as worthy of belief, *S. v. Watts, supra,* and when they are wholly exculpatory, the defendant is entitled to his acquittal. *S. v. Cohoon,* 206 N.C. 388, 174 S.E. 91; *S. v. Robinson, supra.*

When the evidence relied on by the State is analyzed and appraised in the light of these principles of law, it becomes apparent, in our opinion, that the defendant's demurrer to the evidence should have been sustained.

There was evidence of some minor incriminating circumstances, and the testimony tends to show that the defendant made false and contradictory statements shortly after the homicide. In the main, however, the foregoing statements of facts represents a summary of all the testimony the State was able to produce aside from the evidence of statements the defendant made to the officers. While it may point the finger of suspicion at the defendant, it must be conceded that it is wholly insufficient to support the verdict of the jury.

The State must rest its case upon the statements made by the defendant about which the officers testified. Eliminate those statements and there is

no case. If his statements and admissions will not support a verdict against him, but, instead, tend to exculpate him, then the exception to the denial of his demurrer to the evidence was well advised. *S. v. Watts, supra; S. v. Todd, supra; S. v. Robinson, supra.*

So then, the decisive question is this: Does the evidence of statements made by defendant, which the State presented as worthy of belief, make out a complete defense and entitle him to acquittal? We are inclined to the view that it does.

After wandering around with deceased and Grubb from beer stand to beer stand, looking for women, during the early hours of the night, defendant took deceased to ride in an attempt to sober him and persuade him to go home. After reaching Phillips Avenue, thinking that deceased had agreed to go home, the defendant drove off on a dirt road to avoid turning around on the highway. He went about 67 steps and backed into a narrow intersecting road. His rear wheels ran into holes in the side road, and he stopped. Deceased, for personal reasons, got out. Deceased had a bottle of liquor. Defendant declined a drink and said that deceased could not have liquor on his (defendant's) automobile. Deceased then went around the automobile to defendant's side, opened the door, and said he was going to cut defendant's threat. Defendant jumped out and struck deceased in the face with his fists four or five times. He knocked deceased down. When deceased got up, the defendant ran to his automobile and drove off, leaving deceased standing in the woods.

Thereafter, someone assaulted deceased with some blunt instrument which has never been found, and dragged him some distance to the culvert at the foot of the avenue fill. Who committed this crime the record fails to disclose. It may have been the defendant. As to this we may only surmise. The fact remains that the evidence offered by the State leaves the deceased standing in the woods as defendant departed on his automobile to return to his home in Greensboro. Thus the State's evidence takes the defendant from the scene of the homicide before it occurred.

There is no testimony independent of these declarations which tends to place defendant at the scene of the homicide at or about the time it was committed, and this testimony offered by the State exculpates him. Hence the *Watts, Todd,* and *Robinson cases* above cited are controlling.

Furthermore, the evidence of the coroner, offered by the State, negatives any suggestion that the deceased was fatally injured by the blows defendant admittedly struck with his fists. There was a fracture at the base of the brain which extended through the bone. The left side of his face was bruised and blue. After his scalp was retracted, the coroner discovered eight distinct bloody contusions on the surface of the skull. They appeared to have been made by a blunt instrument. There had been

a very extensive brain hemorrhage extending over the frontal and both temporal lobes of the brain which caused his death.

It follows that the order of the court overruling defendant's demurrer to the evidence must be

Reversed.

ELMER E. SHELDON v. WILLIE MARVIN CHILDERS AND McLEAN TRUCKING COMPANY, INC.

(Filed 4 June, 1954.)

1. Negligence § 19c—

Where plaintiff's own evidence clearly establishes contributory negligence constituting a proximate cause of the injury in suit, nonsuit is proper.

2. Negligence § 11—

Contributory negligence need not be the sole proximate cause of injury to bar recovery; it is sufficient for this purpose if it contribute to the injury as a proximate cause, or one of them.

3. Automobiles §§ 14, 18h (3)—Plaintiff's evidence held to show contributory negligence proximately causing rear end collision.

Plaintiff's evidence tended to show that he was driving about 50 miles per hour along the highway, following a tractor-trailer belonging to defendant, that when he was about 400 feet to the rear of defendant's vehicle, with a clear view of the highway ahead, he blew his horn and turned into the left lane to pass, and that when he was about 200 feet behind the tractor-trailer, it pulled into the left lane to enter a dirt road on its left, and stopped, blocking all but about two or three feet of the highway on plaintiff's left, and leaving about five feet of the hard surface and about six feet of shoulder level with the pavement on plaintiff's right, over which plaintiff could have passed, that plaintiff applied his brakes but did not stop before the front of his car collided with the left side of the trailer. The evidence further showed that plaintiff's car left skid marks some 157 feet before it was stopped by and underneath the high body of the trailer. *Held:* Plaintiff's own evidence discloses contributory negligence as a matter of law in his failure to keep a reasonably careful lookout and in traveling at excessive speed under the circumstances.

4. Automobiles § 18g (5)—

The physical facts at the scene of a collision may speak louder than the testimony of witnesses.

5. Automobiles § 14—

The failure of a motorist on the highway to give audible warning with his horn or other warning device before passing, or attempting to pass a vehicle traveling in the same direction is a violation of G.S. 20-149 (b) and constitutes negligence *per se*, and such warning must be given to the driver of the preceding vehicle in reasonable time to avoid injury which would probably result from a left turn. It would seem that such warning given

when the following car is 400 feet behind the preceding vehicle is too great a distance to be timely.

APPEAL by plaintiff from *Whitmore, Special Judge,* October Extra Term 1953 of MECKLENBURG.

Civil action for personal injuries and damages to plaintiff's automobile resulting from rear-end collision with corporate defendant's tractor trailer unit driven by its employee in the course of its business.

About 3:45 p.m. on 8 April 1952, a clear day with the road dry, plaintiff was driving his Buick automobile at a speed of about 50 miles an hour in a northerly direction on U. S. Highway 29, when he saw the defendant's Chevrolet tractor trailer in front of him travelling in the same direction at a speed of about 10 or 15 miles an hour.

Plaintiff's evidence tended to show the following facts: Plaintiff could see the highway ahead for a half a mile or more and there was no traffic meeting plaintiff in front. When plaintiff was about 400 feet to the rear of the defendant's tractor trailer unit and when he had a clear view of the highway for about half a mile ahead, he blew his horn, and turned into the left lane to pass. As he pulled into the left lane, he was going about 50 miles an hour. He observed the tractor trailer at all times. When he was about 200 feet behind the tractor trailer, it pulled into the left lane to enter into the Mar-Grace Mill Road. The plaintiff said: "No type of turn signal was given that I was able to see." The tractor trailer then stopped with the front portion in the left lane about one or two feet away from the edge of the road, not leaving enough room to pass to its left. The trailer part was in the right lane not leaving enough room to pass on the right. Plaintiff applied his brakes, which held, and skidded some 157 feet—forward some 66 feet and sideways some 91 feet—stopping with the front end of his automobile underneath the high body of the trailer. In the collision plaintiff was injured, and his automobile damaged.

Plaintiff had driven on this highway many times before. Plaintiff stated on cross-examination that when the tractor trailer reached the side road, it started to turn into it; that then he was about 200 feet away, and applied his brakes; and "it is true that at the time I saw the truck turn to the left, I was going at such a rate of speed that I was unable to stop without hitting the truck with great force."

Two State patrolmen, witnesses for the plaintiff, arrived at the scene about 20 minutes after the collision. Upon their arrival the tractor trailer was on the pavement, and plaintiff's car was up under the left rear of the trailer. The paved part of the highway is 22 feet wide. The front end of the tractor trailer was about 3 feet from the left-hand edge of the pavement, and its right rear about 5 feet from the right-hand edge of the

pavement. To the right of the rear of the trailer there was about 5 feet of pavement and about 6 feet of shoulder level with the pavement, over which a northbound automobile could have driven. One patrolman, W. D. Sawyer, on cross-examination said: he examined the signal light at the wreck. The light worked, when it was turned on, and was visible from the rear. It showed a red arrow, when the switch was turned on.

The Mar-Grace Mill Road into which the defendant's tractor trailer was preparing to enter is a narrow unpaved road going to a mill. This road which leads from Highway 29 is not a part of the State Highway System; it is not maintained by the State. The State Highway System does not maintain all the roads used by the public; there are many roads used by the public not included in the system. The Mar-Grace Mill Road goes from Highway 29 over to the old Grover Road, which is a paved road. At the point where the Mar-Grace Mill Road meets Highway 29 there were no road signs indicating an intersection. The plaintiff said: "The entrance to this road is not visible from the point on the highway from which I began to pass." A State patrolman, a witness for plaintiff, said as one approaches the scene of collision going north on Highway 29, as plaintiff was, the Mar-Grace Mill Road could be seen four or five hundred feet from the intersection.

The defendant's evidence tended to show these facts in respect to the Mar-Grace Mill Road. It has been open to the public since 1919. It is used by people working at the mill, and children going to school. It has been used by mail carriers since 1919. The road is wide enough for two automobiles to pass. For 30 years it has been used generally by the public.

Defendant Childers testified that when he was about 300 feet from the intersection, he looked in his rear-view mirror, saw no one, and began applying his brakes. About 200 feet from the intersection he turned on his electric turn signals, looked again in his rear-view mirror, saw no one, and turned to his left to enter the Mar-Grace Mill Road. That he did not see plaintiff, until he heard his tires "crying."

From judgment of nonsuit entered at the close of all the evidence, the plaintiff appeals, assigning errors.

Taliaferro, Grier, Parker and Poe for Plaintiff, Appellant.
Kennedy, Kennedy & Hickman and Charles E. Knox for Defendants, Appellees.

PARKER, J. Is the evidence of the plaintiff, taken for him in its most favorable light, sufficient to survive the challenge of the motion for judgment of nonsuit? The trial court decided No, and we agree.

It is to be noted that the plaintiff does not say the tractor trailer unit showed no signal indicating a left turn. His testimony is, "No type of

turn signal was given that I was able to see." *Moore v. Boone,* 231 N.C. 494, 57 S.E. 2d 783; *Hollingsworth v. Grier,* 231 N.C. 108, 55 S.E. 2d 806. It is also significant that W. D. Sawyer, a State Patrolman and witness for the plaintiff, who arrived on the scene about 20 minutes after the collision, testified on cross-examination, he examined the signal light on the rear of the trailer there; the light worked when it was turned on, and was visible from the rear of the trailer; it showed a red arrow when the switch was turned on.

However it may be, as to whether sufficient evidence of negligence on the part of the defendants was offered at the trial, it clearly appears from the plaintiff's own evidence that he was guilty of contributory negligence, and when such facts appear a compulsory nonsuit is proper. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538; *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730.

The plaintiff's negligence to bar recovery need not be the sole proximate cause of injury. It suffices, if it contribute to his injury as a proximate cause, or one of them. *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623; *Moore v. Boone, supra.*

It seems clear that the plaintiff was either failing to keep a reasonably careful lookout, or was driving at an excessive rate of speed under the conditions then existing. The plaintiff pulled into the left lane of traffic to pass, and when he was about 200 feet from the tractor trailer which was travelling 10 to 15 miles an hour, it pulled into the left lane of traffic to enter the Mar-Grace Mill Road, and stopped. Plaintiff applied his brakes, which held, and skidded some 157 feet—some 66 feet forward and some 91 feet sideways—until the front end of his automobile was stopped by and underneath the high body of the trailer. The length and manner of the skid marks are stubborn things and flinch not; and these "physical facts speak louder than the witness" (*Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887) as to plaintiff's excessive speed. It also seems clear that if plaintiff had been keeping a reasonably careful lookout, and not travelling at an excessive rate of speed, he could have safely passed on the right edge of the pavement and the right shoulder which was level with the pavement. The conclusion is inescapable that plaintiff's negligence contributed to his injury. *Moore v. Boone, supra; Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Austin v. Overton, supra.*

The plaintiff contends that his case is controlled by *Ins. Co. v. Cline,* 238 N.C. 133, 76 S.E. 2d 374. The facts are different. In the *Cline Case* when plaintiff's automobile and defendant's truck were running side by side, the truck turned sharply to the left without any signal or warning onto the left half of the highway. The plaintiff also relies upon *Grimm*

v. Watson, supra. The facts are not similar. In the *Grimm Case* the plaintiff was travelling about 35 miles an hour, and the evidence of plaintiff was that the bus driver in front turned the bus sharply to the left without any signal, when the front of plaintiff's car was abreast the rear wheels of the bus. The plaintiff further cites *Howard v. Bingham,* 231 N.C. 420, 57 S.E. 2d 401, which is not similar to the instant case. In that case Bingham, when 75 feet from the intersecting side road, turned to the left.

G. S. N. C. 20-149(b) requires every motorist not within a business or residential district shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle going in the same direction. A violation of this statute is negligence *per se.* *Wolfe v. Coach Line,* 198 N.C. 140, 150 S.E. 876. This warning must be given to the driver of the vehicle in front in reasonable time to avoid injury which would probably result from a left turn. *Lyerly v. Griffin, supra.* The plaintiff testified that he blew his horn when he was about 400 feet behind. This would seem to be not in apt time for defendant's driver to have heard it from that distance behind.

It seems to us that the sole inference to be drawn from plaintiff's evidence is that plaintiff's negligence was one of the proximate causes of his injury and damage, and that the plaintiff has proved himself out of court. *Lyerly v. Griffin, supra; Austin v. Overton, supra; Wright v. R. R.,* 155 N.C. 325, 71 S.E. 306.

Having reached this conclusion, it is not necessary for us to decide as to whether plaintiff violated G.S. 20-150(c), which states that the driver of a vehicle shall not overtake any other vehicle proceeding in the same direction at any intersection of a highway, unless permitted so to do by a traffic or police officer.

The judgment of the lower court is
Affirmed.

MRS. LYDIA ELLIS v. AMERICAN SERVICE COMPANY, INC., CITIES ICE SERVICE COMPANY, INC., BURLINGTON ICE DELIVERY COMPANY, INC., AND FRANK HANEY, AN INDIVIDUAL.

(Filed 4 June, 1954.)

1. Automobiles § 24c—

An employer is liable where his employee causes injury by negligent operation of the employee's automobile while in use in the prosecution of his employer's business, when the employer knows, or should know, that the employee is so using it, even though the employer has no right of control over the employee's personal car, nor responsibility for its condition, upkeep or operation.

2. Same—

An employee is not engaged in the prosecution of his employer's business while operating his personal car to the place where he is to perform the duties of his employment, nor while leaving his place of employment to go home.

3. Master and Servant § 24½ e—Evidence held insufficient to show that employee was using his personal car in the performance of the duties of his employment at time of accident.

The evidence tended to show that defendant employee had certain duties to perform in the course of his employment in assisting the loading of ice on employer's trucks and in making platform sales at the plant, and that when this work was completed his duties were to drive one of the delivery trucks himself, that the employer's delivery truck driven by defendant employee was kept at another plant, that the employee, in driving his personal car to work, drove first to the plant where the trucks were loaded, assisted in work there, and then drove his personal car to the other plant where the truck used by him was stored. The accident in suit occurred while the employee was driving from the plant where the ice was sold and truck loaded to the plant where the truck was kept. Employer had notice of this habit of employee, but such use of the employee's personal car was not required, contemplated or necessary in the performance of his duties, and was of no benefit or advantage to employer or for any purpose other than employee's personal preference or convenience. *Held:* The evidence discloses that the employee was not engaged in the prosecution of the employer's business at the time of the accident, and, therefore, the employer's motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Parker, J.*, September Civil Term, 1953, of ALAMANCE.

Civil action for damages for personal injuries inflicted by automobile owned and operated by defendant Haney.

The evidence most favorable to plaintiff tends to establish these facts:

1. Plaintiff's injuries were proximately caused by defendant Haney's negligent operation of his automobile. Liability of corporate defendants, if any, depends upon applicability of the doctrine of *respondeat superior.*

2. American Service Company, Inc., hereinafter called American, is a foreign corporation. Cities Service Company, Inc., hereinafter called Cities, is a North Carolina corporation. Each has an ice plant in Burlington and is engaged solely in the manufacture of ice. The stock ownership of American is not shown. J. M. Freeman is American's manager. W. R. Massey and the J. L. Domany Estate own the stock of Cities. Massey is Cities' manager.

3. Burlington Ice Delivery Company, Inc., hereinafter called Delivery Company, is a separate North Carolina corporation.

4. The Delivery Company owns and operates twelve delivery trucks. American and Cities sell their entire output to the Delivery Company, which in turn sells at retail to consumers from the platforms of the manu-

facturers and from the delivery trucks. The Delivery Company has an office in Burlington. Freeman, the manager of American, is also the manager of the Delivery Company.

5. Haney was employed and paid by the Delivery Company. He was under the orders of Freeman. He was not under Massey's supervision.

6. During the slack season, from 15 October to 15 April, only one plant operated in the manufacture of ice. Each operated every other year. This season, and on 12 March, 1951, the Cities plant alone was manufacturing ice.

7. H. W. Ellis, plaintiff's husband, was in charge of the manufacture of ice at the Cities plant. On 12 March, 1951, upon arrival at the Cities plant, Ellis started the machines, got everything going, and Nathan Garrison, his assistant, "started pulling ice" and "dumping it into the storage room."

8. On the morning of 12 March, 1951, as was his custom, Haney drove his personal car to the Cities plant. (Ellis testified that usually Haney came in his own car but at times came in the Delivery Company's truck.) His work at the Cities plant was to assist in loading trucks of the Delivery Company assigned to the drivers and to make platform sales. When he completed this work, or was relieved by another employee, he would leave the Cities plant in his own car, go to the American plant, where the Delivery Company's trucks, including the one assigned to him, were kept; leave his personal car there; get his truck; drive it to the Cities plant; load it there and then go out on his delivery route.

9. On 12 March, 1951, about 9 a.m., Ellis remarked that he was going to the Alamance Lumber Company to pay a bill. He and Haney had been good friends for years. Haney told him: "If Nathan will look out for the platform in case a customer comes in—we didn't have but a few customers at that time of year—I will go get my truck and you can ride up there and I will pick you up on my way back." The Alamance Lumber Company was on the direct route from the Cities plant to the American plant. Ellis got in Haney's car. Haney was driving along Webb Street towards the Alamance Lumber Company and American's plant when his car struck plaintiff.

10. Haney then lived "out in the county on the Glencoe Road." While Ellis' testimony is not explicit, the purport seems to be that the distance from Haney's home to the American plant and to the Cities plant is about the same. While the time of the inquiry is not clear, Mr. Freeman, who employed Haney, asked him why he did not get his truck in the morning when he came to work and before going to the Cities plant. The record does not reveal Haney's response, if any.

At the close of plaintiff's evidence, all defendants made motions for judgment of involuntary nonsuit. The motion of defendant Haney was

overruled. The motions of all corporate defendants were allowed. Thereupon, plaintiff submitted to judgment of voluntary nonsuit as to defendant Haney and appealed from the court's rulings (albeit no judgment appears in the record) allowing the motions of the corporate defendants.

P. W. Glidewell, Sr., Carroll & Pickard, and J. A. Webster for plaintiff, appellant.

Armistead W. Sapp for American Service Company, Inc., and Burlington Ice Delivery Company, Inc., defendants, appellees.

Cooper, Long, Latham & Cooper for Cities Ice Service Company, Inc., defendant, appellee.

BOBBITT, J. An employer is liable where his employee causes injury by negligent operation of the employee's automobile while in use *in the prosecution of his employer's business,* when the employer knows or should know that the employee is so using it. *Davidson v. Telegraph Co.,* 207 N.C. 790, 178 S.E. 603; *Miller v. Wood,* 210 N.C. 520, 187 S.E. 765; *Pinnix v. Griffin,* 219 N.C. 35, 12 S.E. 2d 667; 5 Am. Jur. p. 728, Automobiles sec. 393; 60 C.J.S. p. 1159, Motor Vehicles sec. 453.

In *Davidson v. Telegraph Co., supra,* a Western Union messenger was using his own automobile to deliver messages for his employer. In *Pinnix v. Griffin, supra,* an insurance agent was engaged in the collection of insurance premiums for his employer. In *Miller v. Wood, supra,* a case cited by appellant as on "all-fours" with this case, the owner-operator of the automobile had supervision of the machinery at each of the defendant's several plants, used his personal car in going from plant to plant in the course of his duties, and on the occasion of plaintiff's injuries was on his way from one plant to another with parts and tools for the purpose of making repairs.

Haney being an employee of the Delivery Company, the test of its liability is whether Haney, while driving his personal car from the Cities plant towards the American plant to get the truck for use in his employer's business, was engaged in the service of and was acting for his employer. *Wilkie v. Stancil,* 196 N.C. 794, 147 S.E. 296; *Carter v. Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586.

An employee is not engaged in the prosecution of his employer's business while operating his personal car to the place where he is to perform the duties of his employment, *Wilkie v. Stancil, supra,* nor while leaving his place of employment to go to his home, *Rogers v. Garage,* 236 N.C. 525, 73 S.E. 2d 318. Compare: *Bray v. Weatherly & Co.,* 203 N.C. 160, 165 S.E. 332, and cases cited therein, in which the question was whether the employee sustained an injury "by accident arising out of and in the course of" his employment within the meaning of G.S. 97-2 (f).

It is clear that if Haney were on his way from his home to get the truck, which had to be loaded with ice at the Cities plant before he could set out on his delivery route, and while en route to the American plant had injured plaintiff by the negligent operation of his personal car, the Delivery Company would not be liable. The question then is: should liability be cast on the Delivery Company solely on the basis of the circumstance that Haney, for no reason other than his personal preference and convenience, chose to go directly to the Cities plant and do his separate work there before getting his own truck for the purpose of loading it and making deliveries therefrom along his route? Our answer is, No.

In limine, we notice the fact that the Delivery Company had no right of control over Haney's use of his personal car. Under the Massachusetts rule, this alone would absolve the Delivery Company. *Reardon v. Coleman Bros.,* 277 Mass. 319, 178 N.E. 638. Nor did the Delivery Company have any responsibility for its condition, upkeep or operation. But these facts alone are not determinative under our decisions.

Decision here rests upon the ground that no duty of Haney to the Delivery Company contemplated or required that he use his personal car in performance thereof. He was not directed to so use it nor did any necessity exist for its use. Mr. Freeman, his superior, asked Haney why he didn't get his truck first and then go to the Cities plant. The record discloses no answer apart from personal preference or habit on the part of Haney, uninfluenced by any benefit or value to his employer. The most that the evidence discloses is that Freeman acquiesced in Haney's use of his personal car in going to the American plant where his truck was kept. Haney's duty was to get the truck (this being his only reason for going to the American plant) and then operate it in his employer's service and for his benefit. The time and mode of transportation to the American plant was up to Haney and a matter of indifference to his employer. Haney chose to use his personal car in his own way in accordance with his personal preference or convenience. It was never used in connection with the sale and delivery of ice or otherwise in the service of his employer.

Cases in other jurisdictions relating to an employer's liability for negligence of an employee while driving his own car are numerous and different results are reached in divergent factual situations: See Annotations: 57 A.L.R. 739; 60 A.L.R. 1163; 112 A.L.R. 920; 140 A.L.R. 1150.

In the absence of evidence: (1) that the Delivery Company had any right of control over Haney's car or responsibility for its condition, upkeep or operation; or (2) that Haney's car was used otherwise than for the one purpose of transporting himself to the American plant to get the truck kept there for his use in the performance of his duties; or (3) that Haney's use of his personal car was required, contemplated or necessary

in the performance of his duties; or (4) that his use of his personal car was of benefit or advantage to his employer or for any purpose other than his personal preference or convenience: we conclude that Haney, while driving his personal car towards the American plant, under the circumstances disclosed by plaintiff's evidence, was not then engaged in the prosecution of the Delivery Company's business. This conclusion renders unnecessary discussion of plaintiff's further contention that the Delivery Company was a mere instrumentality, agency or department of the other corporate defendants and for this reason they too were liable for Haney's negligence.

Accordingly, the rulings of the court below in allowing motions for judgment of involuntary nonsuit as to the corporate defendants are affirmed. A formal judgment, predicated on such rulings, should be entered in the court below.

Affirmed.

WILLIAM A. GRAHAM v. IOWA NATIONAL MUTUAL INSURANCE COMPANY.

(Filed 4 June, 1954.)

Insurance § 43b—

Under the Motor Vehicle Safety and Financial Responsibility Act of 1947, where an insurance company issues, in accordance with the application, an owner's policy of liability insurance upon an assigned risk covering only one of the two vehicles owned by insured, the insurer is not liable for a loss established by judgment against the insured for damages caused during insured's operation of the other vehicle owned by him. G.S. 20-276; G.S. 20-252 (a); G.S. 20-252 (b). This result is not affected by the failure of the Department of Motor Vehicles to cancel the registration of the automobile involved in the accident.

APPEAL by plaintiff from *Carr, J.*, at November Term, 1953, of DURHAM.

Civil action in which injured third person, whose claim against insured for negligent injury has been reduced to judgment in prior action, sues insurance company upon an owner's policy of liability insurance issued under the Motor Vehicles Safety and Financial Responsibility Act of 1947. Chapter 1006 of the 1947 Session Laws and Amendatory Acts, as codified in Article 9 of Chapter 20 of Recompiled Volume 1C of the General Statutes.

For ease of narration, William A. Graham is called the plaintiff, Britt A. Davis is designated as Davis, and Iowa National Mutual Insurance Company is referred to as the defendant.

The matters necessary to an understanding of the legal question arising on this appeal are stated in the numbered paragraphs set forth below.

1. The events involved in this action occurred before 1 January, 1954, and for that reason are governed by the Motor Vehicle Safety and Financial Responsibility Act of 1947. G.S. 20-279.35.

2. Davis, whose operator's license had been revoked under the provisions of the Uniform Driver's License Act, owned two motor vehicles, namely, a 1940 Buick car, and a 1947 Ford truck. The Department of Motor Vehicles permitted both of these vehicles to be registered in the name of Davis at all the times herein mentioned.

3. Davis undertook to give proof of his financial responsibility under the provisions of the Motor Vehicle Safety and Financial Responsibility Act of 1947 as a condition precedent to having an operator's license issued to him again. Being unable to obtain a motor vehicle liability insurance policy through ordinary methods, he made application under G.S. 20-276 to have his risk assigned to an appropriate insurance carrier, and his risk was assigned to the defendant, an insurance carrier engaged in writing motor vehicle liability insurance in this State. The transcript of the record does not disclose the contents of Davis' application. It appears by implication, however, that Davis applied for an owner's policy of liability insurance covering the 1940 Buick car only.

4. The defendant issued to Davis an owner's policy of liability insurance, which insured Davis against loss within specified limits from any liability imposed by law for damages because of bodily injury to any person, and damage to property caused by accident and arising out of the ownership, use or operation of an explicitly described motor vehicle, to wit, the 1940 Buick car belonging to Davis. The specified limits of liability were consistent with those prescribed by the Motor Vehicle Safety and Financial Responsibility Act of 1947. The written certificate of the defendant certifying to the issuance of the liability policy on the 1940 Buick car was forthwith filed with the Department of Motor Vehicles, which thereupon reissued to Davis his operator's license.

5. While the liability policy mentioned in the preceding paragraph was in force, Davis undertook to drive his 1947 Ford truck along a public street of the City of Durham. In so doing, Davis negligently struck an automobile owned and operated by the plaintiff, inflicting upon the plaintiff both bodily injury and property damage.

6. Subsequent to the collision, the plaintiff recovered judgment against Davis in an action in the Superior Court of Durham County for $1,500.00 as damages for his bodily injury and property damage. Execution was issued on the judgment, and returned unsatisfied.

7. The defendant did not defend the plaintiff's suit against Davis. After the execution was returned unsatisfied, the plaintiff asserted that

the policy mentioned in paragraph 4 obligated the defendant to pay the judgment, and made demand on the defendant accordingly. The defendant refused to comply with this demand on the ground that the liability policy did not cover the 1947 Ford truck, and for that reason did not obligate it to pay for injuries caused by the operation of that vehicle by Davis.

8. Subsequent to all of these events, the plaintiff brought this action against the defendant to subject the liability policy in question to the satisfaction of his judgment against Davis.

9. The action came on to be heard before Judge Leo Carr at the November Term, 1953, of the Superior Court of Durham County. The parties waived trial by jury, and submitted the issues of fact to Judge Carr, who heard the evidence and made findings of fact accordant with the matters stated in the preceding paragraphs. Judge Carr concluded as matter of law that the liability policy in suit did not obligate the defendant to satisfy the plaintiff's judgment against Davis, and entered judgment accordingly. The plaintiff excepted and appealed, assigning the conclusion of law and the resultant judgment as error.

Edwards, Sanders & Everett for plaintiff.
Jordan & Wright and Perry C. Henson for defendant.

ERVIN, J. The plaintiff advances this argument to support his contention that the liability policy obligates the defendant to satisfy his judgment against Davis:

1. The Motor Vehicle Safety and Financial Responsibility Act of 1947 required an insurance carrier issuing an owner's policy of liability insurance upon an assigned risk to include within the coverage of the policy all motor vehicles owned by the insured and registered in his name.

2. When it issued the liability policy upon the 1940 Buick car only, the defendant issued an owner's policy of liability insurance upon an assigned risk. This being so, the statutory requirement entered into and formed a part of the liability policy to the same extent as if it were actually written in it, and extended the coverage of the liability policy to the 1947 Ford truck, which was owned by Davis and registered in his name.

3. Since the liability policy covered the 1947 Ford truck, it obligates the defendant to satisfy the judgment based on the negligent operation of that vehicle by Davis.

This argument lacks validity because its major premise is untenable.

The Motor Vehicle Safety and Financial Responsibility Act of 1947 was analyzed in detail in *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610, and *Russell v. Casualty Co.*, 237 N.C. 220, 74 S.E. 2d 615. It was

pointed out in the *Howell case* that the Act fell short of its avowed purpose "to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles . . . involved in accidents." Legislative recognition of the accuracy of that observation may have prompted the enactment of the Motor Vehicle Safety and Financial Responsibility Act of 1953.

The Motor Vehicle Safety and Financial Responsibility Act of 1947 did not require an insurance carrier issuing an owner's policy of liability insurance upon an assumed risk to ferret out and include within the coverage of the policy all motor vehicles owned by the insured and registered in his name, irrespective of the omission of some of them from the insured's application for the insurance, and irrespective of the insured's ability or willingness to pay premiums upon all of them.

The Act specified that it was not obligatory for an insurance carrier to grant any insurance whatever upon a risk assigned to it until it had received "payment of a proper premium." G.S. 20-276. It put upon the insured responsibility for determining which of his motor vehicles should be covered by the owner's policy of liability insurance by providing for the cancellation of the registration of the motor vehicles not so covered. G.S. 20-252 (b). It declared by inescapable implication that an owner's policy of liability insurance issued under the provisions of the assigned risk plan should restrict its coverage to the motor vehicle or vehicles designated in the insured's application to the assigning agency to have his risk assigned to an appropriate carrier, and the assigning agency's directive assigning the insured's risk to the issuing carrier. G.S. 20-276.

When all is said, the Act simply imposed upon an insurance carrier issuing an owner's policy of liability insurance upon an assigned risk this twofold obligation: First, to issue to the insured a policy meeting the requirements of subdivision (2) of G.S. 20-227, and designating "by explicit description, or by appropriate reference, *all motor vehicles with respect to which coverage is intended to be granted*"; and, second, to issue a written certificate giving the effective date of the policy and designating "by explicit description or by appropriate reference *all motor vehicles covered.*" G.S. 20-252 (a).

The Act required the written certificate of the issuing carrier to be filed with the Department of Motor Vehicles so that the Department could reissue an operator's license to the insured and cancel the registration of such of the insured's motor vehicles as were not covered by the policy of liability insurance. G.S. 20-252.

What has been said makes it evident that the defendant performed its obligations under the Motor Vehicle Safety and Financial Responsibility Act of 1947 when it issued to Davis an owner's policy of liability insurance covering the 1940 Buick car only. The validity of this conclusion

is not impaired in any way by the failure of the Department of Motor Vehicles to cancel the registration of the 1947 Ford truck.

For the reasons given, the judgment is

Affirmed.

STATE v. PAUL MYERS.

(Filed 4 June, 1954.)

1. Receiving Stolen Goods § 6—

Evidence of defendant's guilt of receiving stolen goods with knowledge that they had been stolen, *held* amply sufficient to overrule defendant's motion for nonsuit. G.S. 14-71.

2. Criminal Law § 29b—

Ordinarily, on a prosecution for a particular crime, evidence tending to show that defendant has committed other distinct, independent, or separate offenses is wholly impertinent and should be excluded.

3. Same: Receiving Stolen Goods § 5—

In a prosecution for receiving stolen goods with knowledge that they had been stolen, evidence tending to show that defendant on a previous occasion had accepted stolen merchandise from the same parties under such circumstances that defendant must have known that the merchandise had been stolen, is competent upon the question of defendant's guilty knowledge upon the occasion specified in the indictment.

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

APPEAL by defendant from *Bobbitt, J.,* September Term 1953, FORSYTH. No error.

Criminal prosecution under bill of indictment in which it is charged that defendant did feloniously receive stolen property knowing at the time it was stolen in violation of G.S. 14-71.

About 1:00 or 2:00 a.m. on the night of 11 July 1953, J. D. Harrelson, Jimmy Lee Saunders—an infant of about 17 years of age—and two other associates broke and entered the Acadia Pharmacy in Winston-Salem. They took and carried away a large quantity of merchandise including radios, watches, cameras, cigarette lighters, a cash register, an adding machine, a typewriter, and various other articles described in the bill of indictment. They put the merchandise into a truck and Harrelson and Saunders carried it to defendant's home. The other two got off the truck at a church in the vicinity of defendant's home and waited in the church yard where they had theretofore stored other stolen property. Defendant declined to discuss the purchase of the property in the presence of the

young boy. Harrelson carried Saunders to the church and went back to defendant's home. Defendant then accepted the property and paid Harrelson $152.

On or about 15 June, Harrelson and associates broke and entered the Colonial Stores building and stole over $4,400 worth of merchandise. They left five cases of cigarettes in the church yard and stored the rest of the merchandise in an old tobacco barn. That night they delivered the cigarettes to defendant. Defendant went to look at the other property, and that night it was delivered to him, piled up in his home in such manner he said he could not tell what it was and could not say what he would give for it. He later paid $250.

Defendant told Harrelson and associates he would pay $50 each for 21-inch TV sets. He bought from them one 17-inch TV set about 2:00 a.m. one night and paid $25 for it. He also told them "he could use a lot of little radios."

Defendant was told that the merchandise delivered in June came from the Colonial Stores and that the last came from the Acadia Pharmacy and was "hot stuff." He was also told where the TV set came from.

Defendant denied that he had ever received any property from the State's witnesses and otherwise contradicted their testimony.

The jury rendered a verdict of guilty as charged in the bill of indictment. 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.

P. W. Glidewell for defendant appellant.

BARNHILL, C. J. When we consider the evidence in the light most favorable to the State, as we are required to do in determining the merits of an exception to the refusal of the court to sustain a demurrer to the evidence under G.S. 15-173, a mere statement of the essential facts relied on by the State renders the conclusion that defendant received the property listed in the bill of indictment "knowing the same to have been feloniously stolen or taken," G.S. 14-71, so impelling that it requires no discussion or citation of authority. *S. v. Larkin,* 229 N.C. 126, 47 S.E. 2d 697; *S. v. Collins, ante,* p. 128. He received a large quantity of valuable merchandise at a grossly inadequate price; he refused to trade for the property in the presence of a young boy; he received it at night; and he was told that it was "hot stuff," a term commonly understood to mean stolen. He had theretofore inspected a large quantity of merchandise stored in an old barn and later purchased the same for a nominal sum. He accepted, at night, five cases of cigarettes, stored in an old church

yard. He took the cigarettes and other merchandise from young boys he had no cause to believe were lawfully engaged in the sale of merchandise in the manner here disclosed. He had theretofore received a large quantity of new merchandise taken from the Colonial Stores while it was piled up at night in his home like so much junk, so that he could not tell what it was or estimate its value. He was told each time from whence it came and that it was stolen. He solicited small radios and TV sets. That he was put on notice that the property was stolen would seem to be beyond debate. Indeed the defendant, in his brief, advances no argument to the contrary.

But defendant duly excepted to the evidence tending to show that he received the Colonial Stores property and the TV sets, and that he solicited the delivery of small radios. He did not, however, except to the evidence concerning his offer to purchase TV sets or to the evidence tending to show that he purchased a 17-inch set.

These exceptions are brought forward in his brief. He contends that this evidence tending to show that he had committed like offenses at other times was incompetent and highly prejudicial. We are, however, constrained to hold that they are without substantial merit.

Ordinarily, on a prosecution for a particular crime, evidence tending to show that defendant has committed other distinct, independent, or separate offenses is wholly impertinent and should be excluded. *S. v. McClain, ante,* p. 171.

But this general rule is subject to well-recognized and uniformly applied exceptions. These exceptions are fully discussed in *S. v. McClain, supra,* and the cases cited. What is there said needs no amplification, and mere repetition would serve no useful purpose. Suffice it to say that the testimony to which these assignments of error are directed was admissible on the question of defendant's guilty knowledge at the time he received the merchandise described in the bill of indictment.

In this connection we note that the trial judge, of his own volition, fully and correctly instructed the jury that it was to consider the same only in the event it found the property described in the bill of indictment was stolen and was thereafter received by defendant, "and then only as it may tend to bear and to throw light on the question as to whether the defendant, in receiving such stolen goods described in the bill of indictment, had guilty knowledge of the fact, that they were stolen goods and received such goods with felonious intent, it being for the jury to determine to what extent, if any, such evidence does bear and throw light on such question."

The other exceptive assignments of error fail to disclose cause for a new trial.

No error.

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

AILEEN HARDEE WALL v. MIMIE HARDEE.

(Filed 4 June, 1954.)

1. Habeas Corpus § 3—

The resident judge of the district has jurisdiction to hear a special proceeding under G.S. 50-13, brought and heard after notice to all parties.

2. Bastards § 12—

The mother of an illegitimate child is its natural guardian and has legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child. This rule is not absolute, and the custody of the child may be awarded to another when it clearly and manifestly appears that the best interest and welfare of the child demand it.

3. Same—

It is necessary to support an order of the court awarding permanent custody of an illegitimate child to its nonresident mother that the court find that such permanent removal from the State would be for the best interest and welfare of the child.

4. Appeal and Error § 50—

Where the findings of fact are insufficient to support the judgment, the cause will be remanded.

JOHNSON, J., concurs in the result.

APPEAL by respondent from *Frizzelle, Resident Judge* of the Fifth Judicial District, in chambers at Snow Hill, 5 September 1953. PITT.

Special proceeding by petitioner to obtain the custody of her six year old illegitimate son from the respondent, who is a sister of petitioner.

The facts found by the judge essential to a decision by us follow. The child, Harry Anthony Hardee, is living in a house on a small farm located three or four miles from Greenville, North Carolina, in the custody of Mimie Hardee, the respondent. In this house live the respondent, the mother of respondent and petitioner, a white man, who helps operate the farm, and Harry Anthony Hardee. Mimie Hardee has had custody of the child immediately after its birth, and for the last three years has had exclusive control and custody of the child. For the first three years of the child's life there may have been joint custody of respondent with the mother at respondent's home. On 8 November 1948 the petitioner married Atley Thomas Wall, who is employed with a building contractor in Washington, D. C., and earned in 1952 $4,345.33. They have two small

children about 3 years of age. "That the home of the petitioner is a fit place in which to rear the infant child Harry Anthony Hardee, and that Atley Thomas Wall testified that if custody of said child was awarded his wife, it was their intention to take the necessary steps legally to adopt said child so that said child would have the same status at law as the children naturally born to the said Atley Thomas Wall and Aileen Hardee Wall. That Aileen Hardee Wall, petitioner herein, is of good moral character and bears a good reputation at this time."

Upon the facts found, the judge made these conclusions of law. The petitioner is the natural mother of Harry Anthony Hardee, and as such has the primary, natural and legal right to custody and control of the child; the burden of showing the unsuitability of petitioner by reason of bad moral character and the lack of fitness to have custody of the child is upon the respondent, and the respondent has failed to carry such burden.

Whereupon the Judge awarded permanent custody of Harry Anthony Hardee to petitioner.

The respondent excepted to the judgment, and appealed assigning error.

Sam B. Underwood, Jr., for Petitioner, Appellee.
James & Speight, for Respondent, Appellant.

PARKER, J. This special proceeding is brought under G. S. N. C. 50-13, and was heard after notice by the resident judge of the district in his district. All parties were present with counsel and witnesses. Judge Frizzelle had jurisdiction. *In re Cranford,* 231 N.C. 91, 56 S.E. 2d 35.

It is well settled law in this jurisdiction that the mother of a bastard child is its natural guardian, and, as such, has a legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child. The mother's right is based upon the ground that there is frequent doubt as to the child's father, and that the mother, nearest in interest and affection to the child, will best promote its welfare. *In re Cranford, supra; In re Shelton,* 203 N.C. 75, 164 S.E. 332; *Ashby v. Page,* 106 N.C. 328, 11 S.E. 283. This seems to be the universal rule. Anno. 51 A.L.R. 1507; 7 Am. Jur., Bastards, Sec. 61.

This rule is not absolute. There have been, and will be, cases where the best interests of the bastard child required that its custody be taken from the mother, and placed elsewhere. While the courts are reluctant to do this, for reasons real as well as apparent, they do not hesitate, where it clearly and manifestly appears the best interests and welfare of the child demand it. *In re Cranford, supra; In re Foster,* 209 N.C. 489, 183 S.E. 744; *In re Shelton, supra;* Anno. 51 A.L.R. 1510; 7 Am. Jur.,

Bastards, Sec. 65. It is true the mother may have erred prior to its birth. She may have "loved not wisely but too well." Yet there is a *locus penitentiae*. *Pierce v. Jeffries,* 103 W. Va. 410, 137 S.E. 651, 51 A.L.R. 1502 and Annotation. See *Judd v. Van Horn* (Va.), 81 S.E. 2d 432.

The petitioner and her husband live in Riverdale, Maryland, near Washington, D. C., and if she is awarded the custody of Harry Anthony Hardee, she will carry him there. Judge Frizzelle's order awarding permanent custody of the child to petitioner permits his removal from North Carolina.

This Court said in *In re DeFord,* 226 N.C. 189, 37 S.E. 2d 516: "The rule that the removal from the State of a child whose custody is at issue will not be permitted is not an absolute or arbitrary principle and may be departed from when it is clearly manifested that the welfare of the child requires it." See also *Griffith v. Griffith, ante,* p. 271, 81 S.E. 2d 918.

Judge Frizzelle found as facts that the home of the petitioner is a fit place in which to rear Harry Anthony Hardee, and that petitioner is of good moral character, and bears a good reputation at this time. He apparently deemed such findings of fact sufficient to award the custody of Harry Anthony Hardee to his non-resident mother, for he made no findings of fact that such permanent removal from the State would be for the best interests and welfare of the child. The conclusion seems patent that the trial judge found insufficient facts. *In re DeFord, supra; Griffith v. Griffith, supra.*

One of the gravest responsibilities that can be placed upon a court—and one of the most heart searching—is to determine the proper custodian of a child. Courts should ever bear in mind that children are not chattels, but intelligent and moral beings, and their happiness and welfare is a matter of prime consideration.

In order that the evidence may be considered, the facts found, and judgment entered in accord with the law set forth in *In re DeFord, supra;* and in *Griffith v. Griffith, supra,* the facts found are set aside, the judgment reversed, and the proceeding is remanded.

Error and Remanded.

JOHNSON, J., concurs in result.

IN THE MATTER OF THE CUSTODY OF WILLIAM LIVINGSTON McCORMICK, MILES JOSEPH McCORMICK, MARY ELISE McCORMICK AND JOHN GREGORY McCORMICK.

(Filed 4 June, 1954.)

Habeas Corpus § 3—

G.S. 17-39 provides a proceeding in the nature of *habeas corpus* by which a controversy respecting the custody of minor children may be determined as between husband and wife, living in a state of separation without divorce, and the statute is available to the parent with whom the children then reside, it being immaterial whether the respondent or petitioner has custody at the time.

APPEAL by respondent Miles Joseph McCormick from *Sink, J.,* in Chambers, 2 January, 1954, from GUILFORD.

Proceeding under the provisions of G.S. 17-39 for determination of the charge and custody of the children whose names appear in the above styled caption.

These facts constitute the framework on which this proceeding rests: On 23 December, 1953, Mary Elise Livingston McCormick filed a petition before the Honorable H. Hoyle Sink, Judge of Superior Court, resident of Twelfth Judicial District, in which she set forth in summary: (1) That she was then a resident of Guilford County, N. C., and her husband, Miles Joseph McCormick, was a resident of Forsyth County, N. C.; (2) that she is the mother, and he is the father of these children: William Livingston McCormick, age 8 (31 December, 1953), Miles Joseph McCormick, age 7, John Gregory McCormick, age 5, and Mary Elise Livingston McCormick, age 4; (3) that she and her husband, Miles Joseph McCormick, are living in a state of separation; (4) that while the children are with petitioner at the home of her parents in Greensboro, N. C., her husband threatens to seize them by force, and a controversy exists between her and her husband as to the charge and custody of their said children; and (5) that the children will be produced at the hearing of the petition.

The petitioner therefore prays that a writ of *habeas corpus* issue to the end that the children be brought before the court and that such orders as to their care, custody, training and support be made as provided by G.S. 17-39.

Thereupon on 23 December, 1953, the Honorable H. Hoyle Sink, Judge as aforesaid, issued an order commanding Miles Joseph McCormick to appear before him at his office in the county courthouse, in Greensboro, Guilford County, N. C., on 29 December, 1953, at 2:30 p.m. to show cause, if any he have, why the court should not determine the custody of said children and make such orders and decrees with reference thereto as

to the court might seem just and proper, and, further, ordering that the writ be served upon Miles Joseph McCormick by Sheriff of Forsyth County—in manner set forth, which was done on 24 December, 1953.

Thereafter on 2 January, 1954, to which date hearing on the proceeding was by consent delayed, the respondent Miles Joseph McCormick demurred to the petition and moved that the proceeding be dismissed on the ground "that it appears upon the face of said petition that said petition does not state facts sufficient to constitute a cause of action nor a basis for relief herein, it appearing therein that this respondent does not have possession nor control over nor of the children mentioned, but that they are in the possession and control of the petitioner herself, and that the petition does not present or describe a situation wherein the writ of *habeas corpus* is appropriate, it not being available for the mere resolution of 'disputes' whether or not they be litigable at law or equity."

The demurrer was overruled, and to order signed in accordance therewith the respondent objected and excepted, and appeals to the Supreme Court and assigns error.

H. L. Koontz and C. L. Shuping for petitioner, appellee.
Robert S. Cahoon for respondent, appellant.

WINBORNE, J. This appeal presents one basic question: Where there is a controversy between husband and wife, living in a state of separation, without being divorced, in respect to the custody of their children, are the provisions of G.S. 17-39 available to the parent with whom the children then reside?

The statute, G.S. 17-39, in pertinent part provides that "When a contest shall arise on a *habeas corpus* between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it to the husband or to the wife, for such time under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same . . ."

It is manifest from a reading of this statute, as interpreted and applied in decisions of this Court, that its provisions are available only in cases where the husband and wife are living in a state of separation, without being divorced, and there arises a contest between them as to the custody of their children. *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906; *In re Young,* 222 N.C. 708, 24 S.E. 2d 539; *McEachern v. McEachern,* 210 N.C. 98, 185 S.E. 684; *In re Blake,* 184 N.C. 278, 114 S.E. 294.

While the proceeding is referred to as "a *habeas corpus*" it seems clear that the Legislature did not intend it to be "*habeas corpus*" in the strict meaning of the term. Rather it is set up as a proceeding in the nature of *habeas corpus* by which controversy between husband and wife, living in a state of separation, without being divorced, in respect to the custody of their children may be determined. Hence the Court deems it immaterial whether the respondent or the petitioner has custody at the time. It is a means of bringing the children before the Court for a determination of the controversy.

The judgment below is
Affirmed.

J. R. MIDKIFF, ADMINISTRATOR OF THE ESTATE OF JESSE MIDKIFF, DECEASED, v. NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC., COMPETITOR LIAISON BUREAU OF NASCAR, INC., J & W, INC., WILLIAM (BILL) FRANCE AND JAMES CHESNUTT.

(Filed 4 June, 1954.)

1. Pleadings § 15—

The allegations of the complaint must be liberally construed upon demurrer.

2. Games and Exhibitions § 4—

Allegations to the effect that plaintiff's intestate was a competitor in a stock car automobile race, that the racetrack was under the control of the defendants, who, acting in concert, were conducting the race, and that they started the race with the track in an unsafe condition as a result of one or more "dead" cars being left thereon after the trial runs immediately before the race, without the knowledge of the competitors, but with defendants being chargeable with notice thereof, and that intestate was fatally injured when his car collided with a "dead" car upon the track, *is held* sufficient to state a cause of action against defendants on the theory of concurrent negligence.

3. Negligence §§ 10½, 16—

Ordinarily, assumption of risk is a matter of defense which must be set up by answer rather than by demurrer.

4. Death § 6—

In an action for wrongful death, allegations that plaintiff is the duly qualified and acting administrator of the estate of the deceased is sufficient without allegation that plaintiff brings the action in his representative capacity.

APPEAL by defendants (except J & W, Inc.) from *Patton, Special Judge,* at January Civil Term, 1954, of ALAMANCE.

Civil action by plaintiff to recover damages for the wrongful death of his intestate, Jesse Midkiff, due to the alleged negligence of the defendants.

The defendants (except J & W, Inc.) demurred (1) for failure of the complaint to state facts sufficient to constitute a cause of action and (2) for defect of parties. G.S. 1-127 (4) and (6).

The trial court overruled the demurrer, and from the judgment based on such ruling the demurring defendants appealed.

Thos. C. Carter and Long & Ross for plaintiff, appellee.
Long, Ridge, Harris & Walker for defendants, appellants.

JOHNSON, J. The complaint alleges in substance these ultimate facts: (1) that the intestate, as one of the competitors in a stock car automobile race held on a track near Raleigh, North Carolina, 19 September, 1953, collided with a dead car upon the track a few seconds after the beginning of the race and was killed in the collision; (2) that the individual defendants, as officers, agents, and servants of the corporate defendants, were supervising and directing the race which was being promoted jointly by the corporate defendants; and (3) that the intestate's death was proximately caused by the joint and concurrent negligence of the defendants in that they, "acting in concert," started the race when they knew, or in the exercise of due care should have known, the track was in an unsafe condition as a result of one or more dead cars being left thereon following the test runs made immediately before the race, the dead cars being out of sight of the competitors starting the race who were without knowledge, or means of knowledge, that the track was in such unsafe condition.

These allegations, when liberally construed in favor of the plaintiff, as is the rule on demurrer, are sufficient to state a cause of action against the defendants on the theory of concurrent negligence. *Bumgardner v. Fence Co.,* 236 N.C. 698, 74 S.E. 2d 32; *Bumgardner v. Allison,* 238 N.C. 621, 78 S.E. 2d 752; *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373. See also *Glazener v. Transit Lines,* 196 N.C. 504, 146 S.E. 134, and 38 Am. Jur., Negligence, Sec. 63.

The decisions cited and relied on by the defendants are distinguishable. In the case of *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193, it was alleged merely that the plaintiff truck driver, employee of the defendants, was injured in delivering a truck-load of crushed stone or gravel, on a stock pile when the stock pile which was hollow underneath caved in. In that case there was no allegation in respect to how, when, or under what circumstances the stock pile came to be hollow underneath, nor was there allegation that the stock pile was under the control of the defendants, nor that the plaintiff did not have the same knowledge, or means

of knowledge, of the danger as did the defendants. Here, it is alleged that the race track was under the control of the defendants, who, acting in concert, were conducting the race, and that they started the race with the track in an unsafe condition as a result of one or more dead cars being left thereon after the trial runs immediately before the race, without the knowledge of the competitors, but with defendants being chargeable with notice thereof. These allegations clearly distinguish the instant case from *Shives v. Sample, supra.*

The question whether the defendants are entitled to have the plaintiff's allegations of negligence made more definite and certain under the procedure authorized by G.S. 1-153 is not presented by this record.

Also, it would seem that the defendants' argument based on the doctrine of assumption of risk is premature and untenable. Ordinarily, assumption of risk is a matter of defense which must be set up by answer rather than by demurrer. *Dorsett v. Clement-Ross Mfg. Co.,* 131 N.C. 254, 42 S.E. 612; *Hubbard v. Southern R. Co.,* 203 N.C. 675, 166 S.E. 802. See also 65 C.J.S., Negligence, Sections 192 and 197 (b).

The defendants' contention that the complaint is demurrable for failure of the plaintiff administrator to allege specifically that he brings this action in his representative capacity seems to be without merit. It is alleged that plaintiff "is the duly qualified and acting Adminstrator of the estate of Jesse Midkiff, deceased, having been duly appointed by the Clerk of the Superior Court of Alamance County, North Carolina." These allegations suffice to overcome the defendants' demurrer directed to the question of "defect of parties plaintiff."

The judgment below is

Affirmed.

NICK COLLAS v. TOMMY J. REGAN (MINOR), BY HIS GUARDIAN AD LITEM, C. E. REGAN.

(Filed 4 June, 1954.)

1. Negligence §§ 10, 16—

The last clear chance or discovered peril doctrine must be pleaded by a plaintiff in order to be available as a basis for recovery.

2. Pleadings § 24—

A plaintiff can recover only on the case made by his pleadings.

3. Negligence § 10—

The doctrine of last clear chance does not apply when there is no evidence indicating that defendant might have avoided the injury by using proper care after his discovery of plaintiff's peril.

APPEAL by plaintiff from *Sharp, Special Judge,* at February Special Term, 1954, of ORANGE.

An automobile operated by the infant defendant Tommy J. Regan struck and injured the plaintiff Nick Collas while he was walking across a street in Chapel Hill. The plaintiff sued the infant defendant for resultant damages. These issues arose upon the pleadings and were submitted to the jury: (1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? (3) What amount of damages, if any, is the plaintiff entitled to recover of the defendant? The jury answered the first issue "yes" and the second issue "yes," and left the third issue unanswered. The presiding judge entered judgment for defendant, and the plaintiff appealed, assigning errors.

John T. Manning for plaintiff.
Bonner D. Sawyer for defendant.

ERVIN, J. Counsel for the plaintiff concedes with his customary candor that his client's pleadings do not invoke the last clear chance or discovered peril doctrine, and that in consequence his client is not entitled to prevail on this appeal unless we overrule the decisions holding that the last clear chance or discovered peril doctrine must be pleaded by a plaintiff in order to be available as a basis for recovery. *Bailey v. R. R.,* 223 N.C. 244, 25 S.E. 2d 833; *Hudson v. R. R.,* 190 N.C. 116, 129 S.E. 146. This we cannot do. These decisions are simply practical applications of the basic rule that a plaintiff can recover only on the case made by his pleadings. The plaintiff's legal plight would be no better, however, had his pleadings invoked the doctrine under discussion. This is true because there is no evidence indicating that the infant defendant might have averted the injury by using proper care after his discovery of the plaintiff's peril. *Wade v. Sausage Co.,* 239 N.C. 524, 80 S.E. 2d 150.

No error.

JOHN W. MOORE v. BRIGHT W. CROSSWELL.

(Filed 4 June, 1954.)

1. Appeal and Error § 6c (5)—

While exceptions to the charge may be noted after trial, such exceptions should be included in appellant's statement of case on appeal as served on appellee.

2. Appeal and Error § 23—

The function of the assignment of errors is to group and bring forward such of the exceptions previously noted as the appellant desires to preserve and present to the Court, and may be prepared after service of case on appeal.

3. Appeal and Error § 24—

An assignment of error not supported by an exception duly taken will be disregarded.

4. Appeal and Error § 6c (2)—

A sole exception to the judgment presents only the face of the record proper for review, and when no error appears thereon, the appeal must fail.

APPEAL by plaintiff from *Grady, Emergency Judge,* and a jury, at January Civil Term, 1954, of DURHAM.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, tried below on issues of negligence and contributory negligence. Both issues were answered in the affirmative.

From judgment on the verdict decreeing that the plaintiff recover nothing, he appealed.

C. Horton Poe, Jr., for plaintiff, appellant.

Reade, Fuller, Newsom & Graham for defendant, appellee.

JOHNSON, J. This appeal is predicated upon assignments of error, both of omission and commission, in the charge. Yet, the assignments urged are not supported by exceptions previously noted as required by our rules. See Rules 19 (3) and 21, Rules of Practice in the Supreme Court, 221 N.C. 554. While exceptions to the charge may be noted after trial, when the statement of case on appeal is prepared, even so, such exceptions should be included in appellant's statement of case on appeal as served on the appellee, in order that the latter may be fully apprised at that juncture of the theory of the appeal. The assignment of errors, not necessarily being a part of the statement of case on appeal, may be prepared later. The function of the assignment of errors is to group and bring forward such of the exceptions previously noted in the case on appeal as the appellant desires to preserve and present to the Court. 3 Am. Jur., Appeal and Error, Sections 694 and 695. Therefore, an assignment of error not supported by an exception will be disregarded. *Worley v. Logging Co.,* 157 N.C. 490, 73 S.E. 107. It is so ordered here.

The only exception appearing in the record is to the signing and entering of the judgment from which the appeal is taken. This presents only the face of the record proper for inspection and review, and when no

error appears thereon, the appeal must fail. *Query v. Insurance Co.*, 218 N.C. 386, 11 S.E. 2d 139; *Smith v. Smith*, 226 N.C. 506, 39 S.E. 2d 391; *Bourne v. Edwards*, 238 N.C. 261, 77 S.E. 2d 616; *Donnell v. Cox, ante*, 259, 81 S.E. 2d 664. Here the verdict supports the judgment and no error appears on the face of the record.

No error.

BADGIE LEE SELLARS v. WILLIAM N. SELLARS.

(Filed 4 June, 1954.)

Divorce and Alimony § 12—

The court may allow plaintiff possession of the home owned by the parties as tenants by the entireties in fixing alimony *pendente lite* under G.S. 50-16.

APPEAL by the defendant from *Sharp, Special Judge*, Special February Civil Term 1954 of ORANGE.

Civil action instituted by plaintiff for alimony without divorce, and counsel fees under G. S. N. C. 50-16, heard by consent on motion in the cause for alimony *pendente lite* and counsel fees.

The motion was heard on the complaint and affidavits of the plaintiff and the defendant. The court made detailed findings of fact, which are amply supported by competent evidence. These findings of fact are briefly summarized: On 12 December 1953 defendant feloniously assaulted the plaintiff, his wife, with a razor with intent to kill, inflicting upon her serious injuries across her breast and neck by which her health has been impaired; that he had previously assaulted and seriously injured plaintiff; that defendant is addicted to use of whiskey; that plaintiff cannot return to the home owned by them as tenants by the entirety without endangering her life, as long as defendant is in possession. That plaintiff lacks sufficient means to exist pending the trial of this action and to pay counsel fees. That the state of plaintiff's health renders it in the best interest of the plaintiff, and necessary that alimony *pendente lite* to which she is entitled, be allotted to her in the home. That the defendant is an able-bodied man, and earning at least $37.00 a week after deductions and taxes. Whereupon, the court ordered that the defendant on or before 1 March 1954 pay to plaintiff $50.00; pay to her counsel on or before 1 May 1954 $100.00 as counsel fees; and on or before 27 February 1954 vacate the home owned by the parties at 504 Church Street, Chapel Hill, North Carolina,—plaintiff's alimony being allotted to her in the home pending the further orders of the court.

The defendant excepted to the judgment entered, and appealed.

William S. Stewart and Bonner D. Sawyer for Plaintiff, Appellee.
John T. Manning for Defendant, Appellant.

PER CURIAM. The defendant makes no contention that the evidence fails to support the findings of fact. The argument of the defendant that the court erred in awarding to the plaintiff possession of the home owned by them as tenants by the entirety, has been answered adversely to such contention by this Court in *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555, and upon the authority of that case the judgment of the court below is

Affirmed.

STATE v. JOHN C. MOBLEY.

(Filed 9 July, 1954.)

1. Arrest § 3—

A person has the right to resist an unlawful arrest by the use of force, as in self-defense.

2. Same—

A person resisting an unlawful arrest may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty, and where he uses excessive force, he may be guilty of assault, or, if death ensues, even of homicide.

3. Arrest § 1b—

Under the general common law rule, an arrest may not be made ordinarily without a warrant, and the exceptions to this common law rule are defined and limited entirely by statute in this State.

4. Same—

An arrest without warrant except as authorized by statute is illegal in this State.

5. Same—

A peace officer may make an arrest without a warrant if he has reasonable ground to believe that a felony has been committed or a dangerous wound inflicted, and that the suspect is guilty and will escape unless immediately arrested, G.S. 15-41. Under this rule it is not required that the offense be committed in the presence of the peace officer or in fact that the offense should have been actually committed if the arresting officer has reasonable ground to believe that it has been committed.

6. Arrest § 1a—

Where a felony actually has been committed in the presence of a private citizen, such private citizen may forthwith arrest without warrant the per-

son he knows to be guilty or the person he has reasonable ground to believe guilty. If it turns out the offense is not a felony, such private person may not justify taking the suspect into custody. G.S. 15-40.

7. Arrest § 1a, 1b—

A peace officer or a private citizen on equal terms may arrest without warrant a person whose conduct in his presence amounts to a breach of the peace, or a threat of breach of the peace together with some overt act in attempted execution of the threat such as reasonably justifies a belief that the perpetration of an offense amounting to a breach of the peace is imminent. G.S. 15-39.

8. Same—

The test of the right of a peace officer or private citizen to arrest without warrant under G.S. 15-39 is not whether the offense be a misdemeanor, but whether arrest is necessary to prevent or suppress a breach of the peace. The statute does not justify arrest when the facts furnish reasonable ground to believe an offense covered by the statute is being committed, but the person making the arrest must determine, at his peril, preliminary to proceeding without warrant, whether an offense arrestable under the statute is being committed. *S. v. McNinch*, 90 N.C. 695, overruled on this point.

9. Same—

Mere drunkenness unaccompanied by language or conduct which creates, or is reasonably calculated to create, public excitement or disorder amounting to a breach of the peace, will not justify arrest without warrant under G.S. 15-39.

10. Arrest § 3—

The State's evidence tended to show that defendant resisted arrest without warrant by a municipal police officer on a charge of public drunkenness under G.S. 14-335. The municipal charter conferred no power on its police officers to arrest without warrant in misdemeanor cases. *Held:* In the absence of evidence tending to show *prima facie* that defendant's conduct at the time amounted to an actual or threatened breach of the peace, the arrest was illegal, and defendant's motion to nonsuit on the charge of resisting arrest should have been allowed.

11. Same—

Where the State's evidence fails to show that defendant used excessive force in resisting an illegal arrest, defendant's motion to nonsuit on the charge of assaulting the police officer should have been allowed.

12. Arrest §§ 1a, 1b—

A nuisance is not *per se* a breach of the peace, and neither a police officer nor a private citizen may arrest a person without warrant for creating a nuisance which does not amount to a breach or threatened breach of the peace.

13. Appeal and Error § 51b—

The doctrine of *stare decisis* does not apply where it conflicts with a pertinent statutory provision to the contrary.

14. Same—

The doctrine of ***stare decisis*** should never be applied to perpetuate palpable error.

BARNHILL, C. J., concurs in result.

PARKER, J., dissenting.

DENNY, J., concurring.

APPEAL by defendant from *Rousseau, J.*, and a jury, at October Term, 1953, of GASTON.

Criminal prosecution tried on appeal from the Recorder's Court of the Town of Dallas upon warrants, consolidated for trial, charging the defendant with (1) public drunkenness, (2) resisting arrest, and (3) simple assault.

Police officers of the Town of Dallas arrested the defendant without warrant for public drunkenness. The defendant, asserting he was not drunk, resisted the arrest. Chief Eidson testified that as he and officer Broome drove up to Brewer's Service Station he observed the defendant "wobbling across the driveway. . . . He was drunk. . . . I got out of the car and . . . told him he was under arrest for being drunk. I took hold of his left arm. Mr. Broome got his right arm. We started to the car. He scuffled on around behind the car and . . . hauled off and hit me beside the head and knocked my hat off, and my glasses flew out of my pocket. He started toward Mr. Broome and . . . swung at him and hit him a glancing lick. . . ." The defendant testified, as did a number of bystanders, that he was not intoxicated.

The jury returned a verdict of not guilty of public drunkenness, but guilty of resisting arrest and guilty of simple assault.

From judgment pronounced, imposing penal servitude of nine months, the defendant appealed, assigning errors.

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

R. Gregg Cherry, Ernest R. Warren, and Charles E. Hamilton, Jr., for defendant, appellant.

JOHNSON, J. The offense of resisting arrest, both at common law and under the statute, G.S. 14-223, presupposes a lawful arrest. It is axiomatic that every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense. *S. v. Beal,* 170 N.C. 764, 87 S.E. 416; *S. v. Allen,* 166 N.C. 265, 80 S.E. 1075; *S. v. Belk,* 76 N.C. 10; *S. v. Bryant,* 65 N.C. 327; *S. v. Kirby,* 24

N.C. 201; *S. v. Curtis,* 2 N.C. 471; 4 Am. Jur., Arrest, Sec. 92; 6 C.J.S., Arrest, Sec. 13, p. 613. See also 28 Va. Law Review, p. 330.

True, the right of a person to use force in resisting an illegal arrest is not unlimited. He may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty. *S. v. Allen, supra.* See also *S. v. Glenn,* 198 N.C. 79, 150 S.E. 663. And where excessive force is exerted, the person seeking to avoid arrest may be convicted of assault, or even of homicide if death ensues (4 Am. Jur., Arrest, Sec. 92), but in no event may a conviction of the offense of resisting arrest be predicated upon resistance of an unlawful arrest. *S. v. Allen, supra; S. v. Belk, supra;* Prosser on Torts, p. 165.

This brings us to the pivotal question presented by this appeal: Was the arrest of the defendant lawful or unlawful? Necessarily, the answer is dependent on whether the officers had the right to arrest the defendant without a warrant.

It has always been the general rule of the common law that ordinarily an arrest should not be made without warrant and that, subject to well-defined exceptions, an arrest without warrant is deemed unlawful. 4 Bl. Com. 289 *et seq.;* 6 C.J.S., Arrest, Sec. 5, p. 579; 5 C.J., p. 395. This foundation principle of the common law, designed and intended to protect the people against the abuses of arbitrary arrests, is of ancient origin. It derives from assurances of Magna Carta and harmonizes with the spirit of our constitutional precepts that the people should be secure in their persons. Nevertheless, to this general rule that no man should be taken into custody of the law without the sanction of a warrant or other judicial authority, the processes of the early English common law, in deference to the requirements of public security, worked out a number of exceptions. These exceptions related in the main to cases involving felonies and suspected felonies and to breaches of the peace. 4 Bl. Com. 292 *et seq.;* Archbold's Criminal P. and P., 29th Edition, p. 1013 *et seq.;* 4 Am. Jur., Arrest, Sections 22 to 38. Arrest without warrant in felony cases was justified at common law on the theory that dangerous criminals and persons charged with heinous offenses should be incarcerated with all possible haste in the interest of public safety. Whereas, the necessity for prompt on-the-spot action in suppressing and preventing disturbances of the public peace was the factor which justified arrest without warrant in misdemeanor cases involving breaches of the peace. In such cases, with the moving consideration being the immediate preservation of the public peace, rather than the due apprehension of the offender, the theory prevailed that unless the public peace was menaced, the delay incident to obtaining a warrant from a judicial officer would not prejudice the interests of the State in punishing the offender. See *Carroll v. United States,*

267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 A.L.R. 790. See also 75 University of Pennsylvania Law Review, 485.

It is not necessary for us to deal at length with the refinements of the common law exceptions to the general rule against arrest without warrant. This is so for the reason that in this State the common law exceptions have been enacted or supplanted by statute, so that the power of arrest without warrant is now defined and limited entirely by legislative enactments. And the rule is that where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal. *Sims v. Smith,* 115 Conn. 279, 161 A. 239; *S. v. Bradshaw,* 53 Mont. 96, 161 P. 710; *S. v. De Hart* (N. J. C. Pl.), 129 A. 427; *Mazzolini v. Gifford,* 90 Vt. 352, 98 A. 904; 6 C.J.S., Arrest, Sec. 5, pp. 579 and 580. See also *Stearns v. Titus,* 193 N.Y. 272, 85 N.E. 1077; *Vinson v. Commonwealth,* 219 Ky. 482, 293 S.W. 984; *Fitzpatrick v. Commonwealth,* 210 Ky. 385, 275 S.W. 819.

Our General Assembly of 1868-69 enacted a comprehensive, all-embracing set of rules prescribing and limiting the power of arrest without warrant. This Act, which may well be called our Code of Arrest Without Warrant, is Chapter 178, Subchapter 1, Session Laws of 1868-69. Its caption reads as follows: "When and by whom arrests may be made without process." This statute clarifies, in some particulars modifies, and in other ways extends the pre-existing rules of the common law governing arrest without warrant, but in the main the Act is declaratory of the common law. The statute has been preserved and brought forward through successive codifications of our statute law. It is now codified in pertinent parts as G.S. 15-39, 15-40, 15-41, 15-43, 15-44, 15-45, and 15-46.

The basic rules governing arrest without warrant as precribed by the Act of 1869 may be distinguished as they relate to (1) felonies and to (2) misdemeanors. We discuss them in that order:

1. *Felonies.*—G.S. 15-41 (Subchapter 1, Section 3 of the Act of 1869) confers on peace officers the right to make arrests without process when the officer has "reasonable ground to believe" (1) a felony has been committed or a "dangerous wound" inflicted, (2) that a particular person is guilty, and (3) that such person may escape if not immediately arrested. Under this statute the significant features are that the felony or dangerous wound need not necessarily be committed or inflicted in the presence of the officer. Indeed, in order to justify the arrest it is not essential that any such serious offense be shown to have been actually committed. It is only necessary that the officer have reasonable ground to believe such offense has been committed. Moreover, in the instances enumerated an arresting officer is protected by the statute against the consequences of an erroneous arrest based on mistaken identity of the offender; all that is required is that the officer have reasonable ground to believe he is after

the right person and that the suspect will escape unless immediately arrested.

G.S. 15-40 (Subchapter 1, Section 6 of the Act of 1869) authorizes private persons to make arrests in certain felony cases. By the terms of this statute, when a felony actually has been committed in the presence of a private person, he may forthwith arrest without warrant (1) the person he knows to be guilty, or (2) the person he has reasonable ground to believe to be guilty. It is noted that this statute confers on a private citizen the right of arrest only when a felony is actually committed in his presence. Thus, if it turns out that the supposed offense is not a felony, then the arresting private citizen may not under the terms of the statute justify taking the suspect into custody. However, if a felony actually has been committed in his presence, then the private person making the arrest has the protective benefits of the statute if he arrests either (1) the guilty person or (2) the person he has reasonable ground to believe is guilty of the offense, although perchance the person arrested may be innocent.

2. *Misdemeanors.*—G.S. 15-39 (Subchapter 1, Section 1 of the Act of 1869) deals with breaches of the peace. This statute confers on peace officers and private persons, on equal terms, the power of arrest without warrant in certain misdemeanor cases. The statute follows in the main the pre-existing principles of the common law. The language of the statute is as follows: "Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders." It is significant to note that the statute—as did the rules of the common law it supplanted—confers no power of arrest without warrant in misdemeanor cases, as such. The power of arrest without warrant is referable entirely to the question of breach of the peace. The test is not whether the offense is a misdemeanor, but, rather, whether an arrest is necessary in order to "suppress and prevent" a breach of the peace. The fact that an offense arrestable under this statute as a breach of the peace is also a misdemeanor, is purely coincidental. See *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470.

This brings us to an analysis of the intent and meaning of G.S. 15-39. Its language is plain and clear. An arrest without warrant may be made under the provisions of this statute by anyone when it is necessary to "suppress and prevent" a breach of the peace. This means that either a peace officer or a private person may arrest anyone who in his presence is (1) actually committing or (2) threatening to commit a breach of the peace. To justify an arrest on the ground of necessity in order to "suppress" a breach of the peace, the conduct of the person arrested must amount to an actual breach of the peace in the presence of the person

making the arrest. Whereas, to justify an arrest in order to "prevent" a breach of the peace, ordinarily there must be at least a threat of a breach of the peace, together with some overt act in attempted execution of the threat. However, we think a breach of the peace is threatened within the meaning of the statute if the offending person's conduct under the surrounding facts and circumstances is such as reasonably justifies a belief that the perpetration of an offense amounting to a breach of the peace is imminent. *Quinn v. Heisel,* 40 Mich. 576. See also *Martin v. State,* 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; *Com. v. Gorman,* 288 Mass. 294, 192 N.E. 618, 96 A.L.R. 977; 4 Am. Jur., Arrest, Sec. 26.

In testing the legality of an arrest without warrant by the provisions of G.S. 15-39, it must be kept in mind that not every misdemeanor is a breach of the peace. As to what constitutes a breach of the peace within the meaning of the rules which authorize an arrest without warrant in such cases, the better reasoned authorities emphasize the essentiality of showing as an element of the offense a disturbance of public order and tranquillity by act or conduct not merely amounting to unlawfulness but tending also to create public tumult and incite others to break the peace. We find this succinct statement in 4 Am. Jur., Arrest, Sec. 30:

"Generally speaking, any violation of public order or disturbance of the public tranquillity by any act or conduct tending to provoke or incite others to violence constitutes a breach of the peace, within the meaning of the rules which authorize an arrest without a warrant for a breach of the peace. . . .

"A breach of the peace may be occasioned by an affray or assault, by the use of profane and abusive language by one person toward another on a public street and in the presence of others, or by a person needlessly shouting and making a loud noise."

The Restatement of Torts, Section 116, puts it this way: "A breach of the peace is a public offense done by violence or one causing or likely to cause an immediate disturbance of public order." See also Prosser on Torts, p. 160; Ballentine's Law Dictionary, p. 171; 22 Michigan Law Review, 541, 573.

In applying the statute at hand, G.S. 15-39, it is manifest that mere drunkenness unaccompanied by language or conduct which creates, or is reasonably calculated to create, public excitement and disorder amounting to a breach of the peace, will not justify arrest without warrant under the statute. See *Yarbrough v. Commonwealth,* 219 Ky. 319, 292 S.W. 806; *S. v. Munger,* 43 Wyo. 404, 4 P. 2d 1094; *King v. State,* 132 Tex. Cr. R. 200, 103 S.W. 2d 754; *Crow v. State,* 152 Tex. Cr. R. 586, 216 S.W. 2d 201; 8 Am. Jur., Breach of Peace, Sections 6 to 10; 11 C.J.S., Breach of the Peace, Sections 1 to 6.

It is to be kept in mind that G.S. 15-39 contains no provisions, comparable to those in G.S. 15-41 dealing with felony cases, which justify arrest when the facts furnish reasonable ground to believe an offense covered by the statute is being committed. Therefore, a person making an arrest under the authority of G.S. 15-39 must determine, at his peril, preliminary to proceeding without warrant, whether an offense arrestable under the statute is being committed. *S. v. Hunter,* 106 N.C. 796, 11 S.E. 366; *S. v. McAfee,* 107 N.C. 812, 12 S.E. 435; *S. v. Rollins,* 113 N.C. 722, 18 S.E. 394. See also *McKenna v. Whipple,* 97 Conn. 695, 118 A. 40; *People v. Ward,* 226 Mich. 45, 196 N.W. 971; *Fitzpatrick v. Commonwealth, supra* (210 Ky. 385, 275 S.W. 819, headnote 27); *Edgin v. Talley,* 169 Ark. 662, 276 S.W. 591, 42 A.L.R. 1194; 6 C.J.S., Arrest, Sec. 5, p. 580.

The State, urging that a peace officer may arrest without warrant either when (1) a misdemeanor is actually committed in his presence or (2) when he has reasonable cause to believe a misdemeanor is being committed in his presence, cites some twenty or more cases from other jurisdictions, principally those listed in the footnotes supporting one of the diverse views given in the text statement appearing in 6 C.J.S., Arrest, Sec. 6, p. 595. All the cited cases have been examined. They are distinguishable. In the light of the plain meaning of G.S. 15-39, none of the cited cases is considered authoritative or controlling with us. The cases fall generally into four classifications: (1) decisions controlled by statutes which expressly confer on peace officers broader powers of arrest in misdemeanor cases than are conferred by either the common law or our statute (G.S. 15-39); (2) decisions not controlled by statutes but which, nevertheless, are based on cases controlled by statutes conferring broader powers of arrest in misdemeanor cases than are conferred by either the common law or our statute; (3) decisions based upon the erroneous premise that under the common law any offense, felony or misdemeanor, committed in the presence of a peace officer is arrestable without warrant; and (4) decisions based on an erroneous declaration of the common law, as set out in the third classification, and which also embrace the further erroneous concept that under the common law an arrest without warrant may be justified in any case where the officer has probable cause or reasonable ground to believe a misdemeanor is being committed in his presence. Some of the cited decisions are premised on an erroneous interpretation of *Carroll v. United States, supra* (267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 A.L.R. 790), as being authority for the proposition that a peace officer may arrest generally for any misdemeanor committed in his presence. Whereas, the decision in the *Carroll case,* opinion by *Mr. Chief Justice Taft,* is susceptible of no such meaning; it rests squarely on the provisions of the National Prohibition Act, which expressly authorizes summary seizure and arrest

whenever any person is found transporting intoxicating liquors in any vehicle in violation of law. For a clear analysis of the opinion in the *Carroll case,* and criticisms of subsequent cases based on the erroneous interpretation of this decision, see 75 University of Pennsylvania Law Review, 485 *et seq.*

While the Act of 1868-69, which supplanted the common law rules of arrest without warrant, remains unchanged in basic principles and as now codified in its various parts—G.S. 15-39 through 15-46—furnishes the fundamental rules governing arrest without warrant in this State, nevertheless, since the original enactment of this code of arrest without warrant, the Legislature has seen fit from time to time to extend the power of arrest without warrant to cover numerous specific situations and types of cases, some of State-wide application, others of local nature.

Chief among the local implementing statutes are numerous municipal charter provisions which confer on peace officers authority to arrest on sight without process any person found violating any municipal ordinance, or in some instances committing any misdemeanor, regardless of whether the offense does or does not amount to a breach of the peace. See Coates, Law of Arrest in North Carolina, 15 N. C. Law Review, 101, where numerous examples of such charter provisions are cited. See also *Alexander v. Lindsey, supra.*

It is also noted that a number of implementing State-wide statutes have been enacted from time to time conferring on peace officers the power of arrest without warrant in cases not amounting to a breach of the peace. For example, G.S. 20-183 confers on law enforcement officers power to stop any motor vehicle for the purpose of determining whether it is being operated in violation of any provision of the Motor Vehicle Act, and empowers such officers "to arrest on sight" any person found violating any provision of the Act. Also, when a peace officer discovers a person in the act of transporting intoxicating liquor in any vehicle in violation of law, G.S. 18-6 makes it the officer's duty to seize the liquor, take possession of the vehicle, and arrest the person in charge thereof. G.S. 113-91 (d) confers on game protectors the power to arrest on the spot for violations of game laws committed in their presence. Forest wardens are given similar powers under G.S. 113-49 with respect to violations of the forestry laws. For a list of other North Carolina statutes giving power of arrest without warrant in misdemeanor cases not amounting to a breach of peace, see Machen, Law of Arrest (publication of the Institute of Government, University of North Carolina, 1950), p. 46.

We have examined the charter of the Town of Dallas, Chapter 351, Private Laws of 1913. It nowhere purports to confer on the police officers of the town authority to make arrests in misdemeanor cases without warrants in cases not amounting to a breach of the peace. Indeed, no

special statute implementing the Act of 1868-69 covering the case at hand has been called to our attention, and our research discloses none. Nor does it appear that the defendant was tried for public drunkenness under a town ordinance. Rather, he was charged with public drunkenness under G.S. 14-335. Therefore, upon the record as presented the legality or illegality of the arrest in the instant case must be tested by the terms of the Act of 1868-69, and more particularly by the section thereof now codified as G.S. 15-39.

In the case at hand the evidence on which the State relies fails to show *prima facie* that the defendant's conduct at the time of the arrest amounted either to an actual or threatened breach of the peace within the intent and meaning of G.S. 15-39. Hence, the arrest must be treated as illegal. This being so, the State failed to make out a *prima facie* case of resisting arrest.

Nor does the evidence in any aspect show that the defendant used excessive force in resisting the illegal arrest. Therefore, the defendant's motion for judgment as of nonsuit, both as to the charge of resisting arrest and assault, should have been allowed, and it is so ordered. The judgment below will be vacated and reversed and the motion for nonsuit sustained.

We have not overlooked the decision of this Court in *S. v. Freeman,* 86 N.C. 683, cited and relied on by the State, wherein peace officers were held justified in making an arrest without warrant for public drunkenness in their presence. The person arrested was found between the hours of ten and eleven o'clock at night lying helplessly intoxicated upon the sidewalk exposed to public view at a place much frequented in the town of Hendersonville, in violation of a town ordinance making such helpless state of intoxication a nuisance and punishable by fine or imprisonment. The arrest was upheld by the Court, not upon the theory that the prosecutor's condition of drunkenness amounted to a breach of the peace, but rather upon the express ground that such drunkenness was an offense "against decency and morality" amounting to a nuisance and therefore arrestable on sight without warrant. It is apparent that the Court in so deciding *S. v. Freeman* was not advertent to the provisions of Chapter 178, Subchapter 1, Session Laws of 1868-69, and its salutary impact on the law of arrest in this State. This statute is nowhere mentioned in the opinion. Instead, the Court in holding that nuisance, as distinguished from breach of the peace, is sufficient to justify arrest without warrant, cites Archbold's Criminal P. and P., *page 26, note 2. This is a standard English treatise on criminal law and procedure, first published in 1822. It has since appeared in numerous editions, the last one available to us being the 29th Edition, published in 1934. It was the 6th Edition published in 1853, with American notes by Waterman, that was available to the Court when *S. v. Freeman* was decided in 1882. The Archbold text

clearly states the common law rule to the effect that in nonfelony cases arrest without warrant is justified only in breach of peace cases. The support for the novel proposition that nuisance not amounting to breach of the peace is arrestable without warrant is found in the cited footnote 2, *page 26. An examination of this footnote discloses that it in turn is based solely on the authority of "Swan's Jus. p. 474." Further investigation discloses that Swan's is a manual type of work relating to powers and duties of justices of the peace and constables in Ohio, with forms, the 3rd Edition of which was published in 1841. It is significant that the next edition of Archbold available to us, the 8th Edition, with American notes by the eminent legal scholar J. N. Pomeroy, nowhere refers to the proposition stated in the cited Waterman note. In fact, Pomeroy does not bring forward any part of the Waterman note 2 found on *page 26 of the 6th Edition. It is manifest that the 8th Edition of this work, though published in 1880, was not available to the Court when *S. v. Freeman* was decided (in 1882). At any rate, nowhere among the authorities presently available to us, including subsequent editions of Archbold, have we found authoritative support for the proposition that, in the absence of special statutory enactment, a nuisance not amounting to a breach of the peace is arrestable without warrant. And it is manifest that an offense amounting to a nuisance is not *per se* a breach of the peace. 66 C.J.S., Nuisance, Sec. 9. Accordingly, we are constrained to hold that the decision in *S. v. Freeman*, being repugnant to established common law rules of arrest and also in direct contravention of the provisions of the Act of 1869, and particularly the portion thereof now codified as G.S. 15-39, is overruled. And we withdraw and treat as unauthoritative the subsequent pronouncements of this Court, whether they be—as in most instances they are—*obiter dicta*, or—as in a few instances—decisive of decided cases, to the effect that, in the absence of statute, a nuisance or other misdemeanor not amounting to a breach of the peace is arrestable without warrant. See *S. v. Pillow*, 234 N.C. 146, 66 S.E. 2d 657; *Perry v. Hurdle*, 229 N.C. 216, 49 S.E. 2d 400; *S. v. Loftin*, 186 N.C. 205, 119 S.E. 209; *S. v. Rogers*, 166 N.C. 388, 81 S.E. 999; *Sossamon v. Cruse*, 133 N.C. 470, 45 S.E. 757; *S. v. McAfee, supra* (107 N.C. 812); *S. v. Hunter, supra* (106 N.C. 796).

Similarly, we treat as unauthoritative the decision in *S. v. McNinch*, 90 N.C. 695, which contains this statement to which the State directs our attention: *"In making an arrest upon personal observation and without warrant, the officer will be excused when no offense has been perpetrated, if the circumstances are such as reasonably warrants the belief that it was (Neal v. Joyner, 89 N.C. 287) and the jury must judge of the reasonableness of the grounds upon which the officer acted."* (Italics added.) In making this pronouncement the Court inadvertently failed to note that

Neal v. Joyner, 89 N.C. 287, on which the decision is expressly rested, was a felony case controlled by another part of the Act of 1869—now G.S. 15-41—which clearly authorized arrest on reasonable ground of belief; whereas, in *S. v. McNinch* the Court was dealing with an alleged misdemeanor wherein the officer's power of arrest derived from the so-called "breach of peace" portion of the Act of 1869—now G.S. 15-39—which justifies arrest without warrant only when it is necessary to "suppress or prevent" a breach of the peace. *Alexander v. Lindsey, supra* (230 N.C. 663). Thus, it is manifest that the pronouncement contained in the foregoing italicized excerpt from *S. v. McNinch* is an erroneous application in a misdemeanor case of a rule applicable only in felony and "dangerous wound" cases. The pronouncement is disapproved and withdrawn, as are similar statements based on like facts in subsequent decisions of the Court. See *S. v. Jenkins,* 195 N.C. 747, 143 S.E. 538; *S. v. Campbell,* 182 N.C. 911, 110 S.E. 86; *Sigmon v. Shell,* 165 N.C. 582, 81 S.E. 739.

Where there are conflicting decisions the doctrine of *stare decisis* has no application. *Patterson v. McCormick,* 177 N.C. 448, 457, 99 S.E. 401. Nor should *stare decisis* be applied where it conflicts with a pertinent statutory provision to the contrary. 21 C.J.S., Courts, Sec. 187, p. 304. Moreover, where a statute covering the subject matter has been overlooked, the doctrine of *stare decisis* does not apply. 15 C.J. 958. Nor may the court by a line of erroneous decisions overrule a statutory enactment. *Patterson v. McCormick, supra,* at p. 457. Besides, the doctrine of *stare decisis* should never be applied to perpetuate palpable error. 21 C.J.S., Courts, Sections 187 and 193.

It is to be kept in mind that the decision in this case is no attempt to provide a code for arrest without warrant, nor do we attempt to close the hiatuses in present arrest procedure. Such matters are not within the province of the Court. Our intent here is to eliminate or minimize the conflicts that have developed in the construction and application of present statutes, to the end that peace officers may know with reasonable exactitude their rights and duties in respect to making arrests without warrant.

In the situation thus presented it is for the Legislature, rather than the Court, to determine whether it has or has not kept pace with the exigencies of the times in its process of conferring on various peace officers from time to time by piecemeal enactments broadened powers of arrest without warrant. In short, since this branch of the law has come to be prescribed and regulated wholly by statute, it is for the Legislature to ponder and decide whether the present statutes meet the minimum requirements of public safety and security, or whether further extensions are necessary; for example, by the enactment of a single State-wide statute authorizing

any peace officer to arrest without warrant (1) when a misdemeanor or other criminal offense is committed in his presence, or (2) when he has reasonable ground to believe that the person to be arrested has committed a criminal offense and will evade arrest if not immediately taken into custody, with further enactment requiring that the minimum bond of $1,000 now required of peace officers by G.S. 128-9 be substantially increased. See *Langley v. Patrick,* 238 N.C. 250, 77 S.E. 2d 656.

For constructive criticisms of the present law of arrest see Machen, The Law of Arrest, p. 76 *et seq.;* 15 N. C. Law Review, p. 101, 103 *et seq.;* 29 Michigan Law Review, pp. 452 and 453; 28 Virginia Law Review, pp. 331, 332, and 343 *et seq.* See also 22 Michigan Law Review, p. 541; 49 Harvard Law Review, p. 566.

The judgment below is
Reversed.

BARNHILL, C. J., concurs in result.

PARKER, J., dissenting. The State's evidence tends to show the following facts. Jess Broome, a police officer of the Town of Dallas dressed in his uniform with badge and pistol, saw the defendant around 9:30 or 10 p.m. at the Dallas Grill, a public restaurant. The defendant was staggering around drunk, and cursed Broome and the brother of the Chief of Police of Dallas, who was talking to Broome. Broome asked the defendant to hush cursing. The defendant replied if Broome got out of his car, he, the defendant, would cut his head off, and for Broome "to call the County"—manifestly referring to the County Law Enforcement Officers. Broome did not arrest the defendant then, but "called the County" for help. Broome then went to the courthouse, called the Dallas Chief of Police A. R. Eidson, went to Eidson's home, picked him up, came back up town, and found the defendant at a service station, a public place. Chief Eidson had on a white shirt and was in civilian clothes, but had his badge on his shirt and a gun. The officers had no warrant. The officers got out of the car, and Chief Eidson told the defendant he was under arrest for being drunk. Chief Eidson took hold of his left arm, Broome his right arm, and started to the car. The defendant scuffled around behind the car, and struck Chief Eidson on the head knocking his hat off. He struck at Chief Eidson "a whole lot." Broome hit the defendant a glancing blow on the head with a blackjack. The defendant told Chief Eidson to shoot him. (John Puett, a witness for the defendant, testified the defendant raised his shirt, and said to Chief Eidson "You yellow bellied s.o.b., let's see you put a slug in it.") The officers then seized the defendant, put him in their car and carried him to the county jail. The "scuffle or pulling" between the officers and the defendant lasted about

15 or 20 minutes. Upon arrival at the jail the defendant cursed one of the officers there, and later tried to fight another officer there.

The defendant, and one of his witnesses, testified that Chief Eidson told the defendant he was arresting him for being drunk and disorderly. The defendant testified on cross-examination that one time he went before the Town Board to try to make Jess Broome pay him a debt, and that he had talked to three members of the Board about firing Chief Eidson. The defendant further admitted on cross-examination that he had served a prison sentence for assault with a deadly weapon with intent to kill; had been convicted of speeding and reckless driving; of violating the prohibition law; of carrying a concealed weapon; and probably convicted of an affray. The defendant testified that he knew Chief Eidson was a police officer of the Town of Dallas when he was arrested.

Whether cursing a police officer or addressing scurrilous words to him constitute a breach of the peace for which an arrest may be made without a warrant depends upon the circumstances involved. Mere impudence will not suffice. Anno. 34 A.L.R. 566; *S. v. Moore,* 166 N.C. 371, 81 S.E. 693; 4 Am. Jur. Arrest sec. 31; 8 Am. Jur. Breach of Peace sec. 10.

The State's evidence shows that the defendant cursed Broome in the presence of others, while Broome was sitting in his car on a public street in the Town of Dallas, threatened immediate force to Broome's person if he got out of his car, and then and there cursed Eidson, brother of the town's Chief of Police. It is common knowledge such conduct on a public street in the presence of others provokes and incites to immediate violence. If that evidence is accepted as true by the jury, it shows with apodeictic certainty, according to the authorities cited in the majority opinion, that the defendant committed a breach of the peace in Broome's actual presence, for which offense it was Broome's duty to arrest the defendant promptly without a warrant. G. S. N. C. 15-39. A policeman has the same authority to make arrests within the town limits as is vested by law in a sheriff. G. S. N. C. 160-21.

Did Broome's delay in arresting the defendant make the arrest illegal? In my opinion, the answer is No, considering the evidence in the light most favorable to the State, as is requisite on a motion for nonsuit.

It is said in 4 Am. Jur., Arrest, sec. 67: "In making an arrest without a warrant for breach of the peace or a misdemeanor, an officer must act promptly at the time of the offense***In order to justify a delay, there should be a continued attempt on the part of the officer or person apprehending the offender to make the arrest; he cannot delay for any purpose which is foreign to the accomplishment of the arrest. If an officer sees an affray and calls other officers to his assistance, the fact that the actual arrest is made after the affray is over does not make the arrest without a warrant illegal.***The shortness of the interval does not

really determine whether the right to make the arrest without a warrant exists, but the delay merely throws light on the question whether the arrest was made as soon as the circumstances permitted.***A delay of half an hour in order to procure help in making the arrest may be reasonable, while a delay of two hours may be unreasonable, especially if the officer meanwhile is doing nothing connected with the arrest." See also 6 C. J. S., Arrest, p. 590.

In *S. v. McClure*, 166 N.C. 321, 81 S.E. 458, it is written: "***it is the right of a peace officer to arrest, without warrant, one who assaults him (citing authorities), and the officer did not lose the right in this case because the prisoner had walked off, according to the evidence of one witness, 30 or 40 feet, and to that of another, 50 or 75 yards."

It is a fair inference from the evidence that Broome knew the defendant had hard feelings against him. The defendant's admissions of his criminal record, on cross-examination, did not enlarge Broome's authority, and would not justify an illegal arrest. *Larson v. Feeney*, 196 Mich. 1, 162 N.W. 275, L.R.A. 1917D 694. However, such admissions permit the reasonable inference that Broome knew the defendant was a man of violence. If Broome had attempted immediately to arrest the defendant for the breach of peace committed in his presence, he would have been "rightfully the aggressor." *S. v. Miller*, 197 N.C. 445, 149 S.E. 590. It seems to me most probable, in the light of what happened when the arrest was made, if Broome without aid had made the arrest then and there, he would have had to injure the defendant seriously with gun or blackjack to overcome his resistance. It is also probable that under such circumstances Broome would not have succeeded in making the arrest. The State's evidence tends to show that Broome's delay was due solely to his seeking the aid of an officer, and that he did not in any way desist from that purpose before the arrest. The defendant's conduct was not that of a pacific drunk. Such conduct required summary action on Broome's part, and had not passed when the arrest was made. The offense and the arrest form part of one transaction. The State's evidence does not show how long Broome was gone in his search for aid, but it would not seem to have been over ten or fifteen or twenty minutes at the most. I think the delay was reasonable, and showed sound judgment on Broome's part.

The defendant knew that Chief Eidson and Broome were police officers of the Town of Dallas. The fact that Chief Eidson, and not Broome, told the defendant he was under arrest is immaterial. In reality Broome, with Eidson's aid, made the arrest. Though Eidson said, according to the State's evidence, he was arresting the defendant for being drunk—the defendant testified Eidson said he was arresting him for being drunk and disorderly—that does not erase the defendant's breach of the peace, if the

State's evidence is believed. *State v. Young,* 40 Wyo. 508, 281 P. 17. For an offense committed in his actual presence, an officer is not required to state the cause of the arrest, since the accused is presumed to know the cause of which he is arrested. The authority of a private person to make an arrest is more limited than that of an officer. *Graham v. State,* 143 Ga. 440, 85 S.E. 328, Anno. Cas. 1917A 595; *State v. Evans,* 161 Mo. 95, 61 S.W. 590, 84 Am. St. Rep. 669; *State v. Young, supra;* Annos. 42 L.R.A. 673; L.R.A. 1918D, p. 980; 84 Am. St. Rep. 679.

"If the official authority of an officer is known to the person who is being arrested, it is not essential that he announce it or make known his intention or purpose before actually apprehending the offender." 4 Am. Jur., Arrest, Sec. 65.

To resist an officer in the lawful discharge of his duties is made a crime at common law and in all jurisdictions by statute. 39 Am. Jur., Obstructing Justice, Sec. 8; 67 C. J. S., Obstructing Justice, Sec. 5. In Edmund Burke's words "obedience to law is what makes government."

In my opinion the trial court correctly overruled the motions for nonsuit, and I so vote.

I think there are prejudicial errors in the charge for which a new trial should be awarded.

The defendant assigns as error that the Court several times in its charge said the officers would be justified in making the arrest if in the officer's own judgment and opinion the defendant was guilty, when the Court should have charged that it was for the jury to say whether or not the officer had reasonable grounds to warrant the arrest. The defendant supports his argument by what this Court said in *S. v. McNinch,* 90 N.C. 695: "In making an arrest upon personal observation and without warrant, the officer will be excused when no offense has been perpetrated, if the circumstances are such as reasonably warrant the belief that it was (*Neal v. Joyner,* 89 N.C. 287), and the jury must judge of the reasonableness of the grounds upon which the officer acted." The majority opinion says this "pronouncement is disapproved and withdrawn, as are similar statements based on like facts in subsequent decisions of the Court. See *S. v. Jenkins,* 195 N.C. 747, 143 S.E. 538; *S. v. Campbell,* 182 N.C. 911, 110 S.E. 86; *Sigmon v. Shell,* 165 N.C. 582, 81 S.E. 739." To the disapproval of this statement of law, firmly embodied in our decisions, I do not agree.

The majority opinion states: "We think a breach of the peace is threatened within the meaning of the statute (G.S.N.C. 15-39) if the offending person's conduct under the surrounding facts and circumstances is such as reasonably justifies a belief that the perpetration of an offense amounting to a breach of the peace is imminent," citing authorities from other jurisdictions. In my opinion that is a restatement, only slightly

rephrased, of the criticised statement in *S. v. McNinch,* with this vital omission that the *McNinch case* rightfully requires "that the jury must judge of the reasonableness of the grounds upon which the officer acted."

The majority opinion also says: "to justify an arrest on the ground of necessity in order to 'suppress' a breach of the peace, the conduct of the party arrested must amount to an actual breach of the peace in the presence of the officer making the arrest"; and also states: "a person making an arrest under the authority of G.S. 15-39 must determine, at his peril, preliminary to proceeding without warrant, whether an offense arrestable under the statute is being committed," (citing in support of the last quoted excerpt *S. v. Hunter,* 106 N.C. 796, 11 S.E. 366; *S. v. McAfee,* 107 N.C. 812, 12 S.E. 435; *S. v. Rollins,* 113 N.C. 722, 18 S.E. 394; and cases from other jurisdictions.)

To say that an officer making an arrest without a warrant under the provisions of G.S.N.C. 15-39 for a breach of the peace being committed in his presence must determine at his peril before making an arrest that a breach of the peace is actually being committed, and to say that if a breach of the peace is threatened, he can act upon probable cause is to my mind an unsound distinction. Such a distinction would in one case make the officer an insurer that an offense had been committed, and in another permit him to act upon probable cause.

The excerpt quoted above from *S. v. McNinch, supra,* is sound law, is followed by us in later decisions, and is apparently supported by the majority of courts elsewhere "dealing with the exact question."

In *Peru v. U. S.,* 4 Fed. (2d) 881, it is said: "A mere suspicion is not sufficient upon which to base an arrest for a misdemeanor without a warrant. *U. S. v. Slusser* (D.C.), 270 F. 818. In *Garske v. U. S.,* 1 F. (2d) 620, 625, we said: 'the proper test, supported by the great weight of authority, by which the case should be decided is, were the circumstances presented to the officers through the testimony of their senses sufficient to justify them in a good faith belief that plaintiff in error was in their presence transporting liquor in violation of law*** ? In other words, was there probable cause for them to so believe, or were the facts sufficient to give rise merely to a suspicion thereof? If the former, the arrest was legal*** If the latter, the arrest was illegal.***" It is true that this case involved the National Prohibition Law, which expressly authorizes summary arrest when any person is found transporting liquor in violation of the act. But it is also true that G.S.N.C. 15-39 expressly authorizes summary arrest for a breach of the peace committed in the officer's presence. See also *Carroll v. U. S.,* 267 U.S. 132, 69 L. Ed. 543, 39 A.L.R. 790 (opinion by *Taft, C. J.*).

This decision is criticised in 75 Penn. Law Review 485 *et seq.* as follows: "It is difficult to see how the *Carroll case* can be taken as authority

for the proposition that an arrest can be made by a peace officer without warrant for a misdemeanor less than a breach of the peace. Yet the case has been taken to stand for that proposition by some Federal Courts and as so understood has been followed and is cited in *dicta* where the issue was as to the officer's presence." The article in the Penn. Law Review does not criticise this language in the *Carroll case:* "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of circumstances known to the seizing officer***the search and seizure are valid."

An article entitled "Arrest without Warrant" in the Wisconsin Law Review (1939) pp. 385, 387 says: "Some jurisdictions hold that the officer must actually know an offense is being committed and would hold him liable in such circumstances. The majority of jurisdictions, however, hold that it is not essential that the officer arresting without a warrant absolutely know that an offense is being committed in his presence, and rule that a *bona fide* belief on his part that it is being committed is enough."

In my opinion the fact that some of the courts were construing statutes which authorize peace officers to arrest without a warrant for all misdemeanors committed in their presence, and in *S. v. McNinch, supra,* we were interpreting a statute restricted to riots, routs, affrays or other breach of the peace makes no difference. The rationale of the decisions is identical.

I think that these words in *S. v. Hunter, supra,* (quoted in *S. v. McAfee, supra,* and referred to in *S. v. Rollins, supra*) : "but policemen of Asheville must determine, at their peril, preliminary to proceeding without warrant, whether a valid ordinance has been violated within or out of their view," is in direct conflict with what we had previously said in *S. v. McNinch, supra,* and what we have repeatedly said later in *Perry v. Hurdle,* 229 N.C. 216, 49 S.E. 2d 400; *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907; *S. v. Jenkins,* 195 N.C. 747, 143 S.E. 538; *S. v. Campbell,* 182 N.C. 911, 110 S.E. 86; *Sigmon v. Shell,* 165 N.C. 582, 81 S.E. 739; *Brewer v. Wynne,* 163 N.C. 319, 79 S.E. 629. Further it seems to be in conflict with the majority of courts elsewhere, which have passed on "the exact question." In my opinion it is not correct law, and I vote to overrule such statement in the *Hunter Case.*

Unless our peace officers in arresting without a warrant under G.S.N.C. 15-39 can act upon reasonable grounds or probable cause, as set forth in *S. v. McNinch, supra,* and subsequent decisions of this Court, a crippling blow will be inflicted upon law enforcement in this State. If officers, who in lawfully making arrests are "rightfully the aggressors," are not given reasonable protection in the discharge of their duties, society cannot

expect or receive fearless and efficient action from them. These decisions afford full protection to the rights of the individual. Men, women and children are also entitled to be summarily protected from the foul language, indecent sight and vile conduct of belligerent drunks upon the public streets and in the public places of our towns and cities, and this they cannot adequately receive if the arresting officer, before making the arrest, must determine at his peril, whether an offense arrestable under the statute is being committed.

For prejudicial errors in the charge I cast my vote for a new trial.

DENNY, J., concurring: While the majority opinion deals only with the facts as to what occurred at Brewer's Service Station, the previous conduct of the defendant at the Dallas Grill, in my opinion, did not justify Chief Eidson in arresting him without a warrant.

When all the evidence adduced in the trial below is considered, it clearly appears that bad blood existed between Broome and the defendant. The evidence most favorable to the State is Broome's testimony to the effect that he saw the defendant at the Dallas Grill; that "he was staggering around"; that the defendant cursed him and Arnold Eidson, a brother of the Chief of Police of the town of Dallas. The evidence also discloses that Arnold Eidson and officer Broome were in Broome's car at the time the purported cursing took place. There is in the record, however, no evidence tending to show that the defendant was loud and boisterous or that any person or persons other than Broome and Eidson heard anything he said. Moreover, the warrant upon which the defendant was tried, which was signed by Broome and Chief Eidson, as complainants, does not charge the defendant with disorderly conduct, but merely of appearing "in public under the influence of intoxicating liquor."

Furthermore, it is disclosed by the defendant's evidence and not denied by the State, that after the defendant left the Dallas Grill he went to Brewer's Service Station and was there "about 35 or 40 minutes" before the officers attempted to arrest him. And there is no evidence tending to show any misconduct on the part of the defendant while he was at the filling station prior to the arrival of the officers. I realize that neither the defendant's evidence nor the result of the trial on the charge of being drunk is controlling on the legal question presented for review, nevertheless it is significant that a number of the leading citizens of the town of Dallas talked with the defendant while he was at the filling station and were there when he was arrested, and these citizens testified unequivocally in the trial below that the defendant was not drunk at the time of his arrest. The jury believed them and found the defendant not guilty of the charge.

The law is clear that an officer is not authorized to arrest a citizen even for a breach of the peace not committed in his presence. *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470. The warrant upon which the defendant was convicted charged him with resisting an officer, "to-wit: A. R. Eidson (not Broome), in the performance of his duties as such officer," etc. The State offered no evidence tending to show that the defendant did anything in the presence of Chief Eidson that would justify his arrest without a warrant. Therefore, the State, in my opinion, has not shown facts that would justify the arrest of the defendant by Chief Eidson for alleged misconduct that occurred at least 35 or 40 minutes before he arrested him, and which alleged misconduct neither took place in his presence nor on the premises of the service station where he was arrested.

If it be conceded that the facts as related by Broome are true (which were vigorously denied by the defendant), in view of the personal animosity that existed between Broome and the defendant, I have considerable doubt as to whether the conversation or controversy between Broome and the defendant which occurred at the Dallas Grill, constituted a breach of the peace. G.S. 15-39; and the authorities cited on this point in the majority opinion. Hence, I think that on the record before us, the majority opinion has construed the law aright.

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

(Filed 9 July, 1954.)

1. Railroads § 16; Injunctions §3—

If a carrier has a contractual right to construct and use a turnout or junction from trackage used by it jointly with another carrier and owned by a separate corporation, and such turnout or junction is the only feasible way for it to serve industries located in the area, equity will grant injunctive relief to preserve such right as being necessary to afford an adequate and complete remedy.

2. Appeal and Error § 40d—

Facts admitted by the parties are conclusive.

3. Same—

Findings of fact by the trial court under agreement of the parties are conclusive when supported by competent evidence.

4. Railroads § 16—

Railroad companies formed a corporation to provide bridges and trackage for their joint use. At the first meeting of the board of directors of such corporation prior to the construction of the bridges and trackage, the directors passed a resolution stipulating that any alteration of the general route surveyed should not be made except with the consent of each of the railroad companies. *Held:* The resolution relates to the original construction or location of the bridges and trackage for joint use, and has no bearing upon the right of one of the incorporators to construct at a later date a breakout or junction from the joint facilities.

5. Same—Railroad companies forming corporation to provide common trackage held entitled to equal use of such trackage.

Three railroad companies formed a corporation to provide bridges and trackage for their joint use. One of the railroad companies provided one-half the capital stock with the right to appoint two directors, and each of the other companies provided one-fourth the capital stock with the right to appoint two directors each. Plaintiff railroad company succeeded to the rights of the incorporator furnishing one-half the capital stock, and defendant railroad company succeeded to the rights of the two other incorporators. The corporation thus created operated no trains, paid no dividends, and received no revenue. Its operation and maintenance cost were originally paid in proportion to the respective stockholdings, but later such costs were apportioned between plaintiff railroad company and defendant railroad company on a user or wheelage basis. Dealings between the parties over the course of years indicated that they contemplated equal rights in joint use of the facilities thus provided. *Held:* The right of each incorporator and its successor to the equal use of the joint facilities springs from the nature of the original incorporation, confirmed by usage and the course of dealings across the years, and such right may not be defeated by the control of one of them over the corporation created to furnish the joint facilities.

6. Railroads § 14; Corporations § 17a—

Railroad companies created a corporation for the purpose of providing bridges and trackage for their joint use. *Held:* The fact that such corporation has completed the bridges and trackage authorized by its charter does not render it *ultra vires* such corporation to grant to the successor of one of the incorporators authority to construct a breakout or junction from the common trackage, it being apparent that the jointly used trackage was not only for the benefit of the incorporators' lines as then constructed, but was for the development and expansion of their facilities and operations for future needs.

7. Same—

Railroads have authority under general statutes to provide turnouts, sidings, and switches to serve industrial plants along or near their main lines. G.S. 60-37 (7).

8. Same—

In the absence of express statutory or charter authorization, the power to construct a railroad includes authority to construct such spur, in-

dustrial, switching, and other auxiliary tracks as may be necessary to serve the public needs along or near the main line.

9. Railroads § 16—

The right of each of two railroads to equal use of common trackage does not mean identical use, and where one of them constructs a spur from its independent line to serve a certain area adjacent to such line, but the common trackage is used by it in its operation serving such spur, the other has the right to construct and use a spur from the common trackage when this is the sole feasible means it has to serve industries in the same area, provided such operations will not impair the use of the common trackage by the other.

10. Carriers § 7—

Railroads are *quasi*-public corporations which must operate under the public policy of the State to encourage competition among them for the public good and convenience, and one railroad company will not be allowed to preclude competition by another in a particular area by arbitrarily refusing such other reasonable use of its right of way and trackage. G.S. 60-37; G.S. 60-60.

11. Arbitration and Award § 12—

A provision in an agreement that dispute between the parties thereto as to the proper meaning and interpretation of the agreement should be referred to arbitrators upon the request of either of the parties, gives to each party the right but not the duty to invoke the arbitration provision, and when neither has done so the agreement to arbitrate will not preclude an action on the contract.

12. Same—

A supplemental agreement to a contract which provides for arbitration of a dispute between the parties as to the meaning and interpretation of the supplemental agreement will not preclude a party to the agreement from bringing action to settle a dispute as to matter embraced within the original contract but not the supplemental agreement.

13. Corporations § 10—

A corporation organized to construct and maintain common trackage for the incorporating railroads was under the control of one of the two railroads using such common facilities. Such corporation and the railroad having control thereof, through persons who acted for both, denied the other railroad company the right to construct a junction or turnout from the common trackage. *Held:* The law will not require a vain thing and, therefore, such other railroad company is not required to exhaust its rights as a stockholder before instituting action to establish its right to construct the turnout.

14. Same—

Where an incorporator's rights to use facilities held by the corporation for joint use of the incorporators depend upon the circumstances surrounding the incorporation, confirmed by usage and course of dealings between the parties over a period of years, and not upon its rights as a stockholder, *held*, such incorporator will not be required to exhaust its

remedies as a stockholder before instituting an action to establish its right to use the common facilities.

15. Pleadings § 19c—

Where the allegations of the complaint are sufficient to establish plaintiff's legal right to the relief sought upon one theory of legal liability, a demurrer *ore tenus* will not be allowed because such facts may be insufficient predicate for relief upon a different theory of legal liability.

APPEAL by defendants from *Nimocks, J.*, heard April Term, 1953, judgment 16 January, 1954, of NEW HANOVER.

Seaboard Air Line Railroad Company, hereinafter called Seaboard, is the plaintiff. Atlantic Coast Line Railroad Company, hereinafter called Coast Line, and Wilmington Bridge Company, hereinafter called Bridge Company, are the defendants.

On 25 July, 1952, Carolina Power and Light Company, hereinafter called Power Company, notified Seaboard and Coast Line, competing railroads in the Wilmington area, that it would construct in the Fall of 1952 a new power plant on the east bank of the Cape Fear River.

The estimated cost of the new power plant is between 25 and 30 million dollars. Some 378 cars of construction materials will be required. Two 100,000 kilowatt steam-electric turbines, with other necessary equipment, will be installed. Each turbine unit will burn between 15 and 20 thousand tons of coal each month, some 200,000 tons per year. For the two units, some 8,000 cars of coal will be required each year. The annual freight revenues for handling 8,000 cars of coal will be between $850,000 and $1,000,000.

The Bridge Company, a non-operating company whose stock is owned 50% by Seaboard and 50% by Coast Line, has title to certain land, rights of way, bridges and trackage. Its main trackage extends from Navassa, on the west bank of the Cape Fear, to Hilton, on the east bank of the Northeast Cape Fear, a distance of approximately two and one-half miles. Proceeding from Navassa to Hilton, or *vice versa,* necessitates crossing the bridges spanning the two rivers. The Hamlet-Wilmington line of the Seaboard and the Florence-Wilmington line of the Coast Line, in approaching Wilmington, proceed from Navassa to Hilton by way of the bridges and entire main trackage of Bridge Company.

On Bridge Company trackage between the rivers two junctions had been constructed and were in use, the Yadkin Junction and the Almont Junction. The Fayetteville-Wilmington line of Coast Line approaches Wilmington in this manner: It proceeds south between the rivers and connects with Bridge Company trackage at Yadkin Junction, runs thence over Bridge Company trackage, including that crossing the Northeast Cape Fear bridge, to Hilton, and runs thence into Wilmington. Yadkin

Junction is a Coast Line facility, used only by it. At Almont Junction, between Yadkin Junction and the Northeast Cape Fear bridge, there are *two* turnouts, serving industries located on the west bank of the Northeast Cape Fear north *and* south of the Bridge Company trackage. Almont Junction, the turnouts therefrom, the spur tracks, sidings, switches, etc., serving the several industries, are joint facilities, used by Seaboard and Coast Line.

The power plant site is at a location commonly known as "Mount Misery," on the east bank of the Cape Fear River and north of the Bridge Company trackage. The power plant site is *between* the Cape Fear River and the Fayetteville-Wilmington line of the Coast Line.

Thus, the Coast Line could construct a turnout and trackage from its Fayetteville-Wilmington line, separately owned trackage, to the power plant site; but Seaboard had no means of access to the power plant site from separately owned trackage.

Power Company wants to be served by both railroads. It proposed that Coast Line serve it by a track breaking out from its Fayetteville-Wilmington line, north of its connection with Bridge Company trackage, and that Seaboard serve it by a track breaking out from Bridge Company trackage used as part of its Hamlet-Wilmington line at a new turnout to be constructed east of the Cape Fear, *between* the Cape Fear and Yadkin Junction, the new turnout hereinafter called Power Plant Junction.

Seaboard acquired a right of way extending from Bridge Company trackage at proposed Power Plant Junction to the power plant site, and proposed that Seaboard and Coast Line build the new turnout and trackage facilities, each to bear one-half of the estimated cost of $79,007, for their joint use in providing rail service to the power plant. In addition to this Joint Proposal, Seaboard submitted an Alternative Proposal, namely, that such turnout and trackage facilities be constructed for its exclusive use in providing rail service to the power plant, Seaboard to pay the entire cost thereof.

Coast Line was not interested in either proposal. It assured the Power Company that *Coast Line* was in position to take care of *all* their requirements very satisfactorily by the turnout from its Fayetteville-Wilmington line. Having no need for the proposed turnout from Bridge Company trackage, it refused to consent to Seaboard's construction and use thereof.

Three (then) separate railroad corporations were incorporated as the Bridge Company in 1866. Each incorporator was given the right to elect two of the Bridge Company's six managing directors. Seaboard has succeeded to the position of the incorporator which owned 50% of the stock but elected only two directors. Coast Line has succeeded to the position of the two other incorporators, each of whom owned 25% of the stock and elected two directors. Thus, the stock-ownership of Bridge Company

as between Seaboard and Coast Line is evenly divided; but Coast Line elects four of the six directors. Coast Line insists that the controversy must be resolved through corporate processes of the Bridge Company. Seaboard insists that the issue is between it and Coast Line, as co-owners; and, under the provisions of Bridge Company's By-Laws, Seaboard's failure to attend meetings of stockholders or directors of Bridge Company since this controversy developed results in *no quorum* and the inability of Bridge Company to take formal corporate action. President of the Coast Line is the President of the Bridge Company. All other executive officers of the Bridge Company are Coast Line officials except the Secretary, he being an official of Seaboard. The salary of Bridge Company's president, $200.00 per year, is paid by Coast Line. The salary of Bridge Company's secretary, $200.00 per year, is paid by Seaboard. No compensation is paid to other officers of Bridge Company. Bridge Company has no employees. It conducts no operations. It has never done so. Its facilities are used by Seaboard and Coast Line. Seaboard and Coast Line pay all capital outlay in connection with Bridge Company properties, each paying one-half thereof. They pay all operating and maintenance costs, proportioned on a wheelage or user basis. The Bridge Company has no income, no bank account, etc. Its properties are treated as parts of the Seaboard and Coast Line systems.

The foregoing summary statement of Bridge Company's status illuminates the position taken by the Bridge Company, through officers who are primarily officials of the Coast Line, namely, that no turnout from the Bridge Company's trackage can be made except by mutual consent of Bridge Company's co-owners, Seaboard *and* Coast Line, and that since Coast Line has refused to give its consent the Bridge Company cannot permit such turnout. The position thus taken by Coast Line, if maintained, will operate to bar Seaboard from providing railroad service to the power plant and deprive the Power Company of the benefits of competitive railroad service.

Seaboard commenced this action 10 October, 1952. At a preliminary hearing, held 22 October, 1952, upon return of a show cause order, judgment was entered enjoining and restraining the defendants, among other things, from interfering with the construction and use by Seaboard of a track breaking out of the main track of the Bridge Company to reach and serve the power plant site, and requiring the defendants to permit the plaintiff to operate over the trackage of the Bridge Company, in order to reach, construct, use and maintain the said turnout and the trackage constructed by plaintiff to connect therewith. Defendants appealed to this Court.

After entry of the judgment of 22 October, 1952, the Seaboard commenced construction of the turnout and track. It was in service on or

before 27 January, 1953, but was not completed until the week of 6 April, 1953. The Coast Line commenced construction of the track from its Fayetteville-Wilmington line to the power plant site. It was in service 6 January, 1953, and completed in February, 1953.

The trackage so constructed by the Seaboard extends north from the new Power Plant Junction on Bridge Company trackage 6,220 feet to the power plant site. Primarily on account of the terrain, the actual cost came to $133,497.

The main track, constructed by the Coast Line from its Fayetteville-Wilmington line to the power plant site, a distance of 4,743 feet, together with two set-off tracks included in the project, cost $53,159.77.

This Court, upon defendants' appeal from the temporary restraining order of 22 October, 1952, held that "the mandatory provisions of the restraining order were improvidently entered" at *such preliminary hearing;* and the cause was remanded for trial on the issues raised by the pleadings. *R. R. v. R. R.*, 237 N.C. 88, 74 S.E. 2d 430. On this former appeal, *Devin, C. J.*, summarized the allegations of the complaint. On 27 February, 1953, Burney, J., entered an order dissolving and vacating, *in toto,* the restraining order of 22 October, 1952, and requiring the Seaboard to restore the Bridge Company's properties to their condition on 22 October, 1952. Seaboard appealed therefrom, this appeal was withdrawn, presumably to expedite trial in the court below on the merits. Meanwhile, the mandatory provisions of Judge Burney's order were suspended but Seaboard's *use* of the turnout and track was stayed.

So that, when the cause was before Nimocks, J., at April Term, 1953, the Seaboard's turnout and track had been completed and was ready for use but had not been used for the movement of freight to the power plant site. The Coast Line's turnout and track had been completed; and, as of April Term, 1953, the Coast Line had delivered over it to the power plant site 128 cars of construction materials.

At April Term, 1953, the parties waived jury trial, offered evidence; and, at the conclusion of the hearing, stipulated that Nimocks, J., was authorized to find the facts and render judgment in or out of term and in or out of the district. Judgment was entered 16 January, 1954. In addition to findings of fact embodied in the judgment, the court below made one hundred and eighty-seven specific findings of fact. Defendants interposed exceptions to forty-five of these specific findings, the ground assigned being: "For that it has no evidence to support it, or it is plainly contrary to the weight of the evidence." After setting forth eight separate findings, reflecting the court's ultimate findings of fact and conclusions of law, the judgment provides:

"It is ORDERED, ADJUDGED AND DECREED that the defendant Atlantic Coast Line Railroad Company and its agents, servants and employees,

and the defendant Wilmington Railway Bridge Company, its agents, servants and employees, and each of said defendants and the agents, servants and employees of each of said defendants be, and they hereby are enjoined and restrained

"(a) from interfering with the construction and maintenance by the plaintiff of the turnout in the main line of the defendant Wilmington Railway Bridge Company which the plaintiff has constructed at a point approximately 2,446 feet northerly and easterly (as measured along the center line of the said Bridge Company's main line) from the easterly end of the Bridge Company's bridge over the Cape Fear River, and of the track leading therefrom upon the right of way of the said Bridge Company, and of the facilities appurtenant thereto;

"(b) from interfering with the operation by the plaintiff over the trackage of the defendant Wilmington Railway Bridge Company to reach and use the turnout and track described in paragraph (a) above, subject to the same operating rules and requirements as are applicable to the operation by plaintiff to reach and use the Almont Spur; and it is further

"ORDERED, ADJUDGED AND DECREED that the defendants have suffered no damage and sustained no injury on account of or by reason of the issuance of the temporary injunction by his Honor Leo Carr, dated October 22, 1952, and that no liability has accrued on the bond filed in this cause by the plaintiff in the penal sum of $50,000 with the National Surety Corporation as surety, and that said bond be and the same is hereby cancelled, and that no further liability or responsibility may accrue on account of the same.

"Let the cost of this action be taxed by the Clerk Against the defendant Atlantic Coast Line Railroad Company."

Defendants appeal.

Additional relevant facts will be stated in the opinion.

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

M. V. Barnhill, Jr., and F. S. Spruill for defendant Atlantic Coast Line Railroad Company, appellant.

Hogue & Hogue for defendant Wilmington Railway Bridge Company, appellant.

BOBBITT, J. Is Seaboard entitled as a matter of right, upon the facts established, to use the turnout from Bridge Company trackage at Power Plant Junction to serve the power plant and so compete with Coast Line, notwithstanding Coast Line has no need or desire to make joint use thereof and notwithstanding its refusal to consent to the construction and use thereof by Seaboard? If it has such legal right, Seaboard will suffer

irreparable injury unless Coast Line is enjoined from wrongful interference with Seaboard's exercise of such legal right; for such equitable relief alone will afford Seaboard a plain, adequate and complete remedy.

Coast Line insists that Seaboard cannot use the Bridge Company's properties, in the absence of its consent, to its detriment; and the detriment contemplated is an impairment of what it contends to be its exclusive right to serve the power plant.

While the Power Company's business is the cause of the present controversy, if Coast Line's position prevails Seaboard will be precluded from serving not only the power plant but any other industrial plant now or hereafter established in the area between the Fayetteville-Wilmington line of the Coast Line and the Cape Fear River. The result would give Coast Line a monopoly of freight service in this area by effectively eliminating competition. The turnout at Power Plant Junction, breaking out from Bridge Company trackage, and the spur track therefrom to the power plant, is the only feasible way available to Seaboard to serve the power plant and other industries located in this area. This area, once a barren wasteland, shows promise now of becoming a present-day Mesopotamia.

Seaboard and Coast Line have separately owned tracks, yards and other facilities in the City of Wilmington. The separate Wilmington facilities of each connect with Bridge Company trackage at Hilton.

Coast Line *now uses* Bridge Company trackage to serve the power plant. Whether routed over its Fayetteville-Wilmington line, or over its Florence-Wilmington line, inbound cars of materials and of coal destined for the power plant are brought *via* Bridge Company trackage to Coast Line's Wilmington yards. Thereafter, such cars are moved by Coast Line switch engine over Bridge Company trackage to Yadkin Junction, thence on the Fayetteville-Wilmington line to Coast Line's turnout, thence on Coast Line's trackage to the power plant.

Under Seaboard's *present usage,* in accordance with the judgment of the court below, inbound cars of materials and coal on its Hamlet-Wilmington line, destined for the power plant, are brought *via* Bridge Company trackage to Seaboard's Wilmington yards. Thereafter, such cars are moved by Seaboard switch engine over Bridge Company trackage to Power Plant Junction, then over Seaboard's turnout and trackage to the power plant.

Coast Line has refused to accord to Seaboard reciprocal switching privileges. If such privileges were accorded, Seaboard could deliver its cars to Coast Line's yards in Wilmington and then, *for a switching charge,* Coast Line would switch Seaboard's cars to the power plant. While not the basis of decision, this attitude is illustrative of Coast Line's insistence upon monopolistic privileges within the power plant area.

While the record and exhibits are too voluminous to discuss in detail, some further statement of relevant facts is requisite to a full appreciation of the basis of decision. The facts stated herein, upon which decision is based, are either admitted or are findings of fact by the court below supported by competent evidence. In either event, they are deemed conclusively established. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

By ordinance of the Convention of 1866 "The Wilmington and Weldon Railroad Company," "The Wilmington and Manchester Railroad Company," and "The Wilmington, Charlotte and Rutherfordton Railroad Company," their associates and assigns, were "created and constituted a body politic and corporate, for the term of ninety years, by the name and style of 'The Wilmington Railway Bridge Company.'" In addition to corporate powers conferred by general statutes relating to corporations, it was expressly authorized to construct and erect bridges over the Cape Fear (then called north-western branch of the Cape Fear) and the Northeast Cape Fear rivers; to lay railroad tracks on the bridges; to connect such bridge tracks by railroad tracks running from one bridge to the other; and to extend and continue such a railroad on the east side of the Northeast Cape Fear to form a connection in Wilmington with the lines of the Wilmington and Weldon Railroad Company. By amendment, Acts of 1866-7, Chap. CXIII, the Bridge Company was authorized to connect with the lines of each of its three incorporators.

The Bridge Company, and each of the three incorporators, were authorized and empowered, "acting jointly and severally," to borrow money and to secure payment by a lease or mortgage of the Bridge Company's entire property.

Coast Line stresses a resolution adopted by the Board of Directors of the Bridge Company at its first meeting held 6 September, 1866, providing: "Any alteration of the general route surveyed by M. P. Muller and adopted by this Board shall not be made unless the consent of each of the companies constituting this Corporation shall be previously obtained thereto." It will be observed that this resolution antedated the construction of the bridges and of Bridge Company's main trackage and plainly referred to the location thereof. We are not concerned in this controversy with the construction or location of additional Bridge Company trackage but only with the use to be made of its facilities by "the companies constituting" the Bridge Company.

The original incorporators subscribed to Bridge Company's capital stock as follows: Wilmington, Charlotte and Rutherfordton, $20,000 (50%); Wilmington and Weldon, $10,000 (25%); Wilmington and Manchester, $10,000 (25%).

By agreement between them, 8 November, 1866, they agreed to pay ½, ¼ and ¼, respectively, the current expenses and maintenance costs of

the Bridge Company's properties and the interest and principal of the Bridge Company's funded indebtedness, consisting of $400,000 of bonds *endorsed* by the incorporators. The sale of these bonds provided the funds for construction of the bridges, tracks, etc.

Since the Bridge Company's sole reason for existence was to provide facilities (bridges and trackage) for use by its incorporators, their actions in becoming "the *companies constituting*" the Bridge Company, their subscriptions to its capital stock, their actions in becoming obligated for its indebtedness, and their contract *inter se* with reference to proportional payment *by the incorporators* of the capital outlay and current expense obligations of Bridge Company, show clearly that the basis for these dealings was the understanding and agreement that these incorporators, operating railroads, and their successors, had equal rights, *inter se,* as to user of Bridge Company facilities. Such user rights, predicated on contract, arose by clear implication. What is said by *Mack, Circuit Judge,* in *Great Lakes & St. L. T. Co. v. Scranton Coal Co.,* 239 F. 603, a case involving a different factual situation, is pertinent here:

"Precedent can throw but little light on the sound interpretation of such contracts, especially as to implying unexpressed obligations: each has its own individuality, its own background and surrounding circumstances. Words are only symbols, and at times, even in the most formal agreement, but elliptical expressions of the mutual understanding; the underlying mutual intent, sought by both parties to be clothed in the language used, must be ascertained; text, context, and extrinsic circumstances, including prior negotiations and relations, may be considered to enable the court to view the matter from the standpoint of the parties at the time of making the contract."

During the period of 1867 to 1 November, 1869, the Bridge Company built the bridges and constructed trackage from Navassa to Hilton. It was during this period of tripartite ownership that the Cape Fear and Yadkin Valley Railroad Company was authorized to build its Fayetteville-Wilmington line. (See Ch. 190, Laws of 1883.) The Cape Fear and Yadkin Valley approached Wilmington *between* the two rivers; and, in order to enter Wilmington, it had to connect with the Bridge Company trackage. Not being an incorporator of Bridge Company, or successor to such incorporator, the Cape Fear and Yadkin Valley had to obtain authority to connect with and to use the Bridge Company trackage. By contract of 3 December, 1889, approved by the stockholders and directors of the Bridge Company, Cape Fear and Yadkin Valley was permitted to make use of Bridge Company trackage for such purpose. Under this contract, Yadkin Junction was established. The Cape Fear and Yadkin Valley was acquired by Wilmington and Weldon (later Coast Line) in 1899. See *Manning v. R. R.,* 188 N.C. 648, 125 S.E. 555. It is note-

worthy that the present Fayetteville-Wilmington line of the Coast Line, from which its turnout to the power plant was constructed, was not in existence when Bridge Company built its bridges and main tracks.

Coast Line contends that Bridge Company built its bridges and its tracks as authorized by its charter and thus exhausted its statutory powers; hence, Coast Line contends, permission by Bridge Company to Seaboard to construct the turnout at Power Plant Junction would be *ultra vires.* The position is predicated upon the fact that Bridge Company's charter makes no mention of *any* turnout. The contention is without merit. If such be *ultra vires,* the contract permitting the construction and use by Cape Fear and Yadkin Valley (now Coast Line) of the turnout at Yadkin Junction is equally *ultra vires.* The purpose of the Bridge Company was not to limit railroad traffic but to encourage and facilitate railroad traffic for the benefit and industrial development of the Wilmington area and of the entire State. When Bridge Company was organized, the immediate need was to enable Wilmington, Charlotte and Rutherfordton and Wilmington and Manchester to cross the rivers and connect in Wilmington with Wilmington and Weldon. Bridge Company, by express charter provision, was authorized to connect with the lines of each of its three incorporators. But we cannot accept the view that such authorization extended only to lines of the incorporators previously constructed and then in use. For the plain intent was that this jointly owned facility was for the use and benefit of the incorporators in the development and expansion of *their* facilities and operations in respect to their future as well as their immediate needs. Compare, *St. Louis, K. C. & C. R. R. Co. v. W. R. R. Co.,* 217 U.S. 247, 30 Sup. Ct. 510, 54 L. Ed. 752. Railroads have authority under general statute to provide "turnouts, sidings, and switches" to serve industrial plants along or near their main lines. G.S. 60-37 (7). In the absence of express statutory or charter authorization, the power to construct a railroad includes authority to construct such spur, industrial, switching and other auxiliary tracks as may be necessary to serve the public needs along or near the main line. 44 Am. Jur. 450, Railroads, sec. 231.

Coast Line became the legal successor of Wilmington and Weldon and of Wilmington, Columbia and Augusta (originally Wilmington and Manchester) in 1900. Prior thereto, these developments are noteworthy:

1. In 1892, the Bridge Company acquired the right of way for a spur track to a fertilizer factory. The cost of this construction was met in part by the sale of four of Bridge Company's second mortgage bonds. The balance was paid "by the three companies interested as stockholders in this Company, in the usual proportion." This is the origin of the Almont Spur or Junction, a turnout from Bridge Company trackage to serve industries along the west bank of the Northeast Cape Fear.

2. In 1892, the then bonded indebtedness of $210,000 was refunded by a new issue of 50-year Consolidated Bonds, guaranteed by the (then) three proprietary companies. These were paid 1 April, 1943, at maturity, half by Seaboard and half by Coast Line.

3. In 1894, the original spur from Almont Junction was extended to serve a new industry.

After Coast Line's acquisition of the rights, franchises, property, etc., of its said two predecessors, Coast Line and Seaboard made certain contracts, the Bridge Company being a party thereto, which modified in certain particulars the contract of 8 November, 1866, between the original incorporators. Except as modified, the original contract of 8 November, 1866, was to remain in force and effect. The more important later contracts will be considered.

Under the contract of 22 May, 1909, it was provided "that the Coast Line Company and the Receivers (of Seaboard), or their successors, shall have charge and control of the operation and maintenance of the bridges and railway property of the Bridge Company alternately for a period of five years each, first period of operation to be assumed by the Coast Line Company to commence on the first day of July, 1909, and to continue for five years thence next ensuing." Previously, the proprietary roads had an arrangement whereby they alternated in respect to the actual control and operation of Bridge Company trackage.

In respect of the cost of improvements, additions and replacements made upon the bridges and railway property of the Bridge Company, and in respect of the bonded indebtedness, no change was made; for these obligations were to be paid on the basis of the respective stock holdings of the Coast Line and of Seaboard, to wit, 50% each.

However, in lieu of the original agreement that operation and maintenance costs were to be paid in proportion to respective stock holdings, an entirely different plan was adopted. It was provided that all operation and maintenance costs, including salaries, supplies, repairs, taxes, insurance, etc., were to be *apportioned* between Coast Line and Seaboard on a user or wheelage basis. A schedule was provided for determination of the proportion to be paid by each railroad. Thus, each car in freight or passenger trains moving over the whole length of the Bridge Company's track was to count as one car while each freight, passenger or yard engine making the same trip was to count as two cars. Another item in this schedule was worded as follows: "Each freight and passenger car moving over the Bridge Company's track between Hilton and Yadkin Junction and intermediate points to count . . . ½ car."

Express provisions, set forth in detail, provide for the responsibility of the Coast Line Company and the Receivers (of Seaboard), and their successors, as between themselves, for the defense and payment of all

claims, etc., "accruing for loss or injury either to person or estate, arising out of the operation of the tracks, or other property, *to be used jointly,*" etc. (Emphasis added.)

It was provided in the contract of 22 May, 1909, "that all questions and disputes between the parties hereto, *as to the proper meaning and interpretation of this supplemental agreement,* shall upon request of either the Receivers (of Seaboard) or the Coast Line Company, made to the other in writing, be referred for settlement to a board of arbitrators," to be constituted as specifically provided. (Emphasis added.) The term of the contract of 22 May, 1909, was 15 years.

A supplemental agreement was made 25 May, 1926, between Seaboard, Coast Line and Bridge Company. By its terms, the contract of 22 May, 1909, was continued in effect from year to year until canceled by either Seaboard or Coast Line by giving at least a year's notice to the other parties. The operation and maintenance of the bridges and property was assumed by the Coast Line during the continuance of this supplemental agreement. However, the Seaboard was given the right to assume such operation and maintenance at any time within five years from the date of the supplemental agreement by giving at least one year's prior written notice to the other parties hereto of its desire so to do.

The *item* listed in the contract of 22 May, 1909, as the basis for determining the wheelage or user to be charged to each party, *quoted above,* was modified so as to read as follows: "Each freight and passenger car moving over the Bridge Company's track between Hilton and Yadkin Junction and intermediate points, and each freight and passenger car moving between Navassa and Yadkin Junction and *intermediate* points will be counted as one-half car in pro rating the expense." (Emphasis added.)

This single specific modification suggests that the parties in 1926 contemplated that there would be new industrial plants located on the east bank of the Cape Fear, to be served by a junction, turnout and spur breaking from the Bridge Company trackage between Navassa and Yadkin Junction similar to the Almont Junction, turnout and spur. Only in such case, would there be intermediate points between Navassa and Yadkin Junction.

By contract of 20 April, 1931, Seaboard waived "the taking over of the operation and maintenance of said bridges and railway property on May 1, 1931, with understanding that the Seaboard Air Line Railway Company, its Receivers, or their respective successors or assigns in interest under the contract, shall have the option, by giving to the Atlantic Coast Line Railroad Company ninety (90) days written notice in advance, to take over such operation and maintenance on May 1, 1936, and/or at the end of any five-year period thereafter so long as the con-

tract continued in effect: and should said option be exercised at any time or from time to time the Seaboard Air Line Railway Company, its Receivers, or their respective successors or assigns in interest under the contract, shall operate and maintain said bridges and railway property for a period of five years, but at the expiration thereof the next succeeding five-year period of operation and maintenance shall be taken over by the Atlantic Coast Line Railroad Company." The current five-year period of operation by Coast Line extends until 1 May, 1956.

After the Coast Line acquired the franchise, properties, etc, in 1900, of Wilmington and Weldon and of Wilmington, Columbia and Augusta (originally Wilmington and Manchester), various tracks were provided for industries north and south of the Bridge Company trackage, accessible from the Almont Junction. We deem it unnecessary to review the voluminous correspondence dealing with each of these. In some instances, the Seaboard took the initiative in the construction of a spur track or siding. In other instances, the initiative was taken by the Coast Line. For limited periods, certain tracks were used by one road alone. Eventually, however, whether the title was in Bridge Company, Seaboard or Coast Line, or in Seaboard and Coast Line jointly, joint ownership and joint use was agreed upon. The same applies to trackage serving industries at Navassa. We find nothing in the correspondence that helps us in the resolution of the question here presented. Usually, the road taking the initiative was encouraging the other to participate in the venture by paying its proportionate part of the cost. But the power plant differs from previously established industries thus jointly served. It is an understatement to say that the power plant is not an ordinary industrial plant in relation to its freight service requirements.

The operation of the Bridge Company trackage, under the exclusive control of the Coast Line until 1 May, 1956, is handled in this way.

"Operation of trains, engines and cars over the Bridge Company's main line trackage is controlled by what is known as an absolute block.

"No train or engine is permitted to enter upon the Bridge Company's main line at Navassa, Yadkin Junction, Almont Junction or Hilton without first coming to a full stop, and having a member of the train crew get permission to proceed, which is known as getting the block.

"There are telephone booths at each of those points with telephones that are connected with the office of the Coast Line's train dispatcher at Wilmington.

"The member of the train crew at present telephones the Coast Line's train dispatcher to get the block.

"The train or engine then proceeds on the Bridge Company's main line. When it leaves the main line a member of the train crew telephones the

dispatcher and releases the block. In the meantime, the dispatcher permits no other movement upon the Bridge Company's main line.

"The point at which the track constructed by the Seaboard to reach and serve the power plant breaks out of the main line of the Bridge Company was designated as 'Power Junction.'

"When the Seaboard constructed the turnout at Power Junction it erected a telephone booth at that point in which it installed a telephone and connected the same with the same telephone circuits as the telephones at Navassa, Yadkin Junction, Almont Junction, and Hilton."

The train crew using Power Plant Junction contacts the Coast Line's Dispatcher to "get the block." This is incident to Coast Line's control of operations of Bridge Company facilities until 1 May, 1956. In the event Seaboard takes over control of operations then, Seaboard's Dispatcher will "give the block" to the train crew using Power Plant and other junctions. The railroad having control of operations at any particular time has the burden of providing the Dispatcher and of directing from his office the movement of trains; but, even so, the expense thereof is an operation expense of the Bridge Company to be apportioned in accordance with the wheelage formula.

The Bridge Company was organized and its rights of way acquired and its construction program completed in the years immediately following the close of the Civil War. In North Carolina, railroad financing was difficult. Three railroads were authorized to go into Wilmington. Only the Wilmington and Weldon could reach Wilmington. Its line into Wilmington was east of the Northeast Cape Fear. No connection could be made between it and the two lines approaching from the west and terminating on the west bank of the Cape Fear. Bridges spanning two rivers were required. The Bridge Company was the means by which the three railroad companies at their joint expense could expand and improve their facilities. In effect, the Bridge Company bridges and tracks became a part of the line of each of the railroads entering Wilmington from the west. Cross over the bridges, says the Coast Line, but there is nothing denominated in the bond that gives you the right to break out from this jointly owned trackage to serve industrial plants between the rivers. We have acquired the Cape Fear and Yadkin Valley, which has a line between the rivers; and its contract with Bridge Company back in 1889 gave the Cape Fear and Yadkin Valley the right to connect with Bridge Company trackage. All parties consented to that. That's our Fayetteville-Wilmington line. Thus, we can use the Bridge Company facilities in serving the power plant. But just because the Bridge Company, through its stockholders gave consent to that arrangement, doesn't mean that we have to give consent that Seaboard break out from Bridge Company trackage at Power Plant Junction and thus use Bridge Company

facilities in serving the power plant, to our detriment, *i.e.*, so that we will be deprived of a monopoly of the power plant business.

The position is lacking in realism. It ignores the fact that the manifest purpose for the organization of Bridge Company was to enable the incorporators thereof to expand their railroad facilities in order that public requirements for better service might be met. The incorporators were operating railroad companies. Bridge Company was not an operating railroad company. Stock ownership alone does not give Seaboard its right of user of Bridge Company bridges and trackage. The key factor is that the underlying and sole reason for the creation and existence of Bridge Company was to afford joint and equal use of the facilities to its incorporators, to wit, "the companies constituting" the Bridge Company, and their successors, as a constituent part of their operating railroad systems. Therefore, the right of each incorporator, and of its successors, to the use of such joint facilities and trackage is derived from the nature and circumstances of the original incorporation of Bridge Company and implemented by the contract of 8 November, 1866, not from stock ownership or from contract with the Bridge Company as a separate corporate entity. Compare, *Chicago, M. & St. P. R. Co. v. Des Moines U. R. Co.*, 254 U.S. 196, 41 S. Ct. 81, 65 L. Ed. 219.

The Bridge Company was not organized to engage in business. Its original incorporators, and their respective successors, were not stockholders in the ordinary sense. They expected and received no dividends. What the original incorporators did acquire, to which Seaboard and Coast Line have succeeded, was the right of each to use the Bridge Company facilities; and no corporate action, by stockholders or directors, could deprive any incorporator, or its successor, from the use of the Bridge Company facilities, subject to a similar right in the other(s), in the operation of its railroad system. Thus, the Bridge Company facilities became an integral part of each system; and the right of each incorporator, and its successor, to equal rights in the use thereof springs from the nature of the original incorporation, confirmed by usage and course of dealings across the years. The owner-railroads built and maintained the bridges and the trackage for their use, as part of their respective railroad systems; and the Bridge Company has been and is the corporate agency or device through which they share both the capital outlay and the operational costs. This view is in accord with the following, quoted from the Court's statement of facts in *Wilmington Railway Bridge Co. v. Comrs. of New Hanover County*, 72 N.C. 15 (16): "The plaintiff corporation owns no rolling stock or property of any kind other than its franchise, in connection with the line of road and the bridges before referred to, *which are in fact part of the lines of the two companies mentioned*, the exclusive use thereof being vested in said companies in perpetuity, by a formal

covenant and agreement entered into some years ago between the said railroad companies and the plaintiff." (Emphasis added.) Also, in 1922, the U. S. General Director of Railroads was notified, pursuant to resolution of the stockholders of Bridge Company, that the Bridge Company's property was owned and operated "as a joint facility by and for the benefit of its owner lines," Coast Line and Seaboard.

We cannot regard Seaboard and Coast Line as stockholders in the ordinary sense. They are co-owners of a facility which is in existence for their joint use. While in *Chicago, M. & St. P. R. Co. v. Minneapolis C. & C. Asso.*, 247 U.S. 490, 38 Sup. Ct. 553, 62 L. Ed. 1229, the co-owners of a joint facility were acting in concert to use such facility as a means of exacting higher charges, statements from the opinion are applicable here. Ordinary rules relating to stock ownership have no application, says *Mr. Justice Clarke,* ". . . where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. . . . In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

We do not suggest that Bridge Company is without significance as a separate corporate entity. Through corporate meetings, formal actions relating mainly to financing, taxes, execution of mortgages, deeds, etc., have been taken. Such actions, involving dealings with third parties, are binding upon the corporation and its stockholders. But controversies between its co-owners, which draw into focus their rights, *inter se,* as to user of Bridge Company facilities may not *be resolved* through ordinary corporate procedures. Such differences as have arisen in the past were resolved by *negotiations resulting in agreement.* After agreement was reached, the stockholders and directors of Bridge Company authorized such action as was appropriate to implement the *previously reached agreement* of the co-owners. Unfortunately, the co-owners did not reach agreement on the subject of the present controversy. Consequently, the Court must adjudicate their respective rights, *inter se.*

There is persuasive support for the position that each of the owner-railroads is entitled to the use of Bridge Company facilities as a part of its railroad system by the construction and use of a new turnout from Bridge Company trackage, such as that at Power Plant Junction, subject to limitations such as: first, when reasonably necessary to do so to provide service to the public, including industrial plants; second, when it accords the other the privilege, upon payment of one-half the cost, to share equally

in the use thereof; and third, when it does not substantially impair the usage thereof by the other railroad. If this test were applied, Seaboard, upon findings of fact supported by competent evidence, would be clearly entitled to construct and use Power Plant Junction as its turnout from Bridge Company trackage to the power plant.

But adoption of the position stated above is unnecessary upon the record before us. In any event, neither the Seaboard nor the Coast Line has any right superior to the other to use the Bridge Company's facilities. Each has equal right to use such facilities for the same purposes and in substantially the same manner as the other. Coast Line in fact now uses such facilities to serve the power plant. True, its lines are so located that it can use the Yadkin Junction turnout, not available to the Seaboard. But this does not mean that Seaboard, because of the location of its separately owned lines, is precluded from making a use of Bridge Company trackage similar to that now made by Coast Line. Equal user is not restricted to identical user. The new junction and turnout (Power Plant Junction) afford Seaboard a right of user of Bridge Company facilities similar in character, purpose and operation to that made by Coast Line.

As stated above, the inbound cars of both lines move over Bridge Company trackage into their respective Wilmington yards and thereafter move again by switch engines to the respective junctions and thence to the power plant. To accord Coast Line the sole right to use the Bridge Company trackage in such manner and for such purpose would be a denial of a corresponding right to Seaboard to use Bridge Company trackage in violation of what was contemplated when Bridge Company was incorporated, namely, equal rights in the use of a joint facility intended for use and since used as a constituent part of the railroad system of each incorporator and its successor.

Operation of Seaboard's Power Plant Junction will not impair the usage of Bridge Company trackage by the Coast Line. Seaboard's Power Plant Junction will function in like manner with Coast Line's Yadkin Junction and the joint Almont Junction. The block signal system will operate in like manner. Computation of Seaboard's proportion of operation and maintenance costs will be made in accordance with contract of 22 May, 1909, as modified by the contract of 25 May, 1926. Power Plant Junction is an intermediate point between Navassa and Yadkin Junction. Provisions as to liabilities, *inter se,* as set forth in the contract of 22 May, 1909, with reference to injuries and damages caused by operations, are appropriate. The same number of cars will break into and break out of Bridge Company trackage. The only difference is that some will consist of freight handled by Seaboard and some (but not all) by Coast Line. Too, this construction of the legal rights of Seaboard and of Coast Line, *inter se,* is in accord with (1) the status of Bridge Company both orig-

inally and now as a cooperative venture for the equal benefit of the owner-railroads, and with (2) the public interest, *i.e.*, competition rather than monopoly.

Railroads are *quasi*-public corporations, created to serve primarily the public good and convenience. As such they exercise public franchise rights, including that of eminent domain. G.S. 40-2. And, as stated by *Clark, C. J.*, in *R. R. v. R. R.*, 161 N.C. 531, 78 S.E. 68: "As a matter of public policy, the State encourages competition among common carriers so that the public may have resulting benefits." See G.S. 60-60. Nor will one railroad corporation be permitted to thwart the efforts of another to render railroad service on a competitive basis by refusal to allow it reasonable use of its own right of way and trackage. Under the statute now codified as G.S. 60-37, one railroad corporation was adjudged entitled to condemn a right to use another railroad corporation's right of way for the purpose of operating a parallel track thereon from which competitive service could be provided, there being no substantial interference with the operating facilities of the other railroad. *R. R. v. R. R.*, 83 N.C. 489. In *Corporation Com. v. R. R.* (Industrial Siding Case), 140 N.C. 239, 52 S.E. 941, under the statute now codified as G.S. 62-45, it was held that the Corporation Commission had authority to require the construction of a sidetrack to serve an industry. And in *R. R. v. R. R., supra,* under the statute now codified as G.S. 60-37, one railroad was held entitled to condemn a right to cross the right of way and track of another railroad in order that it might reach industrial plants and provide competitive railroad services. See *R. R. v. R. R.*, on rehearing, 165 N.C. 425, 81 S.E. 617.

Where practicable, and the prospect of profitable operation exists, the public interest requires that industrial plants be provided with competitive service. It is quite clear that the Power Plant contemplated and now desires such competitive service.

Assume no railroad line approached Wilmington between the rivers. Undoubtedly, the Utilities Commission would have authority to require both Seaboard *and* Coast Line to construct sidetracks to industries established between the rivers where there was a prospect of profitable operations, to the end that competitive service be provided. True, the statute limits the distance to 500 feet when such construction *is required* by order of the Utilities Commission. This is unimportant in this connection. The right to break out from the Bridge Company trackage to construct industrial spurs, sidetracks, etc., is here involved. Would the authority of the Utilities Commission be limited by the circumstance that the Coast Line can reach the power plant without breaking out from the Bridge Company trackage? On the contrary, in the public interest, it would be its duty to provide competitive service, assuming the prospect of profit-

able operation. Too, it would seem that, in the absence of a present legal right to use the Power Plant Junction as authorized by the judgment below, Seaboard would have the right to condemn such right of user in a properly constituted condemnation proceeding. Be that as it may, we are not dealing presently either with an order of the Utilities Commission or with a judgment in a condemnation proceeding; and under our decision action by the Utilities Commission or by condemnation proceeding is unnecessary.

Coast Line insists that Seaboard's sole remedy is to invoke the arbitration provisions of the contract of 22 May, 1909. There are at least two answers to this position. In the first place, each party thereto has the right, not the duty, to invoke the arbitration provisions; and neither has done so. In the second place, the arbitration clause concerns "questions and disputes as to the proper meaning and interpretation of this supplemental agreement." Since the subject matter of this controversy is not comprehended by the terms of the contract of 22 May, 1909, the arbitration provisions are inapplicable.

The Bridge Company demurred *ore tenus* in this Court on the ground that the complaint fails to allege facts sufficient to constitute a cause of action. The ground assigned is that Seaboard, being a stockholder of Bridge Company, could not sue Bridge Company without first exhausting its rights as stockholder within the corporation. The position is untenable. The law will not require a vain thing. Bridge Company and Coast Line, through persons who acted for both, denied Seaboard's right to construct Power Plant Junction, turnout and trackage.

The Bridge Company has no independent status or interest. Whatever the outcome of this controversy between its co-owners, the Bridge Company stands neither to gain nor to lose. It receives no revenues, pays no bills. Again, we advert to the fact that the co-owners pay no charge to the Bridge Company for the use of its facilities. As to operational and maintenance costs they pay *its* bills in the *proportion* determined on the wheelage or user basis and each pays 50% of its capital outlay costs. It holds legal title to properties. But in essence it is simply used by Seaboard and Coast Line, its co-owners, as a device to work out details of the usage of the jointly owned facilities. It is an instrumentality of its co-owners. Their rights, *inter se,* in respect of the use of the Bridge Company facilities, do not depend upon action of stockholders and directors within the corporate form. As heretofore observed, they spring from the nature of the original incorporation, confirmed by usage and course of dealings across the years. Seaboard's position is predicated upon legal rights vested in it as successor to an incorporator. Its position is quite different from a stockholder whose right springs solely from stock ownership.

A further contention of Coast Line, stressed upon the oral argument, has not been overlooked. Coast Line contends that the complaint is predicated upon allegations that Coast Line, during the current period when it has operational control of Bridge Company facilities, is an active trustee in respect to properties the title to which is held by Bridge Company as passive trustee, and that Coast Line's refusal to permit Seaboard to use the Power Plant Junction is arbitrary and in breach of trust. True, the complaint contains such allegations. But the facts alleged plainly disclose that Seaboard's case is grounded upon its legal right to use Bridge Company facilities in connection with Power Plant Junction. In fact, this is the basis assigned for the alleged trust. So, stripped of legal conclusions relating to a trust theory, the substance of the complaint is that Coast Line's officials and employees, presently in control of the operation of Bridge Company properties, wrongfully interfered with the exercise by Seaboard of its legal right to use Power Plant Junction as its means of serving the power plant.

No decision has been called to our attention or found in our own research that is sufficiently analogous on the facts to constitute a precedent of substantial help. Apparently, this case is *sui generis.* However, we have examined each of the authorities cited. In so doing, our experience was similar to that expressed by Samuel Johnson in the preface to his famed dictionary:

"I saw that one inquiry only gave occasion to another, that book referred to book, that to search was not always to find, and to find was not always to be informed; and that thus to pursue perfection was, like the first inhabitants of Arcadia, to chase the sun, which, when they had reached the hill where he seemed to rest, was still beheld at the same distance from them."

While discussion of each assignment of error would be unduly tedious, all assignments of error have been considered; and there is none of merit sufficient to warrant another hearing or a different result.

For the reasons stated, we conclude that, upon findings of fact supported by sufficient competent evidence, the judgment is correct in law and should be

Affirmed.

STATE v. CARL PHILLIPS AND LILLIE PHILLIPS.

(Filed 9 July, 1954.)

1. **False Pretense § 1—**

While the offense of false pretense ordinarily may not be predicated alone upon defendant's promise to do something, it may be based upon a false factual representation effective only by reason of being coupled with a false promise.

2. False Pretense § 2—

Evidence tending to show that defendant falsely represented to a certain person that a criminal prosecution against him was imminent, and that defendant falsely promised such person that defendant could prevent the criminal prosecution and would do so if such person furnished him a sum to be paid the public official concerned, plus another sum as a fee to defendant for his services, and that in reliance upon the false representation and false assurance such other person paid defendant these sums, which defendant converted to his own use, is sufficient to be submitted to the jury on a charge of obtaining money by false pretenses.

3. Conspiracy § 6—

A conspiracy is an agreement of two or more persons to do an unlawful act or to do a lawful act in an unlawful manner, and such agreement must be proven directly or by evidence of facts from which the agreement may be legally inferred and not such as raise a mere suspicion.

4. Same—

The association between a husband and wife, living in the marital state, at the time the husband obtained money by false pretense from a third person, has no probative force in establishing a conspiracy between them to commit the offense. As to whether one spouse may be guilty of conspiracy with the other spouse, *quaere?*

5. Same—

The mere subsequent possession by a wife of a portion of the money obtained by her husband from a third person by false pretense has no probative force in establishing a prior agreement between the husband and wife to commit the crime, or even to charge her with guilty knowledge of how the proceeds were obtained.

6. Same—A person cannot retroactively conspire to commit a previously consummated crime.

The State's evidence tended to show that defendant husband obtained money by false pretense from a third person under the guise of preventing a purported criminal prosecution of such third person by the Board of Public Welfare for aiding and obtaining unwarranted old age assistance benefits. *Held:* A statement by defendant wife to such third person, after the alleged false pretense had been practiced, that if such third person deposited his money outside the city, the Board wouldn't know he had it, does not tend to show that the wife conspired with the husband to commit the offense of false pretense.

7. Solicitors § 3—

Prosecuting attorneys owe the duty to the State, the accused whom they prosecute, and the cause of justice they serve, to observe the rules of practice created by law to give those tried for crime the safeguards of a fair trial.

8. Criminal Law § 42c—

In the cross-examination of the male defendant, the solicitor asked him numerous questions which assumed to be facts the unproved insinuations of defendant's guilt of a number of collateral offenses. *Held:* The cross-examination was improper.

9. Same—

If a prosecuting attorney wishes to vouch for the existence or the truth of a fact in the trial of a cause, he should retire from the case, have another appointed to prosecute, take the stand as any other witness, give competent evidence, and submit himself to cross-examination.

10. Same—

Questions asked the male defendant on cross-examination to impeach him as to collateral matters which are so framed as to assert in advance the untruth of defendant's denials, *held* to violate the rule that the State is bound by the answer of the accused to such questions.

11. Same—

It is improper for the solicitor to ask defendant on cross-examination questions insinuating that defendant's brother had been convicted of an offense.

12. Same—

The solicitor on cross-examination of defense witnesses and the *feme* defendant asked numerous questions assuming to be facts the unproved insinuations of the male defendant's guilt of a number of collateral offenses, together with insinuations that the male defendant had aided his wife in despoiling a helpless orphan of her inheritance and that the male defendant's brother had been guilty of a collateral offense. *Held:* The cross-examination was improper.

13. Same—

In cross-examining defendant and the witnesses for the defense, the solicitor may not, by insinuating questions or by other means, place before the jury incompetent and prejudicial matters not legally admissible in evidence.

14. Criminal Law § 40d—

The State may not show by cross-examination of defense witnesses specific acts of misconduct of accused to show the bad character of the accused.

15. Criminal Law § 42c—

While the solicitor may ask defense witnesses questions tending to discredit their testimony, no matter how disparaging the questions may be, he may not, on cross-examination of defense witnesses, needlessly badger or humiliate them by impertinent or insulting questions which he knows, or should know, cannot possibly elicit any competent or relevant testimony, such as that the witness' brother-in-law was a chronic thief, etc.

16. Criminal Law § 81c (7)—

Where the prosecuting attorney persists in asking on cross-examination of defendant and defense witnesses improper questions assuming defendant's guilt of a number of collateral offenses and of wrongdoing, all of which questions are objected to by defendant, *held,* such persistent interrogations by the solicitor in violation of the rules governing cross-examination are prejudicial and entitle defendant to a new trial notwithstanding the court's action in sustaining objection to some of the questions without comment, and its later instruction that the questions of the solicitor did not constitute evidence.

APPEAL by defendants from *Patton, Special Judge,* and a jury, at the November Term, 1953, of the Superior Court of GASTON County.

Criminal prosecution upon indictments charging both a conspiracy to obtain money by false pretenses and actually obtaining money by false pretenses.

Carl Phillips and Lillie Phillips are husband and wife, and live together in the marital state at Gastonia. They were indicted jointly for conspiring to obtain money from Ed Lynn by false pretenses. Carl Phillips was indicted singly for actually obtaining money from Ed Lynn by false pretenses. The two indictments were consolidated by consent for the purpose of trial. Both sides offered evidence at the trial.

The State's evidence was sufficient to make out this case against Carl Phillips:

Carl Phillips ascertained that Lynn had aided his deceased wife in drawing substantial old age assistance benefits through the agency of the Gaston County Board of Public Welfare while he had about $9,500.00 on deposit with financial institutions at Gastonia, and that Lynn was fearful of criminal prosecution at the instance of the Superintendent of Public Welfare of Gaston County on that account. Carl Phillips thereupon falsely represented to Lynn that the Superintendent of Public Welfare of Gaston County had informed him that he had already reached the decision to have the feared criminal prosecution brought against Lynn at once. Carl Phillips combined his false representation of fact to Lynn with the false assurance and the false promise that he could prevent the threatened criminal prosecution by paying the Superintendent of Public Welfare of Gaston County $5,000.00, and that he would do so if Lynn would furnish him such sum for that purpose and give him the additional sum of $300.00 as a fee for the service. Carl Phillips made the false representation, the false assurance, and the false promise with intent to deceive Lynn and defraud him of his money. Lynn relied upon the false representation, the false assurance, and the false promise and was induced by them to deliver $5,300.00 to Carl Phillips, who proceeded to convert the same to his own use.

The State did not introduce any direct proof of any conspiracy between the defendants to commit the offense charged. It undertook to establish its allegations on this phase of the litigation by offering evidence sufficient to show these circumstances: (1) That Lillie Phillips associated with her husband about the time named in the indictments; (2) that Lillie Phillips told Lynn that if he would deposit his money in a bank outside Gastonia the Gaston County Board of Public Welfare "wouldn't know" he had it; and (3) that about four hours after her husband's alleged crime, Lillie Phillips had some undefined part of the money obtained by him from Lynn in her possession at their home. This evidence did not directly

disclose that Lillie Phillips had any knowledge of her husband's alleged offense, or that he had obtained the money in question from Lynn. It did indicate, however, that her statement to Lynn occurred after her husband had made his representation, assurance, and promise to Lynn, and had obtained $5,000.00 from him for ostensible payment to the Superintendent of Public Welfare of Gaston County; that her statement to Lynn was made during a conversation between her and Lynn in the absence of her husband; and that her statement to Lynn was prompted by something said to her by Lynn during such conversation.

The testimony offered by the defendants at the trial tended to exonerate them from all wrongdoing.

The jury found the defendants guilty as charged in the indictments; the presiding judge sentenced them to imprisonment as felons; and the defendants appealed, assigning errors. The assignments of error assert that each defendant is entitled to a reversal for insufficiency of proof, or in the alternative to a new trial for improper conduct on the part of the solicitor.

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

Verne E. Shive and Max L. Childers for the defendants.

BARNHILL, C. J. The following opinion was prepared and filed by ERVIN, J., prior to his resignation as a member of this Court. We adopt it with due credit to *Justice Ervin* for its composition and for the research required in its preparation.

The male defendant is not entitled to a reversal for insufficiency of proof upon the indictment charging him with actually obtaining money from Lynn by false pretenses. To be sure, the State's evidence shows that Lynn relied in part on the male defendant's promise to do something, and the law declares that a promise to do something is ordinarily not sufficient to serve as a pretense, no matter how fraudulent it may be. *S. v. Knott,* 124 N.C. 814, 32 S.E. 798. The State's evidence is ample to show, however, that the male defendant's promise was combined with his false factual representation concerning the Superintendent's supposed statement to him, and that Lynn relied in part on the false factual representation in parting with his money. As a consequence, this phase of the case falls within the purview of this rule: "While . . . the crime is not committed by a mere false promise, a false statement of fact may become effective only by being coupled with a false promise. Where this is the case, the mere fact that the false representation of fact is accompanied by a promise does not render it innocuous or relieve it of its criminal character; the statement of fact and the promise may be considered as together constituting the false pretense and a conviction may follow, or, if

the statement of fact and the promise can be separated, and prosecutor relied in part on the former, the promise may be disregarded and accused may be convicted on the statement of fact, notwithstanding he may also have relied in part on the promise and would not have yielded to the false statement alone." 35 C.J.S., False Pretenses, section 9.

The case on appeal compels us to adjudge that the defendants are entitled to a reversal for insufficiency of proof upon the indictment charging them with conspiring to obtain money from Lynn by false pretenses. For this reason, we omit discussion of the question whether the statutes liberating the wife from her merged identity with the husband have abrogated the common law rule that one spouse cannot be guilty of conspiracy with the other spouse alone. *People v. Miller,* 82 Cal. 107, 22 P. 934; *Dalton v. People,* 68 Colo. 44, 189 P. 37; *Smith v. State,* 48 Tex. Cr. 233, 89 S.W. 817; 11 Am. Jur., Conspiracy, section 7; 15 C.J.S., Conspiracy, section 36.

The Supreme Court of Indiana made these highly relevant observations in *Johnson v. State,* 208 Ind. 89, 194 N.E. 619: "There must be an agreement or joint assent of the minds of two or more before there can be a conspiracy. Such agreement or joint assent of the minds need not be proved by direct evidence. . . . There must be, however, an agreement, and there must be such evidence to prove the agreement directly or such a state of facts that an agreement may be legally inferred. Conspiracies cannot be established by a mere suspicion, nor does evidence of mere relationship between the parties or association show a conspiracy." See, also, in this connection: 15 C.J.S., Conspiracy, section 93.

The State did not produce a scintilla of direct evidence that Lillie Phillips entered into an agreement with her husband to obtain money from Lynn by false pretenses. The circumstantial evidence invoked by the State on this aspect of the case may beget suspicion in imaginative minds. It does no more. The association between the defendants about the time named in the indictments was normal for persons living in the marital state. We cannot assign such association any probative value without subscribing to the doctrine that husband and wife must dwell in a state of separation to escape legal accountability for each other's transgressions. This we are unwilling to do. The mere subsequent possession by a wife of a portion of the proceeds of her husband's crime does not suffice to establish a prior agreement between them to commit the crime. Indeed, such circumstance is insufficient in law and logic even to charge the wife with guilty knowledge of how the proceeds were obtained. *S. v. Larkin,* 229 N.C. 126, 47 S.E. 2d 697; *S. v. Yow,* 227 N.C. 585, 42 S.E. 2d 661; *S. v. Oxendine,* 223 N.C. 659, 27 S.E. 2d 814; *S. v. Lowe,* 204 N.C. 572, 169 S.E. 180. The State's evidence indicated that the *feme* defendant made her statement to Lynn and acquired her possession of a

portion of the money in question after the male defendant had practiced the alleged pretenses upon Lynn. In the very nature of things, persons cannot retroactively conspire to commit a previously consummated crime. *Morris v. State,* 146 Ala. 66, 41 So. 274.

This brings us to the question whether the male defendant is entitled to a new trial upon the indictment charging him with actually obtaining money from Lynn by false pretenses on account of improper conduct on the part of the solicitor.

Prosecuting attorneys are in a very peculiar sense servants of the law. *S. v. Gorman,* 219 Minn. 162, 17 N.W. 2d 42. They owe the duty to the State which they represent, the accused whom they prosecute, and the cause of justice which they serve to observe the rules of practice created by law to give those tried for crime the safeguards of a fair trial. *S. v. Eagle,* 233 N.C. 218, 63 S.E. 2d 170; *United States ex rel. Darcy v. Handy,* 203 F. 2d 407; *State v. Grillo,* 11 N.J. 173, 93 A. 2d 328; *S. v. Bealin,* 201 S.C. 490, 23 S.E. 2d 746; *State v. Murphy,* 92 Utah 382, 68 P. 2d 188; *Wilson v. Commonwealth,* 157 Va. 962, 162 S.E. 15; *State v. Seckman,* 124 W. Va. 740, 22 S.E. 2d 374.

Counsel for the defense assert that the solicitor purposely and persistently violated his duty in this respect in his cross-examination of the male defendant and his witnesses, and in that way nullified the male defendant's right to a fair trial.

The solicitor put these questions to the defendant Carl Phillips over his objection on cross-examination: (1) "I'll ask you if you didn't break in the post office at Lowell and procure Robert Phillips to go and tell the Federal authorities that he saw Leon Phillips break into the Post Office and to get you out of trouble?" (2) "What did you do with the police radio off of that police car or jeep down at Lowell?" (3) "What other property of the Town of Lowell did you carry off?" (4) "You were willing to pay a good bit to get out there and take money off the people?" (5) "You remember the colored man down in Lowell. You found a shotgun in his house and took $125.00 off of him?" (6) "When you were police chief down in the Town of Lowell, did you take a boy's car away from him that you caught speeding and refuse to turn it over to him? You remember taking that boy's car away from him?" (7) "Well, now, I'll ask you if you don't know that on July 15, 1950, if you didn't take from a boy by the name of Jack Shields the sum of $125.00 and take the money and tell him you were going to give it to the mayor down there to pay his fine when you had arrested him for driving under the influence?" (8) "And if you didn't keep that money and failed to turn it in?" (9) "I'll ask you if you don't remember telling Jack Shields, when he came to see about the matter, after he had paid you the $125.00, that it wouldn't be necessary for him to see the mayor, that you had already talked with

him and the mayor said it was all right to reduce the charge to reckless driving and driving with improper brakes and he could pay you the sum of $125.00, that you told him he didn't have to come to court, and if you don't know you didn't turn the money into the mayor?" (10) "How many people do you reckon you have cheated out of their money in your lifetime?" (11) "This is not the first old man you have beaten out of money, is it?" (12) "I say you made it a practice for several years of getting folks and taking them over there and taking money away from them?" (13) "Do you deny you cheated an old woman in Stanley out of $3,000.00?" (14) "How much money did you take off of Sam Gillespie?" (15) "I'll ask you if you didn't enter a suit against a warehouse company you were working for and allege you had hurt yourself lifting a sack or dropping a sack when you knew you hadn't?" (16) "Phillips, how many folks do you owe money around here?" (17) "I'll ask you if you don't know this brother you got the money from has been convicted in Federal Court with you for conspiracy, and if he hasn't been convicted in this court for being a fence for stolen property?"

The presiding judge sustained the objections to the tenth, sixteenth, and the seventeenth questions, and the male defendant denied all the insinuations incorporated in the other fourteen questions. The first nine questions were concerned with the period of the male defendant's service as a policeman, and the last question related to the male defendant's brother Mack Phillips, who had no connection with the case beyond the bare fact that he allegedly supplied the male defendant with money to pay the premium on his appearance bond.

When he phrased the seventeen questions under scrutiny and propounded them to the male defendant, the solicitor assumed the unproved insinuations in them to be facts, and in that way assured the jury upon his official authority that the male defendant had burglarized a Post Office, suborned the commission of perjury, committed thefts, asked and received bribes, practiced extortion, and embezzled public moneys while serving as a policeman; that the male defendant had cheated and defrauded many persons of their moneys; that the male defendant had asserted a spurious claim in a lawsuit; that the male defendant was a dishonest man who refused to pay his just debts; and that the male defendant's brother had been convicted of receiving stolen goods with knowledge of their stolen character. This interpretation of the questions harmonizes with that put upon them by the solicitor himself during the progress of the trial. While the solicitor was asking the male defendant the questions pertaining to his service as a policeman at Lowell, counsel for the defense appealed to the presiding judge to protect their client against the cross-examination on the ground that it was tantamount to the solicitor's testifying. The

solicitor made this instant retort in the presence of the jury: "I'm a pretty good witness. You know I lived at Lowell."

It thus appears that in cross-examining the male defendant, the solicitor repeatedly violated the rule of law which forbids a prosecuting attorney to inject into the trial of a cause to the prejudice of the accused by argument or by insinuating questions supposed facts of which there is no evidence. *S. v. Russell,* 233 N.C. 487, 64 S.E. 2d 579; *S. v. Thompson,* 217 N.C. 698, 9 S.E. 2d 375; *S. v. Phifer,* 197 N.C. 729, 150 S.E. 353; *S. v. Green,* 197 N.C. 624, 150 S.E. 18; *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720; *S. v. Evans,* 183 N.C. 758, 111 S.E. 345; *S. v. Corpening,* 157 N.C. 621, 73 S.E. 214, 38 L.R.A. (N.S.) 1130; *S. v. Goode,* 132 N.C. 982, 43 S.E. 502; *S. v. Tuten,* 131 N.C. 701, 42 S.E. 443; *Hash v. State,* 48 Ariz. 43, 59 P. 2d 305; *People v. Anthony,* 185 Cal. 152, 196 P. 47; *People v. Letterich,* 413 Ill. 172, 108 N.E. 2d 488; *People v. Tilley,* 406 Ill. 398, 94 N.E. 2d 328; *Albertson v. Commonwealth,* 312 Ky. 68, 226 S.W. 2d 523; *Commonwealth v. Broeckey,* 364 Pa. 368, 72 A. 2d 134; *Commonwealth v. Gibson,* 275 Pa. 338, 119 A. 403; *Robbins v. State,* 100 Tex. Cr. 592, 272 S.W. 175; *Ballard v. State,* 97 Tex. Cr. 455, 262 S.W. 85; *Barnard v. Commonwealth,* 134 Va. 613, 114 S.E. 563. If a prosecuting attorney wishes to vouch for the existence or the truth of a fact in the trial of a cause, he should retire from the case, have another appointed to prosecute, take the stand as any other witness, give competent evidence, and submit himself to cross-examination. *Macon v. Commonwealth,* 187 Va. 363, 46 S.E. 2d 396; 23 C.J.S., Criminal Law, section 1087.

The seventeen questions under present review are virtually identical in manner of phrasing with those put to the accused by the commonwealth's attorney in *Thurpin v. Commonwealth,* 147 Va. 709, 137 S.E. 528, where the Supreme Court of Appeals of Virginia made these trenchant observations: "The form of these questions was highly improper. They were more in the nature of testimony and an argument by the commonwealth's attorney before the taking of the testimony had been completed and contained statements of facts not supported by the evidence. The court erred in not requiring the attorney for the commonwealth to put his questions in the usual form, interrogating the witness as to each matter concerning which he wished him to testify."

The questions were ostensibly designed in large degree to elicit from the male defendant impeaching matters of a collateral character. They were so framed, however, as to assert in advance the untruth of his denials. In consequence, they deprived him of the benefit of the evidential rule that the State is bound by the answers of the accused or any other witness for the defense when it cross-examines him as to collateral matters for the purpose of impeachment. *S. v. Broom,* 222 N.C. 324, 22 S.E. 2d 926; *S. v. Jordan,* 207 N.C. 460, 177 S.E. 333; *S. v. Sauls,* 199 N.C. 193,

154 S.E. 28. The question insinuating that the male defendant's brother had been convicted of receiving stolen goods with knowledge of their stolen character was not proper for any purpose. The law is not so callous to justice as to condemn an accused for the sin of another, even though the other is his blood brother.

The solicitor asked the *feme* defendant Lillie Phillips these questions on cross-examination over the objections of the male defendant: (1) "Mack Phillips, that's old Mack, the fence around here in East Gastonia?" (2) "I'll ask you if Mack wasn't indicted while Carl was hiding out in South Carolina?" (3) "Describe it. It wasn't the kind Carl beat Sam Gillespie half to death with, was it?" (4) "How much money have you and Carl taken out of the estate of this little girl, Hilda Jean Kincaid?" (5) "I'll ask you if you know whether or not your husband took any money off of Sam Gillespie?" (6) "I'll ask you if you know whether your husband, on July 15, 1950, took $125.00 from Jack Shields to fix a case in which your husband charged his brother Jimmie of driving under the influence?" (7) "I'll ask you if you don't know that while your husband was chief of police in Lowell that if he didn't procure one Robert Phillips to falsely testify that Leon Phillips had broken into the Post Office at Lowell, and if you don't know that the truth about it was your husband broke in there?" When the third question is placed in its context, it appears that it was prompted by the testimony of the *feme* defendant that Deputy Sheriff Groves threatened to use a blackjack at the time of his arrest of the male defendant upon the charges involved in this case. The presiding judge sustained the objections to the first, second, third, fifth, sixth, and seventh questions, and the *feme* defendant denied the implication of wrongdoing on the part of herself and her husband embodied in the fourth question.

The solicitor propounded these questions to B. G. Ward, a witness for the defense, on cross-examination over the objections of the male defendant: (1) "Did Mr. Phillips tell you about how much money he made while he was chief of police in Lowell taking money off people?" (2) "Did he tell you he had taken approximately $2,500.00 out of the $3,400.00 that the little girl over at his house had gotten from her dead father?" (3) "Did he tell you about getting set up in business here in the grocery business by defrauding every grocer in Cowpens, South Carolina?" (4) "I'll ask you if you don't know the general reputation of that place is that it is a place where stolen goods are disposed of?" The fourth question referred to an automobile service station operated by the male defendant. The presiding judge sustained the objections to the third and fourth questions, and the witness Ward answered the first and second questions in the negative.

The solicitor put two questions to Mrs. Love Jenkins, a witness for the defense over the objections of the male defendant relative to her brother-in-law Rub Jenkins, who was not connected in any way with the case. These questions were as follows: (1) "Don't you know that Rub Jenkins has been stealing around this country for the last five years and that Carl Phillips and his brother Mack Phillips have been selling everything Rub could steal?" (2) "Is it up there between the county home and the Town of Dallas in a brick building in a wire fence?" When the second question is put in its context, it appears that it amounted to an inquiry whether Rub Jenkins was not imprisoned in the State prison camp at Dallas at the time of the trial of the case. The presiding judge sustained the objection to the first question, and Mrs. Jenkins made this response to the second: "I don't know."

The solicitor asked John Henry Jenkins, Jr., a witness for the defense, these questions on his cross-examination over the objections of the male defendant: (1) "I'll ask you if you don't know you and Carl Phillips made it up as soon as you got the money off Lynn you would take the old man to Tennessee and dump him out at the Veterans' Hospital?" (2) "I'll ask you if, when he was chief of police at Lowell, if he didn't fix up several things you had done down there, stealing and otherwise?" The witness denied the insinuations incorporated in each question. He asserted in addition that he "never stole anything."

Two of these questions illustrate in graphic fashion how far afield the cross-examination went. The case on appeal, which was settled by stipulation of counsel, indicates that Hilda Jean Kincaid was orphaned at an early age by the accidental death of her father; that the defendants admitted her to their home, and reared her to maturity; that she still resides with them as a result of her own affectionate choice; and that during her minority the defendants received some compensation from Hilda Jean Kincaid's highly reputable guardian under appropriate orders of court for furnishing her with care, clothing, food, and shelter for many years. The fourth question asked Lillie Phillips and the second question put to B. G. Ward have no basis outside these events. These questions were nevertheless so framed as to suggest to the jury the damning notion that the male defendant and his wife had despicably despoiled a helpless orphan of her inheritance.

When he phrased the fifteen questions under present scrutiny and propounded them to Lillie Phillips, B. G. Ward, Mrs. Love Jenkins and John Henry Jenkins, Jr., the solicitor assumed the unproved insinuations in them to be facts, and in that way assured the jury upon his official authority that the male defendant had burglarized a Post Office, suborned the commission of perjury, asked and received bribes, committed malfeasances, and practiced extortion while serving as a policeman; that the

male defendant had aided his wife in despoiling a helpless orphan of her inheritance; that the male defendant had beaten one Gillespie "half to death" with a blackjack, and taken money from him; that the male defendant had procured the means of setting himself up in the grocery business in Gastonia "by defrauding every grocer in Cowpens, South Carolina"; that the male defendant's brother Mack Phillips was a notorious "fence" for stolen property in Gaston County; that the male defendant and his brother Mack Phillips had jointly plied the nefarious trade of receiving and selling stolen goods with knowledge of their stolen character throughout the five years next preceding the trial of the case; that an automobile service station operated by the male defendant had even acquired "the general reputation" of being "a place where stolen goods are disposed of"; that the male defendant's brother Mack Phillips had been indicted in Gaston County for receiving stolen goods with knowledge of their stolen character; and that the male defendant had thereupon taken flight to South Carolina, where he lurked in concealment to avoid prosecution on the same charge.

When he cross-examined the *feme* defendant and the witnesses for the defense in this manner, the solicitor repeatedly violated the rule of law which invalidated his cross-examination of the male defendant. In so doing, he also repeatedly violated the additional rule of law which forbids a prosecuting attorney to place before the jury by argument, insinuating questions, or other means, incompetent and prejudicial matters not legally admissible in evidence. *S. v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473; *S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *S. v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35; *S. v. Little,* 228 N.C. 417, 45 S.E. 2d 542; *S. v. Buchanan,* 216 N.C. 709, 6 S.E. 2d 521; *United States v. Remington,* 191 F. 2d 246; *Filippelli v. United States,* 6 F. 2d 121; *People v. Irby,* 67 Cal. App. 520, 227 P. 920; *People v. Bennett,* 413 Ill. 601, 110 N.E. 2d 175; *Rohlfing v. State,* 230 Ind. 236, 102 N.E. 2d 199; *Whitaker v. Commonwealth,* 314 Ky. 303, 234 S.W. 2d 971; *People v. Draper,* 278 App. Div. 298, 104 N.Y.S. 703; *Combs v. State,* 87 Okl. Cr. App. 283, 197 P. 2d 524; *Gray v. State,* 191 Tenn. 526, 235 S.W. 2d 20; *Lackey v. State,* 148 Tex. Cr. R. 623, 190 S.W. 2d 364; 23 C.J.S., Criminal Law, section 1087.

The solicitor who prosecuted this case in the Superior Court is an able and alert advocate, who is well versed in law and knows what he is about. He must have known the familiar legal rule that the State cannot offer evidence of specific acts of misconduct by cross-examination of defense witnesses or otherwise to show the bad character of the accused. *S. v. Nance,* 195 N.C. 47, 141 S.E. 468; *S. v. Adams,* 193 N.C. 581, 137 S.E. 657; *S. v. Holly,* 155 N.C. 485, 71 S.E. 450. Hence, the conclusion seems inescapable that his intention in asking the questions under present discussion was to portray the male defendant to the jurors as a bad man of

criminal practices and proclivities by insinuations of specific acts of misconduct which he knew he could not bring to their attention by legally admissible evidence. *People v. Bush*, 300 Ill. 532, 133 N.E. 201; *Fry v. State* 91 Okl. Cr. App. 326, 218 P. 2d 643.

Anyone experienced in courtroom psychology knows that where a prosecuting attorney persists in asking witnesses improper questions for the purpose of getting before the jurors prejudicial matters which the law does not permit them to hear, the questions produce a highly prejudicial effect on the minds of the jurors, even though the trial court refuses to permit the witnesses to answer. *Jones v. Commonwealth,* 191 Ky. 485, 231 S.W. 31; *Stewart v. Commonwealth,* 185 Ky. 34, 213 S.W. 185.

The solicitor violated other legal rules in cross-examining Mrs. Love Jenkins and John Henry Jenkins, Jr. The Constitution of North Carolina declares that "in all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony." Article I, Section 11. As a result of this constitutional guaranty, witnesses for the defendant in a criminal action are compelled to come to court whether they desire to do so or not. The conduct and testimony of witnesses for the defense are necessarily subject to such attack and criticism by the prosecution as the circumstances reasonably justify. For this reason, they may be subjected by the prosecuting attorney to question tending to discredit their testimony, no matter how disparaging the questions may be, if the questions are based on information and are asked in good faith. *S. v. Broom, supra;* 23 C.J.S., Criminal Law, section 1087. But the law does not contemplate that witnesses who attend court and testify for the defense in obedience to its compulsory process are to be needlessly badgered and humiliated by the prosecution. *Lamborn v. Hollingsworth,* 195 N.C. 350, 142 S.E. 19. Consequently, the law forbids the prosecuting attorney to put to a witness for the defense an impertinent and insulting question which he knows or should know cannot possibly elicit any competent or relevant testimony. 70 C.J., Witnesses, section 1012. When he put his first question to John Henry Jenkins, Jr., the solicitor inferentially charged the witness with complicity in the crime alleged against the male defendant, although the evidence for the State itself exonerated the witness from the charge. When he asked Mrs. Love Jenkins the questions insinuating that her brother-in-law Rub Jenkins was a chronic thief perhaps undergoing imprisonment at the State prison camp at Dallas, the solicitor propounded to the witness impertinent and insulting questions which he knew or should have known could not possibly elicit any competent or relevant testimony. Mrs. Jenkins was neither legally nor morally answerable for the conduct or whereabouts of her brother-in-law, and ought not to have been questioned in regard thereto.

Counsel for the defense objected with promptitude to each question. In addition, they appealed to the presiding judge in express terms on several occasions to keep the cross-examination of their clients and witnesses within proper bounds. The judge overruled some objections and sustained others without comment, and gave the jury formal instructions in several instances to the effect that the questions of the solicitor did not constitute evidence. The mild rulings of the judge did not have any deterring effect on the solicitor, who persisted in his improper and prejudicial cross-examination throughout the presentation of the testimony of the defense. A painstaking consideration of the case on appeal leaves us with the abiding conviction that the solicitor's persistent violation of the rules of practice governing the cross-examination of those tried for crime and their witnesses deprived the male defendant of that fair trial to which all men are entitled, no matter how good or how bad they may be. This conclusion necessitates a new trial of the male defendant on the indictment charging him with obtaining money by false pretenses.

The solicitor who prosecuted this case in the Superior Court is an able and diligent public servant. He has rendered the State valuable service in the solicitorial office. No doubt he was moved to excesses in his cross-examination by an earnest and over-zealous desire to bring to justice one whom he deemed to be a great evil-doer. We commend to those servants of the law who labor under like temptations this admonition: "Ministers of the law ought not to permit zeal for its enforcement to cause them to transgress its precepts. They should remember that where law ends, tyranny begins." *S. v. Warren,* 235 N.C. 117, 68 S.E. 2d 779.

New trial as to male defendant on the indictment for false pretense.

Reversed as to both defendants on the indictment for conspiracy.

IN THE MATTER OF THE ESTATE OF JOHN C. BULIS—WACHOVIA BANK & TRUST COMPANY, SURVIVING TRUSTEE.

(Filed 9 July, 1954.)

1. Wills § 33d: Trusts § 3a—Recommendation to life beneficiary as to use of funds held precatory and did not create trust.

The will in suit set up a trust with provision that the net income therefrom should be paid to testator's widow for life, with further provision that "it is my thought . . . that said net income shall be used for her benefit and for the benefit of" testator's sons, "according to their respective needs, and in the sound discretion of my said wife." *Held:* The recommendation as to using part of the income for the benefit of testator's sons was made exercisable by the widow as an individual and not as cotrustee,

and the recommendation is precatory in nature and does not create a trust, *spendthrift or otherwise, in favor of testator's sons.*

2. **Trusts § 19b: Estates § 9e—**

The testamentary trust in question provided that testator's widow receive the net income for life, and at her death the residue should be divided into trusts for the benefit of testator's sons. *Held:* The undistributed income of the trust which accumulated during the life of the widow belonged to her estate and not to the trusts created for the benefit of the remaindermen.

3. **Corporations § 16—**

The declaration of a cash dividend by a corporation creates a debt from the corporation to each of its stockholders who then hold such stock.

4. **Trusts § 19b: Estates § 9e—**

Where dividends are declared on stock held by a trust for payment to stockholders on designated dates which fall prior to the death of the life beneficiary of the trust, such dividends belong to the estate of the life beneficiary, and this is so whether the dividends be received before or after the death of the life beneficiary.

5. **Trusts § 19c—Sum paid to remainderman out of life tenant's income held advancement chargeable to his interest.**

Trustor's widow, who was cotrustee and life beneficiary of the income from the trust, was given power at her pleasure and discretion to use part of the income for the benefit of testator's sons according to their respective needs. By later provision the trustees were authorized to use a part of the *corpus* if advisable for the maintenance of the widow or sons, or the education of the sons. The widow directed her cotrustee to advance one of the sons a stipulated sum to be charged to any funds which such son should be entitled from the testamentary trust, and the son agreed to repay said sum out of such funds. The sum paid such son was withdrawn from the accumulated income rather than the *corpus*. *Held:* The sum paid the son represented an advancement to him and should be charged to the trust fund established for his benefit as remainderman, and should be credited to the accumulated income account for payment to the executor of the widow.

APPEAL by respondents John B. Bulis and Charles R. Bulis from *Sink, J.*, at December Term, 1953, of BUNCOMBE.

Petition by Wachovia Bank and Trust Company, surviving trustee under the will of John C. Bulis, deceased, for advice and instruction and for approval of its final account as surviving trustee of the trust for the benefit of testator's widow, Pansy Bulis, now deceased.

John C. Bulis died 3 August, 1941. By the terms of his will he devised and bequeathed the bulk of his estate to Wachovia Bank and Trust Company and his widow, Pansy Bulis, as trustees, in trust as declared in various items of the will.

The item of the will immediately in question is Item Nine by which the testator directed that (subject to a small bequest to David Cummings

which in nowise affects decision here) the trustees "pay the net income of this trust estate, in convenient installments, preferably monthly, to my said wife, Pansy Bulis, as long as she shall live. This provision, and others contained in this will for the benefit of my wife, are being made in lieu of dower and all other statutory rights. It is my thought, in which my wife concurs, that said net income shall be used for her benefit, and for the benefit of my son, Byron F. Bulis, and of my adopted sons, John Byron Bulis and Charles Bulis, from time to time according to their respective needs, and in the sound discretion of my said wife; but in the event that my said wife, by reason of serious illness, or other cause, shall become unable to see to the use of said net income as herein contemplated, then my said trustees are authorized from time to time, as they may deem it necessary and proper, to use a portion or portions of said net income for the support and maintenance of my said son, Byron F. Bulis, and if in the opinion of my said trustees their situation demands it, a portion or portions of said net income for the benefit of my adopted sons, John Byron Bulis and Charles Bulis, always retaining, however, a sufficient portion of said net income for the use and benefit of my said wife."

By the terms of Item Eleven of the will it is directed that upon the death of the widow, Pansy Bulis, "the residue" of the "trust estate shall be divided into separate shares or trusts" and administered for the benefit of Byron F. Bulis, John Byron Bulis, and Charles Bulis. (The terms of these trusts for the benefit of the three sons of the testator and the directions as to administration thereof are omitted as not pertinent to decision.)

Among the other items of the will which bear on the contentions of the parties are these:

"Item Seventeen. If at any time during the continuance of the trust or trusts herein created, it is necessary or advisable to use some portion of the principal thereof for the maintenance, welfare, comfort or happiness of my wife, Pansy Bulis, or my son, Byron F. Bulis, or my adopted sons, John Byron Bulis and Charles Bulis, or for the education of either of said adopted sons, my trustees are hereby authorized and empowered to use so much of the principal as in their opinion is necessary or advisable to be used to meet such conditions, provided that said trustees deem that the purpose for which such payments are to be made justified the reduction of the principal in the trust estate. Such payments as are made to my wife, Pansy Bulis, under the provisions of this Item, shall be charged to the general trust, but any such payments as may be made to or for the benefit of my son, or either of my adopted sons, shall be charged to their share or trust, or, if made within the lifetime of my wife, shall be kept separate upon the records of the trustees, and at the time of the setting up of the separate trust for said son, and the adopted sons, as

herein provided, shall be charged without interest against the trust or share of the beneficiary for whose benefit the payment was made."

"Item Eighteen. Neither the principal nor the income of this trust estate shall be liable for the debts of any beneficiary thereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his interest in the trust estate, or the income produced therefrom, prior to the actual distribution thereof by the Trustee to such beneficiary."

Pansy Bulis died 25 August, 1953. At that time a surplus of net income from the trust had been accumulated by the trustees amounting to $34,849.92. This sum was in a separate account maintained by the trustees and had never been paid over or disbursed to the life beneficiary, Pansy Bulis.

Between the date of the death of Pansy Bulis (25 August, 1953) and 19 October, 1953, the surviving trustee credited the income account with further sums which with the previous balance of $34,849.92, after payment of the costs of administering the trust, makes a total accumulated income account for distribution of $44,529.45. This latter net credit of $9,679.53 includes the collection of certain dividends declared before the death of the life beneficiary, Pansy Bulis, on corporate stocks held by the trust. It also includes a proposed refund of $5,000 advanced from the accumulated income account to John B. Bulis during the life of Pansy Bulis, this proposed refund to be effected by charging the *corpus*-trust account of John B. Bulis with the item of $5,000 and crediting it to the accumulated income account.

The surviving trustee in its final account submitted to the court in connection with the petition for advice and instruction proposes to pay the accumulated income balance of $44,529.45 to the Wachovia Bank and Trust Company as executor under the will of Pansy Bulis.

The respondents John B. and Charles Bulis filed answers denying the right of the surviving trustee to include in the income account (1) the dividends collected after the death of Pansy Bulis, and (2) the John B. Bulis refund item. These respondents also deny that the estate of Pansy Bulis is entitled to receive any part of the proceeds of the accumulated income account. To the contrary they aver that this fund should be held in trust for them and for B. F. Bulis as remaindermen under the terms of the will of John C. Bulis. The respondent B. F. Bulis filed answer admitting the correctness of the accumulated income account of $44,-529.45 but averring that the trustee should pay over or hold this fund to or for the use and benefit of the three remaindermen, B. F., John B., and Charles R. Bulis.

By written stipulation of all interested parties certain facts were agreed upon before the cause was first heard below. The facts agreed may be summarized as follows:

1. That the corporate dividends in dispute, amounting to $4,355.00, were declared by the boards of directors of the respective corporations for payment to stockholders of record on designated dates, which dates were prior to the death of Pansy Bulis, but the dividends were not actually received by the surviving trustee until after her death.

2. That the $5,000 item charged by the surviving trustee against the *corpus* account of John B. Bulis and credited to the accumulated income account arose out of these facts:

(a) On 13 December, 1952, Pansy Bulis, beneficiary and co-trustee of the trust, addressed to her co-trustee, Wachovia Bank and Trust Company, a letter reading as follows:

"This letter will be your authority from me to advance to John B. Bulis the sum of $5,000.00 from the funds of the testamentary trust estate of John C. Bulis, deceased.

"At the time of the payment of the above sum of money to John B. Bulis, I will thank you to take from him a letter authorizing you to deduct the amount of $5,000.00 from any funds which may be payable to John B. Bulis from the assets of the testamentary trust established by John C. Bulis, deceased, and now under your management as Trustee of said estate or from any other funds in your hands to which John B. Bulis may be entitled, to the end that said sum of money may be restored to said trust and be distributed according to the provisions thereof."

(b) On 16 December, 1952, John B. Bulis addressed to Wachovia Bank and Trust Company a letter reading as follows:

"In consideration of the sum of $5,000.00 advanced to me from the trust estate of John C. Bulis, deceased, as authorized by a letter addressed to you by Mrs. Pansy Bulis, the receipt of which is hereby acknowledged, I hereby agree and bind myself to repay said sum of money out of any funds which may be at any time payable to me from the estate of the said John C. Bulis, deceased, or any other funds to which I may be entitled from any other source, and I hereby irrevocably authorize you to withhold the sum of $5,000 which may at any time be payable to me or to my estate from the funds of the estate of John C. Bulis or Mrs. Pansy Bulis."

(c) Pursuant to the foregoing letters Wachovia Bank and Trust Company as trustee of the John C. Bulis trust, paid to John B. Bulis the sum of $5,000 out of the accumulated and undistributed income held by it as trustee of the trust.

(d) After the death of Pansy Bulis and on 19 October, 1953, Wachovia Bank and Trust Company, as surviving trustee, charged the distributive

share of the *corpus* of the trust due John B. Bulis with the sum of $5,000 and credited the income account of the trust with that sum in settlement of the advancement made to John B. Bulis in December, 1952, and this item of $5,000 is a portion of the disputed sum of $44,529.45 referred to in the petition and final report as the accumulated income account which the surviving trustee proposes to pay over to the executor of the estate of Pansy Bulis.

The Clerk of the Superior Court of Buncombe County heard the cause in the first instance and entered an order approving the final account as submitted by the surviving trustee and authorizing payment of the accumulated income balance of $44,529.45 to the executor of the estate of Pansy Bulis. To this order the respondents Byron F., John B., and Charles Bulis excepted and appealed therefrom to the Superior Court.

When the cause came on for hearing in Superior Court, Judge Sink, then presiding, found and concluded that all the disputed item of $44,-529.45 represents income accrued prior to the date of the death of Pansy Bulis and is property belonging entirely to her estate. Whereupon judgment was entered (1) directing payment of the accumulated income balance of $44,529.45 to Wachovia Bank and Trust Company as executor of the estate of Pansy Bulis, and (2) approving the final account as prepared and filed by the surviving trustee and authorizing distribution of the assets of the trust estate in accordance therewith.

From the judgment so entered the respondents John B. Bulis and Charles R. Bulis appealed, assigning errors.

McLean, Elmore & Martin for Respondent John B. Bulis, appellant.
Fisher & Fowler for Respondent Charles R. Bulis, appellant.
S. G. Bernard for Wachovia Bank and Trust Company, appellee.

JOHNSON, J. Does the earned, undistributed net income of the trust which accumulated during the life of Pansy Bulis, life beneficiary of the trust, belong to her estate or does this fund belong to the remaindermen of the trust, namely: the testator's son B. F. Bulis, and his adopted sons, John B. Bulis and Charles R. Bulis? This is the first question presented by the appeal.

Decision as to this question is controlled by the language of Item Nine of the will. This item directs the trustees to pay the net income of the trust to "Pansy Bulis, as long as she shall live." There is no provision in the will indicating that as to her the trust was intended merely to provide for her upkeep. Nothing is said or intimated that she should be paid only so much of the income as should be needed for her support. The direction that she be paid the net income during the period of her life is without qualification. Nowhere in the will is there any limitation

whatsoever upon the right of Pansy Bulis to receive all the net income of the trust so "long as she shall live." The clear import and meaning of Item Nine is that the gift of income to Pansy Bulis during her life is absolute and complete. The recommendation as to using part of the income for the benefit of the testator's sons "according to their respective needs," is precatory in nature and does not raise a trust, spendthrift or otherwise, in favor of the three sons.

Indeed, the recommendation as to minding the sons' needs is left solely to the "sound discretion" of Pansy Bulis. And this discretion, it is significant to note, was made exercisable by her as an individual and not as a co-trustee of the trust. The conditions under which the trustees were authorized to use income under the provisions of Item Nine, or *corpus* as provided by Item Seventeen, for the benefit of the testator's sons never arose. Therefore, in no aspect of the case are we concerned with the principles of law applicable to discretionary trusts. Accordingly, the authorities cited on that subject are inapplicable and need not be discussed.

The action of the lower court in holding that the undistributed income of the trust which accumulated during the life of Pansy Bulis is an asset of her estate is supported in principle by authoritative decisions of this Court and will be upheld.

In *Mason v. Sadler,* 59 N.C. 148, the testamentary provision involved was: "I lend to my wife, Polly, during her life, all my Negroes . . . and their increase, for the purpose of raising and educating my two sons . . ." After the death of the widow the Negroes were to go to the sons. The sons sought to have the widow declared a trustee for their benefit in the slaves. Said *Manly, J.,* speaking for the Court, pp. 150- 151:

"The question presented by the pleadings is, whether the language used by the testator, Foy Mason, in the first clause of his will, creates a trust, in his wife, of Charles, Clarissa, and Betsy, for the sons, Andrew and Osborne. . . .

"Thus, the equity of the bill rests upon the principle, that the slaves loaned to the wife, for life, was a trust, solely for the benefit of the children during that term. Indeed, that is the leading allegation of the bill. This, we think, is a misconstruction of the will. Considering the clause, in connection with the other bequests of the will, we are of opinion the wife, under the bequest, took an absolute legal estate, and that the words, 'for the purpose of raising and educating my two sons,' have not the effect to qualify that estate. Our interpretation is, that the words mean to give a reason for the gift, and in that way, to suggest and recommend a duty that was incumbent on her."

In *Carter v. Strickland,* 165 N.C. 69, 80 S.E. 961, there was a devise to the testator's niece with this provision: ". . . and it is my request that my said niece . . . shall, at her death, devise said tract of land to her

daughter, Myrtie E. Carter." *Hoke, J.*, speaking for the Court, said in part, pp. 71, 72:

"Some of the earlier English cases, and they have been followed by decisions in this country, are to the effect that a trust will be engrafted or imposed upon an estate, absolute in terms, or upon its holder, by reason of precatory words in a will whenever 'the objects of the precatory language are certain and the subject of the recommendation or wish is also certain'—a position supposed to best effectuate the intent of the testator. A consideration of the later cases, however, will show that, in the decisions referred to, the principle has been too broadly stated, and it is now the prevailing doctrine, certainly so in this jurisdiction, that such words will be given their ordinary significance, and will not have the effect, as stated, unless from the terms and dispositions of the will and the circumstances relevant to its proper construction it clearly appears that they are to be considered as imperative and that the testator intended to create a trust." And again, at p. 74: "On perusal of the will and the facts in evidence, we are of opinion as stated, that plaintiff is entitled to the property in absolute ownership, and that the decree protecting her in the possession and enjoyment of such an estate must be affirmed."

In *Dixon v. Hooker,* 199 N.C. 673, 155 S.E. 567, a bequest was made to the testator's wife "for and during her natural life . . . to have the use and benefit of so long as she lives. . . . My wish and desire is that in the event that my wife should not spend and use all of the personal property mentioned in Item 2 of this will for her support while she lives that she give and bequeath at her death $1,000 in cash or bonds or stock to the Christian Church of Greenville, N. C. . . . and the remainder of the said personal property . . . to my sister . . . but I want my wife to use and spend just as much of said personal property as she desires for her comfort and pleasure." There the Court said in part, pp. 677, 678:

"On the other hand, if the said language is not a limitation over, but is only an expression of the wish and desire which the testator had at the date of the execution by him of his last will and testament, and which he intended that his wife should observe or not, in her discretion, then under *Jordan v. Sigmon,* she was the owner of the property described in the complaint, absolutely, and not for her life only and the judgment of the Superior Court must be affirmed.

"It is clear from the language used by the testator in Item 6 of his last will and testament that he did not give and bequeath to the Christian Church of Greenville, N. C. the sum of $1,000, nor did he give and bequeath to the children of his sister the said property or any part thereof; he was content to express a wish and desire that his wife, Mrs. Gertrude H. Coward, should make these gifts. There was no limitation over of the personal property which he had given and bequeathed to his wife for her

life by Item 2 of his will, for it is manifest that it was not the intention of the testator that the Christian Church of Greenville, N. C., or that the children of his sister should take under his will: at most they were to take from and under his wife, Gertrude H. Coward.

"It is also clear that the testator did not intend by the language used by him to impress upon the title of his wife to the personal property given and bequeathed to her by Item 2 of his will, any trust in favor of the Christian Church of Greenville or of the children of his sister, Gabrella Dixon. Whether or not she should give and bequeath to said church the sum of $1,000, or to said children the remainder of the personal property, given and devised to her by Item 2 of said will, and not used or expended by her during her life, was to be determined by her in the exercise of her discretion. As to the disposition of said personal property after the death of his wife, the testator was content to leave this matter to her discretion, realizing, doubtless, that the conditions under which he made his will might not exist after his death, and while his wife was living."

In *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368, a devise of real estate was made to devisees "to do as they like with" the property, with a subsequent provision stating, "I wish that, after my death and the death of the brothers and sisters named in this will, whatever property there is left shall go to my niece, Geneva Taylor Lewis and her husband, Mark Lewis." It was held that the property was owned in fee simple by the beneficiaries first named.

In re Wilkening's Will, 137 Misc. 451, 244 N.Y.S. 115, involves a testamentary provision directing payment of income by the trustees to the testator's son's wife, "for his support, during the life of the trust." It was held that the words "for his support" were precatory and that the wife was entitled to the income without restriction.

See also *Slater v. Slater,* 46 Misc. 332, 94 N.Y.S. 900; *Schneiderhahn's Guardian v. Zeller,* 33 Ky. Law Report, 694, 110 S.W. 834; Bogert, Trusts and Trustees, Vol. 1, Sec. 48.

The following cases, which seem to come closest to supporting the appellants' views, are factually distinguishable and for that reason are not considered authoritative here: *Brinn v. Brinn,* 213 N.C. 282, 195 S.E. 793; *Carter v. Young,* 193 N.C. 678, 137 S.E. 875; *Young v. Young,* 68 N.C. 309. See *Brinn v. Brinn, supra,* for clear statement by *Barnhill, J.* (now *C. J.*) of the rules applicable to the interpretation of precatory words in a dispositive instrument. See also 54 Am. Jur., Trusts, Sections 54 to 58.

Also on the question of spendthrift trusts see G.S. 41-9; *Mebane v. Mebane,* 39 N.C. 131; *Pace v. Pace,* 73 N.C. 119; *Bank v. Heath,* 187 N.C. 54, 121 S.E. 24; *Mizell v. Bazemore,* 194 N.C. 324, 139 S.E. 453; Annotation: 119 A.L.R. 31, p. 61.

2. The next question for decision is this: Should the corporate dividends declared and made payable to stockholders of record on dates prior to the death of the life beneficiary, Pansy Bulis, but not actually received by the surviving trustee until after her death, be placed in the earned income account and paid over to the executor of Pansy Bulis, or credited to the accounts of the remaindermen of the trust, namely: the three sons of the testator?

The court below treated these dividends as earned net income belonging to the estate of the life beneficiary, Pansy Bulis, and directed payment to her executor. We approve the ruling below. It is supported by the decided weight of authority in this country. In 13 Am. Jur., Corporations, Sec. 673, it is stated: "It is the general rule that the declaration of a cash dividend, whether on common or preferred stock, creates a debt from the corporation to each of its stockholders who then hold such stock." To like effect see 18 C.J.S., Corporations, Sec. 467. See also Annotation, 60 A.L.R. 703. This is in accord with the decision in *University v. N. C. R. Co.,* 76 N.C. 103, where it is stated, at p. 106: "A dividend declared by and due from a private corporation is a debt due to the shareholder and is recoverable as such."

And coming to the precise point on which decision on this aspect of the case turns, we find this statement of the controlling rule in 33 Am. Jur., Life Estates, Remaindermen, etc., Sec. 285, p. 792: "Remaindermen under a will are not entitled to the income from an estate until after the death of a life tenant, and, moreover, any unpaid balance of income which has accrued to the life beneficiary of a trust which has terminated belongs to the estate of such beneficiary." See *Bank v. Baker,* 124 Conn. 577, 1 A. 2d 283, wherein it is held that any unpaid balance of income accrued to the beneficiary of the trust before its termination belongs to his estate. See also *Trust Co. v. Spiegelberg,* 117 N. J. Eq. 171, 175 A. 164; Annotation, 126 A.L.R. 12, pp. 30, 31.

And as bearing directly on the instant question of corporate dividends, we find this statement of principles in the annotation appearing in 72 A.L.R. 981, p. 982: ". . . it is almost uniformly held, in the absence of applicatory statutory provision to the contrary, that ordinary current dividends are not apportionable, but are payable in entirety to the life tenant if declared, or at least if declared and payable, during the continuance of that interest . . ." See also Annotation, 130 A.L.R. 492.

In *Nutter v. Andrews,* 246 Mass. 224, 142 N.E. 67, it is held that dividends declared before the death of a life tenant, payable after her death, to stockholders of record before her death, go to the estate of the life tenant.

The decisions in *Trust Co. v. Thorner,* 198 N.C. 241, 151 S.E. 263; *Minot v. Tappan,* 127 Mass. 333; *Stempel v. Trust Co.,* 127 Conn. 206,

15 A. 2d 305, and other cases referred to in the annotation appearing in 157 A.L.R. 668, and cited by the appellants, have been examined and considered. They are factually distinguishable and are not considered controlling here.

3. The final question presented for decision is whether the item of $5,000 representing the advancement to John B. Bulis in December, 1952, should be charged to him and credited to the accumulated income account for payment to the executor of Pansy Bulis, as proposed by the surviving trustee. The court below held that the item should be debited and credited as proposed, and we approve. The memoranda signed by the parties when the $5,000 was paid to John B. Bulis clearly shows it was intended as an advancement to be repaid. The fact that the money was withdrawn from the accumulated income, rather than *corpus,* does not change the recipient's obligation to make restitution.

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

Affirmed.

B. J. PARMELE v. KENNETH EATON.

(Filed 9 July, 1954.)

1. State § 2b—

The State Board of Education was given sole authority by the statute now codified as G.S. 146-94 to sell and convey all vacant, unentered marsh and swamp lands of the State, provided such lands are not covered by navigable waters and the quantity in any one marsh or swamp exceeds two thousand acres, and a conveyance by the State Board of Education of such marshlands (G.S. 146-4) subsequent to the effective date of the statute conveys title.

2. Same—

Evidence to the effect that the *locus in quo* conveyed to plaintiff's predecessors in title by the State Board of Education subsequent to the effective date of the statute codified as G.S. 146-94, was marshland of more than two thousand acres in area, covered with marsh grass and not navigable by any kind of commercial craft, even at high tide, *is held* to sustain the findings of fact of the trial court that the land in question was a part of a tract of marshland in excess of two thousand acres and that no part of the *locus* was covered by navigable waters.

3. Waters and Watercourses § 11—

The test in this State for determining whether waters are navigable is not the ebb and flow of the tide, but whether the waters are suitable for the purpose of navigation by vessels or boats such as are employed in the ordinary course of water commerce, trade and travel, and are thus navigable in fact.

4. Judgments § 32—

Judgment adjudicating title under a State grant and conveyances from the State Board of Education to a large tract of land *held* not to bar a subsequent suit involving title under conveyance from the State Board of Education to a small portion of the land involved in the former case, in view of new facts alleged in the pleadings and developed at the trial, and an intervening Act of the General Assembly (Ch. 966, Session Laws of 1953) validating titles conveyed by the State Board of Education.

APPEAL by defendant from *Clifton L. Moore, Resident Judge* of the Eighth Judicial District, at Chambers in Wilmington, 30 January, 1954. From NEW HANOVER.

Suit for specific performance submitted to judge and heard by consent on waiver of jury trial (G.S. 1-184; 1-185; 1-218; 7-65).

The tract of land in suit is located along the northern extension of Wrightsville Beach in New Hanover County. It is shown within the dotted lines on the accompanying exhibits. At low tide the land is completely exposed, but at high tide it is covered by tidal waters from Banks Channel, shown on aerial photograph, Exhibit B. The plaintiff claims title through mesne conveyances from (1) the State of North Carolina and (2) the State Board of Education of North Carolina. The *locus in quo* constitutes about one-third of the lands involved in the previous action entitled *Resort Development Company v. Parmele,* the appeal from which was heard and determined in this Court at the Spring Term, 1952, and is reported in 235 N.C. 689, 71 S.E. 2d 474. An examination of the statement of facts and opinion of the Court in that case will serve to point up material differences in the facts there agreed and those here developed and found.

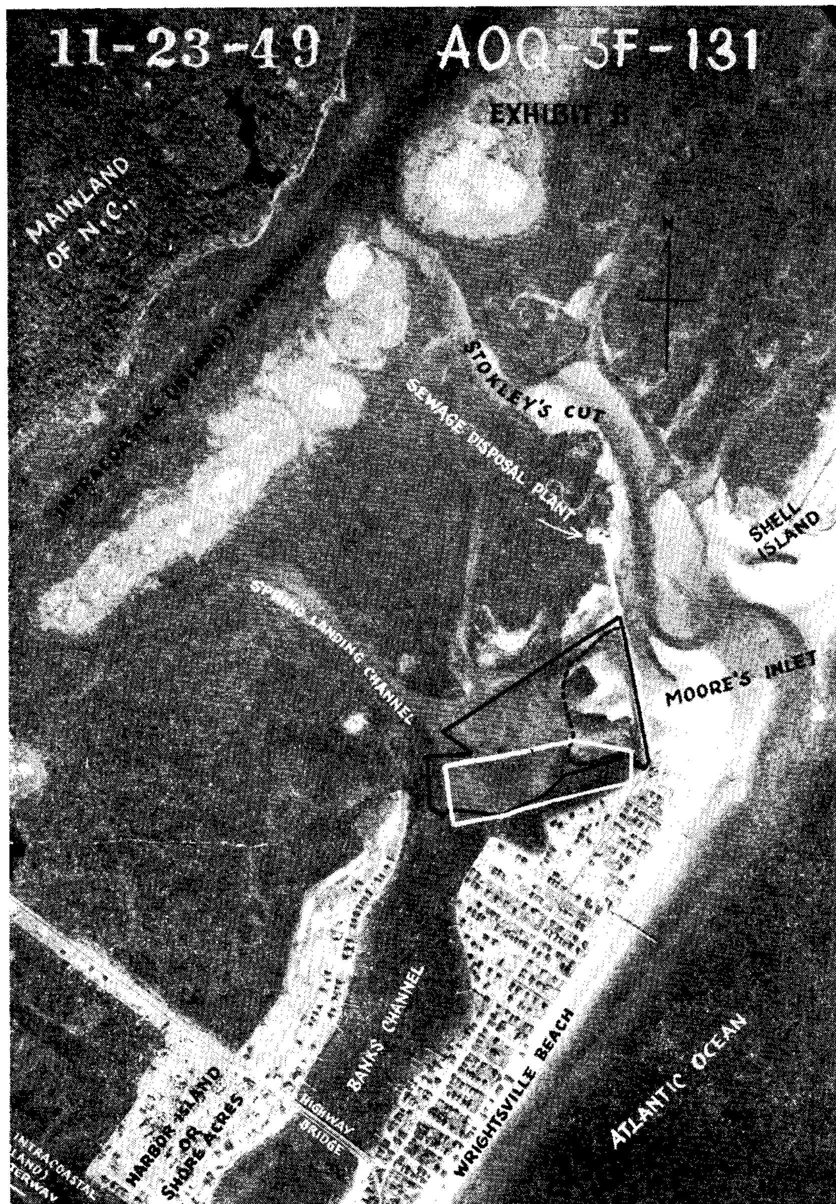
The plaintiff, being under contract (dated 1 November, 1953) to convey to the defendant the *locus in quo,* tendered deed sufficient in form to vest in defendant fee-simple title to the property. The defendant refused tender, alleging title offered to be defective on these grounds: (1) that the land is covered by navigable waters and therefore was not subject to grant by the State of North Carolina or to sale and conveyance by the State Board of Education; and (2) that the plaintiff is estopped by the decision of this Court in *Resort Development Company v. Parmele, supra,* to assert title to the property.

The trial court, after hearing the evidence offered by the parties, found facts, made conclusions of law, and entered judgment, the gist of which follows:

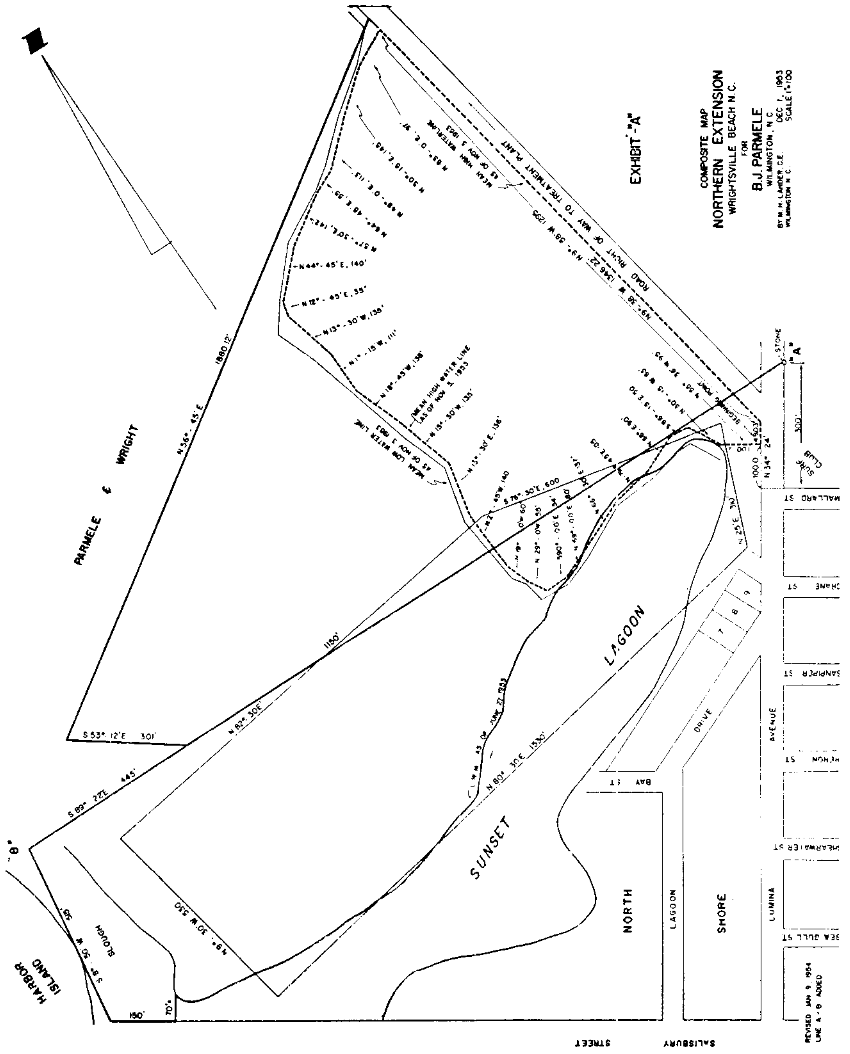
FINDINGS OF FACT.

"2." That the tract of land in controversy lies west of and adjacent to the causeway leading to the sewerage disposal plant at the north end of

Wrightsville Beach and fronts 1295 feet on the causeway and extends southwestwardly toward Harbor Island for a distance of about 700 feet.



"3." That the plaintiff holds title to the portion of the property to the north of line A-B as shown on Exhibit A by *mesne* conveyances from the State Board of Education; that the plaintiff holds title to the property south of line A-B through *mesne* conveyances from the State Board of Education and by grant from the State of North Carolina (the Sneeden grant of 1841).



"4. That the portion of the property to the North of line A-B was conveyed by the State Board of Education . . . in 1926 to plaintiff's predecessor in title for $3.00 per acre and that at the time of such conveyance was marshland and a portion of a tract of marshland in excess of 2,000 acres. That the portion of the property to the South of line A-B which plaintiff holds through *mesne* conveyances from the State Board of Education was conveyed by the State Board of Education . . . to the plaintiff's predecessor in title for $25.00 per acre in the year 1944 and at the time was marshland and part of a continuous tract of marshland in excess of 2,000 acres."

"5." That in the year 1926 Moore's Inlet, where the waters of the Atlantic Ocean break through the outer bank between the *locus in quo* and Shell Island as shown on Exhibit B, was south of the *locus* and since that time has moved in a northwardly direction and is now north thereof; that as Moore's Inlet moved northwardly the *locus in quo* at times was covered with sand which had the effect of killing the marsh grass which had grown upon it.

"6." That the property in controversy is bounded as follows: On the south by a lagoon known as Sunset Lagoon as shown on Exhibit A; on the west and north by a small canal which was cut and dredged by the plaintiff in order to pump sand and mud onto the *locus in quo* for the purpose of raising it above the level of high water; on the east by the causeway leading to the sewerage disposal plant, the right of way of which was conveyed to the Town of Wrightsville Beach by the plaintiff's predecessor in title. Before the land was built up with sand and mud pumped in from the dredging operation, the *locus in quo* "consisted of marsh land covered with marsh grass and was completely out of water at low tide, but at normal high tide was covered with water to a depth of approximately 2 feet and within 6 inches of the top of the marsh grass."

"7. That prior to dredging in Sunset Lagoon and to the West and North of the *locus in quo* the plaintiff obtained permission for the dredging and filling from the U. S. Corps of Engineers acting by authority of the Secretary of Army under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled 'An Act Making Appropriations for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes.'"

"8." That the causeway to the sewerage disposal plant was built by the use of a dragline in approximately the year 1944 by the Town of Wrightsville Beach, a municipal corporation.

"9. That Sunset Lagoon is an artificially dredged body of water extending from Banks Channel and is used by small outboard motor boats and skiffs. That there is no public terminus on Sunset Lagoon and that it has not been and cannot be used by sea vessels or vessels in commerce

for any navigable purpose. That running to the Northwest adjacent to Harbor Island approximately 1,000 feet from the *locus in quo* is a slough known as Spring Landing Channel which connects Banks Channel to the Inland Waterway. That at low tide it is possible to pole or push boats through said slough and at high tide boats drawing three feet of water can go through it but it is not navigable for sea vessels or vessels in commerce, nor is it used by vessels in commerce.

"10. That at low tide prior to the fill made by the plaintiff it was impossible for any boat to navigate over the *locus in quo* which was covered by marsh grass. At high tide it was possible to push or pole a flat bottom boat through the marsh grass but that it was not navigable to power boats or sea vessels, nor was it used as a channel of commerce. That there are no navigable sloughs or guts which enter into the *locus in quo*.

"11. That the *locus in quo* was a portion of the property which was involved in the case of *Resort Development Company v. Parmele* reported in 235 N. C. Reports, page 689. That the decision in that case involved the *locus in quo* and additional property to the West of the *locus in quo*. That since the decision in that case the North Carolina Legislature passed Chapter 966 of the Session Laws of 1953 which was an Act to Validate and Confirm Titles to Marsh and Swamp Lands heretofore conveyed by the State of North Carolina and the State Board of Education . . . That this Act was ratified and in effect as of 23 April, 1953, prior to the purchase by the plaintiff of the *locus in quo*. That the additional facts presented in the present case as heretofore recited together with the passage by the Legislature of the validating act prevent the plaintiff B. J. Parmele from being estopped by his conduct or by the former judgment to prosecute this case. Nor is the former decision *res judicata* as to this hearing."

CONCLUSIONS OF LAW.

"1. That the *locus in quo* is a part of a continuous area in excess of 2,000 acres of marsh land.

"2. That no part of the *locus in quo* is or was covered at any state of the tide by waters which are navigable in fact.

"3. That the plaintiff B. J. Parmele is neither estopped by the former judgment in *Development Company v. Parmele* nor by his conduct to prosecute this case.

"4. That by virtue of the deeds from the State of North Carolina, the State Board of Education of North Carolina and Chapter 966 of the 1953 Session Laws of North Carolina, the plaintiff is vested with a good and marketable title to the *locus in quo* and can convey the same to the defendant herein."

From judgment entered directing that the defendant accept the plaintiff's tender of deed and comply with the terms of the contract, the defendant appealed, assigning errors.

Hogue & Hogue for plaintiff, appellee.

Robert E. Calder for defendant, appellant.

Attorney-General McMullan and Samuel Behrends, Jr., Member of Staff, amici curiae on behalf of the State Board of Education.

JOHNSON, J. Our study of the record leaves the impression that the judgment below should be upheld. We rest decision on the findings of fact which bring the conveyances made by the State Board of Education to the plaintiff's predecessors in title within the purview of the statutes authorizing and validating sales and conveyances of marsh or swamp lands. In this view of the case the question whether the Sneeden grant of 1841 is valid becomes moot.

By statute enacted prior to 1926, now codified as G.S. 146-94, the State Board of Education was given sole authority to sell and convey all vacant unentered marsh and swamp lands of the State where, as limited by the provisions of G.S. 146-1, the land is not covered by navigable waters and the quantity in any one marsh or swamp exceeds 2,000 acres. See *Insurance Company v. Parmele,* 214 N.C. 63, pp. 69 and 70, 197 S.E. 714. See also Chapter 151, Public Laws of 1941, and Article IX, Sec. 9 (formerly 10), Constitution of North Carolina.

By statute enacted prior to 1926, now codified as G.S. 146-4, it is provided that the words "swamp lands" as used in G.S. 146-94 "shall be construed to include all those lands which have been or may now be known and called . . . 'marsh' lands, 'pocosin bay,' 'briary bay,' and 'savanna,' . . ."

By Chapter 966, Session Laws of 1953, ratified 23, April, 1953, applicable to the counties of New Hanover, Pender, and Onslow, it is provided in pertinent part that: "The titles to all marsh lands and all swamp lands which have heretofore been conveyed by . . . the State Board of Education of North Carolina . . . are hereby validated, ratified and confirmed, and the persons, firms or corporations to whom such marsh lands or swamp lands have been conveyed or granted or their successors in title are hereby declared to have such title thereto as was purported to be conveyed or granted by any of the conveyances or grants hereinbefore referred to, as fully and as completely as said conveyances or grants purported to convey or grant the same; . . ."

It is manifest that the deeds made in 1926 and 1944 by the State Board of Education to the plaintiff's predecessors in title were made in contem-

plation that portions of a single tract of more than 2,000 acres of marsh lands were being conveyed.

The trial court found that when the *locus in quo* was conveyed by the State Board of Education to the plaintiff's predecessors in title in 1926 and in 1944, respectively, the land so conveyed was "marsh land and a portion of a tract of marsh land in excess of 2,000 acres." The lower court also found that no part of the *locus* is or was covered at any stage of the tide by waters which are navigable in fact. These are the crucial, determinative findings and conclusions. The defendant challenges the sufficiency of the evidence to support these findings. This brings into focus the testimony of the plaintiff and his witnesses.

The plaintiff testified that the *locus* "is a part of the marsh land which lies behind the banks at Wrightsville Beach and Shell Island. There are many more than 2000 acres of marsh land in the area, perhaps 50,000 acres. It is a complete body of marsh land going right up to Pamlico Sound . . ."

Richard F. Meier, member of the Board of Aldermen of Wrightsville Beach, testified in part: "In 1926 Moore's Inlet was somewhere about Columbia Street. . . . south of the pier . . . shown (on the aerial photograph) going out into the ocean. . . . The land . . . to the west of and adjacent to the . . . Disposal Plant was marsh land. By marsh land I mean that it was land with grass growing on it. . . . At exceptionally high water the whole marsh was covered with approximately 6 inches of water over the marsh. . . . Sunset Lagoon which is shown on the exhibit was dredged out. . . . Hugh MacRae & Company dredged it out for the purpose of building more land. . . . There is no public terminus or any sort of terminus in Sunset Lagoon. There is no public dock . . . anywhere in that area. Commercial shrimp boats do not go up in that area as they can't get by the bridge. (See highway bridge on aerial photo, Exhibit B.) The bridge isn't high enough . . . and they wouldn't have water enough. . . . the area to the west of Wrightsville Beach, just before you get to the beach, is called Harbor Island. . . . I have never seen a boat navigate over the area on the map . . . shown in green. (the land involved in the case—shown on Exhibit A within the dotted lines) . . . at all times since 1926 up until the dredging took place in 1953 that area (referring to the *locus in quo*) was covered with marsh grass. . . . The land . . . was a part of a continuous tract of marsh land which ran in every direction. . . . between the banks and the mainland."

The witness Ernest Woolard testified he has lived in the vicinity of Wrightsville Beach for thirty years and is engaged in the business of boating—taking fishing parties out in the ocean. He said in part: ". . . Moore's Inlet in . . . 1926 was some distance back to the south from where it is presently located. . . . At that time the land to the north and

northwest of Moore's Inlet was a continuous marsh from Stokeley's Channel which goes through here to the end of Harbor Island, except for two creeks which went through the marsh, one closer up here to the northwest and the other down toward the east. All the rest was marsh. There was one creek up close to the end of Harbor Island. It was just a creek. . . . It is not possible to navigate a boat into this marsh land. . . . After the inlet moved to the north the sand beat across it and wherever the sand beat across the marsh it killed the marsh grass. . . . Marsh grass won't grow on sand. . . . Marsh grass won't grow unless it's covered with salt water on high tide . . . At an average high tide most of the marsh land would be covered by water a foot or a foot and a half. . . . The little channels which run through the marsh grass are called little guts. They are just little drains. It is not possible to navigate in those guts. . . . I don't think it is possible to navigate any kind of a boat over marsh grass at high tide. . . . you could drag a row boat over it. . . . I am familiar with the area on Exhibit B shown in green (now in dotted lines) prior to its being filled. It was not possible to navigate a boat in it at any stage of the tide. It was marsh grass. . . . there was no kind of fishing that could be done with a small skiff in that area. You couldn't do nothing because the grass was out on high tide. It was impossible to use that for any sort of navigation."

D. B. George, whose business is fishing in the Wrightsville area, said Harbor Island was created by being "pumped up." He testified in part: "I worked on the dredge that pumped up Harbor Island in . . . 1917. . . . Captain Price carried this dredge around through Spring Landing Channel (shown on aerial-photo, Exhibit B) which goes in just below where the bridge is at Wrightsville. . . . This is the channel shown to the north end of Harbor Island which goes around to the Inland Waterway. . . . I had occasion to try to get through Spring Landing Channel last winter. I was in a boat which drew about two feet of water. The tide was about two hours ebb, that is two hours after high tide. . . . My son thought we could get through, so we went on and got about half way down the channel and found we couldn't get through. . . . Spring Landing Channel is not used for commercial boats of any kind. It's not used for nothing more than fellows going oystering and clamming. . . . Fishermen don't use Spring Landing Channel, they use Stokeley's Channel going out the Inland Waterway. . . . It is possible to get through Spring Landing Channel at high tide with a small boat which draws two feet of water."

Clyde Harrelson testified: ". . . The tide normally rises 3½ feet at Wrightsville Beach. . . . No commercial fishing boats fish in the area of Sunset Lagoon. . . . The area (in controversy) is a part of a tract of

marsh land which is in excess of 2,000 acres that runs from the beach to the mainland."

The foregoing testimony and other evidence of like import supports the crucial findings of fact of the court below to the effect (1) that the land in question when conveyed by the State Board of Education was part of a tract of marsh land in excess of 2,000 acres and (2) that no part of the *locus* is or was covered by waters which are navigable in fact.

With us the ebb and flow of the tide is not the criterion for determining navigability. The more practical test is whether, in its ordinary state, a body of water has capacity and suitability for the usual purpose of navigation by vessels or boats such as are employed in the ordinary course of water commerce, trade, and travel. See 56 Am. Jur., Waters, Sec. 179; *Insurance Co. v. Parmele, supra* (214 N.C. 63). Briefly stated, the rule with us "is that all water courses are regarded navigable in law that are navigable in fact." *Development Co. v. Parmele, supra* (235 N.C. 689).

It is noted that the record here presents no question as to conflict between riparian and navigation rights.

As to the defendant's plea of estoppel, it is enough to say that new facts alleged in the pleadings and developed at the trial relating to the *locus in quo,* showing that the instant case relates to only a small portion of the land involved in the former case, *Development Co. v. Parmele, supra* (235 N.C. 689), and that the land was purchased by the plaintiff after the passage of the Act, Chapter 966, Session Laws of 1953, validating titles to marsh land, prevent the plaintiff in this action from being estopped from asserting and proving marketable title to the *locus in quo.*

The judgment below will be upheld.

Affirmed.

W. W. PEGG v. J. S. GRAY.

(Filed 9 July, 1954.)

1. Animals § 2—

The owner of a reputable dog is not answerable in damages for its entry upon the lands of another upon its own volition under circumstances amounting to an unprovoked trespass, but a dog owner may be held liable if it is shown that the dog was not reputable but possessed a propensity to commit the depredation complained of, and that the owner knew, or was chargeable with knowledge, of such propensity.

2. Same—

The owner or keeper of a dog for the purpose of sport, who, in the absence of permission to hunt previously obtained, intentionally sends his

dog on the land of another or releases the dog with knowledge, actual or constructive, that it will likely go on the lands of another in pursuit of game, is liable for trespass, even though he himself does not go upon the lands.

3. Same—

Evidence tending to show that the owner of dogs, without permission to hunt previously obtained, on numerous occasions intentionally and for the purpose of sport sent his pack of dogs, or released them, knowing that the dogs were likely to go on, over and across the lands of plaintiff in pursuit of foxes, whereby plaintiff sustained substantial damage to his fences and other property, *is held* sufficient to carry the case to the jury on the theory of trespass. The applicability of G.S. 67-2, G.S. 113-104, not presented on the theory of trial.

4. Appeal and Error § 8—

An appeal of necessity follows the theory of the trial.

APPEAL by plaintiff from *Patton, Special Judge,* at 1 February, 1954, Civil Term of GUILFORD, Greensboro Division.

Civil action to recover damages for alleged trespasses committed by foxhounds while in the heat of chase.

The plaintiff's evidence may be summarized as follows: He and the defendant own adjoining farms in Guilford County. During most of the three-year period before the commencement of the action, the defendant kept a pack of from seven to ten foxhounds, and with them at frequent intervals during the hunting seasons chased foxes onto and across the plaintiff's lands without his permission and in disregard of his protests.

The plaintiff's farm contains about 340 acres, on which he cultivated tobacco, corn, wheat, and other crops. He also maintained a herd of about 70 beef cattle. These were kept in a barbed-wire enclosed pasture of about 125 acres, with partition fences within the over-all enclosure making smaller pastures, for purposes of rotation grazing, ranging from 6 to 40 acres.

The plaintiff's farm lies between two creeks. On the occasions of the hunts the defendant did not go in person upon the lands of the plaintiff. The foxes were found along one or the other of the creeks next to the farm. After being jumped they usually ran from creek to creek across the plaintiff's farm, through his croplands, and in the course of some of the chases damage was done by the dogs to growing crops. Also, the foxes, when tiring and in close pursuit by the dogs, often would run in and through herds of cattle in an effort to elude the hounds, thus causing the cattle to stampede and frequently to break down barbed-wire pasture fences, and by reason of which the cattle were frightened, wounded, and molested in their feeding habits and impeded in their normal growth. The plaintiff in describing one of the hunts he observed said the cattle, some

60 head, were huddled up against one of the fences and the dogs were just "dodging in and among the cattle . . .—stayed in the herd about five minutes," and caused the cattle to stampede against the fence. The plaintiff further testified he knew the sound of the defendant's "pack of hounds when they were in full cry" and that as many as fifteen or twenty times on the mornings after hearing them chase foxes across his premises, he found his cattle stampeded and injured and his partition fences damaged and torn down. As he put it: "In the last year or so we have completely abandoned the partition fences. They were torn down faster than we could fix them up by these hounds chasing fox and stampeding my cattle. . . . It cost me about $150 a year to repair my fences damaged by these cattle stampeding for the years 1950, 1951, and 1952." (Cross-examination): ". . . I identified the dogs by the tags. Mr. Gray's name was stamped on the tags. I stopped the dogs about 25 times and counted them, over this three-year period. . . ."

The plaintiff's son testified: "I estimate I went with my father to the cattle pasture, in relation to the fox hunt, 25 times to see what was disturbing them. I have seen the dogs run across the pasture through the cattle many times. I would catch them to see whose tags were on them, and all the time they were Mr. Gray's. . . . We have seen cows in the morning after the hunt—they had been cut sometimes . . ."

The evidence also discloses that when the plaintiff protested to the defendant when one hunt was in progress, the defendant replied: "I don't want to hear you say that any more. They (the dogs) are not damaging your cattle. If they kill one of them, I'll pay you for it."

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.

Howerton & Howerton for plaintiff, appellant.

Hines & Boren, Jordan & Wright, and Charles E. Nichols for defendant, appellee.

JOHNSON, J. We are not dealing here with a trespass committed by a dog of its own volition while roaming abroad.

It may be conceded as a well-established principle of law that where a dog roams abroad on another's land of its own accord and does damage or inflicts injury to persons, animals, or property there can be no recovery therefor in the absence of special statutory enactment, unless it be shown that (1) the dog was possessed of a propensity to commit the depredation complained of and (2) the owner knew, or was chargeable with knowledge, of such propensity. *Buckle v. Holmes,* 2 K. B. (Eng.) 125, 54

A.L.R. 89. See also: *S. v. Smith,* 156 N.C. 628, 72 S.E. 321; *Banks v. Maxwell,* 205 N.C. 233, 171 S.E. 70.

This principle of law is grounded upon a recognition that by natural instinct and habit an ordinary dog of most breeds is inclined to roam around and stray at times from its immediate habitat without causing injury or doing damage to persons or property. And in deference to this natural instinct of dogs the processes of the early common law eschewed the idea of requiring that they be kept shut up, and instead promulgated the foregoing rule which allows a reputable dog a modicum of liberty to follow his roaming instincts without imposing liability on its master. And so, since early times the law has been and still is that the owner of a reputable dog is not answerable in damages for its entry upon the lands of another upon its own volition under circumstances amounting to an unprovoked trespass. *Buckle v. Holmes, supra; Mason v. Keeling,* 1 Ld. Raym. 606, 91 Eng. Reprint, 1305; *Brown v. Giles,* 1 Car. & P. 118, 171 Eng. Reprint, 1127; *Buck v. Moore,* 35 Hun. (N.Y.) 338; *State v. Donohue,* 49 N.J.L. 548, 10 A. 150, 60 Am. Rep. 652; 2 Am. Jur., Animals, Sec. 105; Annotation: 107 A.L.R. 1323.

However, the rule is different where a dog owner or keeper for the purpose of sport intentionally sends a dog on the lands of another or releases a dog or pack of dogs with knowledge, actual or constructive, that it or they likely will go on the lands of another or others in pursuit of game. In such cases the true rule would seem to be that the owner or keeper, in the absence of permission to hunt previously obtained, is liable for trespass, and this is so although the master does not himself go upon the lands, but instead sends or so allows his dog or dogs to go thereon in pursuit of game.

The gist of the leading English decisions on the subject, with footnote citations of the decided cases, may be found in Halsbury's Laws of England (1911), Vol. 1, page 395, where it is said: "The owner of a dog is not answerable in trespass for its unauthorized entry into the land of another, often described as an unprovoked trespass. . . . But if a man wilfully send a dog on another man's land in pursuit of game he is liable in trespass, although he did not himself go on the land . . . So also if he allow a dog to roam at large, knowing it to be addicted to destroying game . . ." And, further, we find this, with supporting note citations of cases, in Halsbury's, Vol. 15, page 226: ". . . or, again, if a person while hunting enters on the land of another without his consent, he commits an act of trespass . . . *Further, the entry need not be personal in order to be actionable. A man who himself does not enter, but invites or authorizes others to do so, is liable to an action for trespass . . . So, too, . . . the sending of a dog on to such land in pursuit of game . . .*" (Italics added.) See *Paul v. Summerhayes,* 4 Q. B. (Eng.) 9; *Beckwith v. Shordike,* 4

Bun. 2092, 98 Eng. Reprint, 91; *Baker v. Howard County Hunt,* 171 Md. 159, 188 A. 223, 107 A.L.R. 1312; Annotation: 107 A.L.R. 1323; Annotation: 21 Ann. Cas. 915. See also 2 Am. Jur., Animals, Sec. 105, p. 770.

We have not overlooked the following statement to which our attention has been directed in 24 Am. Jur., p. 377: "The trespass of a hunter in pursuit of game on another's premises may be made a crime, *but it has been held that such offense is not committed by the sending of a dog on the premises in search or pursuit of game."* (Italics added.) An examination of the two cases on which this text-statement is based discloses that in each instance the court was dealing with a criminal prosecution for alleged violation of a statute making it unlawful to hunt on the lands of another person. This latter portion of the text-statement, ". . . but it has been held that such offense is not committed by the sending of a dog on the premises in search or pursuit of game," is based solely upon the decision in *Pratt v. Martin* (1911), 2 K. B. (Eng.) 90, 21 Ann. Cas. 914, wherein the statute at hand made it a criminal offense for any person to commit a trespass by "entering or being upon" any land in search or pursuit of game. There, the facts were that the appellant hunter was lawfully on the lands of one Babb for the purpose of shooting game. Appellant with gun and dog came to a brook which divided Babb's land from that of another. He waved the dog across the brook into a spinney—a thicket—where the dog "put up a pheasant" which the appellant shot and killed, the bird dropping into the spinney. The dog retrieved the bird and carried it across the brook to the appellant. There was no evidence he was ever off the land of Babb. The lower court convicted. On appeal, the judgment below was reversed upon the theory that the provisions of the statute, as a criminal enactment, did not expressly cover the act of sending a dog on another person's land. The case decides nothing as bearing upon the question of civil trespass in respect to such conduct. It is manifest that the decision in *Pratt v. Martin* is not at variance with the well-established rule that one who intentionally sends his dog on another person's land in pursuit of game may be held civilly liable therefor on the theory of trespass.

This view is in accord with the decision of the English Court in *Paul v. Summerhayes, supra* (4 Q. B. 9), in construing the proviso in Section 35 of the English Game Act of 1831 (1 and 2 Wm. 4, c. 32; Halsbury's Statutes of England, 1929, Vol. 9, p. 1079). The Act makes certain trespasses in pursuit of game criminal offenses, whereas the proviso excepts fox hunting from the provisions of the Act in these words: ". . . that the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, . . ." In *Paul v. Summerhayes* the

appellants, who had been following a pack of foxhounds in the heat of chase, sought to justify entry on the lands of another by virtue of the foregoing proviso contained in the Game Act of 1831. However, it was held that the proviso was intended only to prevent the penal provisions of the Act from being applied against fox hunters, thus leaving the law of civil trespass unaffected by the Act. Said *Lord Coleridge, C. J.*—great nephew of Coleridge the poet—in delivering his opinion: "There is nothing, . . . in the Act to alter the common law with regard to trespass so far as concerns foxhunting." And *Meller, J.*, by way of concurrence had this to say: "In any case the exception in favour of foxhunting in the 35th Section could only apply to the special provisions of the Act for the protection of game, and could not affect the question whether a trespass could be justified at common law in the course of hunting a fox, . . ."

In recognition that the law of trespass as fixed by the principles of the common law affords no immunity to fox hunting as a sport, it has become the established custom in England for the master of the hunt to raise funds, by subscription of the members of the hunt, with which to pay farmers for damage done their poultry, fences, crops, etc., by the hunt. These funds are known as "Poultry," "Damage," and "Wire" Funds. See Brock, The A.B.C. of Fox-Hunting (American edition by Scribner's, 1936), p. 17.

To the established rule which holds one liable for trespass for sending his dog on another's land in pursuit of game we are advertent to this statement apparently *contra* appearing in Ingham, The Law of Animals (1900), Sec. 41, p. 121: "A person may justify trespass in following a fox with hounds over the grounds of another if he does no more than is necessary to kill the fox." This text-statement is based solely on the decision in *Gundry v. Feltham,* 1 T. R. 334, 99 Eng. Reprint 1125. That case was an action for trespass for entering the plaintiff's closes with horses and dogs and following a fox with hounds. It was decided by a three-member court composed of *Lord Mansfield, C. J., Willes* and *Buller, JJ.* The case was disposed of by this terse statement of *Mansfield, C. J.*: "By all the cases as far back as in the reign of Henry 8th, it is settled that a man may follow a fox into the grounds of another." However, *Buller, J.*, concurring, had this to say: "The question on this record is, whether the defendant be justified in following the fox at all over another man's grounds. The demurrer admits that which is averred in the plea, namely, that this was the only means of killing the fox. This case does not determine that a person may unnecessarily trample down another person's hedges, or maliciously ride over his grounds: if he do more than is absolutely necessary (to kill the fox), he cannot justify it; . . ." Thus the decision in *Gundry v. Feltham* was confined to narrow limits at the time of its rendition. It has been much criticized and has been treated by

the English courts as virtually unauthoritative since the notable decision in *Paul v. Summerhayes, supra* (4 Q. B. 9), decided in 1878. In the latter case, as we have seen, the appellants had been engaged in hunting with a pack of foxhounds. They sought to justify entry on the lands of another while in pursuit of a fox. They urged as authority in justification of their asserted right of entry (1) the proviso contained in Section 35 of the English Game Act of 1831 (1 and 2 Wm. 4, c. 32) which, as we have previously pointed out, was held inapplicable, and (2) the decision in *Gundry v. Feltham, supra,* decided in 1786. In holding that the decision in *Gundry v. Feltham* does not justify trespass in hunting on the lands of another with a pack of foxhounds, *Lord Coleridge, C. J.,* said in part:

"It was suggested that there is authority that foxhunting in the popular, well understood, sense of the term, that is, as a sport, can be carried on over the land of a person without his consent and against his will, and the case of *Gundry v. Feltham* was cited as authority for that proposition. I am of opinion that no such right as that claimed exists. The sport of foxhunting must be carried on in subordination to the ordinary rights of property. Questions such as the present fortunately do not often arise, because those who pursue the sport of foxhunting do so in a reasonable spirit, and only go upon the lands of those whose consent is expressly, or may be assumed to be tacitly, given. There is no principle of law that justifies trespassing over the lands of others for the purpose of foxhunting. The case of *Gundry v. Feltham* is distinguishable from the present case, and can be supported, if it is to be supported at all, only on the grounds suggested by *Lord Ellenborough* in the case of *Lord Essex v. Capel,* to which we have been referred. The demurrer admitted that what was done was the only means for destroying the fox, and *Buller, J.,* expressly puts his decision on that ground. The case was brought under the consideration of *Lord Ellenborough* in *Lord Essex v. Capel,* and he was distinctly of opinion that, where any other object was involved than that of the destruction of a noxious animal, an entry on the land of another, against his will, could not be justified. In the case of *Lord Essex v. Capel* it had been pleaded that the means adopted were the only means, and also that they were the ordinary and proper means of destroying the fox. But the evidence clearly shewed that in the case of foxhunting, as ordinarily pursued, the object of destroying the animal is only collateral. The interest and excitement of the chase is the main object. *Lord Ellenborough,* than whom there could be no higher authority on such a point, was of opinion that where this was the case, and where the real object was not the mere destruction of a noxious animal, a trespass could not be justified. If persons pursue the fox for the purpose of sport or diversion, they must do so subject to the ordinary rights of property. It would seem that there

may be some doubt as to the validity of the justification even where the only object is the destruction of a noxious animal. The idea that there was such a right as that of pursuing a fox on another's land appears to have been based on a mere dictum of *Brook, J.,* in the Year Book, 12 Hen. 8, p. 10. This dictum was not necessary for the decision of the case, for there the chasing of a fox was not in question, and the case went off on an entirely different point. It may well be doubted in my opinion whether, even if the case were one in which the destruction of a fox as a noxious animal was the sole object, there would be any justification. That question, however, does not, I think, arise here. It is enough to say that the case of *Gundry v. Feltham,* and the dictum of *Brook, J.,* in the Year Book, 12 Hen. 8, p. 10, do not at all conflict with the opinion expressed by *Lord Ellenborough* in *Lord Essex v. Capel,* which appears to me to be the true view of the law, viz., that a person has no right, in the pursuit of a fox as a sport, to come upon the land of another against his will. For these reasons our judgment must be for the respondent."

It may be conceded that since Samson, according to the folk tale of Biblical lore, tied the firebrands to the tails of 300 foxes and sent them into the grain fields of the Philistines (Judges 15 :4, 5) the fox has been looked upon by many persons as a noxious animal, to be exterminated. Nevertheless, to countless thousands of devotees of the chase the death of a fox, unless it be in front of hounds, is regarded as a social crime. We embrace the view of *Lords Ellenborough* and *Coleridge,* as stated by the latter in *Paul v. Summerhayes, supra,* that fox hunting as ordinarily pursued—certainly as shown by the record in this case—is pure sport to be followed in subordination to established property rights and subject to the principles governing the law of trespass. See also *Baker v. Howard County Hunt, supra;* 24 Am. Jur., Game and Game Laws, Sec. 8; 52 Am. Jur., Trespass, Sec. 12, p. 845.

In the case at hand the evidence is sufficient to justify the inference that the defendant, without permission of the plaintiff, on numerous occasions intentionally and for the purpose of sport sent his pack of dogs, or released them knowing they likely would go, on, over, and across the lands of the plaintiff in pursuit of foxes, whereby the plaintiff sustained substantial damage to his fences and other property. Without further elaboration it is enough to say that the evidence when tested by the applicable principles of law is sufficient to carry the case to the jury on the theory of trespass. The record discloses that the case was cast by the pleadings and developed by the evidence on that theory. The rule is that an appeal of necessity follows the theory of the trial. *Lyda v. Marion,* 239 N.C. 265, 79 S.E. 2d 726; *Parrish v. Bryant,* 237 N.C. 256, 74 S.E. 2d 726. Hence it is not necessary to treat of the statutes, G.S. 67-2 and 113-104, referred to in the briefs and discussed on the argument.

The judgment below is
Reversed.

CHARLES RAY HARRIS, A MINOR, BY HIS NEXT FRIEND, MRS. LULA JONES, v. WHITE CONSTRUCTION COMPANY AND BERNICE S. NELSON.

(Filed 9 July, 1954.)

1. Highways § 4a—

Plaintiff's own evidence disclosed that he saw barricades and signs warning motorists that the highway was under construction, and that the excavation of a three-foot strip of highway along one side was plainly visible. The remaining portion of the hard surface was sufficiently wide for two vehicles to meet and pass. *Held:* The evidence is insufficient to support the inference that the contractor's asserted negligence in failing to post a watchman along the excavation and in failing to exercise due care in providing adequate signs, signals and warnings along the approach of the construction project, was a contributing cause of plaintiff's collision with another vehicle traveling in the opposite direction.

2. Automobiles §§ 13, 18h (2)—

Evidence tending to show that a truck engaged in hauling asphalt was traveling along a one-hundred-foot strip where the highway had been excavated on one side for a width of three feet, leaving about 19 feet of hard surface for two-way traffic, that the truck was being driven 60 to 65 miles per hour, that the driver ran partly off on the shoulder of the road on his right, and in attempting to get back on the highway, lost control and struck plaintiff's car, which was traveling in the opposite direction, on plaintiff's right of the center of the highway, *is held* sufficient to be submitted to the jury on the issue of the truck driver's actionable negligence.

3. Automobiles § 24½ c—

Evidence that the defendant driver, who owned his own truck, was operating it in highway construction work in company with trucks owned by the road contractor, that the contractor reserved the right to terminate defendant driver's services at any time they were unsatisfactory, and that the contractor's foreman was up and down the construction project at all times during working hours directing the work of all of the drivers and other workers, *is held* sufficient to be submitted to the jury on the question of whether defendant driver was an employee of the road contractor and not an independent contractor.

4. Master and Servant § 4a—

The right to control the workman with respect to the manner and method of doing the work, regardless of whether such right is exercised or not, as distinguished from the mere right to require certain results, is usually determinative of whether the relationship between the parties is that of employer and employee, or independent contractor.

5. Trial §§ 31b, 31f—

An erroneous view of the law or an incorrect application thereof in the court's charge to the jury must be held for prejudicial error, even though given in stating the contentions of the parties.

6. Appeal and Error § 6c (6)—

A misstatement of a contention need not be brought to the trial court's attention when such misstatement presents an erroneous view of the law or an incorrect application of it.

APPEAL by defendant from *Frizzelle, J.*, and a jury, at 26 October, 1953, Term of PITT.

Civil action in tort involving an automobile-truck collision on N. C. Highway No. 43 about four miles west of Greenville.

The paved portion of Highway No. 43 west of Greenville at and near where the collision occurred was in process of being widened from 16 to 22 feet by the addition of a strip of new pavement 3 feet wide on each side. The construction work was being done by the corporate defendant under contract with the State Highway and Public Works Commission. The widening job had been completed where the collision occurred, but a strip on the north side some 100 feet or more long had proved defective and had been excavated to a depth of about 18 inches preparatory to being repaved. A barricade had been placed across the north side of the highway about 20 feet east of the excavation. The barricade was a half-sawhorse device with one end of the bar elevated by uprights about 3 feet high; the other end rested on the ground. The barricade was 6 or 8 feet long. It was so placed on the highway that its upright end protruded from the north side of the road over about 2 feet of the old paving, with the bar extending across the new 3-foot strip of paving and resting on the north shoulder of the road. About 350 feet east of the barricade there was a large sign side of the road reading: "CONSTRUCTION AHEAD." And 50 feet east of that sign was another one on which was printed "SLOW." Also, about 2 miles east of these signs was a third one which read: "DANGER—ROAD UNDER CONSTRUCTION," with the name of the corporate defendant underneath the sign. All the signs were of standard size and lettering as prescribed by the State Highway and Public Works Commission.

The collision occurred a few minutes after twelve o'clock noon, 31 July, 1951. The plaintiff was driving a Chevrolet sedan, the defendant Bernice S. Nelson a dump truck. The two vehicles, traveling in opposite directions, were meeting near where the strip of new paving had been dug up on the north side of the road preparatory to repaving. The plaintiff was traveling west; the defendant Nelson was going east. Between them was an open, straight stretch of road about 700 feet long, side of which was the excavation previously described.

The plaintiff offered evidence tending to show he observed the oncoming truck of the defendant Nelson at a distance of about 600 feet; that plaintiff drove on at a speed of 30 or 35 miles per hour, observed the sawhorse-barricade 300 feet before he reached it, passed the barricade, and continued on along his right side of the center of the highway; that the oncoming truck of Nelson was being operated at the excessive speed of from 60 to 65 miles per hour; that before the two vehicles met the truck left the paved portion of the highway on its right and ran for a short distance partly on the dirt shoulder; that Nelson "snatched it back" on the pavement and in doing so lost, or failed to regain, control of the truck and permitted it to cross the center of the highway and collide with the plaintiff's sedan, the left front of the truck striking the left side of the plaintiff's car near the front door and stripping it downward from there. According to the plaintiff's evidence, he had traveled a distance of 179 feet west of the sawhorse-barricade when the collision occurred. His car came to rest in the excavation side of the pavement. In the impact the plaintiff sustained permanent injuries of a serious nature, including the loss of an arm.

Nelson was working for the corporate defendant. He was hauling molten asphalt from the corporate defendant's mixing plant east of the point of collision to where the asphalt was being poured west of the point of collision. Nelson had just delivered a load where the pouring was under way, and at the time of the collision was returning, with empty truck, to the mixing plant for another load of asphalt. Under his hiring arrangement with the corporate defendant, he was using his own truck and was being paid a stated price per ton for hauling. He was operating his truck along with and among a fleet of trucks owned by the corporate defendant and operated by its own drivers. Nelson, like the rest of the drivers operating between the mixing plant and the paving project, was given a ticket by the mixing plant foreman showing the time each load of molten asphalt was delivered in the truck, and he was required to deliver it at the paving project within a fixed period of time, otherwise the asphalt would be too cold for use. The corporate defendant reserved the right "to fire" Nelson and terminate his services any time they were unsatisfactory. Nelson, like the other drivers, received direction from the corporate defendant as to the manner of loading and as to where and how to unload the asphalt. A foreman of the corporate defendant was up and down the construction project all the time during working hours directing the work of Nelson and the other drivers and workers. As the witness Satterthwaite put it: ". . . Mr. Ross was the superintendent . . . and he directed the work. He directed the laying of the asphalt; . . ."

The plaintiff's cause of action as declared on in the complaint and as sought to be developed by the evidence rests on the theory that his injuries

resulted from either or both of two proximate causes, namely: (1) the independent negligence of the corporate defendant in failing to post a watchman at the excavation and in failing to exercise due care in providing signs, signals, and warnings at the approaches to and along the course of the construction project, and (2) Nelson's negligent operation of the dump truck, imputed to the corporate defendant under the principle of *respondeat superior.*

Both defendants denied all allegations of negligence and further alleged that in any event the negligence, if any, of Nelson was not imputable to the corporate defendant for the reason that he was an independent contractor rather than an employee of the corporate defendant. The defendants also set up and specially pleaded contributory negligence of the plaintiff in bar of recovery, and in support thereof offered substantial evidence tending to show that the collision occurred near the sawhorse-barricade as the plaintiff was swinging wide to the left to pass around the barricade, and that the point of collision was over on the defendant Nelson's right side of the center of the main traveled portion of the highway.

Other evidence pertinent to decision is set out in the opinion.

The defendants' separate motions for judgment as of nonsuit, first made when the plaintiff rested his case and renewed at the conclusion of all the evidence, were overruled, after which issues raised by the pleadings were submitted to the jury. The issues submitted presented these questions: (1) negligence as to each defendant; (2) whether the relationship between the corporate defendant and Nelson was that of employer and employee or independent contractor; (3) contributory negligence of the plaintiff; and (4) damages. All the issues were answered in favor of the plaintiff and he was awarded damages in the sum of $27,500.

From judgment entered upon the verdict, the defendants appealed, assigning errors.

James & Speight for plaintiff, appellee.
Albion Dunn and White & Aycock for defendants, appellants.

JOHNSON, J. The evidence adduced below is insufficient to support the inference of negligence on the part of the corporate defendant as a proximate cause of the plaintiff's injuries based on its failure to post a watchman or its failure to provide adequate signs, signals, or warnings for the protection of the traveling public in the vicinity of the excavation. *Presley v. Allen,* 234 N.C. 181, 66 S.E. 2d 789; *Wrenn v. Graham,* 239 N.C. 462, 80 S.E. 2d 378; 25 Am. Jur., Highways, Sec. 410 *et seq.* Numerous times during the week previous to the collision the plaintiff had passed by the construction project. On the morning of the collision

he had driven past the excavation several times going to and from Greenville looking for "tobacco hands." He knew the nature of the work being done on the highway. The excavation was in plain view. As he approached it, he said he saw the barricade for a distance of 300 feet, and according to his evidence he had passed 179 feet beyond the barricade when the collision occurred. It was not a one-way drive alongside the excavation. There was adequate space for two vehicles to meet and pass. Therefore, conceding, without deciding, that the corporate defendant may have been negligent in failing to provide adequate signals, signs, or warnings in the vicinity of the excavation, even so, it is manifest that such negligence in nowise contributed to the plaintiff's injuries as a proximate cause thereof. On the record as presented there is a total lack of causal connection between the collision and the alleged independent negligence of the corporate defendant.

Nevertheless, our examination of the record leaves the impression the evidence is sufficient to carry the case to the jury on the issue of actionable negligence as to the defendant Nelson and also as against the corporate defendant on the theory of *respondeat superior.*

The plaintiff's testimony to the effect that Nelson, while driving 60 to 65 miles per hour, lost control of the truck and struck the plaintiff's car over on plaintiff's right side of the center of the main traveled portion of the highway suffices to make out a *prima facie* case of actionable negligence against Nelson. Whereas, the evidence bearing on supervision and direction of Nelson's work is sufficient to justify the inference that the corporate defendant retained control, or right of control, over the details of the work performed by him. This suffices to make out a *prima facie* case for the plaintiff on the issue of *respondeat superior* under application of the principles explained and applied in these decisions: *Lassiter v. Cline,* 222 N.C. 271, 22 S.E. 2d 558; *Aderholt v. Condon,* 189 N.C. 748, 128 S.E. 337. See also *Hinkle v. Lexington,* 239 N.C. 105, 79 S.E. 2d 220; *Hodge v. McGuire,* 235 N.C. 132, 69 S.E. 2d 227; *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137.

In *Hinkle v. Lexington, supra, Devin, C. J.,* speaking for the Court, said, at p. 107: "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."

We conclude, therefore, that the defendants' motions for judgment as of nonsuit were properly denied by Judge Frizzelle.

However, we are constrained to the view that the defendants are entitled to a new trial for errors appearing in the charge.

The court in charging the jury said: "The plaintiff contends that the defendant Nelson was also negligent in those identical particulars, for that it is alleged that he carelessly and negligently failed to post a watchman in the immediate vicinity where the wreck occurred, or to station a watchman there, or to erect a light there to warn people who had a right to travel over and upon the highway."

In no aspect of the case was the defendant Nelson under legal duty to post a watchman or provide for the giving of signals or warnings in the vicinity of the construction project which was being carried on by the corporate defendant, and this is so irrespective of whether the relationship between Nelson and the corporate defendant was that of employer and employee or independent contractor.

"It is the duty of the trial court to explain and apply the law to the substantive phases of the evidence adduced (G.S. 1-180), and an instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is error, the rule being that while ordinarily the misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contention presents an erroneous view of the law or an incorrect application of it." *Blanton v. Dairy,* 238 N.C. 382, 385, 77 S.E. 2d 922. See also *McKinney v. High Point,* 239 N.C. 232, 79 S.E. 2d 730; *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767.

Since the case goes back for a retrial, we refrain from discussing the rest of the defendants' exceptions.

New trial.

RANDLE POTEETE v. NORTH STATE PYROPHYLLITE COMPANY AND ST. PAUL MERCURY INDEMNITY CO.

(Filed 9 July, 1954.)

1. **Master and Servant § 40c—**

Where an employee, while about his work, suffers an injury in the ordinary course of employment, the cause of which is not explained, but which is a natural and probable result of a risk thereof, and the Commission finds from the evidence that the injury arose out of the employment, an award will be sustained.

2. **Master and Servant § 40a—**

In order to be compensable, an injury must arise out of and in the course of claimant's employment.

3. **Master and Servant § 40c—**

"Arising out of," as used in the Workmen's Compensation Act, means arising out of the work the employee is to do or the service he is to perform as a risk incidental to the employment.

4. **Master and Servant § 55d—**

Whether an accident arose out of the employment is a mixed question of law and fact.

5. **Master and Servant § 40c—Evidence held insufficient to support finding that injury arose out of the employment.**

The evidence tended to show that claimant, a foreman, frequently returned to the employer's plant after his regular working hours, to see how the work was going and to help correct any difficulties he found, that on the day in question claimant returned to the plant twice after his working hours for the purpose of seeing a co-employee to collect a personal debt, that on the second visit he found a rock chute, which was attended by the co-employee, choked up, and that, before speaking about the debt, he helped the co-employee for something over 20 minutes in the hard work of unchoking the chute. The evidence further tended to show that after the chute was unchoked, claimant walked over and sat on a wall to rest and wait until the co-employee had a lull in his work in order to speak to him about the debt, and that claimant, while waiting, lost consciousness and fell off the wall to his injury. *Held:* The evidence is insufficient to sustain a finding that plaintiff's injury arose out of and in the course of his employment, since from the evidence it cannot be held that the accident resulted from risk incidental to the employment.

APPEAL by defendants from *Clarkson, J.*, March Civil Term 1954 of GUILFORD (Greensboro Division).

Proceeding under Workmen's Compensation Act to determine liability of defendant North State Pyrophyllite Company, employer, and defendant St. Paul Mercury Indemnity Co., compensation carrier, to plaintiff, injured employee.

After making the jurisdictional determinations the Industrial Commission found the facts set forth below. The North State Pyrophyllite Company will be called the defendant.

Plaintiff at the time of his injury was foreman of the manufacturing department of the defendant. As such foreman it was an accepted custom and practice on plaintiff's part, with full knowledge and approval of his employer, to return to the plant at any hour after he had finished his day's work to see how the work was going, and to help correct any difficulties found to exist. The defendant always paid him for this extra work without question, which was added to his time card the next morning.

On 20 March 1953 he worked the regular day shift, which ended at 4:00 p.m. He was in good health. About 5:00 p.m. the same day he

returned to the plant to see John Moody, an employee there, who owed him $10.00. The 20th of March was pay day. He found Moody crushing rock. He left, and returned about 6:00 p.m. to see Moody about the $10.00. When he returned the second time, he found the chute to the crusher choked up. Pyrophyllite rock is fed through the chute into the crusher to be ground. Plaintiff immediately began work to help Moody unchoke it. The unchoking process is a two-man job, and it is necessary to work rapidly to prevent the rock from continuing to pile up in the chute. Plaintiff stood on one side of the chute, Moody on the other side, and each with a long iron rod proceeded to punch the choked rocks of all sizes down the chute. This work required about 30 to 40 minutes of hard labor. When the work was done, plaintiff was hot and tired. He walked about 25 steps away from the chute, and sat down on a wall, which was 2 feet high from the side he approached it, and 8 feet high on the other side. That he sat on the wall to rest a moment and to see if the machinery started off right, intending thereafter, when his services to the company ended, and there was a lull in the work, to speak to Moody about the $10.00. Moody started the machinery, and plaintiff was watching to see if the belts were running. The machinery started all right. At that moment plaintiff experienced a sensation of "turning blind," and remembered nothing thereafter until he regained consciousness in a hospital.

Plaintiff fell backward from the wall on which he was sitting, and landed on a concrete floor 8 feet below, receiving severe and permanent injuries.

The Commission reached the conclusion that plaintiff sustained an injury by accident arising out of and in the course of his employment, and awarded compensation.

On appeal to the Superior Court the award of the Commission was upheld. From this latter ruling, the defendants appeal assigning error.

A. C. Davis for Plaintiff, Appellee.
Jordan & Wright and Perry C. Henson for Defendants, Appellants.

PARKER, J. The correctness of the award is challenged on the ground that the evidence does not support the finding that claimant's injury arose out of and in the course of his employment. G. S. N. C. 97-2(f); *Lewter v. Abercrombie Enterprises, Inc., ante,* 399, 82 S.E. 2d 410; *Matthews v. Carolina Standard Corp.,* 232 N.C. 229, 60 S.E. 2d 93.

We have held in the following cases where an employee, *while about his work,* suffers an injury *in the ordinary course of employment,* the cause of which is not explained, but which is a natural and probable result of a risk thereof, and the Commission finds from the evidence that the injury arose out of the employment, an award will be sustained. *Morgan v.*

Cloth Mills, 207 N.C. 317, 177 S.E. 165; *Maley v. Furniture Co.*, 214 N.C. 589, 200 S.E. 438; *Robbins v. Hosiery Mills*, 220 N.C. 246, 17 S.E. 2d 20; *DeVine v. Steel Co.*, 227 N.C. 684, 44 S.E. 2d 77. "There is surprisingly little *contra* authority." Larson's Workmen's Compensation Law, Vol. 1, p. 100.

In the *Morgan case* the indications were he slipped on some ice, or stumbled over some lumber or a hand truck on an unlighted platform, and fell to the frozen ground. In the *Maley case* claimant was seen working in front of a running saw with a fresh bleeding place on his arm. In the *Robbins case* claimant, while reaching up in a rack in the work she was doing, fell. In the *DeVine case* the claimant was required to stand on a platform to lower a flag from a flag pole each day. He was found unconscious at the bottom of the flag pole with ropes of the flag pole tangled with his body.

It is settled law that "where an injury cannot fairly be traced to the employment as a contributing proximate cause . . . it does not arise out of the employment." *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751; *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 342; *Walker v. Wilkins, Inc.*, 212 N.C. 627, 194 S.E. 89.

If claimant's injury did not arise out of and in the course of his employment, it is not compensable. *Lewter v. Abercrombie Enterprises, Inc., supra; Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97. Both are necessary to justify an award. *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680; *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668.

We said in *Bell v. Dewey Brothers, Inc., 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; *Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97."

Whether an accident arose out of the employment is a mixed question of law and fact. *Matthews v. Carolina Standard Corp., supra; Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370.

The Commission found that claimant "walked about 25 steps away from the chute and the crusher, and sat down on a wall . . .; that he sat down on the wall to rest a moment, and to see if the machinery started off all right, intending thereafter, when his services to the company had ended, and there was a lull which would not interfere with the work, to speak to John Moody about the $10.00; that John Moody went to the switchboard and started the machinery, and plaintiff was watching the belts to see that they were running . . .; that the machinery started and at that moment plaintiff experienced a sensation of 'turning blind' which is his last remembrance . . ." The Commission further found that at the time claimant "fell from the wall, he was still acting in his capacity

as foreman, . . ., was rendering services to his employer in that capacity. . . ."

In our opinion, the evidence, most favorably considered for claimant, does not support such findings. Claimant returned to the plant twice on the evening he was injured, on personal business, to collect from Moody $10.00 Moody owed him. Claimant testified: "We started working and after we got it unstopped, I went over to a shed and sat down on a wall over there. Up until that time, when I went over and sat down, I had not said anything to Moody about the money he owed me. We were busy fixing to start back up, and I hadn't mentioned it. I was waiting until he had a lull to speak to him about the money, waiting until he had a chance. You can feed the crusher a little faster than it will grind. I was waiting until we got it running, and he could stop and I could see him about it. Well, I sat down there. I was going to see him about the money, yes, but I wanted him to get everything running before I started talking to him. I wasn't going to interfere on company time. As soon as he got over his activity there and had a lull and it wouldn't interfere with his work, I was going to ask him about the money." Claimant further testified: "I was watching the belts to see that the belts was running. See, each belt was starting and I was watching them, and I come out and in a minute or two, not over two minutes I wouldn't think, and he got up on the pay-loader there and started to feed the thing after everything had started up and that's the last I knowed. It couldn't have been over two or three minutes between the time that I got down off the chute until I fell off the wall."

Moody, plaintiff's witness, testified after the chute was unchoked, he and claimant stood around a few minutes talking, and saw the material was coming through all right. Claimant then walked to the wall, and sat down. Moody had been at work half an hour when he heard claimant yell; he turned, and saw claimant going over the wall backward. During this 30 minutes claimant did no work whatsoever.

The other witnesses shed no light on these facts. Incidentally, the evidence shows claimant worked at the chute around 20 minutes or a little over, according to his testimony; 20 to 30 minutes, according to Moody, though the Commission found claimant worked 30 to 40 minutes.

It is true the accident took place on defendant's premises. It is equally true claimant returned to the premises after his day's work was over on his personal business to collect $10.00 John Moody owed him; that the chute was unchoked and the machinery was working; and that claimant was sitting on the wall so that, in his words, as soon as John Moody "got over his activity there and had a lull, and it wouldn't interfere with his work, I was going to ask him about the money." Whether he had been sitting on the wall 2 or 3 minutes or 30 minutes before his fall is imma-

terial. It would seem that the injury could not be held an accident resulting from a risk incident to his employment. There appears no causal relationship between his employment as foreman and the injury he received. *Bell v. Dewey Brothers, Inc., supra; Matthews v. Carolina Standard Corp., supra; Beavers v. Power Co.,* 205 N.C. 34, 169 S.E. 825.

It can hardly be said that claimant's injury arose "out of and in the course of his employment," both of which are necessary to justify an award under the Workmen's Compensation Act. *Beavers v. Power Co., supra; Hunt v. State, supra.*

In the light of the undisputed evidence, we are constrained to hold that claimant was not injured by accident arising out of and in the course of his employment.

Reversed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1954

BRADLEY PIERCE v. AMERICAN FIDELITY FIRE INSURANCE COMPANY, INC.

(Filed 22 September, 1954.)

1. **Trial § 22a—**

   On motion to nonsuit, plaintiff's evidence is to be considered in the light most favorable to him.

2. **Fraud § 3—**

   As a general rule, a mere promissory representation will not support an action for fraud.

3. **Same—**

   A promissory representation will support an action for fraud if the promise is made with no intention to carry it out and the promise constitutes a misrepresentation of a material fact which induces the promisee to act thereon to his injury.

4. **Insurance § 43½—**

   Where the insurer in an automobile collision policy elects to repair the damaged automobile, insurer, under the provisions of the contract, is bound to repair the automobile and restore it to its former condition, and its authorization to the repairman to return the car to insured upon delivery by insured of a release, constitutes at least a tacit representation that the repairs had been properly made.

5. **Same—Insured may rescind release for misrepresentations that damage to car covered by policy had been repaired.**

   Insurer in an automobile collision policy elected to have the damaged car repaired, and agreed with insured's agent that it might be repaired by

a certain person, whom insurer's agent represented to be a reputable repairman who would make satisfactory repairs. Insured's evidence tended to show that he executed a release which was delivered to the repairman by his agent, and that immediately after delivery of the car by the repairman it was ascertained that the repairs had not been properly made. *Held:* Insurer's contention that the representations of his agent were solely promissory and would not support rescission of the release for fraud is untenable, since insurer, irrespective of the representations of its agent, at least tacitly represented that the repairs would satisfactorily be made, which, under the evidence, constituted a misrepresentation of material fact which induced insured to act in reliance thereon to his injury.

6. Same—

Insurer in an automobile collision policy elected to have the damaged car repaired. After notification by insurer that the car was ready for delivery, insured's agent delivered a release to the repairman, was then shown the car in a darkened room, and requested permission to try the car out before accepting delivery, which request was refused. *Held:* Under the evidence adduced in this case, the delivery of the release before request of permission to try out the car does not preclude the submission of the issue as to whether the release was obtained by fraudulent misrepresentations that the car had been properly repaired.

7. Same: Waiver § 2—

Insurer in an automobile collision policy elected to have the damaged car repaired. After the execution and delivery to the repairman of a release, and after insured had taken possession of the car and ascertained that the repairs had not satisfactorily been made, insurer's agent authorized the return of the car for reinspection and further repairs, if necessary. *Held:* Insurer waived the release, and insured could maintain an action against insurer for breach of the insurance contract upon evidence that the car had not properly been repaired and tendered to him within a reasonable time.

8. Damages § 13a: Appeal and Error § 39f—

Insurer in an automobile collision policy elected to have the damaged car repaired. After initial delivery of the car to insured by the repairman, additional repairs were made. Instructions that the measure of damages would be the difference between the fair market value of the car immediately before it was damaged and its fair market value after it was repaired, *held* not prejudicial as excluding the additional repairs from the consideration of the jury, it appearing that in other portions of the charge the court called the jury's attention to the additional repairs and to the testimony as to the fair market value of the car after all the repairs had been made.

APPEAL by defendant from *Carr, J.*, April Term, 1954, of CURRITUCK.

This is a civil action to recover for loss sustained by the plaintiff resulting from an automobile collision, bottomed on the facts hereinafter set out.

The defendant, on 31 May, 1951, issued a policy of insurance upon the plaintiff's automobile, a new 1951 Model Deluxe Henry J two-door sedan,

which cost $1,593.00, by the terms of which policy the company agreed to pay for direct and accidental loss or damage to the automobile sustained during the policy period as a result of collision or upset, less $50.00.

On Saturday, 21 May, 1952, while the policy of insurance was in effect, the plaintiff's automobile was badly damaged in a collision. The collision was duly and promptly reported to the defendant.

The defendant elected, as it had a right to do under the terms of its policy, to have the automobile repaired in lieu of paying the plaintiff in cash for the damages resulting from the collision. The plaintiff alleges that he had estimates made by two reputable automobile repair agencies on the cost of repairing his car, the low bid being $1,080.00. The defendant, through its adjuster, considered the estimates too high and took possession of the car early in June, 1952. In the meantime, the plaintiff had a heart attack and was ill for several months. The defendant, through its adjuster, dealt with Mrs. Pierce and requested her permission to have the car repaired by Ventura's Auto Center in Portsmouth, Virginia, stating that this concern was cheaper than anybody else. Mrs. Pierce testified that she gave her permission after being assured by the adjuster that the car would be put in excellent condition and that he would guarantee it would be in good shape when she got it back.

On or about 12 August, 1952, the adjuster mailed to plaintiff a release and informed him that it would be necessary to have the release executed before a notary public and delivered before he could get his car. Inquiry revealed the car had not been repaired and plaintiff refused to execute the release until his car was ready for delivery. He was notified on 13 September, 1952, by the adjuster that his car was ready to be picked up. Whereupon, the plaintiff, not being physically able to go to Portsmouth to get the car, executed the release and gave it to his wife, and, according to the evidence, instructed her not to deliver it unless the car was in good condition.

According to the testimony of Mrs. Pierce, she was requested by the insurance adjuster to deliver the release to Mr. Ventura and did so before she saw the car; that she then saw the car which was in a dark room and it looked fairly well until she got it outside where she could see it; that she requested permission to try it out but she was told by Mr. Ventura that she could not do so, that the car was her's and he was not responsible for it any more; that she discovered before she got the car into the street that it was not in proper repair; that she tried to put the brakes on and found it had no brakes; that she planned to have her daughter and her son-in-law ride with her, but when they got in the car it began to scrape and she had to lighten the load in order to drive it; that she had to have the car worked on after she left Ventura's before she could drive it home; that she drove it home with great difficulty and later returned it to Ven-

tura's place of business at the suggestion of the adjuster who agreed in writing, by letter dated 26 September, 1952, to have the car reinspected and to have additional repairs made if necessary. Satisfactory repairs were not made and the car is still in the custody of the defendant or its agent. It is conceded, however, by the defendant that the car is still the property of the plaintiff.

The plaintiff offered evidence to the effect that after additional repairs were purportedly made by Ventura, the car was not in usable condition; that at that time the car had a fair market value of only $300.00 to $350.00, and that its fair market value immediately prior to the collision was $1,500.00.

The defendant set up the release executed by the plaintiff as a bar to any recovery by plaintiff. The release is in the usual form and purports to have been executed in consideration of the payment by the defendant to Ventura's Auto Center of $680.34, less $50.00 which was paid by the plaintiff, as the "agreed loss and damage" to plaintiff's automobile. Plaintiff in his reply alleges that the execution of the release was procured by fraud and misrepresentation.

Appropriate issues were submitted to the jury and answered to the effect that the execution and delivery of the release was obtained by fraudulent misrepresentation as alleged in the reply; that the defendant had breached its contract of insurance as alleged in the complaint, and awarded the plaintiff damages in the sum of $1,100.00. The defendant appeals, assigning error.

John H. Hall and LeRoy & Goodwin for appellee.
McMullan & Aydlett for appellant.

DENNY, J. The defendant challenges the sufficiency of the plaintiff's evidence to withstand its motion for judgment as of nonsuit interposed at the close of plaintiff's evidence and renewed at the close of all the evidence. In our opinion, however, when plaintiff's evidence is considered in the light most favorable to him, as it must be on such motion, it is sufficient to carry the case to the jury. *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Grier v. Phillips,* 230 N.C. 672, 55 S.E. 2d 485.

The defendant excepts and assigns as error the refusal of the trial court to comply with its written request to the effect that if the jury believed the evidence and the facts to be as testified, to answer the issue with respect to fraud and misrepresentation in the procurement of the release in favor of the defendant.

The defendant argues that Mrs. Pierce, agent for the plaintiff, and the adjuster, agent for the defendant, agreed that the damaged automobile

might be repaired by Ventura and that its agent only advised Mrs. Pierce that Ventura was a reputable automobile repair man and would make satisfactory repairs. Therefore, it contends that the misrepresentations made in its behalf, if any, were only promissory in nature and insufficient to support an allegation of fraud, citing *Mitchell v. Mitchell,* 206 N.C. 546, 174 S.E. 447.

The general rule in this respect is to the effect that an unfilled promise cannot be made the basis for an action for fraud. *Davis v. Davis,* 236 N.C. 208, 72 S.E. 2d 414; *Williams v. Williams,* 220 N.C. 806, 18 S.E. 2d 364; *Shoffner v. Thompson,* 197 N.C. 664, 150 S.E. 195; *Pritchard v. Dailey,* 168 N.C. 330, 84 S.E. 392; 23 Am. Jur., Fraud and Deceit, section 38, page 799, *et seq.* The rule, however, is otherwise if the promise is made with no intention to carry it out, and such promise constitutes a misrepresentation of a material fact and the promisee is induced thereby to act upon it to his injury. *Davis v. Davis, supra; Williams v. Williams, supra; Mitchell v. Mitchell, supra; Trust Co. v. Yelverton,* 185 N.C. 314, 117 S.E. 299.

In the instant case, the consideration which the plaintiff was to receive upon the execution and delivery of the release was not to be in money, but in the return of his automobile duly and properly repaired. As stated in Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 6, page 500, ". . . where the insurer elects to repair the damaged automobile and represents, at least tacitly, that it will place the vehicle in the condition that it was in previously, the insured has no choice but to acquiesce, and the original contract of the parties is converted into a new one, under which the insurer is bound to repair the automobile and restore it to its former condition." The plaintiff's car, according to the record, has not been so restored. The defendant's evidence establishes the fact conclusively that when the plaintiff's automobile was delivered to his wife on 13 September, 1952, it had not been repaired as contemplated under the provisions of the insurance policy in the event the insurer elected to have the car repaired, as it did in this case, in lieu of payment for the damages resulting from the collision. The adjuster of the defendant not only authorized the return of the car, after the execution and delivery of the release, to Ventura's Auto Center for reinspection and additional repairs if necessary, but his testimony with respect to the condition of the car when returned was as follows: "I looked over the car after it was wrecked and also after it was returned by Mrs. Pierce following the repairs. It needed repairs in several instances. I had several independent agencies give us an estimate and two dealers gave us statements that the car was not properly repaired and needed additional work."

In light of the evidence adduced in the trial below, the fact that Mrs. Pierce delivered the release to Mr. Ventura before requesting permission

to try out the car would not, in view of his immediate refusal to permit the car to be tried out, warrant a refusal on the part of the court to submit the issue as to misrepresentation and fraud in its procurement. Even so, in our opinion, the defendant waived the provisions of the release by authorizing the return of the car for reinspection and further repairs, if necessary, and we so hold. Therefore, the plaintiff had a right to maintain an action for damages against the defendant for breach of the insurance contract when the car was not properly repaired and tendered to him within a reasonable time. Hence, the finding to the effect that the execution and delivery of the release was obtained by fraud and misrepresentation becomes immaterial, and the assignment of error in respect thereto is overruled.

Assignments of error Nos. 4, 5, 6, and 7 are based on exceptions to the charge with respect to damages. The challenged portions of the charge are to the effect that the plaintiff is entitled to recover, if he is entitled to recover at all, the difference in the fair market value of the automobile immediately before it was damaged in the collision, and the fair market value after it was repaired at Ventura's place of business for the price paid by the insurance company, plus $50.00 paid by the plaintiff.

The defendant contends that this charge was not sufficient to include the additional repairs made to the automobile after it was returned to Ventura's place of business. We do not concur in this view, in light of the only evidence as to the fair market value of the car after the collision, which was that of M. S. Cridlin, the operator of an automobile repair shop, paint shop, and an agency for the sale of Kaiser-Frazer cars including Henry J, in Elizabeth City, North Carolina. This witness testified that the fair market value of plaintiff's car immediately prior to the collision was $1,500.00; that at the time of the collision a new 1951 Henry J automobile would have cost a little over $1,800.00; that he inspected the plaintiff's car three days after the collision and that it had a fair market value of $150.00 as junk; that he went to Ventura's place of business in Portsmouth, Virginia, which appeared to be a junk yard, and inspected plaintiff's car after the additional repairs had purportedly been made; that the car was still not in proper repair and had a fair market value of only $300.00 to $350.00. The court called the jurors' attention to this evidence and pointed out that Mr. Cridlin testified that after the car had been repaired twice at Ventura's place it had a fair market value of around $350.00. Consequently, we do not think any prejudicial error that would warrant a new trial has been made to appear. *Barton v. Farmers Insurance Exchange* (Mo. App.), 255 S.W. 2d 451. Hence, in law, we find

No error.

VIRGINIA S. GROOME v. MRS. R. L. (FRANCES M.) LEATHERWOOD.

(Filed 22 September, 1954.)

1. Executors and Administrators § 26—

The discharge of an administratrix by the probate court having jurisdiction raises a presumption that the administratrix has complied with every prerequisite to a valid discharge.

2. Same: Judgments § 25—

Ordinarily, a decree of a probate court having jurisdiction is not subject to collateral attack.

3. Executors and Administrators § 27: Courts § 14—Party may not maintain action in this State challenging decree of foreign probate court.

Plaintiff's father died in another State leaving real and personal property therein. Plaintiff alleged that defendant administratrix, acting under paper writings purporting to be the last will and testament of plaintiff's father, settled the estate and was discharged by the probate court of such state, but that plaintiff was born subsequent to the execution of said paper writings, and therefore, under the laws of such other state, was entitled to a part of the proceeds of the sale of the real estate and a part of the personal property of the estate. Plaintiff asked for an accounting by defendant administratrix. *Held:* The relief sought involves a challenge to the correctness of the official acts of the administratrix and the order of discharge of the probate court, and demurrer to the jurisdiction of our court was properly sustained. The allegations were insufficient to charge that the administratrix brought funds of the estate into this State and here wrongfully converted such funds to her own use so as to entitle plaintiff to an accounting in a court of equity on the grounds of a personal trust.

APPEAL by plaintiff from *Sink, J.*, March Term, 1954, of SWAIN.

Plaintiff, a resident of Guilford County, North Carolina, instituted this action on 3 July, 1952, in the Superior Court of Swain County, asking for an accounting by the defendant, her mother, a resident of the latter county, in connection with the administration of the estate of plaintiff's deceased father.

The sum and substance of the pertinent allegations in the complaint are set forth in the numbered paragraphs below.

1. That her father died on or about the ...... day of May, 1919, a resident of Mercer County, West Virginia; that on 15 May, 1919, two paper writings purporting to be the last will and testament of plaintiff's father, Charles Stump, were admitted to probate in the office of the Clerk of Court in Mercer County at Princeton, West Virginia; that the defendant, Frances M. Stump (now Mrs. R. L. Leatherwood), qualified as the administratrix of the estate of Charles Stump, deceased.

2. One of the probated paper writings was dated 30 March, 1917, and purported to devise to the defendant a one-half interest in certain real estate, situate near Bluestone Junction, in Mercer County, West Virginia. The defendant already owned the other one-half interest in this property. This instrument directed that all the rest and residue of the decedent's estate, both real and personal, should be distributed according to the general laws of descent and distribution as might be applicable at the time of his death, and expressly charged the residuum of his estate with the payment of his debts.

3. That the other paper writing admitted to probate was dated 19 November, 1917, and purported to devise to the defendant the testator's undivided one-half interest in Lot No. 9, Section D, of the John Walters Addition to the City of Bluefield, West Virginia. The defendant also owned the other one-half interest in this property. No other bequest or devise was contained in this instrument.

4. That plaintiff, Virginia S. Groome, was born 13 December, 1917.

5. That on 5 December, 1919, the defendant sold the tract of land devised in the paper writing dated 30 March, 1917, for a consideration of $8,000.00, and executed and delivered a deed purporting to convey a fee simple title thereto, when in fact the plaintiff, a minor child, owned a one-half undivided interest therein subject to the defendant's right of dower.

6. That on 14 February, 1920, the defendant sold the tract of land referred to in the paper writing dated 19 November, 1917, for a consideration of $8,750.00, and executed and delivered a deed purporting to convey a fee simple title therein, when in fact the plaintiff, a minor child, owned a one-fourth undivided interest therein.

7. That on 24 April, 1920, the defendant, as administratrix of the estate of Charles Stump, deceased, filed her final report as such administratrix and was discharged; that there were a number of notes and a $100.00 Liberty Bond listed among the intangible assets of the estate of Charles Stump, totaling $2,955.64, for which no accounting was given by the administratrix; that the administratrix, the defendant in this action, reported to the probate court that she had advanced $5,417.13 in the settlement of the estate of her intestate, and that this advance was made from the proceeds obtained by the sale of real estate devised to her by Charles Stump, deceased.

8. That the defendant wrongfully sold and disposed of the real property referred to in the above paper writings, and has failed and refused to account to the plaintiff for plaintiff's distributive share therein and still refuses to account therefor.

9. Plaintiff alleges that as an after-born child, she is entitled to recover $2,800.40 of the proceeds derived from the first sale of real estate, and

$2,187.50 of the proceeds derived from the sale of the second tract, a total of $4,987.90, and in addition thereto she prays for an accounting by the defendant for the personal property belonging to the estate of Charles Stump, deceased.

10. That the plaintiff did not learn of her inheritance until Sunday following the 4th of July, 1949, or of its value until August, 1949.

The defendant demurred to the complaint on two grounds, the substance of which is as follows:

1. That this court has no jurisdiction of the subject of the action, in that it appears upon the face of the complaint that the plaintiff bottoms her cause of action upon matters pertaining to the administration and settlement of the estate of her father in Mercer County, West Virginia, and that the defendant, as administratrix of such estate, filed her final account and was discharged on 24 April, 1920; and that this court has no jurisdiction to entertain a collateral attack upon such proceedings.

2. That the plaintiff does not allege facts sufficient to state a cause of action, in that it does not appear in the complaint that the defendant conveyed or passed title to any property, in the name of or on behalf of the plaintiff, or that the defendant received any money for or on behalf of the plaintiff that has not been accounted for; and it nowhere appears in the complaint that the defendant has divested the plaintiff of title to any of her property. The demurrer was sustained and the plaintiff appeals, assigning error.

Howerton & Howerton for appellant.
Edwards & Leatherwood for appellee.

DENNY, J. Apparently the plaintiff did inherit an interest in the estate of her father, Charles Stump, deceased, the extent of which was determinable by the laws of descent and distribution in effect in the State of West Virginia at the time of her father's death. West Virginia Code of 1943, section 4059 (1) and 4060 (2). Whether she still has a right to assert her claim to such inheritance in that State is not presented on this appeal, and if it were, we would be without jurisdiction to adjudicate the matter.

The question presented for determination on this record is whether on the facts alleged the plaintiff is entitled to an order requiring an accounting by the defendant in this jurisdiction with respect to her acts as administratrix of the estate of Charles Stump, deceased, including an accounting of the proceeds realized from the sales of the real estate in which the plaintiff alleges she had an interest and to obtain a judgment for any sum that such an accounting might disclose to be due the plaintiff as an heir and distributee of Charles Stump, deceased, according to the

applicable laws of West Virginia. We do not think the facts alleged are sufficient to give the courts of this State jurisdiction over the subject matter of the purported cause of action, or to authorize them to grant the relief sought.

It would seem impossible to give the plaintiff the relief she seeks without challenging the correctness of the defendant's official acts and reports as administratrix of the estate of Charles Stump, deceased. This is not the proper jurisdiction for that purpose. The complaint discloses that the defendant reported to the probate court that she used $5,471.13 of the proceeds from the sale of the lands in controversy to pay the debts of the estate. The probate court may have taken the advance of that sum of money into consideration in connection with its failure to require an accounting of the personal property belonging to the estate, the value of which, the plaintiff alleges, was only $2,955.64. Moreover, the defendant, as widow of Charles Stump, deceased, also had an interest in the personal property of the estate as a distributee. See Laws of Descent and Distribution, West Virginia Code of 1943, section 4089 (b). In any event, according to the allegations of the complaint, the defendant filed her final account as administratrix of the estate of Charles Stump, deceased, and was discharged on 24 April, 1920. There is a presumption that she complied with every prerequisite to a valid discharge. 21 Am. Jur., Executors and Administrators, section 170, page 467.

Ordinarily, the decrees of probate courts, when acting within the scope of their powers, will be considered and dealt with as orders and decrees of courts of general jurisdiction, and where such courts had jurisdiction over the subject matter of the inquiry, such orders and decrees are not subject to collateral attack. *Fann v. R. R.,* 155 N.C. 136, 71 S.E. 81; *Starnes v. Thompson,* 173 N.C. 466, 92 S.E. 259; *Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240; *Edwards v. White,* 180 N.C. 55, 103 S.E. 901; *Hines v. Foundation Co.,* 196 N.C. 322, 145 S.E. 612; *Dees' Adm'r. v. Dees' Executor,* 249 Ky. 650, 61 S.W. 2d 301; *Foster v. Wright* (Mo. App.), 187 S.W. 2d 974; *Schmidt v. Hicks,* 28 Ohio App. 413, 162 N.E. 762; *In re Anderson's Estate,* 157 Ore. 365, 71 P. 2d 1013; Schouler on Wills, Executors and Administrators (6th Ed.), Vol. 4, section 3442, page 2771; 49 C.J.S., Judgments, section 425 (d), page 842. *Cf. Simmons v. Simmons,* 85 W. Va. 25, 100 S.E. 743.

It is said in *Tate v. Norton,* 94 U.S. 746, 24 L. Ed. 222, "The accounts of an administrator settled by the probate court cannot be collaterally attacked or questioned. They are conclusive, unless impeached for fraud or mistake in a direct proceeding inequity, instituted for that purpose."

It is likewise stated in 31 Am. Jur., Judgments, section 572, page 173: "Judgments rendered by probate courts of sister states within the sphere of their jurisdiction have also been regarded as binding upon the courts

of the several states. This rule has been applied in the case of a decree granting letters testamentary or of administration, or settling the accounts of an administrator or executor." *Simmons v. Saul,* 138 U.S. 439, 34 L. Ed. 1054.

It is true that ordinarily where a foreign executor or administrator comes within the jurisdiction of the courts of another state, bringing with him funds or property of the trust estate, and wrongfully converts such funds or property to his own use, he may be sued, not in his official capacity, but on the grounds of a personal trust which, under certain circumstances, may make him liable to account to a court of equity. 21 Am. Jur., Executors and Administrators, section 893, page 871, *et seq.*

The allegations in the complaint under consideration, however, are not sufficient to support such an action. Hence, the ruling of the court below will be upheld.

Affirmed.

JOHN H. BURTON AND EARL BURTON, REPRESENTING THE CITIZENS AND TAXPAYERS OF THE CITY OF REIDSVILLE, AND SUCH OTHER TAXPAYERS AS SHALL ASK TO BE MADE PARTIES TO THIS ACTION, PLAINTIFFS; J. W. AMOS, MRS. C. E. WARNER AND CLAUDE S. BURTON, ADDITIONAL PARTIES PLAINTIFF; AND PARTIES WHO HAVE REQUESTED TO BE MADE ADDITIONAL PARTIES PLAINTIFF: MR. AND MRS. J. W. MORICLE; MR. AND MRS. JOHN BUSICK; MR. AND MRS. JAMES WILSON; MRS. BERTHA COLLINS; MR. AND MRS. HERBERT FORD; MR. AND MRS. WALTER CHANEY; MR. AND MRS. W. L. COLEMAN; MR. AND MRS. LEE SOMERS; MR. AND MRS. L. G. STANLEY; MR. AND MRS. LONNIE BROWN; MR. AND MRS. LEWIS GOLDEN; MR. AND MRS. NUMA ROBERTSON; MR. AND MRS. H. P. HALL; MISS ADA BOWES; MR. AND MRS. E. V. BOSWELL; MR. AND MRS. W. D. STANLEY; MR. ROBERT L. STANLEY; MR. T. L. GARDNER; MR. P. M. WARE; MR. AND MRS. HENRY DOSS; MRS. ROBERT CRADDOCK; MR. AND MRS. CLARENCE MOORE; MRS. ANNIE ALLINGTON; MR. AND MRS. HERMAN HAZLIP; MR. MELVIN MORICLE; MR. AND MRS. R. G. FAIRCLOTH AND MRS. A. Z. HOOPER, HEREIN DESIGNATED AS ADVERSE PARTIES PLAINTIFF, v. THE CITY OF REIDSVILLE; GEORGE HUNT, JAMES L. THOMPSON, SR., W. B. PIPKIN, CLYDE COBB AND WILLIAM C. SPRINGS IN THEIR CAPACITY AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF REIDSVILLE AND ALSO IN THEIR CAPACITY AS INDIVIDUALS.

(Filed 22 September, 1954.)

1. Parties § 1—

While it is not necessary that all parties plaintiff have the identity of interest required by the common law, it is necessary under the code that the interests of parties plaintiff be consistent. G.S. 1-68, G.S. 1-70.

2. Parties § 10b—

Interveners must ordinarily come into the case as it exists, and when they expressly deny all material allegations of the complaint and attempt to assert claims wholly antagonistic to those asserted by original plaintiffs, such interveners, even if properly joined as additional parties, may not be made additional parties plaintiff.

3. Appeal and Error § 1—

The Supreme Court will not decide questions on appeal which have not been adjudicated in the court below.

4. Pleadings § 28—

A motion for judgment on the pleadings is in effect a challenge to the sufficiency of the pleading, admitting the truth of all its well-pleaded facts and the untruth of movant's own allegations in so far as they are controverted thereby, and the motion should be denied if the pleading challenged is good in any respect or to any extent.

5. Same: Municipal Corporations § 7a: Public Officers § 9—Complaint held to allege abuse of discretion by city officials.

This action was instituted to enjoin a municipality from destroying certain apartment buildings belonging to the city and situate on land leased by it. The complaint alleged that the apartments are of solid construction, are not injurious to life, health, or morals, do not constitute a slum condition or a fire hazard, violated no zoning regulations, and that the city council had been offered substantial consideration for the buildings, but had refused to negotiate or consider the sale or any disposition of the property other than its destruction. *Held:* The facts alleged are sufficient predicate for plaintiffs' assertion that the order of the city council to destroy the apartments constituted an arbitrary abuse of discretion, and it was error for the court to sustain the municipality's motion for judgment on the pleadings.

APPEAL by original plaintiffs from *Phillips, J.*, at 7 June, 1954, Civil Term of ROCKINGHAM.

Civil action instituted by taxpayers to enjoin the City of Reidsville from destroying three low-cost apartment buildings belonging to the City, heard below at pre-trial conference and disposed of by judgment on the pleadings.

The buildings are located on Thomas Street. They were erected in 1946 under the auspices of the Federal Public Housing Authority on land leased from the Burton plaintiffs for the purpose of relieving the housing shortage and to provide homes for returning war veterans. The buildings contain eighteen dwelling units. In December, 1949, at the City's request and pursuant to Act of Congress, the United States Government conveyed to the City of Reidsville, without monetary consideration, all right, title and interest in the buildings, and thereafter and until 1954 the City operated the apartments as a rental project and collected and retained the net rents. The original lease made by the Burton land-

owners expired 30 April, 1948. Thereafter the lease was renewed from year to year, with the last renewal expiring 30 April, 1954. Before securing the last yearly extension the City tried but failed to purchase from the Burton plaintiffs the land on which the buildings are situate. Each of the leases contained a provision which permitted removal of the buildings during the term or within a reasonable, or a designated, time after expiration.

The City Council decided to discontinue the rental project and at its meeting held 11 February, 1954, adopted a resolution directing that the tenants be notified to vacate the premises by 1 May, 1954. Following this, the Burton plaintiffs entered negotiations with the City Council looking toward a continuation of the rental project.

By written memorandum dated 7 April, 1954, the Burtons submitted to the City Council a series of proposals by which they offered: (1) to lease the lands on which the buildings are situate to the City for a term of two years upon the same conditions contained in the then current lease, provided the City agree to continue to operate the apartment project during the term; or (2) pay one-half the costs of improving the buildings, provided the City take a lease for an additional term of six years, or longer, and agree to continue the apartment project during the term; or (3) bid a minimum of $7,500 for the purchase of the buildings at public auction and make improvements which would correspond with those made by the City on similar apartments on Wray Street, where the City owned both land and buildings, provided the Burton's not be required to sell the land on which the Thomas Street buildings are situate; or (4) sell at public auction the lands upon which the buildings are situate, provided the City at the same time offer the buildings for sale at public auction and agree upon a reasonable apportionment of the moneys derived from the joint sale, and provided further that the Burtons not be required to bid any specified amount at the sale; or (5) consider any counter offer made by the City.

All the offers were rejected by the City without counter offer, and by resolution adopted 13 April, 1954, the Council ordered that the housing project "be closed" and the buildings "torn down." This order was predicated upon findings of fact made by the City Council and embodied in the resolution to the effect that (1) the housing emergency was over; (2) that there was no longer a housing shortage in the City of Reidsville requiring the use of temporary apartment units; (3) and that the Thomas Street apartments having been "constructed in temporary and substandard manner, will create a slum area in the City and endanger or injure the health, safety and welfare of the citizens of Reidsville."

On 24 April, 1954, the original plaintiffs instituted this action, the allegations of their complaint, as supplemented by later amendments,

being in substance: That the apartment buildings sought to be destroyed by the City are constructed of sound, substantial materials. They are not injurious or dangerous to life, health or morals. They do not constitute a slum condition. They are not a fire hazard. They violate no zoning regulation. The City Council has been offered and is able to receive a substantial consideration for the property but refuses to negotiate or consider the sale or any disposition of the property other than its destruction. It is further alleged that under the existing facts (1) the proposed and intended destruction of the buildings is unlawful and beyond the scope of municipal authority, and (2) that in any event the order of the City Council to destroy the apartments constitutes an arbitrary abuse of discretion.

On 24 April, 1954, Judge Leo Carr, Resident Judge of the Tenth Judicial District, granted a temporary order restraining the demolition of the buildings.

On 19 May, 1954, J. W. Amos, Mrs. C. E. Warren and Claude S. Burton were made additional parties plaintiff by order of the Clerk and by proper pleading came in and adopted the allegations of the complaint of the original plaintiffs.

On 26 May, 1954, the defendants filed answer admitting that the buildings had been ordered torn down, denying that the action of the City Council was an abuse of legislative authority or discretion, and alleging in substance the facts found by the City Council in support of its resolution of 13 April, 1954, ordering the destruction of the buildings.

On 7 June, 1954, by *ex parte* order of the Clerk, J. W. Moricle and 44 others were joined as additional parties plaintiff and designated as "adverse parties plaintiff." These parties filed answer denying the material allegations of the complaint, admitting the allegations of the defendants' answer, and further alleging, among other things, that they, the adverse parties plaintiff, are the owners of real estate located in the same vicinity as the apartment buildings and that if the buildings are not torn down a slum area will be created which will be detrimental to the general health, safety and welfare of the citizens of Reidsville at large and more particularly of those persons residing in the immediate community.

The original plaintiffs moved the court (1) that the names of the adverse parties plaintiff be stricken from the title of the cause and that their pleading bè removed from the file; or (2) that if the court be of the opinion these parties are proper parties to the action, then and in that event that the court order them joined as additional parties defendant.

The motion was heard and denied *in toto* by Judge Phillips on 9 June, 1954. Also, on that day the case was disposed of after pre-trial conference by the entry of judgment on the pleadings dissolving the restraining order and dismissing the action.

From the order so entered the plaintiffs appealed. The appeal entries direct that the restraining order be continued in effect pending the appeal.

Julius J. Gwyn for plaintiffs, appellants.
Jule McMichael and Claude S. Scurry for defendants, appellees.
Sharp & Robinson for adverse parties plaintiff, appellees.

JOHNSON, J. In order to justify joinder of parties plaintiff the interests of the plaintiffs must be consistent. True, the unity or identity of interest required at common law is not necessary under the Code (G.S. 1-68, 1-70; *Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750), but two or more plaintiffs representing opposing interests with reference to the main purpose of the action may not be joined. *Osborne v. Canton,* 219 N.C. 139, 13 S.E. 2d 265; McIntosh, N. C. Practice and Procedure, Sec. 228, p. 212; 39 Am. Jur., Parties, Sec. 29, p. 892; *Hallett v. Moore,* 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572. Moreover, an intervener as a party plaintiff in a taxpayer's action ordinarily must come into the case as it exists and conform to the pleadings as he finds them. See 39 Am. Jur., Parties, Sec. 79.

The plaintiff J. W. Moricle and those similarly situated have come into the case, and by their pleading have expressly denied all material allegations of the complaint and attempted to assert claims wholly antagonistic to those alleged by the original plaintiffs. Manifestly, the court below erred in permitting these adverse parties to remain in the action as plaintiffs. The question whether they may be joined as defendants not having been ruled on below is not presented for review. This Court will not decide questions on appeal which have not been adjudicated in the court below. *Bank v. Caudle,* 239 N.C. 270, 79 S.E. 2d 723; *Perry v. Doub,* 238 N.C. 233, 77 S.E. 2d 711.

Next we come to the question whether the court below erred in allowing the defendants' motion for judgment on the pleadings. These principles of law come into focus:

A motion for judgment on the pleadings is in effect a demurrer to the challenged pleading and admits the truth of all well-pleaded facts in the pleading and the untruth of the movant's own allegations in so far as they are controverted by the pleading of the adversary. *McGee v. Ledford,* 238 N.C. 269, 77 S.E. 2d 638; *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384. See also *Dobias v. White,* 239 N.C. 409, 80 S.E. 2d 23. Moreover, if good in any respect or to any extent, a plea will not be overthrown by motion for judgment on the pleadings. *Erickson v. Starling, supra.* See also *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466; *Perry v. Doub, supra.*

The complaint, when liberally construed in favor of the pleader, as is the rule on demurrer or motion for judgment on the pleadings, is sufficient to allege abuse of discretion on the part of the governing board of the City of Reidsville in ordering the destruction of the apartment buildings. This suffices to overthrow the motion for judgment on the pleadings and entitles the plaintiffs to be heard on the questions of fact raised by the pleadings. See *In re Housing Authority,* 235 N.C. 463, 70 S.E. 2d 500. The judgment was erroneously entered and will be set aside. It is so ordered.

Error.

LOUIS TWIFORD v. MARVIN A. WATERFIELD, EXECUTOR OF THE ESTATE OF MRS. MARTHA PARKER.

(Filed 22 September, 1954.)

1. Executors and Administrators § 15d—

The rule that where a person renders services to another which are knowingly and voluntarily accepted, the law presumes that such services are given and received in anticipation of payment, is subject to the qualification that the circumstances must be such as to warrant the inference that at the time the services were rendered payment was intended on the one hand and expected on the other.

2. Same—

Services performed by one member of a family for another within the unity of the family rule are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation.

3. Same—

Plaintiff's evidence tended to show that he rendered personal services to his foster mother during her last illness, and that his foster mother stated that he had looked after her and that she wanted to look after him when she died. *Held:* The failure of the court to apply the law to the evidence favorable to defendant by charging that no recovery could be had if the services were rendered by plaintiff in discharge of a moral obligation in return for services the foster mother and her husband had rendered plaintiff during his childhood and youth, is error.

4. Same—

The court's instruction that where services are rendered for one person by another, which are knowingly and voluntarily accepted, without more, the law presumes that the services are given and received in expectation of payment, must *be held* for error upon exceptions duly taken in failing to qualify the rule with the limitation that at the time the services were rendered payment must have been intended on the one hand and expected on the other hand.

APPEAL by defendant from *Carr, J.*, March Term 1954, CURRITUCK. New trial.

Civil action to recover compensation for services rendered defendant's testatrix.

Defendant's testatrix and her husband had no children. They took plaintiff into their home when he was six or seven years of age and reared him as a foster son. He lived in the home until he was about twenty-seven years of age. He then married and moved on his farm, which is across the road from the homeplace of defendant's testatrix, where he lived until a few years ago when he moved to a house about one-half mile away.

Defendant's testatrix died 29 March 1951. During the last several years of her life she was in ill health and had to take insulin. Plaintiff offered evidence tending to show that during the years of her illness until about six months before her death he gave her the insulin shots, stayed in her home at night more than half the time, and never let her stay at home alone overnight. If no one was with her he would spend the night in her home. He provided her with food, prepared her breakfasts, cut and carried in fire wood, built her fires, and generally did those things which were necessary to make her comfortable during the day while he was away, and made himself the man of the household, performing all the chores that a man in that position would perform.

There was also evidence that the deceased made statements to the effect that plaintiff looked out for her and stayed with her when she was by herself, and "when she died she wanted to look out for him then."

The defendant offered evidence tending to show that the deceased lived with other people and out of the State during most of the last three years of her life and would return to her home only occasionally and for very short periods of time, and that she was cared for by others than plaintiff.

The court limited any recovery to services rendered during the three years next preceding the institution of this action, not counting the nine days which elapsed between the death of the testatrix and the qualification of her executor.

Issues were submitted to and answered by the jury as follows:

"1. Is the defendant indebted to the plaintiff? Answer: Yes.

"2. If so, in what amount? Answer: $2500.00."

The court entered judgment on the verdict and defendant excepted and appealed.

Frank B. Aycock, Jr., and Worth & Horner for plaintiff appellee.

John H. Hall for defendant appellant.

BARNHILL, C. J. The ruling of the court below fixing the beginning date of the three-year statute of limitations, which statute was duly pleaded, was favorable to the defendant, and plaintiff did not except or appeal. Hence we need not discuss that feature of the case.

The court charged the jury in part as follows: (1) "The Court instructs you that where services are rendered by one person for another, which are knowingly and voluntarily accepted, *without more* the law presumes that such services are given and received in expectation of being paid for and will imply a promise to pay what they are reasonably worth (italics supplied); and (2) "If the plaintiff has satisfied you from this evidence and by its greater weight that he did render any services to Mrs. Parker between the 14th day of June, 1949, and the time of her death, which were knowingly and voluntarily accepted by her, and that they were of some value, and that he is entitled to some compensation for said services, it would be your duty to answer that first issue YES . . ."

The defendant excepted to the foregoing excerpts from the charge and assigns same as error. He also excepts "in that the Court failed to allude to facts and circumstances whereby any presumption to pay may be rebutted and no legal obligation to pay arises, as where the services were rendered as a pure gratuity, or simply in discharge of a moral obligation; and the Court failed to declare and explain the law arising on the evidence whereby the relation of the parties might be found by the jury to be such as to rebut any presumption to pay or implied promise to pay on the part of defendant's testatrix."

The excerpts from the charge of the court above quoted find sanction in the decisions of this Court. *Hauser v. Sain,* 74 N.C. 552; *Winkler v. Killian,* 141 N.C. 575; *Ray v. Robinson,* 216 N.C. 430, 5 S.E. 2d 127; *Grady v. Faison,* 224 N.C. 567, 31 S.E. 2d 760; *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764. In fact, the excerpt numbered (1) is almost in the exact language used in the *Wyrick case.*

Unless proper emphasis is given the italicized words "without more," the rule is too broad and comprehensive. Indeed, seldom, if ever, does a case arise in which nothing more than the rendition of some service of value which is knowingly and voluntarily received is made to appear.

While, as heretofore stated, this Court has quoted the rule with approval, we have no case, so far as we have ascertained, in which the decision was made to rest squarely on the rule, without limitation. Instead, in every opinion in which reference is made to the rule, the Court has proceeded to discuss the limitations pertinent to the facts involved in the particular case under consideration. So then, when we examine all of our decisions in cases where the plaintiff was seeking to recover for services rendered under an implied promise by the recipient to pay there-

for, we find that there are material and substantial qualifications of the rule which have never been incorporated in the rule itself.

The circumstances must be such as to warrant the inference that the services were rendered and received with the mutual understanding that they were to be paid for. "The *quantum meruit* must rest upon an implied contract." *Lindley v. Frazier,* 231 N.C. 44, 55 S.E. 2d 815. It must be made to appear that at the time the services were rendered, payment was intended on the one hand and expected on the other. *Brown v. Williams,* 196 N.C. 247, 145 S.E. 233; *Francis v. Francis,* 223 N.C. 401, 26 S.E. 2d 907. The plaintiff must show by the greater weight of the evidence that both parties, at the time the labor was done or the services were rendered, contemplated and intended that pecuniary recompense should be made for the same. *Young v. Herman,* 97 N.C. 280; *Staley v. Lowe,* 197 N.C. 243, 148 S.E. 240; *Lindley v. Frazier, supra; Lowrie v. Oxendine,* 153 N.C. 267, 69 S.E. 131.

Services performed by one member of a family for another within the unity of the family rule are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation. *Francis v. Francis, supra.*

Where a party has voluntarily done an act or rendered a service, and there was no intention at the time that he should charge therefor or understanding that the other should pay, he will not be permitted to recover, for that which was intended originally as a gratuity cannot subsequently be turned into a charge. The law cannot imply a promise contrary to the intention of the parties. *Wood v. Lewis,* 167 S.W. 666.

While proof that services of value were rendered and voluntarily received raises a presumption or will support the inference that compensation was contemplated by the parties, the presumption is rebuttable, and it is always a question for the jury to find whether there was or was not a promise, express or implied, to pay therefor, and it should judge from the facts and circumstances under which the services were rendered that it was in the contemplation of the parties that the services were to be gratuitous or compensated, and the relation of the parties is one of the circumstances to be considered. *Williams v. Barnes,* 14 N.C. 348. If the services were rendered as a pure gratuity or in discharge of a moral obligation, no promise to pay is implied and no presumption of such promise arises. *Young v. Herman, supra.*

It follows that the court erred in applying the pertinent rule in its most general terms without limitation and then failing to apply the law to the evidence favorable to the defendant. It should have instructed the jury that if, upon a consideration of all the testimony, it should find that plaintiff performed the services which are the gravamen of his action without expectation of compensation or in return for the services the

deceased and her husband had rendered him during his childhood, youth, and young manhood, or, if, upon a consideration of all the evidence, it should find that plaintiff had failed to prove by the greater weight of the evidence that the services in question were rendered and received with the mutual understanding that they were to be paid for or that they were performed by plaintiff with the expectation of compensation and were knowingly accepted by the deceased under circumstances calculated to put a reasonable person on notice that the services were not gratuitous, it should answer the first issue in the negative. *Lindley v. Frazier, supra; Lowrie v. Oxendine, supra;* Anno. 54 A.L.R. 548.

While there is ample evidence in the record to sustain a verdict for the plaintiff, the failure of the court in its charge to apply the law to the evidence favorable to the defendant entitles the defendant to a

New trial.

IN RE BATTERY KING MANUFACTURING COMPANY, INCORPORATED.

(Filed 22 September, 1954.)

1. **Setoffs § 1—**

Setoff operates as payment only when there are reciprocal demands, and may be invoked only where there is mutuality of parties and of demands.

2. **Same: Assignments § 5: Receivers § 12b (1)—Notice of assignment of account held sufficient under the statute, defeating debtor's right of setoff.**

Purchase order for goods was issued by the purchaser's wholly owned subsidiary acting as purchasing agent. The goods were delivered to the purchaser's warehouse, and invoices delivered to the purchasing agent. One of the invoices was stamped with notice that account for the goods had been assigned to and was owned by a factor. The invoice stamped with the notice was retained by the purchasing agent, and the other invoice was sent to the purchaser. The seller later became insolvent, and the purchaser sought to set off a debt due it by the seller against the account for the goods in the receiver's hands. *Held:* If the purchaser and its purchasing agent are treated as a single entity for the purpose of showing mutuality of parties and obligations as a basis of setoff, they must be treated as a single entity in resolving the question of notice, and therefore, notice stamped on the invoice received by the purchasing agent must be treated as notice to the purchaser within the meaning of G.S. 44-80 (1), (c), and such assignment defeats the purchaser's right to setoff.

3. **Assignments § 5: Receivers § 9—**

Merchandise was delivered to the purchaser with copies of the invoice, one of which was stamped with notice that the account had been assigned to a named factor. The factor paid the seller for the account. The goods were refused by the purchaser on the ground that they were defective, and returned to the seller. Upon receivership of the seller, the receiver sold

the same goods to the original customer at a reduced price. *Held:* Under the provisions of G.S. 44-84 the purchase money received from the sale of the goods by the receiver was impressed with a trust in favor of the assignee, and the assignee may assert his claim therefor as against the receiver.

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

APPEAL by claimant Rawleigh, Moses & Company, Inc., from *McSwain, Special Judge,* at 26 October, 1953, Term of FORSYTH. Reversed.

Craige & Craige and Roger B. Hendrix for Rawleigh, Moses & Co., Inc., appellant.

Harvey A. Lupton and Parker & Lucas for Battery King Manufacturing Company, appellee.

Womble, Carlyle, Martin & Sandridge, and Charles F. Vance, Jr., for Duke Power Company, appellee.

JOHNSON, J. This is a receivership proceeding involving the validity and priority of claims against an insolvent corporation, heard below by the presiding judge on exceptions to the report of the receiver.

Battery King Manufacturing Company, Inc., hereinafter referred to as Battery King, is the corporation in receivership. It was engaged in the business of reconditioning and selling motor vehicle batteries.

Rawleigh, Moses & Co., Inc., hereinafter referred to as Rawleigh-Moses, is a factoring corporation engaged in the business of purchasing accounts receivable from businesses which find it advantageous to reduce their receivables to quick liquidity.

At the time Battery King passed into receivership it was operating under an unregistered factoring agreement with Rawleigh-Moses executed 2 June, 1952, whereby Rawleigh-Moses would factor, *i.e.,* purchase at a fixed rate the accounts receivable of Battery King and collect the moneys due thereon directly from the various debtors.

The appeal relates to two claims filed with the receiver. One involves a setoff claimed by Duke Power Company, the other an assigned account receivable for a shipment of goods rejected by Burlington Mills. Both claims were resolved against the factoring firm of Rawleigh-Moses in the court below. We discuss them *seriatim.*

1. *The Setoff Claim of Duke Power Company.*—At the time Battery King went into receivership, it owed Duke Power Company, hereinafter referred to as Duke Power, the sum of $381.25; whereas Duke Power owed a Battery King account receivable of $227.56. Duke Power claimed the right to set off the sum due it by Battery King against the amount it owed on the Battery King account receivable. The setoff claim was con-

tested by the factor, Rawleigh-Moses, on the ground that the Battery King receivable owed by Duke Power had been assigned to Rawleigh-Moses prior to the receivership and in law was a protected assignment.

The setoff was allowed by the court below on the ground that the assignment of the Duke Power account to Rawleigh-Moses was not binding on Duke Power for the reason that written notice of the assignment had not been given it before the receivership. The exception taken by Rawleigh-Moses to this ruling brings into focus the provisions of our Assignment of Accounts Receivable Act, Chapter 196, Session Laws of 1945, now codified as G.S. 44-77 through 44-85.

It is noted that this Act prescribes two methods of protecting an assignment of accounts receivable: (1) by the registration of a notice of assignment in the public registry of the county of residence of the assignor, G.S. 44-78; or (2) by "the giving of written notice to the debtor that the account has been assigned to the named assignee," G.S. 44-80 (1), (c). We are concerned here only with the second method. Rawleigh-Moses insists that written notice of the assignment was duly given to Duke Power in compliance with the statute. As to this, the controlling facts agreed, or found without objection by the court below, are these:

Mill Power Supply Company, hereinafter referred to as Mill Power, is a wholly owned subsidiary of Duke Power and serves as its purchasing agent. The disputed account is based on a shipment of merchandise made by Battery King and delivered at Duke Power's bus garage in Greensboro on order of Mill Power. The purchase order from Mill Power, dated 2 January, 1953, submitted to Battery King, contained the following instructions on the face thereof:

"Ship to:	Charge to:
Duke Power Company	Duke Power Co.
E. Mkt. St. Whse.	Charlotte, N. C.
Greensboro, N. C.	

"This order is subject to the terms and conditions printed on the back hereof."

On the back of the order is the following:

"This order is subject to the following terms and conditions and by accepting the order, or any part thereof, the seller agrees to and accepts said terms and conditions."

Among the conditions printed on the back of the order were the following:

"1. If seller refuses to accept this order exactly as written, he will return it at once with explanation.

. . . .

"4. Seller will deliver no invoices to purchaser's employees.

. . . .

"17. Purchaser may at any time insist upon strict compliance with these terms and conditions notwithstanding any previous custom, practice or course of dealing to the contrary."

Copy numbered two of the invoice was delivered with the merchandise to one Z. V. Green, storekeeper at the bus garage and an employee of Duke Power, who signed his name on the copy of the invoice after the words "Rec'd by." The invoice is dated 12 January, 1953, and indicates a sale of merchandise in the amount of $227.56 made by Battery King to Mill Power Supply Co., Charlotte, N. C., for delivery to Duke Power in Greensboro. The following was stamped on copy numbered two of the invoice:

"NOTICE

"THIS ACCOUNT is assigned to and is owned by
RAWLEIGH, MOSES & CO. INC., FACTORS
Box 1188 High Point, N. C.

"Payment other than to said Factors does not constitute payment. Notify Factors if merchandise not received in 5 days after receipt of invoice."

Copies numbered one and two of the invoice were received by Mill Power on 26 January, 1953. Battery King was placed in receivership 28 January, 1953. The original invoice, numbered one, received by Duke Power in Charlotte contained no stamped notice of assignment as shown on copy numbered two or any reference to any assignment of the account. No evidence was presented that the copy numbered two ever was received by Duke Power.

The court below further found that all shipments to Duke Power from Battery King were on orders from Mill Power for Duke Power and that prior to receivership all assigned accounts on orders from Mill Power were paid direct by Duke Power, without objection of any nature, to Rawleigh-Moses.

Setoff operates by way of payment where there are reciprocal demands. It may be invoked only where there is mutuality of parties and of demands. *In re Bank,* 205 N.C. 333, 171 S.E. 436; *Dameron v. Carpenter,* 190 N.C. 595, 130 S.E. 328; 47 Am. Jur., Setoff and Counterclaim, Sec. 48; 80 C.J.S., Set-Off and Counterclaim, Sec. 48 (2).

Duke Power in order to show the mutuality requisite to the right of setoff relies upon the fact that Mill Power is its wholly owned subsidiary,

but seeks to escape the burden of being charged with the written notice to Mill Power showing assignment of the account. The position is untenable. If Duke Power and Mill Power are to be treated as a single entity for the purpose of showing mutuality of parties and obligations as a basis for setoff, logic and simple justice require that the single-entity concept also be applied in resolving the question of notice. As to this, the crucial finding below is that invoice numbered two on which the notice of assignment was stamped was "received by Mill Supply Company on 26 January, 1953, and so stamped." This notice received two days before receivership by the wholly owned subsidiary of Duke Power must be treated as notice to the latter within the meaning of G.S. 44-80 (1), (c). This defeats the setoff claim.

In this view of the case the terms and conditions of the purchase order are not pertinent to decision, and we treat as moot the question whether the notice to Z. V. Green on 12 January, 1953, at the bus garage was notice to Duke Power.

2. *The Shipment of Goods Rejected by Burlington Mills.*—Shortly prior to the receivership, Battery King delivered to Burlington Mills fourteen batteries, and the account receivable in the amount of $388.00 representing the delivery was assigned to Rawleigh-Moses, who immediately made payment to Battery King for the account. Upon delivery of the batteries to Burlington Mills, together with two copies of the invoice, one of which was stamped with notice of assignment of the account receivable, the receiving clerk for Burlington Mills refused to accept the shipment on the ground that it contained improper batteries. The returned batteries were in the possession of Battery King when the receiver was appointed. Later the identical batteries were sold by the receiver to Burlington Mills for the reduced sum of $364.88.

The foregoing facts bring the claim of Rawleigh-Moses within the provisions of the Returned Goods section of the Assignment of Accounts Receivable Act, G.S. 44-84, under which the receiver was required to hold in trust for Rawleigh-Moses the goods which gave rise to this assigned account receivable. This being so, the purchase money received from the sale of the goods was impressed with a trust in favor of Rawleigh-Moses, and it is so ordered.

As to both claims, the judgment of the court below is

Reversed.

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

J. O. HATCHETT (EMPLOYEE) v. THE HITCHCOCK CORPORATION (EMPLOYER), ST. PAUL MERCURY INDEMNITY COMPANY (CARRIER).

(Filed 22 September, 1954.)

1. **Master and Servant § 37—**

While the Workmen's Compensation Act is to be liberally construed to the end that its benefits should not be denied by narrow and strict interpretation, the rule of liberal construction does not warrant the reading into the act meanings alien to its plain and unmistakable words or justify judicial legislation converting the act beyond the legislative intent into an accident and health insurance act.

2. **Master and Servant § 53b (3)—No recovery may be had for services as practical nurse when Commission does not authorize or order such services prior to their rendition.**

The evidence disclosed that employee's mother, with whom employee resided, cared for him for long periods of time while employee was in a cast and entirely helpless during intervals between treatments at a hospital. A rule of the Industrial Commission promulgated pursuant to G.S. 97-80 (a) stipulated that fees for practical nursing would not be honored unless written authority had been obtained from the Commission in advance. No prior approval for such nursing services was obtained from the Commission in this case. *Held:* The facts do not warrant an award to the employee's mother for the nursing services rendered, even if G.S. 97-25 and G.S. 97-26 empower the Commission to make an award for such services, since under its rule and under the statutes such "other treatment required" must be previously authorized or ordered by the Commission.

APPEAL by defendants from *Sink, J.,* April Term 1954 of CHEROKEE.

Proceeding under Workmen's Compensation Act to determine liability of defendant, The Hitchcock Corporation, employer, and defendant, St. Paul Mercury Indemnity Company, compensation carrier, to plaintiff, injured employee, and to Mrs. J. W. Hatchett, plaintiff's mother, for services rendered to him at her home.

The hearing commissioner found the jurisdictional requirements, the occurrence to the plaintiff of a compensable injury, the extent of the disability resulting therefrom and the compensation for said injury payable to the plaintiff therefor under the Act, and made a substantial award, and also made an award to the plaintiff's mother in the sum of $840.00 for services rendered to the claimant. The defendants did not appeal from the award of compensation to the plaintiff for his injuries, but did appeal to the Full Commission from the award to his mother, assigning as error the failure to find certain facts and the conclusions of law. The Full Commission made findings of fact, conclusions of law and awarded $780.00 to the plaintiff's mother.

On appeal to the Superior Court, the award of the Commission was upheld. From this latter ruling, the defendants appealed assigning error.

O. L. Anderson for Plaintiff, Appellee.
Uzzell & DuMont for Defendants, Appellants.

PARKER, J. The sole question presented for review is the award of $780.00 to claimant's mother for services rendered in her home to him.

The following facts found by the Full Commission are supported by competent evidence. The claimant, 23 years of age and unmarried, received in his work a severe comminuted fracture of the right femur. He lived with his mother, Mrs. J. W. Hatchett, who is neither a graduate nurse, nor a registered nurse, nor a licensed practical nurse under our Statute Law. Her sole experience in rendering aid to the sick is such as is normally acquired by a mother who has reared three children on a farm. That after orthopedic surgery and about 30 days in a hospital, claimant was removed 22 July 1949 to his mother's home. He was incased in a hip spica cast, covering his entire body from the level of the lower chest extending over his hips, covering both legs to the ankle. He could not leave his bed without help, and could do nothing for himself except to feed himself when food was brought. His mother cooked and served his meals, bathed him, placed and removed bedpans, and rendered other necessary services. On 22 August 1949 claimant was carried to a hospital for further surgery. On 23 December 1949 he returned to his home in a hip spica cast, where his mother rendered similar services to him. On 29 December 1949 he was carried back to the hospital for further treatment. On 28 January 1950, he was returned to his home again in a hip spica cast, where again his mother rendered services to him. On 8 May 1950, he returned to the hospital for further treatment. On 9 July 1950, he was returned to his home in a hip spica cast, which did not include his left leg. He was still confined to his bed unable to care for himself. On 25 September 1950, he returned to the hospital, the cast was removed, a brace was fitted, and he was able to care for himself. Mrs. Hatchett did not obtain the approval of the Industrial Commission before rendering these services to claimant, nor did any one else for her.

The Full Commission made these conclusions of law: *One,* the services rendered by Mrs. Hatchett to the claimant were part of the other treatment contemplated by G.S. 97-25, and the defendants are required to pay therefor under G.S. 97-26 and G.S. 97-90 (a), and cites in support *Collins v. Reed-Harlin Grocery Co.,* (Mo.) 230 S.W. 2d 880; *California Casualty Ind. Exch. v. Industrial Acc. Com'n.,* (Cal.) 190 P. 2d 990; Larson Workmen's Compensation Law, Sec. 61.13. *Two,* the services rendered by Mrs. Hatchett to her son were not gratuitous. *Three,* the Commission

has jurisdiction to fix fees to be paid for nursing services rendered to claimant under G.S. 97-90 (a); G.S. 97-25 and G.S. 97-26. *Four,* Mrs. Hatchett is to be paid $4.00 a day for 195 days of services rendered to claimant under G.S. 97-25, G.S. 97-26 and G.S. 97-90 (a). An award to her of $780.00 was made.

The Full Commission in its opinion and award to Mrs. Hatchett states that under authority of G.S. 97-80 (a) it made and published Rules and Regulations in connection with the administration of the Compensation Act. The Rules and Regulations, made and published in 1945, which were in force when Mrs. Hatchett rendered services to claimant, contain these provisions as to nursing: "In cases of urgent necessity a special graduate or registered nurse may be furnished for not to exceed seven days. Written authority must be obtained in advance for all services in excess of seven days. Fees for practical nursing service by a member of claimant's family or anyone else will not be honored unless written authority has been obtained in advance." The Rules and Regulations published by the Industrial Commission in 1951 contain almost the exact language of the 1945 Rules and Regulations as to nurses. The Full Commission in its opinion and award states that its published Rules and Regulations as to nursing must be relaxed in this proceeding under the general policy announced in its Rules "the fees in the following schedule are the ones which will ordinarily be approved by the Commission."

Dr. James H. Cherry, an orthopedic surgeon, performed claimant's operations, and was his witness. Dr. Cherry testified that when the claimant was at his home in a cast, he never recommended the employment of a registered nurse to take care of him; that all claimant needed was practical care consisting of daily bathing, feeding, turning him over, attending to bedpans, etc.

It is not debatable that the Workmen's Compensation Act is "to be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation." *Johnson v. Hosiery Co.,* 199 N.C. 38, 153 S.E. 591. The rule of liberal construction cannot be used to read into the Act a meaning alien to its plain and unmistakable words. *Henry v. Leather Co.,* 231 N.C. 477, 57 S.E. 2d 760. We should not overstep the bounds of legislative intent, and make by judicial legislation our Workmen's Compensation Act an Accident and Health Insurance Act. *Lewter v. Enterprises, Inc., ante,* 399, 82 S.E. 2d 410.

G.S. 97-25 provides for medical, surgical, hospital, and other treatment, including medical and surgical supplies, as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief, and for such additional time as in the judgment of the Commission will tend to lessen the period of disability. It further provides that in case of a controversy arising between the employer and

employee relative to continuance of medical, surgical, hospital or other treatment the Industrial Commission may order such further treatment as may in the discretion of the Commission be necessary. The Commission may at any time upon the request of an employee designate other treatment suggested by the injured employee subject to the approval of the Commission.

G.S. 97-26 provides for the pecuniary liability of the employer for medical, surgical, hospital service or other treatment required, *when ordered by the Commission.* (Italics ours).

G.S. 97-90 (a) provides that fees for attorneys and physicians and charges of hospitals for services shall be subject to the approval of the Commission.

G.S. 97-80 (a) provides that the Commission may make rules not inconsistent with the Compensation Act, for carrying out its provisions.

There is no evidence in the Record that claimant requested the Industrial Commission to order his mother to render services to him or that the Commission ordered such services to be rendered. There is no evidence that the Industrial Commission ever gave written or oral permission for the rendition of such services, though it made an award for them to Mrs. Hatchett. The services were not done in a sudden emergency.

We do not consider it necessary to decide in this proceeding the interesting question debated in the briefs and argued in the opinion of the Commission as to whether the words "and other treatment required" contained in G.S. 97-25 and in G.S. 97-26 include nursing. If they do, the award cannot be sustained, because no authority, written or otherwise, from the Industrial Commission had been obtained in advance for such services by claimant's mother, nor had such services been ordered by the Commission. To hold otherwise would be to distort and pervert the plain and explicit words of the 1945 Rules and Regulations of the Commission made pursuant to G.S. 97-80 (a), and of G.S. 97-26, which provides for the pecuniary liability of the employer for "other treatment required" when ordered by the Commission, if *such* words "other treatment required" in G.S. 97-26 embrace nursing. The argument of the Industrial Commission that its Rules as to previous written authority for practical nursing service by a member of claimant's family must be relaxed under the general policy announced in its Rules "the fees in the following schedule are the ones which will ordinarily be approved by the Commission" is not convincing. Such general policy, as the Commission calls it, seems to apply only to the size of the fees. Further, in making such argument the Commission seems to have overlooked the words of G.S. 97-26 that liability exists for "other treatment required when ordered by the Commission"—that is the language of the General Assembly. It is their duty to enact legislation; it is ours to interpret and apply it as written.

S. v. Scoggin, 236 N.C. 19, 72 S.E. 2d 54. If the words "other treatment required" do not include nursing, there is no liability of defendants to Mrs. Hatchett.

It may not be amiss to refer to the two cases cited in the Conclusion No. 2 of the Full Commission's opinion. In *Collins v. Reed-Harlin Grocery Co.,* (Mo.) 230 S.W. 2d 880, the court was construing a Missouri Statute, which the opinion states contains these words: "Section 3701, R.S. Mo. 1939, Mo. R. S. A., provides: (a) in addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical and hospital treatment, including nursing . . ." In *California Casualty Ind. Exch. v. Industrial Acc. Com'n.,* (Cal.) 190 P. 2d 990, the Court was construing the Labor Code. The opinion states: "Section 4600 of the Labor Code provides: Medical, surgical and hospital treatment, including nursing, medicine . . ."

It is our opinion, and we so hold, that the findings of fact of the Commission do not support its conclusions of law that the defendants are required to pay Mrs. Hatchett for her services to claimant, and the award cannot be sustained.

Reversed.

STATE v. JAMES DEW AND STATE-WIDE BAIL, INC.

(Filed 22 September, 1954.)

1. Arrest and Bail § 8—

Where the surety's answer to a *scire facias* amounts to nothing more than a plea for additional time, without allegation of facts disclosing excusable neglect or constituting a legal defense or appealing to the conscience and sense of fair play, judgment absolute against the surety is proper.

2. Same—

The liability of a surety on an appearance bond is primary, and therefore service of *scire facias* on the principal is not a prerequisite to judgment absolute against the surety.

3. Same—

The service of a *scire facias* on the surety gives the surety notice to appear at the next term of court, and no other notice by the judge, the solicitor, or calendar is necessary, it being a term-time matter.

4. Same—

Where the original answer to a *scire facias* presents no legal defense or matters appealing to the conscience or sense of fair play, and there is no exception to the court's refusal to permit the surety to file an unverified, amended answer setting forth a legal defense, the refusal of the court to grant the surety's verified motion to vacate the judgment absolute on the

bond will not be held for prejudicial error, since upon the record if the judgment were vacated the State would be entitled to have the same judgment re-entered.

5. Appeal and Error § 23—

Assignments of error must be filed in the trial court and certified with the case on appeal. An assignment of error filed initially in the Supreme Court will be disregarded. G.S. 1-282.

6. Appeal and Error § 38—

Where the record is silent upon a particular point, the action of the trial court will be presumed correct.

7. Arrest and Bail § 8—

Where judgment absolute has been entered against the surety on an appearance bond, the surety is entitled upon the later apprehension and delivery of the defendant to the authorities of that county for trial, to be heard under the provisions of G.S. 15-116 upon its motion to modify or vacate the judgment absolute.

APPEAL by the surety on defendant's appearance bond from *Morris, J.*, May Term 1954, WILSON. Affirmed.

Criminal indictment, heard on motion to vacate or modify judgment absolute entered against the surety on defendant's appearance bond.

A true bill of indictment charging the commission of a felony was returned against the defendant at the December 1953 Term of the Superior Court of Wilson County. He was apprehended and executed bond for his appearance at the February 1954 Term of court. State-Wide Bail, Inc. executed the bond as surety.

The defendant failed to appear at the February 1954 Term as he was bound to do. He was duly called and failed to answer. Thereupon the court entered judgment *nisi* on the bond and directed that a *scire facias* and capias be forthwith issued. The *scire facias,* returnable on 3 May 1954, the first day of the May Term, was duly served on the surety. On 8 April 1954 the surety filed with the clerk a paper writing which purports to be an answer to the *scire facias.* On 3 May 1954, the return date of the *scire facias,* judgment absolute on the appearance bond was duly entered against the surety. Neither the surety nor its attorney was in court at the time. Counsel had gone to Winston-Salem to attend to other business.

After some little negotiation by telegram, telephone, and otherwise, between counsel, the solicitor, and the judge, counsel for the surety was notified that he might appear on 11 May and present any legal defense set forth in *S. v. Pelley,* 222 N.C. 684, 24 S.E. 2d 635, and to show that the defendant failed to appear for the reason he was then serving a sentence in another jurisdiction, if such showing could be made, but that the

judge would not hear a motion to vacate or modify the judgment absolute which was addressed solely to his discretion; that he would decline to exercise his discretion in favor of the surety at that time.

On 11 May 1954, counsel for the surety appeared, tendered a proposed amendment to his original answer, and filed a motion to vacate the judgment and for an extension of time within which to apprehend and produce the defendant, or, in any event, that the surety "be heard in mitigation of forfeiture under such terms as may be fair and just."

In the proposed unverified amendment to the answer it is alleged that at the time the defendant defaulted he was serving a sentence in another jurisdiction; that he was thereafter apprehended and returned to the Wilson County jail; that he is now serving a sentence imposed in Wayne County; and that he will be delivered to the officers of Wilson County so soon as he completes the sentence he is now serving.

The court made an entry at the foot of the proposed amendment to the answer as follows: "This amended answer tendered and declined and motion to strike judgment is declined. This May 11, 1954. Morris, J." The surety did not except.

The record fails to disclose that any hearing was had on 11 May or that the surety tendered any evidence as to the whereabouts of the defendant at the time he failed to appear or at any subsequent time or any other evidence whatsoever for the consideration of the court.

On 24 May 1954 the defendant gave written notice of its exception to the order entered by the court below and of its appeal to the Supreme Court. Service thereof was accepted by the solicitor.

Charles L. Abernethy, Jr., for appellant.
Luke Lamb for appellee.

BARNHILL, C. J. The records in this and companion cases now pending in this Court are in a state of confusion. We may only surmise what happened in the court below. The clerk first certified the record proper and assignments of error, and the appeal was docketed here. Appellant thereafter filed with the Clerk of this Court what purports to be an agreed case on appeal. It likewise filed here its "Assignment of Error No. 7."

There is nothing in the record to indicate that the surety offered any evidence, either oral or documentary, in support of its motion to vacate the judgment absolute to the end the surety might have additional time in which to locate and produce the defendant. Yet the trial calendar for that two weeks' criminal term of court, telegrams, summaries of telephone conversations, and other extraneous matter are included.

When the record is boiled down to its essentials, it becomes apparent that the one and only question of law presented for consideration is this:

Did the court below commit error when it declined to consider the motion to vacate or modify the judgment absolute in so far as it was directed to the discretionary authority of the court and limited the hearing to such evidence as tended to establish a legal defense or to show that the defendant, at the time the judgment *nisi* was entered, was in prison in some other jurisdiction? In other words, was the bondsman entitled to a hearing under G.S. 15-116 as a matter of right?

Ordinarily we might answer in the affirmative. On the particular facts appearing in this record we are constrained to say that if it was the duty of the court at that time to hear and rule on the motion in the exercise of his discretion, his refusal so to do did not prejudice the defendant.

The original answer to the *scire facias* fails to disclose excusable neglect on the part of the surety or its attorney. Nor does it contain any allegations of fact which would constitute a legal defense or appeal to the conscience and sense of fair play of the judge. In fact, it is nothing more than an appeal for additional time. The verified motion is lacking in merit. The defendant was at the time a fugitive from justice and there were several other cases on the docket in which judgments absolute had been entered against the appellant and were still unsatisfied.

The liability of a surety on an appearance bond is primary. Service of the *scire facias* on the principal is not a prerequisite to a judgment absolute against the surety. *Tar Heel Bond Co. v. Krider,* 218 N.C. 361, 11 S.E. 2d 291; *S. v. Brown,* 218 N.C. 368, 11 S.E. 2d 294.

The *scire facias* served on the appellant gave it ample notice that it was required to appear on the first day of the May Term and show cause, if any it had, why judgment absolute should not be entered. Neither the fact there was a trial calendar nor the fact there was no *scire facias* calendar prepared for the term imposed on the judge or the solicitor any obligation to give appellant or its attorney any additional notice. It was a term-time matter. Appellant had notice the cause was pending for motion for judgment absolute, and it knew that the defendant had not been apprehended. It was its duty to attend to the business at hand or else suffer the consequences.

So then, at the time the court declined to vacate the judgment there was no fact or circumstance disclosed to the court in appellant's pleadings filed which, if true, would constitute a legal defense or appeal to the discretionary authority of the judge. Should we now direct the court below to vacate the judgment, the State would have the right to demand the immediate entry of its counterpart. Why should we do a vain and useless thing?

Assignments of error may not be filed, in the first instance, in this Court. They must be filed in the trial court and certified with the case

on appeal. G.S. 1-282. Therefore, appellant's purported assignment of error No. 7 presents no question for this Court to consider and decide. In any event, as the record is silent on the question, we must assume that the judge had ample cause for entering that part of the judgment to which this assignment is directed.

Should the surety hereafter apprehend the defendant and deliver him to the authorities of Wilson County for trial in this case, it may still be heard under the provisions of G.S. 15-116. *S. v. Bradsher,* 189 N.C. 401, 127 S.E. 349; *S. v. Clarke,* 222 N.C. 744, 24 S.E. 2d 619; *Tar Heel Bond Co. v. Krider, supra; S. v. Brown, supra.*

If the defendant was in fact in the custody of the Wilson County authorities or of the State Highway and Public Works Commission at the time he was called and judgment *nisi* was entered, this would constitute a legal defense and appellant may now enter its motion to vacate the judgment absolute with the assurance it will be afforded an opportunity to establish that fact. *S. v. Eller,* 218 N.C. 365, 11 S.E. 2d 295.

The judgment entered in the court below is

Affirmed.

STATE v. JULIUS PATTERSON AND STATE-WIDE BAIL, INC.

(Filed 22 September, 1954.)

APPEAL by the surety on defendant's appearance bond from *Morris, J.,* May Term 1954, WILSON. Affirmed.

Criminal prosecution, heard on motion to vacate or modify judgment absolute entered against the surety on defendant's appearance bond.

The defendant was tried in the recorder's court of the city of Wilson under G.S. 14-33 (3). He was convicted and appealed to the Superior Court. He executed bond for his appearance at the February 1954 Term of the Superior Court with State-Wide Bail, Inc. as surety. At said term judgment *nisi* was entered. *Scire facias* returnable on the first day of the May Term was served on the surety. Judgment absolute was entered 3 May 1954. The surety appeared and moved to vacate said judgment. The motion was denied and said surety appealed.

Charles L. Abernethy, Jr., for appellant.

Luke Lamb for appellee.

PER CURIAM. The facts in this case are substantially on all fours with the facts in *S. v. Dew, ante,* 595, except that here the defendant alleges

that "the said defendant is more than likely serving a sentence in another jurisdiction." What is said in the opinion in that case is controlling here.
Affirmed.

STATE v. JOHN WILLIAM BARRETT, DEFENDANT, AND STATE-WIDE BAIL, INC., SURETY.

(Filed 22 September, 1954.)

APPEAL by the surety on defendant's appearance bond from *Morris, J.*, March Term 1954, EDGECOMBE. Affirmed.

Criminal indictment, heard on motion to vacate or modify judgment absolute entered against the surety on defendant's appearance bond.

In November 1953 defendant was arrested on a charge of larceny of an automobile. He executed a bond for his appearance at the January Term 1954, Edgecombe County Superior Court with State-Wide Bail, Inc. as surety. At the January Term 1954 judgment *nisi* was entered. *Scire facias* returnable on the first day of the March Term was served on the surety. Judgment absolute was entered 1 March 1954. The surety appeared and moved to vacate said judgment. The motion was denied and said surety appealed.

Charles L. Abernethy, Jr., for appellant.
C. H. Leggett for appellee.

PER CURIAM. The facts in this case are substantially on all fours with the facts in *S. v. Dew, ante,* 595, except that the surety in its answer alleges that the defendant was at the time of the judgment *nisi* in custody of officers of Hudson County, New Jersey, and the court granted a full hearing. What is said in the opinion in that case is controlling here.
Affirmed.

STATE v. ELSIE TAYLOR SIMMS AND STATE-WIDE BAIL, INC.

(Filed 22 September, 1954.)

Arrest and Bail § 8—

The subsequent arrest of defendant does not *ipso facto* discharge the original forfeiture of bail, but entitles the surety to move that the judgment absolute against it be modified.

APPEAL by the surety on defendant's appearance bond from *Morris, J.*, May Term 1954, WILSON. Affirmed.

Criminal indictment, heard on motion to vacate or modify judgment absolute entered against the surety on defendant's appearance bond.

A true bill of indictment charging the commission of a felony was returned against the defendant at the December 1953 Term of the Superior Court of Wilson County. She was apprehended and executed bond for her appearance at the February 1954 Term of court with State-Wide Bail, Inc. as surety. At said term judgment *nisi* was entered. *Scire facias* returnable on the first day of the May Term was served on the surety. Judgment absolute was entered 3 May 1954. The surety appeared and moved to vacate said judgment. The motion was denied and said surety appealed.

Charles L. Abernethy, Jr., for appellant.
Luke Lamb for appellee.

PER CURIAM. The facts in this case are substantially on all fours with the facts in *S. v. Dew, ante,* 595, except that the appellant alleges in its proposed amendment to its answer that this defendant has been apprehended and was returned to the Wilson County jail on 16 April 1954. What is said in the opinion in that case is controlling here.

While the subsequent arrest of the defendant does not, *ipso facto,* discharge the original forfeiture, *Tar Heel Bond Co. v. Krider,* 218 N.C. 361, 11 S.E. 2d 291; *S. v. Brown,* 218 N.C. 368, 11 S.E. 2d 294, the door is still open to the defendant to appeal to the court to modify the judgment absolute for the reason the defendant has been apprehended and surrendered to the Wilson County authorities.

The judgment of the court below is
Affirmed.

STATE v. JACK JENKINS AND STATE-WIDE BAIL, INC.

(Filed 22 September, 1954.)

APPEAL by the surety on defendant's appearance bond from *Morris, J.*, May Term 1954, WILSON. Affirmed.

Criminal indictment, heard on motion to vacate or modify judgment absolute entered against the surety on defendant's appearance bond.

A bill of indictment charging the commission of a felony was returned against the defendant at the October 1953 Term of the Superior Court

of Wilson County. He was apprehended and executed appearance bond with State-Wide Bail, Inc. as surety. At the December 1953 Term defendant was called and failed to appear, and judgment *nisi* was entered. *Scire facias* returnable on the first day of the May Term was issued 19 March 1954 and served on the surety. Judgment absolute was entered 3 May 1954. The surety appeared and moved to vacate said judgment. The motion was denied and said surety appealed.

Charles L. Abernethy, Jr., for appellant.
Luke Lamb for appellee.

PER CURIAM. The facts in this case are substantially on all fours with the facts in *S. v. Dew, ante,* 595, except that the appellant, in a proposed amended answer, alleges that this defendant was apprehended and returned to the Wilson County jail on 31 March 1954. What is said in that case is controlling here. While the subsequent arrest of the defendant does not, *ipso facto,* discharge the original forfeiture, *Tar Heel Bond Co. v. Krider,* 218 N.C. 361. 11 S.E. 2d 291; *S. v. Brown,* 218 N.C. 368, 11 S.E. 2d 294, the door is still open to the defendant to appeal to the court for a modification of the judgment absolute for the reason the defendant has been apprehended and surrendered to the Wilson County authorities.

The judgment of the court below is
Affirmed.

STATE v. FLOYD MILLNER.

(Filed 22 September, 1954.)

1. Criminal Law § 62f—

The term "good behavior" as used in an order suspending execution of a sentence means law-abiding, and a defendant does not breach such condition of suspension unless he is guilty of conduct constituting a violation of some criminal law of the State.

2. Same—

The exercise of the discretionary authority of the trial judge to order that a suspended sentence should be activated must be predicated upon a finding, based upon evidence of sufficient probative force to generate the conclusion in the minds of reasonable men, that the defendant had in fact breached a condition of the suspension, and in the absence of such proof, defendant is entitled to his discharge as a matter of right.

3. Same—

The fact that a defendant has no occupation to the knowledge of the officers testifying is insufficient alone to support a finding that the defendant is a vagrant as the basis for an order executing a suspended sentence, especially when there is positive evidence that the defendant has a home and possesses ready cash. G.S. 14-336.

4. Same—

Evidence that officers found glasses and fruit jars having an odor of whiskey in the kitchen of the defendant's house and a number of empty fruit jars in back of the house, that during a day a number of people would drive up to the house, knock on the door, and that defendant on some occasions would come to the door and speak to them and then the people would leave, without evidence that defendant passed any package to any of these visitors or that they passed money or any object to him, or that there was any disorder or disturbance, *is held* insufficient to support an order executing a suspended sentence on the ground that defendant had violated the law.

APPEAL by defendant from *Sharp, Special J.,* May Term 1954, ROCKINGHAM. Reversed.

Criminal prosecution on a warrant which charges that defendant did sell and deliver one pint of liquor, heard on motion to activate suspended sentence.

The defendant was tried in the municipal court of Reidsville. He was convicted and appealed to the Superior Court. When the appeal came on to be heard at the January 1954 Term of the Superior Court, the defendant, through counsel, entered a plea of "guilty as charged." Clarkson, J., the judge presiding at said term, pronounced judgment of imprisonment for a term of eighteen months, suspended for a period of three years on condition that defendant pay a fine of $100 and the costs and "be of good behavior and violate none of the laws of the State during the period of suspension."

At the May Term 1954, the defendant was brought into court by capias on the charge that he had violated the conditions imposed in the original judgment, and the solicitor moved for judgment activating the original sentence.

The evidence offered in support of the motion tends to show that:

(1) Defendant is a cripple who lives in a house in Reidsville.

(2) On 24 May 1954, officers made a search of his home. They discovered no whiskey but detected the odor of liquor. They did find some glasses and three or four fruit jars in the kitchen having a faint odor of whiskey, and there were a "large number" of empty fruit jars back of the house and a pile of glass in the vicinity of the house and two sacks of coins in a locked closet in the house.

(3) Officers had kept defendant's home under surveillance for some time and had observed people, both white and colored, going to and from defendant's home.

(4) On Saturday preceding the search, between the hours of 4:00 p.m. and 10:00 p.m., twenty-eight automobiles and ninety people came to the vicinity of defendant's home, and on Sunday, twenty-five cars and fifty-one people were observed. "Some of them would go up to the front door and knock. On some occasions Floyd would come to the door and speak to these people and then the people would leave."

(5) The officers did not hear what was said and observed no package passed from defendant to any of the persons who went to his house or any money passed from any one of them to defendant.

(6) "The general reputation of Floyd's house since January has been selling whiskey."

(7) Officers have seen defendant frequently in Reidsville but have never seen him drinking or misbehaving since January when the suspended sentence was imposed.

(8) Defendant has no known occupation; and

(9) Different people, from time to time, have lived in the same house with defendant.

Upon the evidence offered the court below found and concluded that the defendant "has violated the terms under which sentence was imposed at the January 1954 Term of this Court in Case No. 1632 in that he has not been of good behavior for that since the imposition of said sentence he has been a vagrant; has maintained a disorderly house; has been guilty of maintaining and operating a common-law nuisance; and has engaged in illicit sale of liquor." It thereupon ordered "that commitment issue to put the 18 months sentence imposed at the January 1954 Term into effect." Defendant excepted and appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Brown, Scurry & McMichael and Price & Osborne for defendant, appellant.

BARNHILL, C. J. The validity of the order of Clarkson, J., entered at the January Term, suspending or staying execution of the sentence of imprisonment imposed by him on condition that defendant "be of good behavior and violate none of the laws of the State during the period of suspension," is not challenged on this appeal. *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; *S. v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706.

The term "good behavior" as used in the order means in obedience to and conformity with the laws of the State: the demeanor of a law-abiding

citizen. *S. v. Johnson,* 169 N.C. 311, 84 S.E. 767; *S. v. Everitt,* 164 N.C. 399, 79 S.E. 274; *S. v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850. Good behavior, by correct interpretation, means conduct that is authorized by law. *S. v. Hardin,* 183 N.C. 815, 112 S.E. 593.

Behavior such as will warrant a finding that a defendant has breached the condition of suspension on good behavior must be conduct which constitutes a violation of some criminal law of the State. *S. v. Hardin, supra.*

The discretionary authority of the trial judge to determine whether a suspended sentence shall be activated does not mean that he can invoke the sentence and direct that capias and commitment issue without a finding, based on competent evidence, that the defendant in fact has been guilty of conduct which constitutes a violation of some criminal law. The breach of condition must be properly established by pertinent testimony that the conditions have been broken. *S. v. Hardin, supra.* There must be substantial evidence of sufficient probative force to generate in the minds of reasonable men the conclusion that defendant has in fact breached the condition in question. In the absence of such proof, the defendant is entitled to his discharge as a matter of right and not of discretion.

We are constrained to hold that the evidence contained in this record, when considered in the light of these principles of law, is insufficient to sustain the findings or conclusions made by the court below.

It is true that the defendant has no occupation to the knowledge of the officers. But this alone is not sufficient to support a finding that defendant is a vagrant, especially in view of the positive evidence that he has a home and possesses ready cash. G.S. 14-336.

There is no evidence that defendant has engaged in the sale of liquor. The evidence as to what the officers found upon making search of defendant's premises raises a strong suspicion and nothing more. It is true there was also evidence that a large number of people, both white and colored, went to defendant's home day and night. But the testimony also discloses that these people knocked, but did not enter. While at times they saw the defendant, they always departed empty handed. The officers never saw defendant pass any package to any of these visitors, nor did they see any of them pass any money or other object to him. There was no disorder and no disturbance. None of the visitors were apprehended by the watching officers, and defendant was guilty of no misbehavior or disturbance. So the officers testified.

Indeed, the testimony is such as to induce the inference that defendant's home had at one time been an oasis for the thirsty of that community, but that since January their oasis had been arid.

The defendant is entitled to his discharge subject to the original suspended sentence. To that end the judgment entered in the court below is

Reversed.

STATE v. LEE STONE.

(Filed 22 September, 1954.)

1. Rape § 13—

Where defendant is convicted of an assault with intent to commit rape, his further conviction of an assault on a female will be treated as surplusage as included in the graver offense.

2. Rape § 11: Incest § 2—

Evidence in this case *held* sufficient to overrule nonsuit and sustain conviction of assault with intent to commit rape on a female child under the age of 12 years and of incest.

3. Criminal Law § 32a—

When the State relies on circumstantial evidence, all facts and circumstances forming a link in the chain of proof and which tend to prove the facts sought to be inferred as a reasonable and logical deduction are competent, but evidence of facts or circumstances which are equally consistent with the existence or nonexistence of the fact sought to be inferred is incompetent.

4. Same: Rape § 10: Incest § 2—

Defendant was charged with carnal knowledge of a female child under the age of 12 years, with carnal knowledge of a female child over the age of 12 and under the age of 16, and with incest. *Held:* The finding of prophylactic rubbers on the person of defendant when he was arrested some seven months after the last act of intercourse took place according to the evidence, and some three and one-half years after the prosecuting witness became 12 years of age, does not tend to prove defendant's guilt of the offenses charged, and the admission of such evidence over defendant's objection constitutes reversible error.

APPEAL by defendant from *Clarkson, J.*, January Criminal Term 1954, ROCKINGHAM Superior Court.

The grand jury at the May Term, 1953, returned against the defendant two bills of indictment. The first bill contained one count. It charged that on the ...... day of June, 1949, the defendant, a male person over the age of 18 years, had carnal knowledge of a female child under the age of 12 years. The other bill contained two counts. The first charged the defendant with incest. The second charged the carnal knowledge of a female over the age of 12 and under the age of 16, with the other necessary averments. It is charged that the offenses in the second indictment

occurred on 15 August, 1952. The complaining witness is the daughter of the defendant.

At the time of arraignment, the solicitor announced in open court that he would not ask for a verdict for the capital offense of rape, but would ask for a verdict of assault with intent to commit rape or assault on a female. Whereupon the bills were consolidated for the purpose of trial. The jury returned the following verdict:

Guilty of incest.

Not guilty of carnal knowledge of a virtuous female over 12 and under 16 years.

Guilty of assault with intent to commit rape.

Guilty of an assault on a female.

It was the judgment of the court that defendant be confined in the State's prison for not less than 18 nor more than 24 months, from which he appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and William Mayo, Member of Staff, for the State.

P. W. Glidewell, Sr., for defendant, appellant.

HIGGINS, J. The conviction for an assault on a female may be treated as surplusage. This is a lesser offense included in the charge of assault with intent to commit rape. A conviction of an assault on a female could only be sustained, provided the jury acquitted of the greater offense. The conviction on the other counts would, of course, sustain the judgment.

As disclosed in the record, the principal State's witness told a story involving her father in sex crimes with her, beginning when she was nine years old and continuing until 15 August, 1952. On 15 August, 1952, the defendant and his wife were taking the witness to task for keeping company with a married man, whereupon a fight took place in which she testified the defendant pulled her hair and she kicked him. She immediately left home, not to return. At that time she was 15 years old. Immediately after she left home on 15 August, 1952, she told a married sister and her sister's husband of her father's conduct toward her. In corroboration, they testified for the State as to what she had told them. The defendant testified in his own behalf, entering a complete denial. The wife and other members of the family testified in his behalf, corroborating him, and in part contradicting the daughter's story. Eight neighbors testified to the defendant's good character.

The story told by the principal State's witness is lurid in some, but vague in other details. She testified on some occasions her father used rubbers, others he did not. While the story is not altogether free from suspicion, yet it is sufficient to survive the challenge interposed by defend-

ant's motion for judgment as of nonsuit at the close of the State's evidence and renewed at the close of all the evidence.

The defendant was arrested on 16 March, 1953, just seven months after the State's witness left home, and, according to her story, all acts covered by the charges in the indictments had ceased. At the time of arrest the defendant was at work near his home. In the search incident to the arrest the officers took from his pocket a billfold. In the flap to this billfold the officers found two prophylactic rubbers. These they sealed in an envelope and made the following notation thereon: "Lee Stone—taken from Lee Stone's wallet 3-16-53 in the presence of Allen and Lillard." The prophylactics, together with the envelope and notation, were introduced in evidence, over the defendant's objection. The admissibility of this evidence is determinative of this appeal.

In circumstantial or indirect evidence, of which that offered is an example, it is often difficult to draw the line separating that which is admissible and that which is not. There is a twilight zone between circumstances that are clearly admissible and those clearly not admissible. It is in this category that the courts have difficulty. As said by *Justice Allen* of this Court in the case of *Bank v. Stack,* 179 N.C. 514, 103 S.E. 6, "The relevancy of evidence is frequently difficult to determine because men's minds are so constituted that a circumstance which impresses one as having an important bearing on a controverted issue appears to another to have no probative value." The rule is stated by Greenleaf (1 Greenleaf, Evidence, sec. 51a), "It is not necessary that the evidence should bear directly on the issue. It is admissible if it tends to prove the issue or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it."

Taylor (1 Taylor, Evidence, sec. 316), in stating the rule, says: "While he (the judge) shall reject as too remote every fact which merely furnishes a forceful analogy, or a conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble light on the question in issue."

In the case of *S. v. Plyler,* 153 N.C. 630, 69 S.E. 269, *Justice Brown* states the rule: "Where the particular fact sought to be proved is equally consistent with the existence or nonexistence of the fact sought to be inferred from it, the evidence can raise no presumption either way, and should be excluded." *S. v. Vinson,* 63 N.C. 335; *S. v. Brantley,* 84 N.C. 766.

In the case of *S. v. Brantley, supra,* after discussing the necessity for the use of circumstantial evidence and the dangers incident to such use, the Court said: "Among other hazards and inconveniences it was found that to allow evidence to be given touching every collateral matter that could be supposed, however remotely, to throw any light upon the main

fact sought to be established, had the effect to render trials too complicated and to confuse and mislead the juries, and at the same time to surprise the party on trial who could not come prepared to disprove every possible circumstance, but only such as he might suppose to be germane and material. And therefore the main rule was adopted of restricting the inquiry to such facts as, though collateral to the matter at issue, had a *visible, reasonable* connection with it—not such a connection as would go to show that the two facts, the collateral one and the main one, sometimes, or indeed often, go together, but such as will show that they *most usually* do so."

When tested by the foregoing rule, the possession of prophylactics on 16 March, 1953, does not tend to prove the defendant committed rape on the ...... day of June, 1949, and it does not tend to prove he committed incest or that he had sexual intercourse with an innocent and virtuous female over 12 and under 16 years of age on 15 August, 1952.

The evidence objected to in this case is in a category entirely different from that offered in *S. v. Fogleman,* 204 N.C. 401, 168 S.E. 536, and *S. v. Payne,* 213 N.C. 719, 197 S.E. 573. In each of those cases the defendant was indicted for murder. The evidence established the killing with firearms. After the homicide an arsenal including high-powered firearms was discovered in the automobiles in which the defendants were shown to have been riding. These weapons, together with the burglar tools concealed in the automobiles with them, were offered in evidence. The Court, in the *Fogleman case, supra,* which was quoted with approval in the *Payne case,* said: "Evidence of this character is admissible on the principle that it tends to show a design or plan." The articles introduced were implements of violence in a prosecution for a crime of violence.

The possession of two contraceptives does not tend to prove the owner had been engaged in acts of incest, rape, and carnal knowledge of an innocent and virtuous girl between the ages of 12 and 16 years. The admissibility of this evidence over defendant's objection was prejudicial error.

The case is sent back to the Superior Court of Rockingham County for a new trial on indictment No. 1724B; and new trial on the first count in indictment No. 1724A.

New trial.

THE BANK OF FRENCH BROAD, INC., v. MRS. BLANCHE R. BRYAN, ADMINISTRATRIX OF THE ESTATE OF WAYNE BRYAN, AND RALPH RAMSEY.

(Filed 22 September, 1954.)

1. Pleadings § 31—

A motion to strike an allegation from a pleading for irrelevancy admits, for the purposes of the motion, the truth of all facts well pleaded in the allegation, and any inferences fairly deducible from them. But it does not admit the conclusions of the pleader.

2. Insurance § 26½—

Where, upon valid consideration, a person agrees with another, who has an insurable interest in the life of a third person, to procure the issuance of a term policy on the life of such third person, and fails to procure the issuance of the policy, recovery may be had, upon the death within the period specified of the person sought to be insured, for breach of the contract to procure the issuance of the policy or for negligent default in failing to perform the duty imposed by such contract. The principle of liability for breach of agreement to procure property insurance applies also to life insurance.

3. Same: Bills and Notes § 29—

An accommodation endorser alleged that the payee bank through its officer, who was also an agent for a life insurance company, agreed to procure the issuance of a term policy of life insurance on the maker, that interest on the note and the insurance premium were paid to the officer, that the policy was not issued, and that the maker died within the term specified. *Held:* The allegations are germane to defense of an action on the note by the payee bank, regardless of whether it is alleged that the premium was paid to the bank or to the insurance company, the basis of the defense being the bank's breach of its agreement to procure the issuance of the policy.

4. Pleadings § 31—

Motion to strike allegations of the answer which are germane to a valid defense is properly denied.

APPEAL by plaintiff from *Johnston, J.*, June Term, 1954, of MADISON.

Civil action by plaintiff to recover on $700.00 promissory note of 6 July, 1953, payable ninety days after date. The note sued on was executed and delivered by the late Wayne Bryan and by defendant Ralph Ramsey to the plaintiff. Wayne Bryan died 24 September, 1953.

Plaintiff's appeal is from the order of the court below denying plaintiff's motion to strike as "immaterial, prejudicial, redundant and irrelevant," paragraphs 2, 4 and 5 of defendants' Further Answer and Defense.

In paragraphs not challenged by plaintiff's motion, defendants allege that the note sued on is a renewal note, the original, a $700.00 note of 7 April, 1953, payable ninety days after date, having been signed by the

late Wayne Bryan and, as accommodation endorser, by defendant Ralph Ramsey; and further, that C. E. Rector, an official of the plaintiff, was acting in behalf of the bank "in the scope of his agency during all times herein mentioned."

In paragraphs 2 and 4, challenged by plaintiff's motion, defendants allege, in substance, that C. E. Rector was also an agent of the State Capital Life Insurance Company of Raleigh, N. C., and as such agent issued, in connection with the original loan transaction of 7 April, 1953, a life insurance policy whereby said insurance company agreed to pay to the bank the sum of $700.00 in the event of the death of Wayne Bryan within three months from 7 April, 1953.

In paragraph 5, challenged by plaintiff's motion, defendants allege:

"That on or about 6 July 1953, as these defendants are informed and believe, the said Wayne Bryan sought to renew the above-mentioned note and insurance and the interest on the note and the premium on the insurance were paid to The Bank and to the agent of the said State Capital Life Insurance Company, and the plaintiff agreed to cause an insurance policy to be issued with the State Capital Life Insurance Company in the sum of $700.00, payable to the plaintiff in the event of the death of Wayne Bryan during the three months period for which said note was to be renewed; that as these defendants are informed and believe, the plaintiff failed to cause said insurance to be issued as it agreed to do; that Wayne Bryan died during the term for which the plaintiff agreed to cause said insurance to be issued; that by reason of the plaintiff's failure to cause said insurance to be issued as it agreed to do the plaintiff is not entitled to recover any amount from the defendants in this action."

Carl R. Stuart and E. L. Loftin for plaintiff, appellant.

G. D. Bailey and W. E. Anglin for defendants, appellees.

BOBBITT, J. Appellant, in its brief, does not deal separately with each challenged allegation. It presents its position as if the case were before us on demurrer to defendants' Further Answer and Defense, challenging the sufficiency of defendants' pleading to constitute a defense rather than the propriety of particular allegations.

As stated by *Ervin, J.*: "A motion to strike an allegation from a pleading for irrelevancy admits, for the purposes of the motion, the truth of all facts well pleaded in the allegation, and any inferences fairly deducible from them. But it does not admit the conclusions of the pleader." *Dixie Lines v. Grannick*, 238 N.C. 552 (556), 78 S.E. 2d 410. Appellant concedes and indeed cites this statement of the applicable rule.

Assuming sufficient interest or other recognized consideration, it is generally held that where one agrees to procure the issuance of insurance

on the property of another, affording protection against designated risks, and fails to do so, he will be held liable, within the amount of the proposed insurance, for the loss attributable to his default. This Court has recognized the breach of such agreement as a basis of liability where the parties to the agreement were in the following relationships:

1. In actions by a property owner against an insurance agent or broker. *Elam v. Realty Co.*, 182 N.C. 599, 109 S.E. 632, 18 A.L.R. 1210; *Case v. Ewbanks*, 194 N.C. 775, 140 S.E. 709; *Boney, Insurance Comr., v. Ins. Co.*, 213 N.C. 563, 197 S.E. 122; 29 Am. Jur. p. 130, Insurance, secs. 108, 109; 44 C.J.S. p. 861, Insurance, sec. 172 (a); Annotations: 18 A.L.R. 1214; 29 A.L.R. 2d 171.

2. In actions by a vendee against a vendor in relation to personal property subject to a conditional sales contract. *Truck Corp. v. Trust Co.*, 200 N.C. 157, 156 S.E. 787; *Meiselman v. Wicker*, 224 N.C. 417, 30 S.E. 2d 317; 23 N.C.L.R. 64.

3. In actions by a property owner against a warehouseman. *Box Co. v. Storage Co.*, 210 N.C. 829, 186 S.E. 155.

4. In actions by the owners of real property, subject to deed of trust, against the owners of the secured debt. *Dixon v. Osborne*, 204 N.C. 480, 168 S.E. 683; *Crouse v. Vernon*, 232 N.C. 24, 59 S.E. 2d 185; 36 Am. Jur. p. 852, Mortgages, sec. 328; 59 C.J.S. p. 449, Mortgages, sec. 328 (b).

To enforce such liability the plaintiff, at his election, may sue for breach of contract, or for negligent default in performance of duty imposed by contract. *Elam v. Realty Co., supra;* 44 C.J.S. p. 863, Insurance, sec. 172 (b).

In *Crouse v. Vernon, supra,* plaintiff, a property owner, obtained a $2,500 construction loan from a bank. She secured her $2,500 note to the bank by deed of trust conveying the property on which she was building a house and gave additional security. Her house burned while in process of construction. She sued the bank official with whom she had dealt, the bank, and the trustee in the deed of trust. In dealings with the plaintiff, the named official was acting for the bank. In addition, however, there was allegation and evidence that the named bank official had a broker or agency relationship with certain (unnamed) fire insurance companies. Plaintiff recovered judgment against the bank official individually and against the bank, predicated upon the jury's verdict to the effect that the bank official agreed to procure and have issued to plaintiff a fire insurance policy in amount of $4,500 covering the house being built on plaintiff's property and failed to do so. The allegations of the complaint as disclosed by the original record bear close resemblance to the allegations of defendants now challenged by plaintiff's motion.

Here, the insurance policy contemplated by the agreement alleged by defendants was to provide coverage against the risk of the death of Wayne Bryan during the term of ninety days from 6 July, 1953. But we discern no substantial distinction because the insurance to be procured was life insurance rather than to protect against property risks.

In our view, it may be fairly deduced from the challenged allegations that the *bank*, through *its said agent*, agreed to cause the issuance of the policy on the life of Bryan; and that at the time the loan was renewed, Bryan paid an amount sufficient to cover interest on the renewal note and premium on insurance policy. Plaintiff insists that the allegations compel the conclusion that the interest was paid to the bank and that the premium was paid to Rector as agent of the insurance company. Under the rule of liberal construction in favor of the pleader, the relationships alleged do not require such an attenuate distinction. The allegations indicate plainly that the issuance of the insurance policy was not independent of but rather an integral feature of the loan renewal transaction. The allegations are clear to the effect that the death benefit under the proposed insurance policy was to be payable to the bank, thereby protecting it as well as the obligors on the $700.00 note in case of Bryan's death during the ninety day term. Whether the amount of the premium was paid to Rector, in his capacity as bank official or in his capacity of insurance agent, the defendants are entitled to allege and show, if they can, that the bank made the agreement to cause the life insurance policy to be issued. The circumstance that its official was also an agent for a life insurance company would not affect its liability if in fact it made such agreement. Indeed, if, within its own organization, there was an agent authorized to issue such policy, its failure to cause the issuance thereof could hardly be justified.

The defendants' pleading is sufficient to survive the motion to strike, leaving for jury decision upon the evidence presented the issue as to whether the bank made the alleged agreement. Of course, the case now before us is on the pleadings. Whether defendants can support their allegations by sufficient evidence is another matter.

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF J. A. SUMMRELL v. CAROLINA-VIRGINIA RACING ASSOCIATION, INC., AND THE CURRITUCK COUNTY RACING COMMISSION.

(Filed 22 September, 1954.)

1. Constitutional Law § 20b—

The mere fact that a state court overrules its previous decision on a question of state law does not constitute a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

2. Constitutional Law § 25—

A contract imposes no binding obligations if its validity is dependent upon the provisions of an unconstitutional statute. Constitution of the United States, Art. I, sec. 10.

3. Same—

The Federal Constitutional protection of the obligations of contracts against state action is directed only against impairment by legislation and not by judgments of courts. Constitution of the United States, Art. I, sec. 10.

APPEAL by defendant Carolina-Virginia Racing Association, Inc., from *Paul, S. J.*, April 4th Special Term, 1954, of CURRITUCK.

At Spring Term, 1954, in *S. v. Felton,* 239 N.C. 575, 80 S.E. 2d 625, it was held that Ch. 541, Session Laws of 1949, was in violation of designated provisions of the Constitution of North Carolina. The constitutional question having been so decided, this cause, *Summrell v. Racing Asso.,* 239 N.C. 591, 80 S.E. 2d 638, then before this Court, was remanded for further proceedings.

Defendant Association conducted gambling operations on its premises under a system of pari-mutuel betting on dog races. It is so alleged in its pleadings and so stated in stipulation set out in the record. Its contention is that such conduct was lawful because authorized by franchise from the Currituck County Racing Commission granted under the 1949 Currituck Act. And because of said Act, it contends that G.S. 19-1, *et seq.,* general statutes providing that premises used for gambling operations constitute a nuisance, are inapplicable. In the decisions cited above, this Court held adversely to these contentions. The provisions of the 1949 Currituck Act, the actions taken in pursuance of its terms and the operations of defendant Association thereunder are fully stated in these decisions:

In Currituck Superior Court, April 4th Special Term, 1954, defendant Association tendered judgment providing for dismissal of the action and for costs. The court below denied motion for such judgment and exception was duly taken. Thereupon, the court below signed and entered

judgment in favor of plaintiff in conformity with the provisions of G.S. 19-1, *et seq.* Defendant Association excepted and appealed.

The assignments of error are to the effect that the failure of the court below to sign the judgment tendered by defendant Association and the judgment as signed and entered constituted a violation of defendant Association's rights under the Constitution of the United States in that the obligations of its contract rights are impaired thereby and in that it is deprived of its property without due process of law. This position was asserted in a pleading filed 4 April, 1954, bearing the caption, "Answer to Petition for Judgment."

Frank B. Aycock, Jr., for plaintiff relator, appellee.

John G. Dawson, John B. McMullan, and Lucas, Rand & Rose for defendants, appellants.

BOBBITT, J. In addition to its appeal to this Court, defendant Association instituted an action in the federal district court to enjoin enforcement of the judgment of the court below and to restrain State law enforcement officers from enforcing the provisions of the State anti-gambling statutes against operations conducted at its dog track. The district court having denied its application for an interlocutory injunction, defendant Association appealed. In its decision of 20 July, 1954, the United States Court of Appeals for the Fourth Circuit, opinion by *Parker, Chief Judge,* affirmed the order denying the application for interlocutory injunction with directions to the district court to dismiss the bill for want of equity. *Racing Asso. v. Cahoon, et al.,* 214 F. 2d 830.

Defendant Association, in its brief, in relation to its position that the judgment constitutes a taking of its property without due process of law, contends that the constitutionality of the 1949 Currituck Act was not before this Court for decision in *Summrell v. Racing Asso.,* 239 N.C. 591, 80 S.E. 2d 638. Decision of the constitutional question upon the former appeal, which defendant Association suggests was done, is said to constitute such a departure from prior decisions of this Court as to constitute a denial of due process. The contention is without merit.

Upon the former appeal, this Court considered carefully all the cases now cited. With reference to *Amick v. Lancaster,* 228 N.C. 157, 44 S.E. 2d 733, stressed by defendant Association, this Court, for reasons then stated, expressed the view that the authority of that decision in relation to the facts in this cause was at least open to question. Be that as it may, the constitutional question was not determined on the former appeal in this cause. It was decided in *S. v. Felton,* 239 N.C. 575, 80 S.E. 2d 625. The 1949 Currituck Act having been declared unconstitutional in the *Felton case,* defendant Association could not rely further upon its pro-

visions as a defense in this cause. It should be noted that counsel for defendants herein were permitted to appear *amici curiae* in the *Felton case* and did participate orally and by brief in the argument of the constitutional question.

If the defendant Association's contention is that the decision in *S. v. Felton, supra,* constituted a departure from previous decisions of this Court, the obvious answer is that we do not so regard it. But even if there were such departure, the contention is without merit; for, as pointed out by *Parker, Chief Judge,* in *Racing Asso. v. Cahoon, et al., supra,* with citation of authority, the mere fact that a state court overrules its previous decisions on a question of state law does not constitute a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

Defendant Association contends further that its operations were conducted under a franchise granted to it on or about 11 May, 1949, by Currituck County Racing Commission, an agency of the State of North Carolina, and that the judgment impairs the obligation of such contract and of its corporate charter in violation of Art. I, sec. 10, of the Constitution of the United States. Again, the answers to such contention are given by *Parker, Chief Judge,* in *Racing Asso. v. Cahoon, et al., supra,* with citation of authority: first, a purported contract imposes no binding obligations if its validity is dependent upon the provisions of an unconstitutional statute; and second, the provision of Art. I, sec. 10, of the Federal Constitution, protecting the obligations of contracts against state action, is directed only against impairment by legislation and not by judgments of courts.

It appears that defendant Association has made large expenditures in the purchase and establishment of its dog racing premises and its pari-mutuel apparati. It appears also that its operations during the five seasons, 1949-1953, prior to the presentation and decision of the constitutional question, were quite profitable. It continues as owner of the real property. The record does not disclose whether defendant Association or another became purchaser of the personalty when sold by the commissioner under the judgment. While the delay in the presentation of the constitutional question to this Court for decision would seem to be without legal significance, the records in this cause and in the *Felton case* and companion cases leave the impression that defendant Association was neither alert nor cooperative in any effort to obtain an early decision on the constitutionality of the 1949 Currituck Act.

For the reasons stated the judgment of the court below is

Affirmed.

RALPH E. MILLER v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 22 September, 1954.)

1. Master and Servant § 25c—

An action by an employee of a common carrier to recover for injuries received in the course of his duties in interstate commerce is governed by the Federal Employers' Liability Act.

2. Master and Servant § 25b—

In an action under the Federal Employers' Liability Act matters of procedure, including the judge's charge, are governed by rules of the state court.

3. Trial § 31e—

The crucial question in this case was whether the employer was negligent in failing to provide the employee with additional help to perform the task which the employee was assigned to do alone. *Held:* An instruction that if more than one person is required for the safe performance of a certain duty, "such as the one in question in this case," must be held for prejudicial error as an expression of opinion of the court that the job in question required more than one man for its safe performance.

4. Same—

The fact that an expression of opinion by the trial court upon the evidence is an inadvertence renders such error nonetheless harmful. G.S. 1-180.

APPEAL by defendant from *Burgwyn, E. J.,* January Special Term, 1954, of PERQUIMANS.

This action was brought in the Superior Court of Perquimans County, North Carolina. However, it is alleged and admitted that the defendant is a common carrier by rail, engaged in interstate commerce. It is likewise admitted that the plaintiff at the time of the injury was an employee of the defendant, and that he was engaged in work in furtherance of its interstate business.

The evidence disclosed that for several days prior to injury, the plaintiff had been working as a carpenter, together with another employee, repairing defendant's camp cars. Plaintiff testified he was an inexperienced carpenter. On the day of the injury, the other workman was off duty. The plaintiff was instructed to proceed alone. He was shown the material to be used and told to do the best he could by himself. The work assigned to him was the lining of one of defendant's camp cars. Other workmen could be made available but plaintiff did not request assistance. In the course of his work he attempted to fit a seasoned pine board about 5½ inches wide by ¾ inch thick and 12 to 14 feet in length, and weighing 15 to 20 pounds, into a position above the window in the car, about six

feet from the car floor. He was attempting to nail the board at one end, holding the board in position with his arm and at the same time attempting to hold the nail in position. In the attempt to perform these operations alone, it was necessary for him to assume an awkward and cramped position. Under these conditions he attempted to drive a nail through the plank and into the car frame. He hit the nail a glancing blow that caused it to fly out of the plank, striking him in the eye, causing great pain, loss of time and wages, and resulting in 99 per cent permanent loss of vision to the injured eye, and caused some danger of sympathetic impairment of the other. He contended the work he was assigned to do was a two-man job, and that the defendant was negligent and liable in having him attempt to do the work alone.

The defendant contended that two men had been working together for convenience rather than necessity, that one man could do the job. The defendant offered evidence that the plaintiff was told by his foreman to do what he could and not to attempt the impossible.

In the argument here, counsel for both parties, with commendable frankness, conceded that the crucial point in the case is whether the defendant was guilty of actionable negligence in failing to provide the plaintiff with additional help to perform the task which he was assigned to do alone. Three issues were submitted to the jury:

(1) Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?

(2) Did the defendant by his own negligence contribute to his injury as set out in the amendment to the answer?

(3) What damage, if any, is the plaintiff entitled to recover of the defendant?

The jury answered the first issue, "Yes;" the second issue, "Yes;" and the third issue, "$25,000." Judgment was signed in accordance with the verdict, from which the defendant appealed.

Chas. E. Johnson and John H. Hall for plaintiff, appellee.
Wilson & Wilson for defendant, appellant.

HIGGINS, J. In this case the rules of liability and recovery are governed by the provisions of an Act of Congress known as The Federal Employers' Liability Act, 45 U.S.C.A. 51. When a case is brought under this Act in the State courts, matters of procedure, such as the judge's charge, are governed by rules of the North Carolina courts.

Numerous exceptive assignments of error appear in the record and are discussed in the briefs. In our view, it is necessary to consider only one, Assignment of Error No. 17, based on Exception No. 17. This assignment and exception challenge the correctness of that part of his Honor's

charge as follows: "Now there are certain duties which a corporation, as is this defendant, owes to its employees, one of which is: They should provide them with a fit and suitable place in which to work; and another is: They should supply them with reasonable assistance in the performance of a duty which requires (remember that word, gentlemen, REQUIRES) assistance of others in the safe performance of their duties; in other words, that the job in question should not be what is known as 'undermanned' (u-n-d-e-r-m-a-n-n-e-d); and if it requires more than one person for the safe performance of a certain duty, such as the one in question in this case, and the defendant has available persons who could have been called in for that assistance, and failed to do so, they would be liable in damages if their failure so to do was the proximate cause of the injury complained of."

The noxious part of the charge is contained in the phrase, "such as the one in question in this case." Whether the judge intended the jury to understand the phrase, *such as the one in question in this case,* related to and qualified *it* (which referred to the job) or whether it was intended to relate to and qualify the word "duty," is not clear. If the phrase related to the job, as we are constrained to believe it did, it was equivalent to saying to the jury the job required more than one man. Duty was not at issue, it was not "in question." The law fixed the duty. The question at issue was whether the job required more than one man. What the judge said was equivalent to an expression of opinion that the job required more than one man, or at least that was the probable effect on the jury. That the expression was an inadvertence on the part of a careful and painstaking judge renders the error none the less harmful. Both the statute, G.S. 1-180, and the decisions that help to fill the books are to the effect that a judge is not permitted even to intimate to the jury whether, in his opinion, an essential fact in a case has or has not been proved.

For the error committed in the charge, there must be a

New trial.

STATE v. HARRY McBRIDE, JR.

(Filed 22 September, 1954.)

1. Criminal Law § 62f—

The maximum period during which the execution of a sentence in a criminal case may be suspended upon conditions is 5 years, but ordinarily a suspension in excess of five years will be held void only as to that portion in excess of the statutory maximum, and the sentence may be ordered executed for condition broken at any time within the 5-year period. G.S. 15-200.

2. Same—

Where execution of sentence is suspended upon condition that the defendant be of good behavior and violate none of the laws of the state, the violation of a criminal law of another state is not a breach of the condition and cannot be made the basis for the execution of the sentence.

3. Same—

The fact that an order directing the execution of a suspended sentence is held erroneous on appeal for want of proper finding of condition broken, does not prejudice the power of the court below to activate the sentence thereafter for violation of any valid condition, if such be found and properly adjudicated, during the period of suspension, but where there is nothing in the record to suggest that defendant had violated any of the conditions upon which his sentence was suspended, it will not be directed that he be held in custody for possible further inquiry, but it will be directed that he be immediately released.

PETITION for *certiorari.*

At the October Term, 1950, of the Superior Court of Cabarrus County the petitioner, hereinafter called the defendant, was arraigned upon a bill of indictment in which he was charged in the first count with breaking and entering and in the second count with larceny.

The defendant entered a plea of *nolo contendere* and Judge Gwyn pronounced judgment in pertinent part as follows:

"On the count of larceny, judgment of the Court is that the defendant be confined in the State's Prison for a term of 3 years.

"On the count of breaking and entering, judgment of the Court is that the defendant be confined in the State's Prison for a term of 5 years. The latter sentence is suspended for a period of 8 years upon the following conditions:

"After his release from active service, that the defendant be of good behavior and violate none of the laws of the state; that he return to Cabarrus County and report to the Sheriff and also to the Probation Office; . . . for a period of three years the defendant shall be placed under probation, and it is so ordered, during which time he shall faithfully abide the orders of the Probation Officer; . . ."

The defendant served the three-year sentence imposed on the larceny count and was released from prison. Following this, and on 25 January, 1954, he was brought by the Probation Officer before Judge Rousseau, then presiding over the Superior Court of Iredell County, for alleged violation of the terms of his probation and suspended sentence. Whereupon Judge Rousseau found as facts that the defendant "had wilfully violated the following conditions of probation:

"He has violated condition 'J' of the probation judgment, 'violate no penal law of any state or the Federal Government and be of general good behavior' in that on January 19, 1954 in Domestic Relations Court,

Danville, Virginia, subject was convicted of disturbing the peace in his home.

"He has violated condition 'a' of the probation judgment, 'avoid injurious or vicious habits' in that he has been drinking since being on probation."

Thereupon judgment was entered directing that the five-year suspended sentence be placed into effect. Commitment was issued and on 27 January, 1954, the defendant was committed to Central Prison in Raleigh.

Thereafter the defendant sued out a writ of *habeas corpus* which was returned before Judge Stevens, Judge presiding at the March Term, 1954, of the Superior Court of Wake County. Upon return of the writ, Judge Stevens, being of the opinion that he lacked authority to inquire further into the action of Judge Rousseau in ordering the suspended sentence into execution, denied the defendant's application for release and ordered him remanded to prison.

Following the order denying his petition for writ of *habeas corpus,* the defendant petitioned this Court for writ of *certiorari* for review of the order of denial. By order entered 9 July, 1954, we allowed the petition.

R. Brookes Peters and E. O. Brogden, Jr., for the State.

R. B. Templeton and W. H. Yarborough for petitioner, defendant.

JOHNSON, J. The maximum period during which the execution of a sentence in a criminal case may be suspended on conditions is five years. This is fixed by statute. G.S. 15-200. *S. v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *S. v. Wilson,* 216 N.C. 130, 4 S.E. 2d 440. A suspension of sentence for a period in excess of that authorized by statute is not void *in toto.* Ordinarily it is valid to the extent the court had power to suspend or stay execution and void merely as to the excess. Therefore the attempt to suspend for a period of eight years the sentence imposed in the case at hand for breaking and entering is void as to the last three years. Accordingly, the period of suspension is reduced by operation of law to the statutory maximum of five years. This period not having expired on 25 January, 1954, Judge Rousseau had authority to hear and determine the question of revocation.

However, it is noted that Judge Rousseau revoked the suspension on the basis of his findings that the defendant had violated conditions "J" and "A" of the judgment; whereas it nowhere appears that the judgment contains any such conditions. It is manifest that Judge Rousseau, hearing the cause in Iredell County without opportunity to inspect the original judgment in Cabarrus County, was led to believe and acted on the assumption that the judgment was suspended upon the usual conditions set out in the printed forms promulgated by the State Probation Com-

mission, which contain conditions "a" and "j" referred to in Judge Rousseau's order. However, the record shows that the printed form judgment was not used.

The crucial condition upon which the original sentence was suspended is "that the defendant be of good behavior and violate none of the laws of the state." It is established by authoritative decisions of this Court that in order to activate a sentence for breach of such condition it must be made to appear that the defendant has violated one of the criminal laws of this State. *S. v. Millner, ante,* 602, decided this day. It does not suffice to show a violation of a criminal law of another state where the condition of suspension is expressly limited to a violation of a law of this State.

It necessarily follows that in the absence of a finding that the defendant violated any one of the conditions upon which his sentence was suspended, the order of revocation was erroneously entered and will be vacated, but without prejudice to the power of the court below to activate the sentence for violation of any valid condition of suspension, if such be found and properly adjudicated during the period of suspension.

However, since the record here, which includes the State's answer to the defendant's petition, filed 10 March, 1954, nowhere suggests or intimates that the defendant has violated any of the conditions upon which his sentence was suspended, we are not disposed to direct that he be held in custody for possible further inquiry. On this record he is entitled to immediate release. It is so ordered. To that end the Clerk of this Court will certify copies of this opinion to the Clerks of the Superior Court of Wake and Cabarrus Counties and to the Director of Prisons with direction that the defendant be discharged immediately from custody.

Error and remanded.

C. O. STORY v. EUGENIA B. WALCOTT.

(Filed 22 September, 1954.)

1. Deeds § 14—

A grantee, by acceptance of a deed, becomes bound by the stipulations, recitals, conditions, and limitations therein contained, even though he has not signed the deed.

2. Deeds § 14b: Vendor and Purchaser § 23: Parties § 3—

Plaintiff grantor instituted this suit for specific performance against his grantee, alleging that the deed contained a provision that if the grantee should desire to sell the land conveyed, she would first offer it to grantor, that grantee had entered into a contract to sell to a third person, and that

grantor had offered to purchase the lands on the same terms and had tendered an amount equal to the consideration called for by that contract. *Held:* The ultimate question is whether the grantor in the deed or the third person in the contract to convey is entitled to specific performance, and therefore such third person is a necessary party to the action.

APPEAL by plaintiff from *Moore, Presiding Judge* of the Eighteenth Judicial District, heard 28 April, 1954, in Hendersonville, N. C., from POLK.

Plaintiff's appeal is from judgment sustaining defendant's demurrer to complaint.

The complaint, in substance, alleges:

1. Plaintiff conveyed to defendant certain lands in Polk County consisting of four separately described acreage tracts. The deed was filed for registration on the day of its execution and delivery, to wit, 27 September, 1946, and was duly recorded. It recites a consideration of "Ten Dollars and other considerations." The lands conveyed, in addition to descriptions by metes and bounds, are further identified as "adjoining the lands of James Pace, C. O. Story, R. S. Walcott, and others."

2. As part consideration for the sale and conveyance by plaintiff to defendant, the parties agreed in accordance with the following provision, appearing in the deed, viz.: "It is understood and agreed that in case the said party of the second part should desire to sell the land above described she will first offer the same to C. O. Story."

3. By recorded contract of 2 July, 1952, defendant has agreed to sell and convey the lands to the State of North Carolina for a stipulated consideration.

4. Defendant, notwithstanding her desire to sell the lands, failed to offer the same to plaintiff.

5. Plaintiff, on or about 19 June, 1953, upon discovery of defendant's said contract to sell, offered to purchase the lands on the same terms; prepared a proper deed for execution by defendant and tendered in cash an amount equal to the consideration called for by said contract of sale; and that defendant, in violation of the agreement set forth in her deed, refused and still refuses to sell and convey to plaintiff upon the terms she has agreed to sell and convey to the State of North Carolina.

6. Plaintiff is ready, able and willing to purchase the lands on said terms and seeks specific performance.

Defendant demurred on the ground that the provision in the deed, quoted above, is void (1) for indefiniteness, (2) for lack of mutuality of obligation, and (3) for failure of consideration.

McCown, Lavender & McFarland for plaintiff, appellant.
Robert L. Whitmire, Jr., for defendant, appellee.

BOBBITT, J. A grantee, by acceptance of a deed, "becomes bound by the stipulations, recitals, conditions, and limitations therein contained, even though he has not signed the deed." 26 C.J.S. pp. 259-260, Deeds, sec. 53. This rule is recognized generally and by this Court. 16 Am. Jur. p. 645, Deeds, sec. 358; *Raynor v. Raynor,* 212 N.C. 181, 193 S.E. 216; *Stephens Co. v. Lisk, ante,* 289, 82 S.E. 2d 99.

The crucial question is whether the quoted provision is void as an unlawful restraint upon alienation, repugnant to the nature of the estate granted, or valid as a personal pre-emptive right granted C. O. Story to purchase at such price as defendant is willing to sell to another. Appellee relies upon *Hardy v. Galloway,* 111 N.C. 522, 15 S.E. 890, 32 Am. St. Rep. 828. Appellant undertakes to distinguish the *Hardy case,* contending that the provision under consideration here imposes no unlawful restraint upon alienation. See: Restatement of the Law, Property, sec. 413; American Law of Property (1952), Vol. VI, pp. 506-512, secs. 26.64-26.67. For the reason stated below, we refrain from discussion of this question of law.

The complaint expressly alleges that defendant is under written contract to convey the lands to the State of North Carolina. Hence, the ultimate question for determination is whether plaintiff or the State of North Carolina is entitled to specific performance. This determination appears to turn on the validity of the provision in plaintiff's deed to defendant.

Decision now would be conclusive only as between plaintiff and defendant. A complete determination of the controversy cannot be made without the presence of the State of North Carolina. G.S. 1-73. It is not a party to this action, nor does it appear that it has had notice thereof. But its right, if any, to compel specific performance to it of the lands concerned here would be vitally affected by the precedent of decision now made. Under the facts alleged it is entitled to be heard before decision is made. *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344.

Hence, the judgment sustaining demurrer is vacated and the cause remanded, with direction that the court below cause notice, with copy of the summons and complaint, to be served on the State of North Carolina, allowing it thirty (30) days from such service to make itself a party hereto, if it so desires, and assert its rights, if any, to the lands. Upon expiration of the time so prescribed, the court below will consider the cause *de novo* upon the pleadings then before it, without prejudice to any party on account of Judge Moore's judgment of 28 April, 1954, or on account of what is stated herein.

Remanded, with directions.

MRS. CASSIE M. MESSICK v. C. A. TURNAGE.

(Filed 22 September, 1954.)

1. Negligence § 19b (5)—

Plaintiff instituted this action to recover for personal injury allegedly caused by the falling of plaster in defendant's theatre. The allegations were to the effect that the plaster fell because of seepage of water due to a leaking roof, but the evidence was to the effect that the water flowed from a rest room on the balcony level. *Held:* Nonsuit was properly entered for variance between the allegation and proof.

2. Pleadings § 24—

Proof without allegation is as unavailing as allegation without proof.

PLAINTIFF'S appeal from *Carr, J.*, February 1954 Term, BEAUFORT Superior Court.

In this action the plaintiff seeks to recover damages on account of injuries she received while a patron in defendant's moving picture theatre. The allegations in her complaint are in substance that she purchased a ticket and entered the theatre during a hard rain; that falling plaster and water behind her so frightened her that she involuntarily jumped from her seat, striking the metal part of the seat in front, causing her injury. The particular breach of duty on the part of the defendant which she alleges is actionable negligence is set out in the following words: "That the defendant failed to maintain a safe theatre and auditorium for plaintiff's enjoyment, in that the defendant knew or should have known by reasonable observation which was his duty, that said roof was leaking and in bad repair."

She further alleges somewhat indefinitely that this condition caused the plaster to give way. The other allegations of negligence are too general, too indefinite, and too vague to be availing.

The defendant answered, denying negligence, and denying that the roof was leaking or in bad repair.

The evidence, in the light most favorable to the plaintiff, tended to show the theatre consisted of a main floor and a balcony which extended over the rear part of the main floor on either side and to the rear. A restroom on the level with the balcony floor was maintained for the patrons of the theatre. A valve in one of the fixtures in the restroom failed to close, causing water to spill out to the floor. This floor was of tile, sloping toward the center, and fitted with a drainpipe sufficient in size to carry all overflow. This pipe was covered with a grill. Cigarette butts and other debris had clogged the pipe. Water covered the floor to a depth sufficient to overflow a three-quarter-inch strip at the door. The balcony was covered with a carpet which soaked up the overflowing

water. Seepage from the carpet through the floor of the balcony softened the plaster under the balcony. Suddenly this plaster gave way, and, to use plaintiff's own words, "I thought the whole balcony was coming down behind me, it make so much fuss. I did not know what was going on at the second when it happened, and it startled me so I hit my leg on the back of the seat." The plaintiff's evidence further tended to show the door to the restroom was closed. The sound of running water could not be heard from the outside. Water could not be discovered from the outside, except by examination or stepping on the carpet. At the close of plaintiff's evidence, motion for judgment of nonsuit was made and sustained. The plaintiff appealed.

LeRoy Scott and L. H. Ross for plaintiff, appellant.
Rodman & Rodman for defendant, appellee.

HIGGINS, J. The negligence sufficiently pleaded in the complaint is to the effect that the defendant "knew or should have known . . . that said roof was leaking and in bad repair . . ." There is not a suggestion in the evidence that the roof was leaking and in bad repair. It was incumbent upon the plaintiff not only to prove negligence proximately causing her injury, but it was her duty to prove negligence substantially as alleged in her complaint. This she failed to do. Proof without allegation is as unavailing as allegation without proof. *Smith v. Barnes,* 236 N.C. 176, 72 S.E. 2d 216; *Bowen v. Darden,* 233 N.C. 443, 64 S.E. 2d 285.

The judgment of the Superior Court of Beaufort County is
Affirmed.

BLUE MAGIC COMPANY OF NORTH CAROLINA, A PARTNERSHIP COMPOSED OF W. H. HUPLITS, JR., AND MAX M. LEVY, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 September, 1954.)

Pleadings § 28—

Allegations of evidential rather than ultimate or issuable facts, and of contentions of law, should be stricken on motion aptly made. Such determination is without prejudice to rulings upon the trial as to the competency of the evidence and upon the questions of law.

APPEAL by plaintiffs from *Morris, J.,* May Term, 1954, of WILSON. Modified and affirmed.

Action by plaintiffs to recover from defendant, terminal carrier, with reference to glass bottles purchased by plaintiffs, alleged to have been

damaged while in transit from shipping points in Indiana and Pennsylvania to plaintiffs' plant in Wilson, North Carolina.

Defendant answered the allegations of the complaint. Thereafter, the defendant alleged much new matter under the captions First Further Answer and Defense and Counterclaim, Second Further Answer and Defense, and Third Further Answer and Defense. The hearing below was on plaintiffs' motion to strike twelve numbered paragraphs of defendant's First Further Answer and Defense, all of its Second Further Answer and Defense, and all of its Third Further Answer and Defense. Judgment in the court below allowed plaintiffs' said motion as to paragraph 13 of defendant's First Further Answer and Defense but denied plaintiffs' motion to all other challenged allegations. Plaintiffs appealed from the portion of the judgment denying its motion.

Gardner, Connor & Lee for plaintiffs, appellants.

M. V. Barnhill, Jr., F. S. Spruill, and Lucas & Rand for defendant, appellee.

PER CURIAM. A careful consideration of the allegations challenged by plaintiffs' motion reveals that the matters alleged are evidential or probative facts rather than ultimate or issuable facts, or that they constitute a narration of defendant's contentions of law. Hence, they have no proper place in defendant's pleading. They are deemed prejudicial. *Daniel v. Gardner, ante,* 249, 81 S.E. 2d 660. Plaintiffs' motion should have been allowed in its entirety. It is so ordered.

Defendant's pleading sufficiently alleges, in allegations not challenged, the ultimate or issuable facts upon which it bases its defense and counterclaim. Rulings as to competency of evidence and as to questions of law will be passed upon at the trial. The allowance of plaintiffs' motion will have no bearing upon the decision of such questions by the trial judge.

Modified and affirmed.

H. A. COLLINS AND WIFE, PARALEE COLLINS, AND RUTH C. BROOKSHIRE, PETITIONERS, v. NORTH CAROLINA STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 22 September, 1954.)

Trial § 39—

Even though the amount of the verdict may prompt the surmise that it was a quotient verdict, this alone is insufficient to compel the conclusion, as a matter of law, that it was in fact a quotient verdict.

APPEAL by respondent from *Pless, J.*, March Term 1954, BUNCOMBE. No error.

Special proceeding for the recovery of compensation for the land of petitioners appropriated by respondent for highway purposes.

In the proceeding before the clerk, the commissioners assessed the damages, the clerk signed judgment on the report of the commissioners, and respondent appealed.

In the court below the jury fixed the damages sustained by petitioners at $1,666.67. From judgment on the verdict respondent appealed.

Don C. Young for petitioner appellees.

R. Brookes Peters and McLean, Elmore & Martin for respondent appellant.

PER CURIAM. Respondent's exceptive assignments of error fail to raise any question of law of sufficient moment to require discussion. Upon the rendition of the verdict the respondent did not request the court to poll the jury. While the amount of the verdict may prompt the surmise that it was a quotient verdict, it alone is insufficient to compel the conclusion, as a matter of law, that it was in fact a quotient verdict.

As no prejudicial error is made to appear, the verdict and judgment will not be disturbed.

No error.

WILLIAM J. BATCHELOR, ETHEL BATCHELOR v. M. B. MITCHELL AND WIFE, EMMA H. MITCHELL; R. I. MITCHELL AND SONS, INC., W. J. MANNING.

(Filed 22 September, 1954.)

APPEAL by plaintiffs from *Morris, J.*, at February Civil Term, 1954, of NASH. Affirmed.

Davenport & Davenport and O. B. Moss for plaintiffs, appellants.

Hobart Brantley and Cooley & May for defendants, appellees.

PER CURIAM. This is a civil action involving title to land. It was here before on appeal from a judgment sustaining the defendants' demurrer to the complaint. Our decision reversing the lower court and holding that the allegations of the complaint are sufficient to constitute a cause of action is reported in 238 N.C. 351, 78 S.E. 2d 240, where the essential facts alleged may be found summarized.

When the case went back to the lower court the defendants filed answer denying the material allegations of the complaint and setting up the pertinent statutes of limitation.

On retrial, at the close of the plaintiffs' evidence the defendants moved for judgment as of nonsuit. The motion was allowed and from judgment based on such ruling the plaintiffs appealed.

The appeal presents no new question or feature requiring extended discussion. We have examined the record and find no substantial merit in any of the exceptions brought forward. They relate to matters of evidence and to the question of nonsuit. Neither reversible nor prejudicial error has been made to appear. The evidence adduced when liberally construed in favor of the plaintiffs is insufficient to make out a *prima facie* case. The judgment of nonsuit will be upheld.

Affirmed.

CAROLINA DRIVE-UR-SELF, INC., v. JAMES B. MAIDEN, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ALLIED ROOFING COMPANY.

(Filed 22 September, 1954.)

APPEAL by defendant from *Whitmire, Special Judge,* July Conflict "A" Term 1954 of BUNCOMBE.

Civil action to recover on rental contract of 8¢ per mile, plus $25.00 per week and 3% sales tax thereon, on automobiles rented and used by the defendant from the plaintiff. The General County Court of Buncombe County entered judgment for the plaintiff in the exact amount prayed for in the complaint. The defendant appealed to the Superior Court, which court overruled each and every one of the defendant's assignments of error and in all respects affirmed the judgment of the General County Court.

The defendant appealed to the Supreme Court assigning errors.

Ward & Bennett for Plaintiff, Appellee.

S. J. Pegram and William J. Cocke for Defendant, Appellant.

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 judgment entered in the Superior Court. The facts are simple. The applicable rules of law well established. There is no need for

further discussion. All the defendant's assignments of error are overruled, and the judgment below is
Affirmed.

C. C. JACKSON v. W. R. SULLIVAN.

(Filed 22 September, 1954.)

APPEAL by defendant from *Clement, J.*, January Term, 1954, of BUNCOMBE.

This is a civil action tried in the General County Court of Buncombe County, North Carolina, to recover a balance of $375.00 alleged to be due upon a contract for services rendered by the plaintiff for and on behalf of the defendant. Jury trial was waived. Verdict for the plaintiff, and judgment was duly entered. The evidence supports the verdict. The defendant excepted to the judgment and appealed to the Superior Court of Buncombe County. His exceptions and assignments of error were overruled and the verdict and judgment of the lower court affirmed. The defendant appeals, assigning error.

I. C. Crawford and L. C. Stoker for appellee.
Appellant in propria persona.

PER CURIAM. The assignments of error brought forward in the defendant's brief fail to reveal error. Hence the judgment below is
Affirmed.

ETHEL DAVIS v. WENDELL S. SIMMONS AND JEFFERY BLACKMON.

(Filed 22 September, 1954.)

APPEAL by plaintiff from *Sink, J.*, July Term 1954, SURRY. No error.

About 1:00 a.m. on 31 May 1953, plaintiff was lying prone across the westerly half of Highway 52 near Mount Airy. She was apparently in a drunken stupor. Defendants, traveling in a southerly direction, meeting automobiles going in the opposite direction, ran over a part of plaintiff's body. Defendant Blackmon was the owner of the automobile, and Simmons was, at the time, operating the vehicle.

The jury answered the first issue of negligence "No." The court below entered judgment on the verdict and plaintiff appealed.

Frank Freeman and J. N. Freeman for plaintiff appellant.
Ratcliff, Vaughn, Hudson, Ferrell & Carter for defendant appellees.

PER CURIAM. Plaintiff's assignments of error fail to disclose any error in the trial in the court below such as would entitle her to a new trial. None of them are of sufficient merit to require discussion. The jury has resolved the facts adversely to plaintiff. She must abide the result.

No error.

STATE v. FRANK E. SMITH.

(Filed 29 September, 1954.)

1. Criminal Law § 78g—

Ordinarily exception to improper remarks of the solicitor during the argument must be taken before verdict.

2. Criminal Law § 50f—

Where the remarks of counsel are improper in themselves, or are not warranted by the evidence, and are calculated to mislead or prejudice the jury, it is the duty of the court to correct same upon objection, and, even in the absence of objection, it is proper for the court to correct gross abuse *ex mero motu.*

3. Same—

Ordinarily the court, upon objection, may correct improper argument of the solicitor in his charge, but if the impropriety be gross it is the duty of the court to interfere at once.

4. Same—Argument of solicitor held improper as appealing to prejudice and as being unwarranted by evidence.

In this prosecution of the defendant for driving on the highways of the State while under the influence of intoxicating liquor, the solicitor argued that the jury should accept the word of the local officers as against the word of a stranger from another state, and argued that just because the defendant was a man of wealth having unlimited means, he should not be permitted to drive through the county, criticizing its roads, and running down children in his big car, and that the fact that a bottle of whiskey found in the defendant's car had the seal unbroken was no evidence that defendant had not taken a drink, since defendant, being a man of means, could buy several bottles and throw each away after he had broken the seal and taken a drink, etc. There was no evidence in the record that the defendant was a man of wealth. *Held:* The argument was improper both as containing appeals to prejudice and as being unwarranted by the evidence. Such impropriety is not corrected by an instruction that the jury should give a nonresident as fair a trial as a resident and should give a man of means as fair a trial as a man without means, there being no instruction that the argument was improper and that the jury should disregard it.

5. Criminal Law §§ 67a, 78g—

The defendant's assignments of error to the argument of the solicitor in a non-capital case cannot be sustained when not supported by exception taken before verdict, but upon the record in this case the Supreme Court, in the exercise of its supervisory power, takes cognizance *ex mero motu* to preserve defendant's constitutional right to a fair and impartial trial.

BOBBITT, J., dissenting.

JOHNSON, J., concurs in dissent.

HIGGINS, J., concurring in dissent.

APPEAL by defendant from *Burgwyn, Emergency Judge,* March Criminal Term 1954 of CASWELL.

Criminal prosecution upon a warrant charging the defendant with driving an automobile upon the highways of the State, while under the influence of intoxicating liquor in violation of the State statute. On this warrant the defendant was found guilty, and judgment pronounced by the Caswell County Recorder's Court. On appeal to the Superior Court of the county the defendant was tried *de novo,* convicted by a jury, and judgment pronounced.

The defendant appealed to the Supreme Court assigning error.

Harry McMullan, Attorney General, Ralph Moody, Assistant Attorney General, and Charles G. Powell, Jr., Member of Staff, for the State.

W. Brantley Womble for Defendant, Appellant.

PARKER, J. The defendant's assignments of error, except those that are formal, relate to the argument of the Solicitor for the State to the jury. The part of his argument assigned as error is as follows: "1. Officer Norwood and Sheriff Harrison are personally known to all of you for years, whereas this stranger from Texas is an unknown. Therefore, you have no choice but to take the word of the local officers against his.

"2. Just because he is a man of property, can afford an expensive Lincoln car is no reason why he can come through here and break our laws. The rest of us are not blessed with wealth and have to be satisfied with the simple things of life.

"3. Just because he drives a Lincoln car 1,000 miles a week and covers seven states is no reason why he can come through Yanceyville criticizing our roads and saying they are narrow and full of curves. These roads are good enough for the rest of us. If he doesn't like them, let him stay out of here and go back to Texas where he belongs. We have to be satisfied with the meagre possessions we have. I dare say not one of us here owns a Lincoln car.

"4. Just because he is a man of property and can afford a Lincoln car, are you going to allow him to drive through here and run down your little daughter or your little son, or yours, or yours? I say 'No.' You must find him guilty.

"5. And as for his having a sealed bottle of whiskey in his car, thus claiming that he hadn't been drinking, I ask you to ignore this apparently innocent unopened bottle of whiskey. This man of property, in order to delude police, can afford to buy two bottles, take a few swigs out of one and then throw it away—keeping the sealed bottle conspicuously in the car to prove he hasn't touched it. Having unlimited means, he will stop further up the road, buy another bottle, have a few swigs out of it, and throw this away, too. With his means, he can do this repeatedly and ignore the expense, thus drinking himself into such a condition that he is no longer fit to drive—but still having the sealed bottle there in the car as a decoy to the arresting officer.

"6. This business of having power steering and automatic headlight dimmers—luxuries that you gentlemen can't afford on your cars—is no license for him to come through our community breaking our laws."

The evidence for the State tends to show that the defendant is a traveling salesman living in Raleigh, to which place he came from Texas. In the car with him were two ladies, neither of whom was drinking. The patrolman found in the car a pint of ABC whiskey with unbroken seal, and testified there was no evidence that drinking had been going on in the car.

There is no evidence in the record that the defendant was a man of wealth having unlimited means, as argued by the solicitor. The fact that he was driving a Lincoln car permits no such inference.

The record shows that the defendant excepted to the solicitor's remarks, but it does not show when the exception was made. Upon inquiry by this Court upon the oral argument as to when the exception was made, defendant's counsel replied that it was entered after the verdict of guilty, when he made a motion that the verdict be set aside on the ground that the argument of the solicitor was prejudicial, and then moved that the court set aside the verdict in its discretion.

The court made this reply to the motion of the defendant to set the verdict aside: "I am not going to set it aside. I tried to charge the jury and impress on them that it is their duty to give a man from Texas as fair a trial as a man from North Carolina or another county in the State; and to give a man of means as fair a trial as a man of no means. It is a question of fact." That in substance is all the court charged the jury in respect to the improper remarks of the solicitor. Nowhere in the charge did the court charge the jury that the remarks of the solicitor were improper, grossly unfair and highly prejudicial, and that the jury should

disregard such remarks. Nowhere in the charge did the court instruct the jury that there was no evidence that the defendant was a man of wealth possessed of unlimited means, and that the jury should disregard such remarks. On the contrary, it would seem that the court emphasized the solicitor's remarks that the defendant was a man of wealth. The court's reply to the motion of the defendant to set the verdict aside and its attempt in its charge to correct the baneful effect of the remarks of the solicitor make it manifest that the court heard the improper remarks, or at least it was brought to its attention before it delivered the charge to the jury.

We have held in a long line of decisions that exception to improper remarks of counsel during the argument must be taken before verdict. *S. v. Suggs,* 89 N.C. 527; *S. v. Tyson,* 133 N.C. 692, 45 S.E. 838; *S. v. Steele,* 190 N.C. 506, 130 S.E. 308; *S. v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35. The rationale for this rule, which has been frequently quoted in our decision, is thus stated in *Knight v. Houghtalling,* 85 N.C. 17: "A party cannot be allowed . . . to speculate upon his chances for a verdict, and then complain because counsel were not arrested in their comments upon the case. Such exceptions, like those to the admission of incompetent evidence, must be made in apt time, or else be lost."

We have modified this general rule in recent years so that it does not apply to death cases, when the argument of counsel is so prejudicial to the defendant that in this Court's opinion, it is doubted that the prejudicial effect of such argument could have been removed from the jurors' minds by any instruction the trial judge might have given. *S. v. Little,* 228 N.C. 417, 45 S.E. 2d 542; *S. v. Hawley, supra; S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664.

In respect to the general rule we said in *S. v. Davenport,* 156 N.C. 596, p. 612, 72 S.E. 7: "In the passage taken from *S. v. Tyson,* we did not intend to decide that a failure of the judge to act immediately would be ground for a reversal, unless the abuse of privilege is so great as to call for immediate action, but merely that it must be left to the sound discretion of the court as to when is the proper time to interfere; but he must correct the abuse at some time, if requested to do so; *and it is better that he do so even without a request,* for he is not a mere moderator, the chairman of a meeting, but the judge appointed by the law to so control the trial and direct the course of justice that no harm can come to either party, save in the judgment of the law, founded upon the facts, and not in the least upon passion or prejudice. Counsel should be properly curbed, if necessary, to accomplish this result, the end and purpose of all law being to do justice." (Italics ours).

We have also held in many cases that where the remarks of counsel are improper in themselves, or are not warranted by the evidence, and are

calculated to mislead or prejudice the jury, it is the duty of the court upon objection to such remarks to interfere. *S. v. O'Neal,* 29 N.C. 251; *Melvin v. Easley,* 46 N.C. 386 (no exception was made to improper argument of the plaintiff's counsel as to statements in a book he held in his hand, which was not in evidence and not admissible; the court did not correct the mistake at the time nor in its charge; on the contrary the court decided the book was admissible in evidence, and charged the jury upon it as evidence; a *venire de novo* was ordered); *Jenkins v. Ore Co.,* 65 N.C. 563; *McLamb v. R. R.,* 122 N.C. 862, 29 S.E. 894; *Perry v. R. R.,* 128 N.C. 471, 39 S.E. 27; *S. v. Davenport, supra; S. v. Tucker,* 190 N.C. 708, 130 S.E. 720; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705; *S. v. Little, supra; S. v. Hawley, supra; S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466.

Ordinarily the court may correct improper argument at the time or when it comes to charge the jury. *S. v. O'Neal, supra; Melvin v. Easley, supra; McLamb v. R. R., supra; S. v. Little, supra.* If the impropriety be gross, it is the duty of the court to interfere at once. *Jenkins v. Ore Co., supra; S. v. Tucker, supra.*

It is especially proper for the court to intervene and exercise the power to curb improper argument of the solicitor when the State is prosecuting one of its citizens, and should not allow the jury to be unfairly prejudiced against him. *S. v. Williams,* 65 N.C. 505. Every defendant should be made to feel that the solicitor is not his enemy, and that he is being treated fairly. *S. v. Smith,* 125 N.C. 615, 34 S.E. 235; *S. v. Tucker, supra.*

Counsel have wide latitude in making their arguments to the jury. *S. v. O'Neal, supra; McLamb v. R. R., supra; S. v. Little, supra.* However, 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., supra; Perry v. R. R., supra; S. v. Howley, supra.* "Courts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause, by extraneous considerations, which militate against a fair hearing." *Starr v. Oil Co.,* 165 N.C. 587, 81 S.E. 776.

The remarks of the solicitor in his argument were grossly unfair and well calculated to mislead and prejudice the jury. Counsel for the defendant should have objected to these improper remarks as soon as they were begun, and before they were elaborated in detail. If verdicts cannot be won without appealing to prejudice, they ought not to be won at all. We can see how the vigorous solicitor in the heat of debate made these improper remarks without conscious intent to mislead and prejudice the

jury, but coming from him in his exalted place with the high respect that he has earned for himself in his district, such remarks were disastrous to the defendant's right to a fair and impartial trial.

Advertent to what this Court had said in *S. v. Davenport, supra,* quoted above, the able and experienced trial judge, out of his inherent sense of fairness, attempted to remove from the minds of the jury the prejudicial effect of the improper remarks of the solicitor without a request from defendant's counsel. Doubtless, he thought he had done so, but we sitting here in calm review are of opinion that he did not do so.

The defendant's assignments of error are not sustained, because not made in apt time.

However, this Court is vested with authority to supervise and control the proceedings of the inferior courts. N. C. Constitution, Art. IV, Sec. 8; *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663. This Court has exercised this power very sparingly, and rightly so.

Under the facts of this case, we are of opinion, and so hold, that to sustain this trial below would be a manifest injustice to the defendant's right to a fair and impartial trial. Acting under the supervisory power granted to us by the State Constitution, a new trial is ordered to the end that the defendant may be tried before another jury, where passion and prejudice and facts not in evidence may have no part.

New trial.

BOBBITT, J., dissenting: The State's evidence consisted of the testimony of a State Highway Patrolman, a deputy sheriff and the sheriff. The patrolman and the deputy sheriff observed the defendant while he was driving and when he was arrested and taken to jail. The sheriff observed him later when he was released from jail after furnishing bond. All were of the opinion that he was under the influence of some intoxicant.

The testimony of the State's witnesses, if accepted as worthy of belief, was fully sufficient to support a conviction. The testimony of the defendant, and of one of the two ladies riding with him on the occasion of his arrest, if accepted as credible, exonerated the defendant. It was a case for the jury. The defendant does not contend otherwise.

Upon the jury's return of a verdict of guilty, the defendant moved that the verdict be set aside on the ground "that the argument of the Solicitor was prejudicial." The exceptive assignments of error are to the refusal of the trial judge to set aside the verdict and to the judgment pronounced, namely, that the defendant pay a fine of $100.00 and the costs.

To appreciate the evidential background for the solicitor's address to the jury, the following portions of the evidence should be noted.

All the evidence tended to show that the defendant was operating a Lincoln car. A State's witness identified the car as a 1954 four-door

Lincoln. The defendant's testimony was that he had purchased it the previous week, that it had automatic, power steering, and that he was unfamiliar with it. He further testified that he traveled out of Raleigh, covering seven southern states and driving about four thousand miles a month.

The State's evidence tended to show that the defendant stated on the occasion of his arrest that he had recently been transferred from Texas to Raleigh. The State's evidence also tended to show that defendant's car bore a North Carolina license tag and that defendant had and produced a Texas operator's license.

The defendant explained the State's evidence to the effect that he failed to dim his bright lights when the approaching patrol car's lights were blinked several times, by his testimony that the car he had been driving was equipped with automatic dimmers and that he "could have forgotten" the fact that it was necessary to press a button to dim the bright lights on his recently acquired Lincoln car.

The defendant explained the State's evidence to the effect that he was operating his car back and forth from the edge of the pavement to a foot or so across the center line, by his testimony as follows: "The type of road I came down with respect to curves and the type of road, seems like it's all hair-pin curves and up and down hill and very narrow. As I said, I drive about four thousand miles a month and have never seen one like the one out here for the next ten miles."

All the evidence tends to show that there was a pint of ABC whiskey in defendant's car, the seal unbroken.

Defendant's testimony tended to show that he and the two ladies were driving from Raleigh to Reidsville, where they were to meet a man from his company arriving by train from Lynchburg; that he had drunk no whiskey; that he had a bottle of beer at a drive-in as they left Raleigh; and that farther along the way he stopped again and had a cheese sandwich and another bottle of beer.

In the record, under the caption, "Prosecutor's Summation To Jury," there are six numbered paragraphs, each setting forth an excerpt from the solicitor's address to the jury. While the record imports verity, attention is called to the fact that the prosecutor's summation is not given in its entirety and so does not disclose the context of the solicitor's challenged remarks. It seems only fair to infer that these remarks were in some degree if not wholly in reply to the preceding (undisclosed to us) arguments by defense counsel.

An advocate, in addressing the jury, has the right, and indeed it is his function, to analyze the evidence and present every inference and every deduction tending to support his contention as to the facts established thereby. Where, as here, the testimony of the State's witnesses

and that of the defense witnesses cannot be reconciled because in direct conflict, so that the jury's task is largely one of determining the credibility or non-credibility of each witness, the advocate's rightful sphere of argument includes his contention as to each circumstance relevant to such determination reasonably arising from a consideration of the evidence before the jury.

While many, if not all, of the solicitor's challenged remarks have their roots in evidence before the court, I agree that the detached excerpts set forth in the record are objectionable as an appeal to prejudice in their emphasis upon the fact that the defendant was a stranger in the community and in the contention that he was a man of means.

But when an improper argument is being made, the rule is that counsel must object so that the presiding judge can call a halt to the continuance thereof. There are at least two underlying reasons for this well-established rule. First, there can be no question *then* as to the content and context of the objectionable statements. Second, the presiding judge, *then and there,* can stop such argument and promptly instruct the jury to disregard it and, *equally important,* caution and instruct the advocate to pursue the argument no further.

An unfair argument may and frequently does cause a jury to react unfavorably to the advocate's cause. Of course, the trial judge may take the initiative, if he hears the argument and considers it a manifest abuse of privilege, by then intervening and instructing the jury and the advocate with reference thereto. But ordinarily the trial judge will leave it to counsel for the opposing litigant to determine whether he desires that the court intervene or whether he prefers to rely upon the good sense and judgment of the jury either to disregard it entirely as irrelevant or to reject it as unfair.

Here, the defendant was represented by a trial attorney of long experience. He did not see fit to object *at any time* during the solicitor's argument. The first objection was made after verdict.

Although defense counsel interposed no objection, the presiding judge, in his charge to the jury, gave the instructions set out below.

Near the first of his charge, this instruction was given:

"You are not concerned about what kind of car a man drives; the fact that a man drives a Lincoln automobile does not deprive him of the same rights and privileges of a man driving a Ford; and, the fact that a man drives a Ford, does not deprive him of the same rights and privileges of a man driving a Lincoln automobile. You are not to be concerned about, and I'm sure that you will not even consider what kind of a car the defendant was driving. The only question is: Has the State satisfied you from the testimony and beyond a reasonable doubt of his guilt? If so, it is your duty to convict him; if not, it is equally your duty to acquit him."

In concluding his charge, these instructions were given:

"It all revolves itself into purely a question of fact for you to determine, you being the sole triers of the facts. It is your duty to give a gentleman not living in this county and coming into the State from Texas to live the same fair, just, and impartial trial that you would expect for yourselves or some member of your family if tried here or in another county—to be treated as fairly as anybody else without regard to where he came from or regard to his property or lack of property; the only thing you are concerned about is to find the truth and speak the truth and let it please whom it will.

"If you find beyond a reasonable doubt that the defendant was under the influence of liquor at the time he was arrested by the State Highway Patrolman, Mr. Norwood, and that he was operating his automobile at that time, it is your duty to find him guilty. If you have a reasonable doubt about it, give him the benefit of that doubt and find him not guilty."

In my opinion, the quoted instructions were entirely satisfactory. Defense counsel evidently thought so for he made no request for additional instructions. Had he done so, the trial judge could have instructed the jury further relative to features to which attention was directed. Moreover, no exception to the sufficiency of these instructions was taken and error is not assigned on account of any insufficiency thereof.

It is pointed out in the opinion of the Court that the trial judge did not at any time tell the jury to disregard the challenged excerpts from the solicitor's address to the jury. In my view, it was better to instruct the jury as was done, directing attention to the single issue for decision and instructing the jury that whether the man was from Texas or North Carolina or a man of means or one without means should have no part in their decision. I think the trial judge handled the matter in excellent manner. The alternative would have been a repetition of the objectionable statements and contentions of the solicitor coupled with an instruction that they were improper and therefore should be disregarded by the jury in its deliberations. The repetition of the objectionable excerpts for the purpose of eliminating them from consideration might well have emphasized rather than eliminated the prejudicial effect, if any, they may have had.

Except in capital cases, under the rule established in *S. v. Tyson,* 133 N.C. 692, 45 S.E. 838, which overruled earlier cases in conflict therewith, a defendant, when represented by counsel, cannot sit by, interpose no objection or motion for mistrial, take his chances with the jury, and then, after verdict, complain for the first time that portions of the solicitor's argument constituted a prejudicial abuse of privilege for which he is entitled to a new trial.

With the law as stated in the opinion of the Court, I am in accord. Further, I do not question the authority of this Court, in the exercise of its general supervisory jurisdiction over trials in the Superior Court, to award a new trial when manifest injustice has been done even though settled rules of law as established by the decisions of this Court must be set aside in order to do so. The basis of my dissent is my opinion that this record does not present a situation that justifies the exercise of such authority.

Justice is always the goal. Yet experience has demonstrated that we can best approximate the ideal by the observance of orderly procedure.

My apprehension is that counsel, instead of being alert to object in apt time as required under our decisions, will deem it prudent to remain silent when an alleged prejudicial argument is beng made, take their chances with the jury then impaneled; and then, after conviction, bring before us the solicitor's address to the jury or excerpts therefrom for close inspection against an ideal standard in the hope that we will in such case see fit to exercise the general supervisory powers of this Court by awarding a new trial on the basis of an alleged abuse of privilege that could have been fully and effectively corrected if objection had been interposed in apt time.

When the trial judge was considering defendant's motion to set aside the verdict, the record shows the following remarks:

"COURT: I'm not going to set it aside; I tried to charge the jury and impress on them that it is their duty to give a man from Texas as fair a trial as a man from North Carolina or another county in the State; and to give a man of means as fair a trial as a man of no means, it's a question of fact."

If this can be fairly interpreted as a statement by the trial judge that the defendant was a man of means, the complete answer is that this remark, made *after verdict,* could have had no effect on the jury's deliberations.

For the reasons stated, I vote to affirm.

JOHNSON, J., concurs in dissent.

HIGGINS, J., concurring in dissent: Conceding the remarks of the solicitor were improper and prejudicial, yet, under the decisions of this Court in similar cases, I think the objection after verdict came too late. For that reason, I concur in the dissenting opinion of *Justice Bobbitt.*

MARY MAHAN v. CHARLIE S. READ.

(Filed 29 September, 1954.)

1. Appeal and Error § 1—

Where the question of the constitutionality of the act upon which the proceeding is based is not raised in the lower court, such question may not be initially presented in the Supreme Court.

2. Same: Appeal and Error § 40l—

The Supreme Court will not decide the constitutionality of a statute when the appeal may be disposed of upon a question of less moment.

3. Parent and Child § 18: Courts § 14½—

Under the provisions of the Uniform Reciprocal Enforcement of Support Act (Chapter 317, Session Laws 1951; G.S. Ch. 52A) the initiating state has no jurisdiction to make any determination affecting the substantive rights of the parties, and therefore, a conclusion by our court that the duty of respondent to support the children in question had already been found to exist by a court of competent jurisdiction of the initiating state, is erroneous.

4. Same—

In a proceeding under the Uniform Reciprocal Enforcement of Support Act, the court of the initiating state, by approval of the petition and the certification of the documents, enables petitioner to submit herself to the jurisdiction of responding state without the necessity of personal presence or employment of counsel, and the responding state acquires jurisdiction of the respondent through service of summons and notice.

5. Same—

Where, after filing petition under the Uniform Reciprocal Enforcement of Support Act, the obligee moves to another state and is a resident of such third state at the time of the hearing in this state, our court has no jurisdiction to make an award for transmittal to the initiating state for transmittal in turn to the petitioner in the third state, and judgment of nonsuit and dismissal should have been entered here upon motion.

6. Same—

A proceeding by a wife under the Uniform Reciprocal Enforcement of Support Act to enforce payment of support for the minor children of the marriage should be dismissed upon motion in this State for defect of parties, since in such instance the children are the obligees and the suit must be brought in their name and behalf by a duly appointed next friend. This result is not affected by provision of the law of the initiating state that a petition under the act might be brought in behalf of a minor obligee without appointment of guardian or next friend, since the rights of the parties are determinable in the court having jurisdiction of respondent, and the cause here must be so constituted as to conform to our law.

7. Parties § 9: Appeal and Error § 1—

Where there is a fatal defect of parties plaintiff, of which the court will take notice *ex mero motu*, the action must be dismissed.

APPEAL by respondent from *Morris, J.*, January Term, 1954, of EDGECOMBE.

Proceeding under Uniform Reciprocal Enforcement of Support Act.

Petitioner, Mary Mahan, formerly the wife of respondent, Charlie S. Read, filed her petition 20 October, 1953, in the Pulaski County Chancery Court, Arkansas, the "Initiating State," alleging in substance that Sheilla Treadway Read, age 10, and Dwight LaMont Read, age 6, then residing with her in Little Rock, Pulaski County, Arkansas, are children of petitioner and respondent; that respondent, who resides and is gainfully employed in Rocky Mount, Edgecombe County, North Carolina, owes a duty of support to his said children which he has failed to discharge since 22 July, 1951; and, in accordance with the prayer of the petition, the Chancellor of the Arkansas court, based upon his finding "that the Petition set forth facts from which it may be determined that the respondent owes a duty of support" to his said children, ordered that certified copies of the petition, order, etc., as provided, be transmitted to the Superior Court of Edgecombe County, North Carolina, "responding State," in order that it "may obtain jurisdiction of the above-named respondent or his property."

Upon receipt of certified copy of the Arkansas proceeding, a summons and notice were issued by the Clerk in Edgecombe County and served on respondent, who, represented by counsel, filed an answer to the petition.

The hearing was before the Presiding Judge, January Term, 1954, of Edgecombe, without a jury. Petitioner and respondent were present in person and each testified. Their testimony was the only evidence before the court. At the conclusion of the hearing, the court entered judgment, which embodied certain findings of fact and conclusions of law.

The findings of fact, summarized, are:

1. Respondent has not provided support for his minor children since 22 July, 1951.

2. Until 22 July, 1951, petitioner (wife) and respondent (husband), and their two minor children, resided as a family in Edgecombe County, North Carolina, "at which time the petitioner left the place of abode in Edgecombe County of herself and the respondent and removed herself to the State of Arkansas," taking with her the two children.

3. In Arkansas, petitioner sued for and obtained an absolute divorce from respondent; and thereafter petitioner married Mahan.

4. Petitioner was a resident of Arkansas when she filed her petition, *i.e.*, 20 October, 1953, but since 4 January, 1954, she has been a resident of Williamsburg, Virginia, where she is employed as a nurses' aide, the children residing with her there.

Petitioner's evidence amplifies the findings of fact in several particulars, including the following: She left Rocky Mount for Arkansas 22

July, 1951. She testified: "I had told him months and months before then that I was going to leave him." She obtained her absolute divorce in Arkansas 15 November, 1951. She married an Arkansas boy, presumably Mahan, 28 January, 1952. She left Arkansas in December, 1953. She arrived in North Carolina 12 December, 1953. Presumably she visited in North Carolina—"all my people are from Rocky Mount"—until she went to Williamsburg, Virginia. On 4 January, 1954, she reported for duty as a nurses' aide at the hospital in Williamsburg.

Upon its findings of fact, the court below concluded:

"That the respondent is legally responsible for the support and maintenance of his two minor children in accordance with his ability, based upon his earning capacity and his estate. That said responsibility to support said children has already been found to exist by a court of competent jurisdiction of the County of Pulaski in the State of Arkansas."

Thereupon, the court below entered judgment requiring the respondent to pay into the office of the Edgecombe County Welfare Department for the support and maintenance of his two minor children $20.00 per week, "and thereafter to continue until the oldest of said children shall reach the age of twenty-one years when the same shall be reduced to the sum of $10.00 per week, or until the further orders of this Court," and providing further that "the Edgecombe County Welfare Department, upon receipt of said sum each week, shall immediately forward said sum so received by it from the respondent to the Clerk of the Chancery Court for the County of Pulaski of the State of Arkansas, who shall transmit the same to the petitioner, in accordance with the statutes in such case made and provided." Respondent appeals, assigning errors.

Attorney-General McMullan and Worth H. Hester, Member of Staff, for plaintiff, appellee.

Davenport & Davenport and T. A. Burgess for respondent (defendant), appellant.

BOBBITT, J. A statute known as the Uniform Reciprocal Enforcement of Support Act was approved in September, 1950, by the National Conference of Commissioners on Uniform State Laws. This statute, referred to hereafter as the 1950 Uniform Act, was enacted, with some variations from state to state, by the legislatures of many states, including Arkansas (Acts of Arkansas, 1951, Act. 68, pp. 140 *et seq.*) and North Carolina (1951 Session Laws of North Carolina, ch. 317, pp. 256 *et seq.*).

Variations in the North Carolina Act include the following:

(1) The 1950 Uniform Act divides the statute into three parts, bearing the captions, "Part I—General Provisions," "Part II—Criminal Enforcement," and "Part III—Civil Enforcement." No divisions or cap-

tions appear in the North Carolina Act. Sections 52A-27 through 52A-30 of our statute correspond to sections 1-4 of the 1950 Uniform Act, which appear under caption, "Part I—General Provisions." Sections 52A-31 and 52A-32 of our statute correspond to sections 5 and 6 of the 1950 Uniform Act, which appear under the caption, "Part II—Criminal Enforcement." Sections 52A-33 through 52A-44 of our statute correspond to sections 7-19 (excluding section 8) of the 1950 Uniform Act, which appear under the caption, "Part III—Civil Enforcement."

(2) Our statute specifically provides that when North Carolina is the "Initiating State," "actions hereunder shall be commenced by the issuance of summons in the form required for actions for alimony without divorce," and when North Carolina is the "Responding State," "the procedure under this Act shall be the same as in actions for alimony without divorce as provided by G.S. 50-16."

(3) Our statute omits entirely section 8 of the 1950 Uniform Act, which is worded as follows: "Remedies of a State or Political Subdivision Thereof Furnishing Support.—Whenever the state or a political subdivision thereof has furnished support to an obligee it shall have the same right to invoke the provisions hereof as the obligee to whom the support was furnished for the purpose of securing reimbursement of expenditures so made."

Difficulties were encountered and defects discovered when the provisions of the 1950 Uniform Act were related to actual case situations. So, the 1950 Uniform Act was extensively amended by action of the National Conference of Commissioners on Uniform State Laws in September, 1952; and the statute as amended will be referred to as the 1952 Uniform Act. Thereafter, the legislatures of many states enacted the 1952 Uniform Act. Arkansas repealed the 1950 Uniform Act, which it had enacted in 1951; and in lieu thereof enacted the 1952 Uniform Act. Acts of Arkansas, 1953, Act 170, pp. 573 *et seq.;* Arkansas Statutes, 1947, Annotated, Vol. 3, 1953 Cumulative Pocket Supplement, secs. 34-2401 *et seq.* Thus, many states, including North Carolina, have on their statute books the 1950 Uniform Act, with variations, while others, including Arkansas, have on their statute books the 1952 Uniform Act, with variations.

Uniform Laws, Annotated, Vol. 9A, 1953 Cumulative Annual Pocket Part, pp. 49 *et seq.*, contains tables showing the states which have a statute substantially in accord with the 1950 Uniform Act and other states which have a statute substantially in accord with the 1952 Uniform Act.

In 1948, the New York Joint Legislative Committee on Interstate Cooperation drafted what is called the Uniform Support of Dependents Act, which was enacted in New York and other states, including Ken-

tucky. A comparison of this statute with the 1950 and 1952 Uniform Acts discloses an identity of underlying purpose and sufficient similarity to permit reciprocity between states having any one of these statutes.

Respondent, upon appeal, questions the constitutionality of the North Carolina Act (Ch. 317, Session Laws of 1951). But the questions now raised were not presented to or passed upon by the court below. Moreover, disposition of this appeal does not necessitate a consideration of the constitutionality of the statute. *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22. However, it is noteworthy that the Court of Appeals of Kentucky has upheld as constitutional its Uniform Support of Dependents Act, *Duncan v. Smith,* 262 S.W. 2d 373. And the Court of Appeals of Maryland, in *Commonwealth of Pennsylvania v. Warren,* 105 A. 2d 488, wherein Pennsylvania was the "Initiating State" and Maryland was the "Responding State," both of these states having the 1952 Uniform Act, held that the constitutional guarantee of a trial by jury extended only to the type of case in which the right of trial by jury existed at the time the Constitution was adopted.

W. J. Brockelbank, Professor of Law at the University of Idaho and a member of the Idaho Bar, served as chairman of the committee that drafted the 1950 Uniform Act. In an article appearing in the Arkansas Law Review, Vol. 5, No. 4, Fall 1951, from which the Supreme Court of Arkansas quotes in *Dean v. Dodge,* 250 S.W. 2d 731, Professor Brockelbank states succinctly both the purpose and the procedure embodied in the 1950 Uniform Act in the following paragraph:

"The idea of a two-state procedure originated with the New York Act. This idea was adopted by the Uniform Law Commissioners in the Uniform Reciprocal Enforcement of Support Act, and the difference between the two acts on this matter is chiefly one of form. Reduced to its simplest terms the two-state proceeding is as follows: It opens with an action which normally will be commenced in the state where the family has been deserted (the initiating state). A simplified petition is filed. The judge looks it over to decide whether the facts show the probable existence of a duty of support, and if they do he sends the petition and a copy of the act to a court of the responding state to which the husband has fled or in which he has property. That court will then take the steps necessary to obtain jurisdiction of the husband or his property, will hold a hearing and if the court finds that a duty of support exists, may order the defendant to furnish support and will transmit a copy of its order to the court in the initiating state. To enforce compliance with its orders the court may subject the defendant to such terms and conditions as it may deem proper, may require him to furnish bond or make periodic payments or, in case of refusal, may punish him for contempt. It has the duty to transmit to the initiating court any payments it receives and upon request

to furnish a certified statement of those payments. The initiating court must receive and disburse these payments."

The court below was in error in reaching the conclusion that the respondent's "responsibility to support said children has already been found to exist by a court of competent jurisdiction of the County of Pulaski in the State of Arkansas." Under the North Carolina and Arkansas statutes, the function of the court of the "Initiating State" is to certify to the sufficiency of the petition, *i.e.*, that it sets forth facts "from which *it may be determined* that the respondent owes a duty of support." (Italics added.) In this case, the Chancellor's certificate is in the quoted language. Indeed, the petition is that the court of the "Initiating State" certify copies of the petition and order, with copy of the Arkansas statute, to the court in the "Responding State" *so that the court of the "Responding State" may obtain jurisdiction of the respondent or his property.*

It is quite clear that the Arkansas court, when the Chancellor signed the certificate and ordered that the petition and other documents be transmitted to the Superior Court of Edgecombe County, had no jurisdiction to make any determination affecting the substantive rights of the parties nor did it purport to do so. In effect, by approval of the petition and the certification of the documents the Arkansas court enabled petitioner to submit herself, without the necessity of personal presence or employment of counsel, to the jurisdiction of the Superior Court of Edgecombe County, North Carolina. Upon the receipt and filing of the transmitted documents, the Superior Court of Edgecombe County obtained jurisdiction of respondent through service of a summons and notice. Respondent, through counsel, filed an answer to the petition.

While it is unnecessary to set forth in detail the provisions of the North Carolina Act, we note the following:

"The remedies herein provided are in addition to and not in substitution for any other remedies."

" 'Obligor' means any person owing a duty of support."

" 'Obligee' means any person to whom a duty of support is owed."

When the cause came on for hearing at January Term, 1954, of Edgecombe County, before the Presiding Judge of the Second Judicial District, the undisputed facts were that petitioner had definitely and finally left Arkansas as her residence and place of abode and she and the children were then residing in Williamsburg, Virginia; and the question presented was not the broad question as to whether respondent owed a duty to support his children but the specific question as to whether the court in the pending two-state proceeding under the Uniform Reciprocal Enforcement of Support Acts had authority to require the respondent to make payments to the Welfare Department of Edgecombe County for

transmittal to the Pulaski County Chancery Court of Arkansas for transmittal, in turn, to the petitioner in Williamsburg, Virginia.

It is an ironical development that the first case to reach this Court under our Uniform Reciprocal Enforcement of Support Act should be predicated upon a factual situation wholly different from the typical case posing the acute problem that gave rise to the legislation. Such acute problem was the situation where a deserting husband and father abandons his family and flees to another jurisdiction and thereby escapes his obligations because the wife and children have neither the facilities nor the means to pursue him and institute suit in the state in which he chooses to establish a new residence. In fact, some of the popular names given the act are the Skipper's Act, the Runaway Father's Law, the Disappearing Pappy's Bill, and the Fugitive Husband's Law. Alabama Law Review, Vol. V, No. 2, Spring 1953, Article, "Alabama's Reciprocal Nonsupport Legislation," by Mary A. Lee. See also, 29 N.C.L.R. 423 *et seq.* The case before us presents the problem of the *roving obligee* rather than that of the *fugitive obligor.*

True, the language of the act requires only the *presence* of the obligee in the Initiating State when the petition is filed. So long as the obligee is present in such state, it has a definite interest in the proceeding. Awards made in the Responding State are transmitted to the Initiating State in discharge of a duty of support to an obligee present therein to the end that its Welfare Department will not be saddled with the burden of supporting destitute persons. For this reason, the Initiating State has supervision of the funds so that it may see that the persons to be supported thereby actually get the benefit thereof.

Cessante ratione legis cessat, et ipsa lex. We do not think the act should be interpreted so as to apply to a situation other than one where the obligee is present in the Initiating State and the obligor is subject to the jurisdiction of the Responding State. To interpret the act so as to permit an obligee to pursue a remedy through the courts of two states when the obligee is not present in either one of them and perhaps is on the move from place to place would so complicate and confuse the procedure thereunder as to impair seriously its manifest purpose and its usefulness in proper cases.

It is to be noted that when the cause was heard the question for determination was not whether an award should be made for support of the children while they were in Arkansas.

We hold that the Superior Court of Edgecombe County was without authority in the Arkansas-North Carolina proceeding to make an award for transmittal to the Arkansas court for transmittal, in turn, to the petitioner in Virginia, for the future support of the children while in Virginia. For this reason, the motions for judgment of nonsuit and

dismissal of the Arkansas-North Carolina proceeding should have been allowed.

Had we reached a different conclusion, even so this cause would have to be dismissed. The obligees are the children. Respondent owes no duty of support to petitioner. Nor does she assert that he owes such duty.

Thus, the obligees, who should be the petitioners, are the real parties in interest; and under our statute it is provided that in actions when any of the parties plaintiff are infants suit must be brought in the name of such infants and in their behalf by general or testamentary guardian or by duly appointed next friend. G.S. 1-64. Where there is a fatal defect of parties plaintiff, of which the Court will take notice *ex mero motu*, the action must be dismissed. *Dare County v. Mater,* 235 N.C. 179, 69 S.E. 2d 244.

It is specifically held in North Carolina that when an infant has no other adequate remedy, suit against the father for support may be brought in its name and behalf by a duly appointed next friend. *Green v. Green,* 210 N.C. 147, 185 S.E. 651; *Pickelsimer v. Critcher,* 210 N.C. 779, 188 S.E. 313; *Bryant v. Bryant,* 212 N.C. 6, 192 S.E. 864.

We are not unmindful of the following provision of the Arkansas Act: "A petition in behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as guardian *ad litem.*" No determination of legal custody is alleged or shown. Irrespective of this, the complete answer is that this provision is not in the North Carolina Act. And since the rights of the parties are determinable in the court having jurisdiction of respondent, the cause here must be so constituted as to conform to North Carolina law.

Bearing upon the question of custody, we note the fact that, the petitioner and the children being now in Virginia, neither Arkansas nor North Carolina has jurisdiction to determine the question of custody. *Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798.

The minor children are not without remedy. A properly constituted action may be brought in the courts of North Carolina in their name and for their benefit. In connection therewith, custody as between parents could be determined. If petitioner is unable or unwilling to cause such proceeding to be commenced in North Carolina, it would seem that the interests of the children, as long as they remain in Virginia, could be protected by a Virginia-North Carolina proceeding under the Uniform Reciprocal Enforcement of Support Acts of these states.

Since the record does not disclose whether Mahan was left in Arkansas or whether he now resides with petitioner and the children in a family relationship in Williamsburg, no question arises now as to the liability of a stepfather for support of his wife's children while living in the relationship of a family unit.

For the reasons stated, the judgment of the court below is Reversed.

H. H. WALDRUP v. A. G. CARVER AND THE ESTATE OF H. G. McKENZIE, FIRST NATIONAL BANK & TRUST COMPANY, TRUSTEE.

(Filed 29 September, 1954.)

Negligence §§ 4f, 19c—Invitee held guilty of contributory negligence as matter of law barring recovery for fall down elevator shaft.

The plaintiff's evidence tended to show: The owner of an office building furnished the tenants keys in order that they might enter the building at night. There was a light in the lobby which could be turned on by pulling a cord hanging from the ceiling in line from the door to the elevator shaft and stairway. The doors to the elevator shaft on each floor locked from the inside, and no elevator service was furnished at night. On the first floor there was a hole in the metal lattice of the upper portion of the door to the elevator shaft, which condition had existed for some time. Plaintiff and another, while working at night, left the building for some fifteen minutes, leaving the folding door to the elevator and the door to the elevator shaft closed, but leaving the elevator light on. Upon their return, plaintiff, without turning on, or waiting for the lobby light to be turned on, walked in the dark to the elevator shaft, unlocked the elevator shaft door from the inside by reaching his hand through the hole in the grill work, and, although the absence of the elevator light and elevator door gave him notice that conditions had changed since he left the building, reached into the shaft to switch on the elevator light, and either stepped or fell into the elevator shaft. *Held:* The negligence, if any, on the part of the owner in failing to repair the grill work in the elevator shaft door was passive, while the plaintiff was guilty of active negligence proximately causing his injury and barring recovery as a matter of law.

APPEAL by plaintiff from *Sharp, Special J.*, March Term 1954, BUNCOMBE. Affirmed.

Defendants own a four-story office building, with basement, in Asheville, known as the Oates building, and maintain therein an elevator for the convenience of their tenants during business hours. The building is closed, the elevator doors are locked, and the elevator operator departs at the afternoon closing hour; but defendants furnish some, if not all, their tenants keys to the front door of the building so they may return to their offices at night when and if they desire.

There is a recess or very small lobby just inside the door to the first floor so that the elevator shaft and stairway are four or five feet from the front door. There is a light about midway between the front door and the elevator door and stairway. This light is turned on by pulling a cord hanging from the ceiling in line from the door to the elevator shaft and

stairway. Any one entering the building at night can pull the cord and turn on the light before he reaches the stairway or elevator, whichever he intends to use There is a door to the elevator shaft on each floor which locks from the inside and, ordinarily, cannot be opened from the outside without a key. Then there is a folding door to the elevator cage. This is a part of the elevator.

On the first floor the upper portion of the door to the elevator shaft is composed of metal lattice or grill work. Someone had made a hole through this grill work so that it is possible for a person to reach through the hole, throw the safety latch, push open the folding door to the elevator cage, enter and operate the elevator in the absence of the operator and without a key with which to unlock the elevator door from the outside. There is evidence that the elevator had been in this condition for some time.

W. E. Pate, district manager of the State Capital Life Insurance Co., occupied offices on the fourth floor of the building. Plaintiff and one Penland worked for or under him. On 22 April 1952 plaintiff and Penland returned to the office about 5:30 or 6:00 p.m. to do some work. About 7:45 p.m. they left the office to get something to eat. They found the elevator at the fourth floor with the outer door open and the elevator light on. They rode down to the first floor on the elevator and closed the door but left the elevator light on. In about fifteen minutes they returned to the building, accompanied by Page. There was, at the time, no light in the lobby or in the elevator. Plaintiff walked in the dark, without stopping to turn on the light in the lobby, to the elevator, reached through the hole in the grill work, lifted the inside safety latch, opened the door, stepped in the elevator shaft, and fell to the basement. At the time Page was reaching for the light cord to turn on the light.

Plaintiff testified: "I was walking in front, Mr. Penland, and Mr. Page behind; we were all right together; there wasn't any of any kind of lights when we walked in and through the entrance-way . . . there was no elevator or hall light; it was pretty dark, so dark you couldn't see; I reached my hand through the opening that had been made 'til we could open the door, reached in to turn the light on and fell; I don't remember Mr. Page saying anything about turning the light on . . .

"The lock that locks the elevator door is on the lefthand side inside the elevator behind the door. The way one unlocked the door was by reaching my hand in through the metal grill where it had been torn and flipping the lock on the inside . . . I reached my hand through the hole in the grating and unlocked the door from the inside and then opened the door . . .

"Q Did you step into the place where the elevator was?

"A Well, I was reaching for the light and fell in, yes sir."

Page, witness for plaintiff, testified:

"To get on the elevator you had to open that door and also open the door that was on the elevator that went up and down with the elevator. Open both doors . . . I was trying to find the cord . . . Before I could reach and turn the light on, Mr. Waldrup opened the stationary door and reached in and unlocked the door, unlocked the bolt, and opened it; and just walked on in; right into the dark, must have."

Plaintiff's other companion, Penland, testified to like effect.

At the conclusion of the plaintiff's testimony in chief the court, on motion of the defendants, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Cecil C. Jackson and L. C. Stoker for plaintiff appellant.
Williams & Williams for defendant appellees.

BARNHILL, C. J. If it was the duty of defendants to repair the grill work in the upper half of the door to the elevator shaft located on the first floor of their office building, we are unable to perceive that a breach of this duty constituted one of the proximate causes of the unfortunate mishap described in the complaint. The hole in the grill work was without capacity to cause injury to anyone. While, perhaps, it created a continuous and continuing temptation to occupants of the building on returning to their offices at night to take the easy way rather than to climb the steps, it could do no harm to any one. It merely constituted a passive condition. Before it could be connected even remotely with an incident such as the one here described, it had to be knowingly and deliberately activated and put to use by the injured party.

However, we need not and do not rest decision on the question whether the state of disrepair of the grill work of the door existing over a period of time, nothing else appearing, constitutes actionable negligence. We will leave that question open until it is brought more acutely into focus.

The rule which controls decision on a motion for a judgment of involuntary nonsuit for that it is made to appear that, as a matter of law, plaintiff was guilty of negligence which proximately contributed to his own injury has been stated and restated in our reports so frequently that it has become axiomatic. Any further restatement or elaboration at this time would constitute needless repetition. Suffice it to say that upon the facts appearing in this record, any reasonable mind would reach the inescapable conclusion that plaintiff's unfortunate injury resulted from his own failure to exercise ordinary care and precaution for his own safety.

When the plaintiff left the building he did not turn off the light in the elevator. When he returned, there was no light in the elevator shaft

where it would be if the elevator was still at that floor. This alone was sufficient to put him on notice conditions had changed since he left the building. When he returned, the lobby was in a safe condition. There was no state of disrepair or latent danger calculated to cause him injury. A light was available to him. The use of the elevator by tenants at night was at most permissive. Knowing the conditions and being fully aware it was so dark he could not see, he found his way to the elevator and opened the door. Here again the existing physical conditions gave him warning of his peril. He found no elevator door which had to be opened before a passenger could enter the elevator. He then reached in the shaft without waiting for the hall light to be turned on to switch on the elevator light and either stepped or lost his balance and fell into the elevator shaft to the basement.

Thus this case comes squarely in the line of decisions represented by *Scott v. Telegraph Company,* 198 N.C. 795, 153 S.E. 413, and *McInturff v. Trust Co.,* 201 N.C. 16, 158 S.E. 547, which control decision here. Indeed the evidence of plaintiff's want of due care for his own safety is more persuasive than are the facts in either the *Scott* or the *McInturff cases.*

The mishap was unfortunate. That plaintiff has had to suffer the ill effects of his injuries is to be regretted. Yet he cannot hold these defendants to a higher degree of care for his safety than he exercised in his own behalf. The negligence, if any, of defendants was passive; that of plaintiff was active. The defendants permitted a condition to exist which made it possible for plaintiff to create the hazard which caused his injuries, but he, by his own conduct, created the hazard. He must suffer the consequences.

The judgment of the court below is
Affirmed.

H. H. DUKE AND WIFE, NETTIE C. DUKE, v. L. L. DAVENPORT AND LOUIS L. DAVENPORT, JR.

(Filed 29 September, 1954.)

1. **Landlord and Tenant § 16—**

Upon the expiration of a lease for a term of years without request for renewal by lessees in the manner provided in the lease, lessors have the right to treat their lessees as trespassers and may bring an action for their eviction without notice.

2. **Landlord and Tenant § 18—**

Where, upon the expiration of a lease for a term of years without request by lessees for renewal in the manner provided in the lease, the lessees hold

over and continue to pay the rent monthly in the amount stipulated in the lease, which payment is accepted by lessors, the tenancy is presumed to be one from year to year.

3. Same—

The presumption of a tenancy from year to year arising upon the holding over by lessees after the expiration of the lease for a term of years without request for renewal in the manner provided in the lease, is a rebuttable presumption. But in the present case the trial court found that neither lessors nor lessees had any understanding as to the future occupancy after the termination of the lease, and such finding negatives any agreement or understanding that might rebut the presumption.

4. Same—

Where tenants for years hold over after the expiration of the lease without request for renewal by written notice 30 days prior to the expiration of the term in accordance with the lease, and lessors thereafter accept monthly rent in the amount stipulated in the lease, the character of the tenancy becomes fixed as that of a tenancy from year to year, and lessees cannot exercise the option for renewal by giving written notice subsequent to the termination of the period of the lease.

APPEAL by defendants from *Fountain, Special Judge,* June Term, 1954, of EDGECOMBE.

This is an action in summary ejectment instituted and tried before a justice of the peace. Judgment was rendered in favor of the plaintiffs and against the defendants for the possession of the property in controversy. Appeal was duly taken to the Superior Court of Edgecombe County and when the matter came on to be heard, the parties waived trial by jury and agreed in open court that his Honor should hear the evidence, find the facts, state his conclusions of law, and render judgment thereon.

The facts found by the court below pertinent to the appeal are summarily stated as follows:

1. The plaintiffs are the owners by the entirety of the property in controversy, being Lot No. 1, Block B, Edgecombe Terrace, known as 501 Raleigh Street, Rocky Mount, North Carolina.

2. That the defendants went into possession of the property on 1 January, 1947, by virtue of and under the terms of a lease executed by the plaintiffs to the defendants dated 29 November, 1946, and duly recorded.

3. That by the terms of the lease it ran for a period of five years, from 1 January, 1947, to 1 January, 1952, with an option to the lessees to extend the lease on the same terms and conditions for an additional fifteen years or any part thereof, from the expiration of the first five years, by giving written notice to the lessors thirty days prior to the expiration of the first five years, which notice shall specifically state the additional term for which the option is exercised.

4. The defendants have been in possession of the premises since 1 January, 1947, and gave no notice as provided in the lease of their intention to extend the lease for any term in addition to the first five years.

5. That neither plaintiffs nor defendants had any understanding as to the future occupancy of the premises after 1 January, 1952, but defendants continued to pay the same amount each month as was provided in the lease should be paid as rent, to wit: $125.00 per month.

6. That on 26 January, 1954, the plaintiff H. H. Duke verbally notified the defendants that the plaintiffs wanted possession of the property on 1 April, 1954, and that if the defendants did not vacate the premises by that time the rent thereafter would be $250.00 per month.

7. That on 4 February, 1954, the defendants gave plaintiffs written notice that they would exercise the option to extend the term of the lease for the remainder of the fifteen years.

8. That on 12 February, 1954, the plaintiffs gave the defendants written notice to vacate the premises on or before 28 February, 1954.

9. That the payments to be made by the defendants of $125.00 were paid each month and accepted by the plaintiffs through February, 1954, each payment having been made by check and marked "rent." Since that time the monthly payments of $125.00 have been made and accepted, by agreement, without prejudice to either of the parties.

Upon the foregoing findings of fact, the court concluded as a matter of law: (1) that the defendants have been in possession of the plaintiffs' premises from 1 January, 1952, until and through 28 February, 1954, as tenants at will; (2) that since 28 February, 1954, the defendants' possession has been wrongful and the plaintiffs are entitled to the immediate possession of their premises; (3) that the plaintiffs have not waived any rights to written notice as provided in the lease; and (4) that the plaintiffs were entitled to accept and receive the payments made to them by the defendants up to and including 1 February, 1954, as damages for the possession of the premises.

Judgment was entered accordingly and the defendants appeal, assigning error.

Thorp & Thorp for appellees.
Davenport & Davenport for appellants.

DENNY, J. The defendants challenge the correctness of the court's conclusion of law to the effect that when the defendants failed to exercise their option to extend the lease for an additional fifteen years or any part thereof, from the expiration of the first five years, by giving notice as required by the lease, but held over, they became and remained tenants at

will until 28 February, 1954, and that their occupancy since that time has been wrongful.

The plaintiffs argue and seriously contend that the judgment below should be affirmed on authority of *Vanderford v. Foreman,* 129 N.C. 217, 39 S.E. 839; *Oil Co. v. Mecklenburg County,* 212 N.C. 642, 194 S.E. 114, and *Realty Co. v. Demetrelis,* 213 N.C. 52, 194 S.E. 897.

In the case of *Vanderford v. Foreman, supra,* the lease had expired on 31 December, 1899. Demand for possession and notice to vacate had been properly given and an action for possession instituted. A substantial amount of rent accrued after the expiration of the lease and before the final disposition of the action. In the meantime, the defendant tendered a smaller sum than was due for rent, subject to certain conditions, not pertinent here, and the plaintiff accepted the tender. Whereupon, the defendant contended that the acceptance of rent converted the tenancy into one from year to year. The Court held otherwise, but stated there would be force in this contention, "if there had not been served in proper time a notice upon the defendants to vacate the premises and deliver the possession at the end of the term."

The pertinent facts in *Oil Co. v. Mecklenburg County, supra,* were as follows: Mecklenburg County, on 7 January, 1935, leased to the plaintiff the old courthouse lot in the City of Charlotte for a period of two years beginning 1 February, 1935, at a stipulated annual rental, payable monthly. The lease contained a provision granting to the lessee the option to renew such lease for an additional term of three years, beginning 1 February, 1937, provided and on condition that the lessee should notify the lessor of its election to renew the lease, and prescribed the manner in which the notice was to be given and requiring such notice to be given on or before 30 November, 1936. The lessee failed to give the notice to the defendant in the manner and within the time specified in the lease, but did notify the defendant on 24 December, 1936, that it desired to exercise its option to renew.

The lessee having failed to renew the lease as provided in the contract, the lessor gave it notice to vacate the premises and advertised for bids thereon. The plaintiff instituted the action to restrain Mecklenburg County from executing a lease to a new tenant. A temporary restraining order and notice to show cause was issued. Upon the hearing on the notice to show cause why the restraining order should not be continued until the hearing, judgment was entered dissolving the temporary restraining order. Upon appeal to this Court the ruling of the court below was affirmed.

The *Demetrelis case* involved a rather unusual factual situation. The defendant leased certain hotel property on 27 February, 1925, for a period of ten years at a monthly rental of $700.00. The lease contained

an option for its renewal for an additional five years provided the lessee, at least six months before the expiration of the ten-year period covered by the lease, gave notice by registered mail to the owner of the hotel of the lessee's intention to extend or renew the lease. No notice was given during the ten years or later. During the ten-year period the rental was lowered and raised from time to time "as business was good or bad." This same practice was continued after the expiration of the ten-year lease. On 16 January, 1937, the plaintiff gave the defendant notice to vacate the premises on 1 March, 1937.

On the above facts, the defendant contended that the payment of rent and the acceptance thereof until the institution of the action, constituted a waiver of the notice required by the renewal or extension clause of the lease, and that his lease had been extended for an additional five years. The lower court held that the lease had not been so extended, and upon appeal the ruling was upheld. This Court said: "Upon the expiration of the lease on 27 February, 1935, the plaintiff was entitled to recover damages for the occupation of the premises thereafter, and therefore it could receive payment for such occupation voluntarily without the effect of continuing the lease. *Vanderford v. Foreman,* 129 N.C. 217; *Mauney v. Norvell,* 179 N.C. 628."

We call attention to the fact that the plaintiff in the *Demetrelis case* contended that after the expiration of the lease the defendant was a tenant from month to month, or at sufferance. Presumably this contention was based on the fact that the amount of the monthly rental was constantly changing. Be that as it may, it gave the statutory notice to quit in compliance with that required for a tenancy from year to year. Therefore, when this Court upheld the ruling of the lower court to the effect that there had been no renewal or extension of the lease, it was immaterial on the facts before the court whether the tenancy was from year to year, month to month, at will, or sufferance.

The above cases are not controlling on the findings of fact as set forth in the record now before us.

When the lease under consideration expired according to its terms, and no request for renewal having been made in the manner provided in the lease, the plaintiffs had the right to treat the defendants as trespassers and to bring an action for their eviction without notice. *Murrill v. Palmer,* 164 N.C. 50, 80 S.E. 55; 32 Am. Jur., Landlord and Tenant, section 919, page 779, and section 952, page 803; 51 C.J.S., Landlord and Tenant, section 74 (a), page 623; Tiffany on Real Property (3rd Ed.), Vol. 1, section 175, page 281. But, when the plaintiffs permitted the defendants to remain as tenants and accepted the $125.00 per month as rent for more than two years, without any understanding as to the character of the occupancy, the tenancy is presumed to be one from year

to year. *Harty v. Harris,* 120 N.C. 408, 27 S.E. 90; *Holton v. Andrews,* 151 N.C. 340, 66 S.E. 212; *Murrill v. Palmer, supra; Cherry v. Whitehurst,* 216 N.C. 340, 4 S.E. 2d 900; *Sinclair Ref. Co. v. Shakespeare,* 115 Colo. 520, 175 P. 2d 389, 171 A.L.R. 1058; 32 Am. Jur., Landlord and Tenant, section 942, page 793, *et seq.;* Tiffany on Real Property (3rd Ed.), Vol. 1, section 183, page 293, *et seq.;* Thompson on Real Property, Permanent Edition, Vol. 3, section 1037, page 40, and section 1017, page 2 in the supplement thereto.

We think the law applicable to the facts in this case was stated by *Hoke, J.,* in speaking for the Court in *Murrill v. Palmer, supra,* in which he said: "It is a principle fully recognized, and not infrequently applied in this State, that when a tenant for a year or a longer time holds over and is recognized as tenant by the landlord, without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existent conditions. . . .

"The position, in the first instance, is at the option of the landlord. He may treat his tenant, who holds over, as a trespasser, and eject him, or he may recognize him as tenant; but when such recognition has been made, a presumption arises of a tenancy from year to year, and as stated, under the terms and stipulations of the lease as far as the same may apply. This is a rebuttable presumption, which may be overcome by proper and sufficient proof. When there is testimony permitting the inquiry, it is usually a question of intent—an intent, however, which under some circumstances may be inferred from conduct and in direct opposition to the express declaration of one or the other of the parties."

As pointed out by *Justice Hoke* in the above case, the presumption that a tenancy is from year to year is rebuttable, but in this case the finding of fact as set out hereinabove in paragraph five, negatives any agreement or understanding by the parties that might rebut the presumption that the tenancy under consideration is one other than that from year to year. Hence, we hold that the present tenancy of the defendants is one from year to year.

The contention of the defendants that by giving notice on 4 February, 1954, that they would exercise the option to extend the lease for the remainder of the fifteen years, extended the lease for that period, is without merit. *Oil Co. v. Mecklenburg County, supra;* 32 Am. Jur., Landlord and Tenant, section 978, page 821, and section 979, page 821, *et seq.* When the defendants failed to exercise their option to extend the lease as provided therein, but held over, and the plaintiffs recognized them as tenants and continued to accept the rent unconditionally, the character of the tenancy became fixed and may not be terminated except by mutual consent, surrender at the end of a tenancy year, or by notice to quit, given

one month or more before the end of the current year of the tenancy. G.S. 42-14; *Cherry v. Whitehurst, supra.* As to forfeiture upon the failure to pay rent, see G.S. 42-3.

The judgment of the court below is reversed and this cause remanded for judgment in accord with this opinion.

Reversed and remanded.

IN THE MATTER OF C. WALTER STOKLEY.

(Filed 29 September, 1954.)

1. Criminal Law § 14½—

On *certiorari* from an inferior court, the Superior Court acts only as a court of review and is confined to the facts as they appear of record.

2. Same—

Certiorari, as a substitute for an appeal, must be applied for in apt time, ordinarily at the next term of the supervising court. In this case petition for *certiorari* filed some 11 years after sentence was not in apt time and should have been denied.

3. Criminal Law § 67a—

This was an appeal by the State from judgment of the Superior Court upon a writ of *certiorari* issued some 11 years after the rendition of the judgment attacked. *Held:* Regardless of the State's right to appeal from the judgment of the Superior Court releasing defendant from custody, the Supreme Court, in the exercise of its supervisory power, holds *ex mero motu*, that after the lapse of such time the writ of *certiorari* was not available and that the writ was improvidently issued, and the cause is remanded to the inferior court. Constitution of North Carolina, Art. IV, sec. 8.

APPEAL by the State of North Carolina from *Morris, Resident Judge* of the First Judicial District, in Chambers, at the courthouse of PASQUOTANK County, 24 July, 1954.

Petition for writ of *certiorari* 19 July, 1954, to bring up for review as irregular criminal proceedings had in the Recorder's Court of Pasquotank County in the year 1943, which are bases for commitment in 1954 for violation of conditions of suspended judgment as determined in 1943.

The record on this appeal reveals these salient facts:

1. On 9 April, 1943, in a criminal proceeding #11836 in the Recorder's Court of Pasquotank County, defendant C. Walter Stokley, was convicted of offenses of unlawful possession and transportation of illicit intoxicating liquors, and was sentenced to jail for a term of two years to

work on the public roads. The road sentence was suspended on conditions that defendant be placed upon probation for a period of two years, and as a special condition thereof he "should not violate any State or Federal law relative to the manufacturing, possession, selling and transportation of intoxicating beverages."

2. Thereafter on 19 June, 1943, three warrants were issued out of the Recorder's Court of Pasquotank County charging defendant C. Walter Stokley with separate violations of the prohibition law (1) on 5 June, 1943, #12,445, (2) on 17 June, 1943, #12,446, and (3) on 19 June, 1943, #12,447, and upon trial, the cases being consolidated therefor, the court found defendant guilty on all counts. And in #12,445 judgment was rendered "7/2/43," sentencing defendant to two years on the roads, suspended on good behavior and general probation for 5 years "after the serving of 2-yr. sentence in violation of probation in Docket No. 11,836."

3. Prior thereto on 30 June, 1943, the Judge of the Recorder's Court of Pasquotank County, upon motion of prosecuting attorney, and after hearing of evidence and argument of counsel, in presence of defendant, found as a fact that defendant had violated the special condition on which the sentence of 9 April, 1943, was suspended, by unlawfully and willfully violating the State law in specific respects as to intoxicating liquors, and thereupon ordered that the jail and road sentence imposed upon the defendant in the judgment of 9 April, 1943, be put into effect, and defendant was ordered into custody and held under bond to report at noon 8 July, 1943, for the purpose of serving said sentence. But defendant failed to appear at the time and place ordered. Whereupon judgment *nisi* was entered, and *sci. fa.* ordered and capias ordered and issued for defendant as a fugitive from justice. Capias was served 6 July, 1954.

4. Thereupon, defendant filed a bond in the sum of $2,000 for his personal appearance at next term of Superior Court of Pasquotank County "then and there to answer to a charge to be preferred against him for failing to comply with judgment of court and as a fugitive from justice and to abide the orders and decrees of said court in said cause," and petitioned for *certiorari,* as first hereinabove stated. The Resident Judge, being of opinion that, as a matter of law, as to the record, "because the dates appearing on the warrant and order of revocation are inconsistent with the date of adjudication appearing on the docket, the order of revocation was irregular and invalid, and that the court was bound thereby on this hearing in *certiorari,* and that, on the record, as a matter of law, the defendant C. Walter Stokley is not amenable to commitment for service of a prison sentence for violation of probation, and his petition in *certiorari* should be sustained and the defendant be released from custody and from the terms of his appearance bond entered into July 6, 1954, and it is so ordered and adjudged."

The State excepts and appeals to Supreme Court, and assigns error.

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

W. C. Morse, Jr., for petitioner-defendant.

WINBORNE, J. In brief of defendant filed presently in this Court it is stated that the State contends that when a criminal action is brought from an inferior court to the Superior Court on *certiorari,* the Superior Court can act only as a court of review, and must act on the facts as they appear of record. This is not debatable. *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241.

Certiorari, as a substitute for an appeal, must be applied for in apt time, *S. v. Lawrence,* 81 N.C. 522; *Taylor v. Johnson,* 171 N.C. 84, 87 S.E. 981,—ordinarily at the next term of the supervising court. Surely eleven years, from 8 July, 1943, to 6 July, 1954, is not in apt time.

The error in granting the writ appears upon the face of the record proper. Compare *S. v. Todd,* 224 N.C. 776, 32 S.E. 2d 313. So whether the State has the right to appeal from the judgment rendered in this case, a point raised by the Attorney-General, this Court, in the exercise of its supervisory power over courts of the State, N. C. Constitution, Art. IV, sec. 8, *Taylor v. Johnson, supra,* holds *ex mero motu,* that is, of its own motion, that after such lapse of time a writ of *certiorari* is not available to bring up for review by the Superior Court proceedings had in an inferior court eleven years previously.

Hence this Court is constrained to hold that the writ of *certiorari* was improvidently issued. Therefore the judgment below will be reversed, and the proceeding remanded to the Recorder's Court of Pasquotank County for further proceedings as to right and justice appertains and as the law provides. And to this end defendant will be taken into custody, and held to bail in the sum of $2,000 to abide the orders of the court.

Reversed and remanded.

W. W. GASPERSON v. CLAUDE RICE, SR., CLAUDE RICE, JR., AND YOUNGBLOOD TRUCK LINES, INC.

(Filed 29 September, 1954.)

1. Trial § 55: Appeal and Error § 40d—

Where a jury trial is waived, the findings of fact of the trial court have the force and effect of a verdict by jury and are conclusive on appeal if there be competent evidence to support such findings.

2. **Automobiles §§ 14, 18h (3)—Plaintiff held guilty of contributory negligence in turning left without seeing that movement could be made in safety.**

In this trial by the court under agreement of the parties, plaintiff's testimony to the effect that he looked in his rear-view mirror upon giving a left-turn signal some 350 feet before making the left turn, but did not look in the mirror again and did not see the tractor-trailer, which was following, at any time before collision, together with defendant's evidence that as the tractor-trailer came alongside plaintiff's vehicle in an attempt to pass, plaintiff cut left into the side of defendant's vehicle, with the point of impact being behind the tractor and at the front of the trailer, *is held* sufficient to support the trial court's conclusion that plaintiff was guilty of contributory negligence proximately causing his injury, and nonsuit was proper. G.S. 20-154.

APPEAL by plaintiff from *Whitmire, Special Judge,* at July "A" Term, 1954, of BUNCOMBE.

Civil action to recover for personal injuries and property damage resulting from a collision of two motor vehicles, heard below on appeal from the General County Court.

The collision occurred on the Sweeten Creek Road a few miles south of Asheville. Both vehicles were proceeding northwardly. The plaintiff, driving a pick-up truck, was in front. The defendant Claude Rice, Jr., driving the tractor-trailer of the defendant Claude Rice, Sr., was in the act of overtaking and passing the pick-up truck, which was turning left from the highway into a side road.

Issues of negligence, contributory negligence, and damages were raised by the pleadings. Jury trial was waived (G.S. 7-287). The judge of the County Court, on the basis of findings and conclusions that both drivers were negligent and that the negligence of each contributed as a proximate cause of the collision, entered judgment denying recovery and dismissing the action.

To the findings and conclusions adverse to the plaintiff, he excepted and appealed to the Superior Court. There all his exceptions and assignments of error were overruled and the judgment of the County Court was affirmed.

From the judgment of the Superior Court the plaintiff appeals to this Court.

S. J. Pegram and William J. Cocke for plaintiff, appellant.
Adams & Adams for defendants, appellees.

JOHNSON, J. Where jury trial is waived, the findings of fact of the trial court have the force and effect of a verdict by jury and are conclusive on appeal if there be competent evidence to support such findings. *Woody v. Barnett,* 239 N.C. 420, 79 S.E. 2d 789.

The plaintiff's assignments of error challenge the sufficiency of the evidence to support the findings and conclusion that the plaintiff was contributorily negligent.

The General County Court found and concluded in substance that the plaintiff was negligent in that before making the left turn into the side road he did not exercise reasonable care to ascertain that such movement could be made in safety, as required by G.S. 20-154, and that such negligence was a proximate cause of the plaintiff's injury and damage. The crucial portion of the determinative finding of the court below is that "the plaintiff did not look to his rear and to his left and thus failed to observe, as he should have observed, the oncoming tractor-trailer . . ."

The record discloses plenary evidence in support of the crucial findings which defeat plaintiff's right to recover. It suffices to note that the plaintiff on cross-examination stated that he looked in his mirror when he gave the left-turn signal 350 feet before turning but that he did not look in the mirror again. He further admitted he never saw the tractor-trailer at any time before the collision. As to this, the defendants' evidence discloses that as the tractor-trailer came alongside the plaintiff's pick-up, the plaintiff cut left into the side of the passing vehicle, with the point of impact being behind the tractor and at the front of the trailer.

Prejudicial error has not been made to appear. The judgment below will be sustained under authority of *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538, and *Ervin v. Mills Co.,* 233 N.C. 415, 64 S.E. 2d 431.

Affirmed.

A. S. AUSTIN, LLOYD STYRON, LEO PEELE, JR., AND PRESTON BASNETT, TAXPAYERS OF DARE COUNTY, FOR THEMSELVES AND SUCH OTHER TAXPAYERS OF DARE COUNTY AS MAY MAKE THEMSELVES PARTIES TO THIS ACTION, v. THE COUNTY OF DARE; THE BOARD OF COUNTY COMMISSIONERS OF DARE COUNTY, AND C. C. DUVALL, LAWRENCE L. SWAIN, JAMES W. SCARBOROUGH, W. H. LEWARK, AND LLOYD SCARBOROUGH, INDIVIDUALLY.

(Filed 29 September, 1954.)

Appeal and Error § 5—

When pending appeal from the denial of plaintiff's application for a temporary restraining order, the act sought to be restrained has been consummated, whether defendant should have been restrained *pendente lite* becomes an academic question, and the appeal will be dismissed.

APPEAL by plaintiffs from *Carr, J.,* Presiding Judge of the First Judicial District, heard 17 March, 1954, in Elizabeth City, N. C., by consent, from DARE.

Plaintiffs appeal from Judge Carr's denial of their application for a temporary restraining order.

In 1942, David L. Lindquist, reserving a life estate, gave to Dare County a tract of some 680 acres in Nags Head Township. A deed therefor was executed and delivered, reciting that the gift was made "to the end that this land will be ultimately for the public benefit and in the advancement of the County's recreational and material interest." In 1944, part of said tract was condemned for the use of the United States Coast Guard. The remainder, referred to as the 640-acre Bodie Island tract, lies within the Cape Hatteras Seashore National Park. Established by Act of Congress, this park, under the direction of the Secretary of Interior, is for the recreation, benefit and enjoyment of the public.

Pursuant to a Declaration of Taking, the right of the United States of America to said land was adjudged in condemnation proceedings, leaving at issue only the amount of damages to be paid Dare County as compensation therefor. Under these circumstances, Dare County, acting through its Board of County Commissioners, agreed to sell and convey the land to the United States of America for the sum of $50,000.00.

Plaintiffs alleged that the value of the land was not less than $125,000.00; that the taxpayers of Dare County would suffer irreparable damage if defendants made the sale and conveyance for a consideration less than $125,000.00; and that the contemplated transaction should be enjoined. After hearing, Judge Carr denied plaintiffs' application. Plaintiffs appealed.

Frank B. Aycock, Jr., for plaintiffs, appellants.

Martin Kellogg, Jr., and John H. Hall for defendants, appellees.

BOBBITT, J. The court below denied plaintiffs' application for a temporary restraining order, thus deciding the only question presented at the hearing. Thereafter, Dare County conveyed the lands to the United States of America for the consideration of $50,000.00. It was so stated upon the argument here. The sale and conveyance having been consummated, whether Judge Carr should have restrained the defendants, *pendente lite,* is now an academic question. It is quite obvious that a court cannot restrain the doing of that which has been already consummated. *Surety Corp. v. Sharpe,* 233 N.C. 644, 65 S.E. 2d 137; *Saunders v. Bulla,* 232 N.C. 578, 61 S.E. 2d 607; *Efird v. Comrs. of Forsyth,* 217 N.C. 691, 9 S.E. 2d 466. Hence, plaintiffs' appeal must be dismissed. *Cf.: Savage v. Kinston,* 238 N.C. 551, 78 S.E. 2d 318.

Appeal dismissed.

L. A. MUSE v. W. F. MORRISON, POWELL DEWEESE, AB ROBINSON, CARY SMATHERS, W. L. SNYDER AND LLOYD SELLERS.

(Filed 29 September, 1954.)

APPEAL by plaintiff from *Sharp, S. J.*, March Term 1954, BUNCOMBE.

This case was first heard in the Superior Court at the March Civil Term 1951, of Buncombe, on demurrer to the complaint. The demurrer was sustained. Upon appeal the judgment was reversed. *Muse v. Morrison,* 234 N.C. 195, 66 S.E. 2d 783.

The complaint alleges the defendant Morrison, who was Secretary of the State Board of Examiners of Plumbing and Heating Contractors, the defendant Smathers, who was the Town Clerk of Canton, and the other defendants, who were members of the Board of Aldermen of the Town of Canton, conspired to drive the plaintiff out of business as a journeyman plumber. It alleged that the means used to accomplish this purpose were: (1) The defendant Morrison and the members of the Board of Examiners of Plumbing and Heating Contractors (the latter not parties) wrongfully refused to issue the plaintiff a license; (2) the defendants procured the passage of an ordinance for the Town of Canton requiring that all persons doing plumbing and heating contracting in the town first obtain a State license; (3) the defendants initiated criminal prosecutions against the plaintiff, charging him with engaging in business without license; that in the prosecutions false affidavits were made and the processes of the courts corruptly used to embarrass the defendant and make it impossible for him to carry on his business.

The defendants answered, denying all charges of wrongdoing, and pleading the lapse of time and the three-year statute of limitations in bar of plaintiff's right to recovery.

Upon the hearing on the merits at the March Term 1954, Superior Court of Buncombe County, the defendants made a motion for judgment of nonsuit at the conclusion of plaintiff's evidence. Judgment of nonsuit was entered, from which the plaintiff brings this appeal.

Cecil C. Jackson and W. W. Candler for plaintiff, appellant.

Shelley B. Caveness, Tom A. Clark, and Ward & Bennett for defendants, appellees.

PER CURIAM. We have examined each of the 90 assignments of error and find them without substantial merit. The evidence taken in the light most favorable to the plaintiff fails to sustain the allegations of the complaint. The judgment of nonsuit at the close of plaintiff's evidence was required by reason of a failure of proof.

The judgment is
Affirmed.

DELIA POOLE v. MARY BRASWELL AND MARION WILSON.

(Filed 29 September, 1954.)

APPEAL by defendant Marion Wilson from *Paul, Special Judge,* May Term, 1954, of HALIFAX.

Civil action to recover for personal injuries alleged to have been sustained in a collision between the automobiles of the defendants on 9 March, 1953, at the intersection of State Highway 301 and Whitaker Street in the town of Enfield.

The plaintiff, a guest passenger in the automobile of defendant Wilson, alleges in her complaint that her injuries were proximately caused by the joint and concurrent negligence of the defendants.

The appellant demurred to the complaint for that it does not state facts sufficient to constitute a cause of action against her, it appearing upon the face of the complaint: (1) That the sole proximate cause of the motor vehicle collision in question was the negligence of the defendant Braswell in driving her car into the intersection against a red traffic light; and (2) that if the defendant Wilson was guilty of any negligence, the same was insulated and rendered inoperative by the negligence of her codefendant.

His Honor overruled the demurrer and the defendant Wilson appeals, assigning error.

Battle, Winslow & Merrell for plaintiff, appellee.

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

PER CURIAM. The complaint filed in this action is not as clear and unequivocal in some of its pertinent allegations as it might be. Nevertheless, when all its allegations are considered, as they must be on demurrer, we are led to the conclusion that it is sufficient to withstand the demurrer interposed by the appellant.

Affirmed.

ELLA B. BLALOCK v. CAROLINA CENTRAL GAS COMPANY, INC.

(Filed 29 September, 1954.)

APPEAL by defendant from *Moore, J.*, at January Term 1954, of HENDERSON.

Civil action to recover damage for personal injury sustained by plaintiff when she fell into a register hole in hallway of one H. G. Neighbors, in Hendersonville, N. C., from which, as alleged, employees and agents of defendant in making repairs to gas heating appliances, had negligently removed the metal register.

Plaintiff filed complaint, and defendant filed answer, and further answers thereto, and to the first and second further answers plaintiff replied.

And at January Civil Term 1954, by permission of the court plaintiff amended her complaint to allege that on account of the injuries of which she complains she has incurred, and will incur expenses for medical attention, including medicine, doctor's bill and hospitalization, for which she prays recovery.

Thereupon defendant moves that the matters so alleged by way of amendment be stricken out. The motion was overruled, and defendant excepted and appeals to Supreme Court and assigns error.

Arthur J. Redden, J. E. Shipman, and Monroe M. Redden for plaintiff appellee.

L. B. Prince for defendant appellant.

PER CURIAM. While the record on this appeal reveals that defendant assigns as error the action of the court in overruling (1) its motion for a continuance, and (2) its motion to strike, the sole question brought forward in brief of defendant relates to the latter motion.

This assignment of error is without merit, and requires no express consideration.

Affirmed.

SID P. CHILDRESS v. MURRAY J. ABELES AND CLARENCE A. TROUTMAN, T/A UNIVERSAL COMPANY.

(Filed 13 October, 1954.)

1. Contracts § 1—

The right to make contracts is both a liberty and a property right.

2. Contracts § 26—

An action in tort lies against an outsider who knowingly, intentionally, and unjustifiably induces one party to a contract to breach it to the damage of the other party.

3. Contracts § 27—

In an action to recover compensatory damages for wrongfully inducing a third person to breach his contract with plaintiff, plaintiff must show: (1) that a contract existed between him and a third person which conferred upon plaintiff some contractual right against the third person; (2) that defendant had knowledge of plaintiff's contract with such third person; (3) that defendant intentionally induced the third person not to perform his contract with plaintiff; (4) that in so doing the defendant acted without justification; and (5) that defendant's acts caused plaintiff actual damages.

4. Contracts § 26—

A stranger to a contract may be held liable for wrongfully inducing one of the parties to breach the agreement if he knows the facts which give rise to the plaintiff's contractual right, even though he may be mistaken as to the legal significance of those facts, or believes there is no contract, or believes that the contract means something other than what it is judicially held to mean.

5. Same—

A stranger to a contract who wrongfully induces one of the parties to breach same may be held liable even though he is not actuated by actual malice in the sense of personal hatred, ill will, or spite, it being sufficient if he acts without justification, *i.e.*, intentionally without lawful excuse or reason, which constitutes legal malice.

6. Torts § 1—

A malicious motive makes a bad act worse, but it cannot make that wrong which, in its own essence, is lawful.

7. Contracts § 27—

In an action against a third person for wrongfully inducing a party to a contract to breach same, malice is ordinarily material only upon the question of punitive damages.

8. Contracts § 26—

While actual malice is not an element of a cause of action for wrongfully inducing the breach of a contract, it may negative the existence of justification in a particular case, since a person is never justified in inducing the breach of a contract solely for the purpose of venting personal hatred, ill will, or spite.

9. Pleadings § 15—

Upon demurrer, a pleading will be liberally construed with every reasonable intendment and presumption in favor of the pleader.

10. Contracts § 27—

The allegations of the complaint as amended *held* sufficient to state a cause of action against defendants for wrongfully inducing a third person to breach his contract with plaintiff, and defendants' demurrer *ore tenus* was properly overruled.

11. Contracts § 26—

A person is justified in interfering in a contract between two other persons if he is in competition with one of them.

12. Contracts § 27—

In this action to recover for wrongful interference with contractual rights by defendant, a stranger to the contract, plaintiff's evidence was to the effect that he was not acting in competition with defendants. Defendants offered evidence *contra*. *Held:* Nonsuit on the ground that defendants were justified in interfering with the contract because plaintiff was acting in competition with them was properly denied, and the conflicting contentions were properly submitted to the jury.

13. Contracts §§ 5, 27—Execution of one contract may be consideration for another.

Plaintiff's evidence was to the effect that defendants were desirous of purchasing certain furniture cabinets, that plaintiff brought defendants together with a furniture manufacturer, and that defendants purchased the cabinets from the manufacturer with the understanding that the manufacturer should pay plaintiff commissions on all cabinets thereafter purchased by defendants under the continuing contract. *Held:* The contract for the purchase of the cabinets was sufficient consideration for the manufacturer's agreement to pay plaintiff commissions, and in plaintiff's action against defendants for wrongfully inducing the manufacturer to breach the contract to pay commissions, defendants are not entitled to nonsuit on the ground that the contract for commissions was void because not supported by consideration.

14. Contracts § 26—

The fact that a contract between two parties is terminable at the will of either does not make it terminable at the will of a third person, and is not a defense in an action by one of the parties to the contract against such third person for wrongfully inducing the other party to the contract to breach same.

15. Contracts § 6—

The law does not favor the destruction of contracts on the ground of indefiniteness and uncertainty.

16. Same: Contracts § 26—

An agreement by the seller to pay to plaintiff commissions at a fixed rate on all sales made under a contract with a certain purchaser will not be declared void for indefiniteness or uncertainty, even though the agreement be terminable at will.

17. Frauds, Statute of, § 1—

The defense of the statute of frauds is personal to the parties to a contract, and is not available to strangers to the agreement.

18. Same: Contracts § 27—

In this action against strangers to a contract for wrongfully inducing one of the parties to the agreement to breach same, defendants set up the defense that the contract was entered into in the State of Georgia and that under the laws of that State the contract was unenforceable because not in writing. *Held:* The defense of the statute of frauds, both under the laws of this State and the laws of the State of Georgia, is not available to defendants, who are strangers to the agreement.

19. Contracts § 27—

In an action for wrongfully inducing one of the parties to a contract to breach same, the fact that plaintiff may have a right of action on the contract against the other party to the agreement, is no defense.

20. Appeal and Error § 39c—

Where the jury does not award plaintiff punitive damages, the exclusion of the defendants' evidence tending to show absence of actual malice cannot be prejudicial.

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

APPEAL by defendants from *Sharp, Special Judge,* November Term 1953, (High Point Division) of GUILFORD.

Civil action to recover compensatory and punitive damages upon the alleged ground that the defendants wrongfully and with actual malice interfered with a contract which plaintiff had with the Trogdon Furniture Company for the payment of commissions on merchandise manufactured and sold by that company to defendants.

The parts of the Complaint and Amended Complaint essential for a decision are summarized: *One,* sometime in February 1949 the defendants requested the plaintiff to secure the manufacture of certain television stands and cabinets of a certain type, quality and quantity for them by one of the plaintiff's customers, to which he agreed, on condition that he secured a satisfactory commission from the manufacturer on all sales of such goods made to the defendants. *Two,* thereafter plaintiff contacted the Trogdon Furniture Company of Toccoa, Ga., and the said furniture company, after several conferences with plaintiff, agreed to manufacture for the defendants such television cabinets and stands as the defendants would require, and to pay the plaintiff an 8% commission on all such sales to defendants. *Three,* the plaintiff then in company with the defendants went to Toccoa, Ga., and the defendants and the Trogdon Furniture Company entered into a contract whereby the furniture company would manufacture and sell to the defendants such television cabinets and stands as the defendants required, and in the presence of each of the

defendants, the Trogdon Furniture Company agreed with plaintiff to pay him an 8% commission on all such sales made by them thereafter to defendants. *Four,* pursuant to such contract the Trogdon Furniture Company manufactured and sold to the defendants during March and April 1949, $9,207.00 of television cabinets and stands, and paid to the plaintiff commissions thereon of 8% amounting to $736.56. In May 1949 plaintiff and the furniture company by mutual agreement modified their agreement so that plaintiff should be paid by it commissions of 4%; in May 1949 the Trogdon Furniture Company made and sold to defendants $8,868.50 of such cabinets and stands, and paid to plaintiff 8% commissions on sales of $6,214.50 and 4% commissions on sales of $2,654.00—the commissions amounting to $603.32. During June, July, August, and a part of September 1949 the Trogdon Furniture Company continued to pay the plaintiff his commissions on sales made by them to defendants. *Five,* in August 1949 a dispute arose between the plaintiff and the defendants with reference to another transaction between them, the plaintiff contending the defendants owed him $256.00. This controversy had no connection with the plaintiff's or defendants' contract with the Trogdon Furniture Company. This controversy resulted in the plaintiff instituting a civil action against the defendants to recover $256.00. The summons in said action were issued on 9 September 1949. The action ended in the defendants paying to plaintiff $256.00. *Six,* the defendants became vexed at the plaintiff because of the dispute over the $256.00, and told him if he persisted in his attempts to collect it, they would cost him thousands of dollars. In a brief time after the plaintiff instituted action to recover the $256.00, the defendants notified the Trogdon Furniture Company to cease paying commissions to plaintiff on the sales the furniture company was making or would make to the defendants, and that they, the defendants, would cease to do business with the furniture company if it did not *immediately* discontinue the payment of commissions to plaintiff. That at this time the Trogdon Furniture Company had already manufactured and stored in its warehouse a large quantity of television cabinets and stands especially for the order of defendants. That as a result of such action on defendants' part the Trogdon Furniture Company has not thereafter paid any commissions to plaintiff, although a large sum has accrued to the plaintiff by way of commissions on television cabinets and stands manufactured and sold by the furniture company to defendants. *Seven,* the action of the defendants in demanding that the Trogdon Furniture Company cease payment of such commissions to plaintiff was an interference with the contractual relations between plaintiff and the Trogdon Furniture Company without any justification and excuse, and was malicious, wilful, wanton and reckless, and done for the purpose of gratifying the defendants' feelings of resentment

and rage towards the plaintiff for instituting action against them to recover $256.00; that the defendants wrongfully, unlawfully and maliciously persuaded, induced and coerced the Trogdon Furniture Company to breach its contract with plaintiff in order to vent their spleen and malice against plaintiff. *Eight,* that the plaintiff alleges, upon information and belief, that the Trogdon Furniture Company from September 1949 to the commencement of this action has manufactured and sold to the defendants television cabinets and stands in the approximate amount of $500,000.00, and he prays that he have and recover from the defendants $20,000.00 as compensatory damages, and $10,000.00 as punitive damages. During the trial plaintiff was allowed to amend his complaint so as to pray that he recover $17,860.00 as compensatory damages.

The plaintiff introduced in evidence competent evidence in support of the allegations of his Complaint and Amended Complaint. We do not deem it necessary to summarize all of plaintiff's evidence, but we do summarize certain parts of it, which tends to show these facts: In the early part of 1949 plaintiff had a conversation with the defendants relative to procuring a contract from a manufacturer to make television cabinets and stands for them, and at that time Mr. Abeles, one of the defendants, said to plaintiff, if he could secure a manufacturer to make these goods for them "I'll see that you get commissions, and I'll not interfere in your commissions in any way." At the time the Trogdon Furniture Company made this contract with the defendants, the Trogdon Furniture Company also made a contract with plaintiff to pay him 8% commissions on the merchandise manufactured and sold by it to the defendants. When negotiations were initiated between the defendants and the furniture company, the defendants said the furniture company was to pay commissions to plaintiff. The contract was executed on 19 March 1949. In May 1949 the defendants wanted goods of a different style or design. The furniture company told the defendants it could not make them for the price they offered to pay, unless the plaintiff's commissions were reduced. The furniture company saw plaintiff, and he agreed to reduce his commissions to 4%, whereupon the new design was manufactured. In the late summer or early fall of 1949 the furniture company stopped paying commissions to plaintiff, because of a letter received from the defendants. This letter dated 22 July 1949 reads in part: Plaintiff's "concern and the Universal Company have reached a parting of the ways as he has attempted to go into competition with us. We have had other disagreements with Mr. Childress over his methods, and, so far as we are concerned, this is the last straw . . . For this reason we must decline to do any further business with you through Mr. Childress." From 1 October 1949 to 1 November 1950 the Trogdon Furniture Company manufactured and sold to the defendants $446,500.00 of television cabinets and

stands—4% commission on this amount is $17,860.00. As a result of this letter the furniture company did not make a new agreement with the defendants; it worked along as it had been. On 15 July 1949 defendants placed a substantial order with the furniture company, and at the end of the order wrote: "No commission is due to any one on this order, and is given in this manner." The plaintiff never competed in business with the defendants. The furniture company has not paid to plaintiff any commissions on the sales of $446,500.00, and the plaintiff has made no demand on it for such payment. The furniture company told the defendants it felt it was duty bound to pay plaintiff commissions on all their orders manufactured before receipt of their letter to stop paying commissions to plaintiff, and the defendants said "that would be all right," and such commissions were paid. Ray Trogdon testified the agreement between the furniture company and plaintiff was personal as its employee, and it felt at liberty to terminate it at any time; that there is no doubt that plaintiff brought the furniture company and the defendants in contact, as he had not known defendants until the plaintiff introduced them to him. On direct examination plaintiff testified in 1949 he developed a dispute with defendants over $256.00 they owed him on a transaction not connected with the Trogdon Furniture Company; that this went on several months; that he told defendants: "I'm going to have to sue you, because you owe me $256.00, and I'm going to have it." Both defendants were present and Murray Abeles replied: "If you sue me, I'll knock you out of thousands of dollars worth of commissions." Shortly after plaintiff put the claim into the hands of a lawyer to collect, his commissions from the Trogdon Furniture Company stopped. Action was brought, and defendants paid him the $256.00—plaintiff paying the costs. On cross-examination plaintiff testified he put this claim in the hands of a lawyer to collect 9 September 1949. On re-direct examination he testified he placed this claim in the lawyer's hands "May or June, I think."

On cross-examination the defendant Troutman said: "I would say the controversy about the $256.00 arose even back in March 1949."

Plaintiff's evidence tends to show that he had no access to the designs of the various articles of merchandise that the Trogdon Furniture Company was manufacturing for defendants.

On cross-examination the plaintiff testified in substance as follows: He attended the furniture show in New York in July 1949. He went to the Tele-King Corporation to buy a television set wholesale. He knew this company had been a customer of the defendants. He did not know the defendants had sold this company goods manufactured by the Trogdon Furniture Company. He never heard of the defendants making cabinets. The president of the Tele-King Corporation gave him blue prints of its cabinets, and asked him if he could get the cabinets made for it. Ray

Trogdon was in New York, and he asked him did he want to make cabinets for Tele-King Corporation, and he replied No. Plaintiff never tried to get any one to make Tele-King cabinets for him, except what he said to Trogdon.

On cross-examination of the defendant Abeles, he said: "I knew Mr. Childress was to get a commission if the deal was consummated. I know that he got a commission for a while. I knew Mr. Trogdon stopped it, because Mr. Troutman and I asked him to stop it."

The defendants' evidence in brief tends to show that their letter to the Trogdon Furniture Company that they must decline to do any further business with it through plaintiff and their order for merchandise with the statement, "No commission is due to any one on this order, and is given in this manner," were caused by plaintiff being in competition with them, and not by reason of the $256.00 dispute; that Abeles never told plaintiff, if he sued him for the $256.00, he would knock him out of thousands of dollars of commissions.

There is no evidence in the Record as to plaintiff being in competition with defendants, unless such an inference can be drawn from plaintiff's showing Ray Trogdon the blue prints of Tele-King Corporation's cabinets, and what he said to Trogdon.

The jury answered the first issue: "1. Did the plaintiff have a contract with Trogdon Furniture Company for the payment of commissions on merchandise sold by that company to the defendants, as alleged in the complaint? Answer: Yes.

"2. Did the defendants wrongfully interfere with the contractual relationship between the Trogdon Furniture Company and the plaintiff, as alleged in the complaint? Answer: Yes.

"3. If so, was the action of the defendants in interfering with the plaintiff's contract actually malicious? Answer: Yes."

The jury answered the issue of actual damages $17,860.00, and the issue of punitive damages None.

From judgment signed in accord with the verdict, the defendants appeal, assigning errors.

Thomas Turner for Plaintiff, Appellee.

Womble, Carlyle, Martin & Sandridge, York & York
By: W. F. Womble for Defendants, Appellants.

PARKER, J. The defendants contend by their assignments of error that the lower court erred in overruling their demurrer *ore tenus* made during the introduction of evidence, in denying their motion for nonsuit, in admitting and excluding testimony, and in charging the jury. Before

discussing their assignments of error, we advert to certain relevant principles of law.

"The right to make contracts is both a liberty and a property right." *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E. 2d 647; *Morris v. Holshouser*, 220 N.C. 293, 17 S.E. 2d 115. In consequence, the overwhelming weight of authority in this nation is that an action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party. *Bryant v. Barber*, 237 N.C. 480, 75 S.E. 2d 410; *Coleman v. Whisnant, supra; Jones v. Stanly*, 76 N.C. 355; cases collected in the annotations of 26 A.L.R. 2d 1227 and 84 A.L.R. 43; 30 Am. Jur., Interference, Secs. 18-32; 86 C.J.S., Torts, Sec. 44; Restatement of the Law of Torts, Sec. 766.

To subject the outsider to liability for compensatory damages on account of this tort, the plaintiff must allege and prove these essential elements of the wrong: First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Eller v. Arnold*, 230 N.C. 418, 53 S.E. 2d 266; *Winston v. Lumber Co.*, 227 N.C. 339, 42 S.E. 2d 218; *Bruton v. Smith*, 225 N.C. 584, 36 S.E. 2d 9; *Kirby v. Reynolds*, 212 N.C. 271, 193 S.E. 412; *Swain v. Johnson*, 151 N.C. 93, 65 S.E. 619; 28 L.R.A. (N.S.) 615; *Holder v. Mfg. Co.*, 138 N.C. 308, 50 S.E. 681; *Haskins v. Royster*, 70 N.C. 601, 16 Am. R. 780. *Second*, that the outsider had knowledge of the plaintiff's contract with the third person. *Sineath v. Katzis*, 218 N.C. 740, 12 S.E. 2d 671; *Morgan v. Smith*, 77 N.C. 37; *Haskins v. Royster, supra*. *Third*, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. *Holder v. Mfg. Co.*, 135 N.C. 392, 47 S.E. 481; *Haskins v. Royster, supra*; 30 Am. Jur., Interference, Sec. 22. *Fourth*, that in so doing the outsider acted without justification. *Dulin v. Williams*, 239 N.C. 33, 79 S.E. 2d 213; *Winston v. Lumber Co.*, 228 N.C. 786, 47 S.E. 2d 19; *Bruton v. Smith, supra; Coleman v. Whisnant, supra; Holder v. Bank*, 208 N.C. 38, 178 S.E. 861; *Elvington v. Shingle Co.*, 191 N.C. 515, 132 S.E. 274; *Biggers v. Matthews*, 147 N.C. 299, 61 S.E. 55; *Haskins v. Royster, supra*. *Fifth*, that the outsider's act caused the plaintiff actual damages. *Haskins v. Royster, supra; Watts Co. v. American Bond & Mortgage Co.*, 267 Mass. 541, 166 N.E. 713, 84 A.L.R. 12.

The outsider has knowledge of the contract within the meaning of the second element of the tort if he knows the facts which give rise to the plaintiff's contractual right against the third person. "If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that there is no contract or that the contract means something other than what it is judicially held to mean." Restatement of the Law of Torts, Sec. 766(e). Justification imports "a

sufficient lawful reason why a party did or did not do the thing charged, a sufficient lawful reason for acting, or failing to act. It connotes just, lawful excuse, and excludes" legal "malice." 51 C.J.S. 421. As a consequence, the outsider acts without justification in inducing the breach of contract within the purview of the fourth element of the tort if he has no sufficient lawful reason for his conduct. *Townsend v. United States,* 95 F. 2d 352, 68 App. D. C. 223; *Louis Kamm, Inc., v. Flink,* 113 N. J. Law 582, 175 A. 62, 99 A.L.R. 1; *State v. Williams,* 166 S.C. 63, 164 S.E. 415; *Mercardo v. State,* 86 Tex. Crim. Rep. 559, 218 S.W. 491, 8 A.L.R. 1312.

There are frequent expressions in judicial opinions to the effect that malice is requisite to liability in an action for inducing a breach of contract. It is not necessary, however, to allege and prove actual malice in the sense of personal hatred, ill will, or spite in order to make out a case for the recovery of compensatory damages against the outsider for tortiously inducing the breach of the third person's contract with the plaintiff. The term "malice" is used in this connection in its legal sense, and denotes the intentional doing of the harmful act without legal justification. *Coleman v. Whisnant, supra; Holder v. Mfg. Co., supra; Morgan v. Smith, supra; Haskins v. Royster, supra;* 30 Am. Jur., Interference, Sec. 23. Indeed, actual malice and freedom from liability for this tort may coexist. If the outsider has a sufficient lawful reason for inducing the breach of contract, he is exempt from liability for so doing, no matter how malicious in actuality his conduct may be. A "malicious motive makes a bad act worse, but it cannot make that wrong which, in its own essence, is lawful." *Bruton v. Smith, supra; Holder v. Bank, supra; Biggers v. Matthews, supra.* For this reason, actual malice is ordinarily material in an action for inducing a breach of contract only on the issue of whether punitive damages should be awarded. *Reichman v. Drake,* 89 Ohio App. 222, 100 N.E. 2d 533. See, also, in this connection *Wright v. Harris,* 160 N.C. 542, 76 S.E. 489. Notwithstanding it is not an element of the cause of action, actual malice may negative the existence of justification in a particular case. This is true because the outsider is never justified in inducing a breach of contract solely for the purpose of visiting his personal hatred, ill will, or spite upon the plaintiff. Restatement of the Law of Torts, Sec. 766(m).

In enumerating the essential elements of the tort, we omitted the use of the term "legal malice" to achieve simplicity of statement and promote clearness of comprehension. Legal "malice is proved if it appears that the defendant with knowledge of the contract intentionally and without justification induced one of the contracting parties to break it." *Meadowmoor Dairies v. Milk Wagon Drivers' Union,* 371 Ill. 377, 21 N.E. 2d 308; *Anderson v. Moskovitz,* 260 Mass. 523, 157 N.E. 601. Hence, malice

in a legal sense is necessarily present in all cases where the second, third, and fourth elements of the tort exist.

The accepted rule with us is to construe liberally a complaint with every reasonable intendment and presumption in favor of the pleader. The complaint must be fatally defective before its total rejection. *Winston v. Lumber Co., supra; Scott v. Veneer Co., ante,* 73, 81 S.E. 2d 146.

The complaint in substance alleges the existence of a valid contract between the plaintiff and the Trogdon Furniture Co., conferring on plaintiff contractual rights against the Trogdon Furniture Co.; that the defendants had knowledge of this contract; that plaintiff had fully performed and was entitled to the full commissions, and the defendants intentionally and without justification induced the Trogdon Furniture Company not to perform its contract with the plaintiff to the plaintiff's actual damage. The allegations of the complaint, as amended, contain all the essential allegations necessary to recover damages for wrongfully inducing a breach of contract, and the lower court was correct in overruling the defendants' demurrer *ore tenus.*

The defendants contend that they were entitled to judgment of nonsuit on these grounds: *One,* the defendants were acting in the exercise of an absolute right; *Two,* the plaintiff failed to prove the existence of a valid and enforceable contract between himself and the Trogdon Furniture Company because there was no consideration for the contract; that it was indefinite and uncertain, and that it was unenforceable by reason of the Statute of Frauds; *Three,* because the contract was terminable at will.

As to the defendants' contention that they were acting in the exercise of a lawful right, because the plaintiff was acting in competition with them. If the plaintiff was in competition with the defendants, the defendants would be justified in interfering. The evidence considered in the light most favorable to the plaintiff tended to show that the plaintiff had a valid contract with the Trogdon Furniture Company, that the defendants had actual knowledge of this contract, and intentionally and without justification induced the Trogdon Furniture Company not to perform its contract with him, and that he did not act in competition with defendants. A close reading of the entire evidence and the charge of the court shows that the case was tried below on these conflicting contentions, supported by evidence, and the jury decided in favor of the plaintiff.

The defendants contend there was no consideration for plaintiff's contract with the Trogdon Furniture Company. The plaintiff's evidence tends to show these facts: The defendants had a conversation with the plaintiff relative to procuring a contract from a manufacturer to make television cabinets and stands for them, and at that time the defendant Abeles said to plaintiff, if he could secure a manufacturer to make goods

for them "I'll see that you get commissions and I'll not interfere in your commissions in any way." When negotiations were initiated between the defendants and the furniture company, the defendants said the furniture company was to pay commissions to plaintiff. When the controversy arose between the plaintiff and the defendants over $256.00 owed plaintiff by defendants on a transaction not connected with plaintiff's or defendants' contract with the furniture company, both defendants being present, the defendant Abeles said to plaintiff, "if you sue me, I'll knock you out of thousands of dollars worth of commissions." The defendant Abeles said on cross-examination: "I knew Mr. Childress was to get a commission if the deal was consummated. I know that he got a commission for a while. I know Mr. Trogdon stopped it, because Mr. Troutman and I asked him to stop it." When the question arose as to whether the furniture company would make goods of a different design for defendants at a certain price, the furniture company told the defendants they could not at that price, unless the plaintiff's commissions were reduced. The furniture company saw plaintiff, who reduced his commissions, and the goods were made. Ray Trogdon testified when negotiations first started with the defendants, both defendants said he, Trogdon, was to pay commissions to plaintiff. This evidence tends to show that the agreement of the Trogdon Furniture Company, to pay commissions to the plaintiff was in contemplation of the plaintiff, the defendants and the Trogdon Furniture Company, when the contract was made between the defendants and the furniture company, and between plaintiff and the furniture company. Such evidence necessarily means that the agreement to pay the commissions to plaintiff was intended at the time of the execution of the contract between the defendants and the Trogdon Furniture Company as a part of the consideration for the contract, and the contract was a valid consideration for the promise to pay the commissions. It was not a past consideration. *Bryant v. Hayes,* 63 Ga. App. 440, 11 S.E. 2d 360; *same case,* 66 Ga. App. 221, 17 S.E. 2d 765; 1 Williston on Contracts, Sec. 142, Rev. Ed.

Ray Trogdon, president of the Trogdon Furniture Company, a witness for plaintiff, testified on cross-examination: "Any agreement was personal between me and Mr. Childress as my employee. There was nothing said between Mr. Childress and me as to how long I was going to pay him commissions. I felt at liberty to terminate my relationship at any time I saw fit. It was up to him and myself." The commissions were to be paid on sales to the defendants. The rate of commissions was fixed. This contract is terminable at will. *Phillips Lumber Co. v. Smith,* 7 Ga. App. 222, 66 S.E. 623; *Kirby v. Reynolds, supra; Elmore v. R. R.,* 191 N.C. 182, 131 S.E. 633; *Richardson v. R. R.,* 126 N.C 100, 35 S.E. 235; Williston on Contracts, Rev. Ed., Vol. 1, Sec. 39. The contention of

defendants that plaintiff's contract is too indefinite and uncertain is not tenable. The law does not favor the destruction of contracts on such ground. *Fisher v. Lumber Co.,* 183 N.C. 485, 111 S.E. 857; *Chew v. Leonard,* 228 N.C. 181, 44 S.E. 2d 869.

The fact that plaintiff's contract with the Trogdon Furniture Company was terminable at will is not available as a defense to the defendants. *Mr. Justice Hughes* said in *Truax v. Raich,* 239 U.S. 33, 60 L. Ed. 131: "The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others . . . by the weight of authority the unjustified interference of third persons is actionable although the employment is at will." See also Anno. 84 A.L.R., p. 60 at f, where the authorities are assembled; 30 Am. Jur., Interference, p. 78.

Elmore v. R. R., supra, and *Richardson v. R. R., supra,* relied upon in defendants' brief, are not in point. Both were actions against the employer, not against third persons. In *Kirby v. Reynolds, supra,* relied upon by defendants, the facts are different; the plaintiff was *sui juris* and voluntarily resigned his employment.

The defendants contend also that the plaintiff's action should have been nonsuited because the agreement between plaintiff and the Trogdon Furniture Company was entered into in Georgia, and that Sec. 20-401 and Subsection 5 of said section of the Georgia Code Anno. provides that any agreement (except contracts with overseers) that is not to be performed within one year from the making thereof to be binding on the promisor, the promise must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized.

This contention of the defendants is without validity. The overwhelming weight of authority is that the defense of the Statute of Frauds is personal to the parties to the contract, and such a defense is not available to strangers to the agreement. Georgia and North Carolina decisions are in accord with the general rule. *Saunders v. Sasser,* 86 Ga. App. 499, 71 S.E. 2d 709; *Gilbert Hotel No. 22, Inc. v. Black,* 67 Ga. App. 221, 19 S.E. 2d 796; *Waynesboro Planing Mill v. Perkins Mfg. Co.,* 35 Ga. App. 767, 134 S.E. 831; *Cadillac-Pontiac Co. v. Norburn,* 230 N.C. 23, 51 S.E. 2d 916; *Maney v. Extract Co.,* 194 N.C. 736, 140 S.E. 738; *Cowell v. Ins. Co.,* 126 N.C. 684, 36 S.E. 184, 37 C.J.S., Statute of Frauds, Sec. 220(a); 49 Am. Jur., Statute of Frauds, Sections 588, 589 and 591.

The defendants further contend that plaintiff has no cause of action against them for the recovery of actual damages because the plaintiff still has his cause of action against the Trogdon Furniture Company for damages for breach of the contract to pay him commissions. This contention has been rejected by the great majority of courts which have passed on the question. The fact that "A" also has a cause of action against "B"

for breach of contract does not prevent his having a cause of action in tort against a third person who wrongfully and without justification induces "B" to breach the contract with "A." *Lien v. Northwestern Engineering Co.* (S. D.) 39 N.W. 2d 483; *Louis C. Moser & Co. v. Kremer,* 192 Misc. 85, 80 N.Y.S. 2d 199; *Frischman v. Metropolitan Tobacco Co.,* 199 Misc. 844, 104 N.Y.S. 2d 446; *Phillips & Benjamin Co. v. Ratner,* 206 F. 2d 372; *Hornstein v. Podwitz,* 254 N.Y. 443, 173 N.E. 674, 84 A.L.R. 1; *Harvey Corporation v. Universal Equipment Co.,* 158 Fla. 644, 29 So. 2d 700.

The defendants' motion for judgment of nonsuit was properly overruled.

The defendants in their brief have four assignments of error as to the court's rulings upon the evidence. They cite no authorities in support of their argument as to these assignments of error. We deem it necessary to discuss only one.

The court declined to admit in evidence a letter dated 26 July 1949 written by the Trogdon Furniture Company, apparently in response to the defendants' letter of 22 July 1949 to it. On 22 July 1949 the defendant Troutman wrote to the Trogdon Furniture Company in substance: The plaintiff and the defendants have reached a parting of the ways, as he has attempted to go into competition with us; for this reason we must decline to do any further business with you through Mr. Childress. The pertinent part of the letter of the Trogdon Furniture Company in reply follows: "Your announcement of a severance of all relations between you is somewhat shocking. Also, to have you tell me he is in competition with both you and ourselves is something he certainly has not discussed with me whatever. . . . As for our bringing to a close our deal with Mr. Childress, we don't see how this will be possible, legally or morally, as we are dealing with him strictly on a commission basis. This, of course, can be stopped by you by writing both of us, and indicating in your letters that a copy is being mailed to both ourselves and to him. In such announcement you could set out that from this date on any new business placed with us would be on a no-commission basis to Mr. Childress, or anyone else. We could then accept your new proposition on your terms." Plaintiff introduced in evidence the defendants' letter of 22 July 1949 to the Trogdon Furniture Company.

The evidence in the Record shows that the defendants had full knowledge of the facts which gave rise to the plaintiff's contractual right against the Trogdon Furniture Company, and full knowledge that the Trogdon Furniture Company was paying the plaintiff commissions on the goods manufactured and sold by it to them. Acting with this knowledge they knew that their acts in wrongfully inducing the Trogdon Furniture Company to breach its contract with plaintiff would be highly

injurious to him. There is no evidence in the Record that the defendants followed the suggestion in the Trogdon Furniture Company's letter that the payment of commissions could be stopped *by writing both the Trogdon Furniture Company and plaintiff, and indicating in their letters that a copy is being mailed to both ourselves and to him;* and the failure of defendants to write a letter as suggested would seem to indicate that the defendants acted wrongfully, without justification and *with actual malice.* In our opinion the exclusion of this evidence was not prejudicial to defendants.

If the defendants had contended that this letter was competent to negative actual malice on their part—no such contention is made in their brief—its exclusion was harmless, for the jury awarded no punitive damages.

We have carefully read the court's charge to the jury in its entirety with particular attention to the defendants' exceptions and their argument and the authorities set forth in their brief, and are unable to perceive any prejudicial error therein which would justify the award of a new trial.

All the defendants' assignments of error are overruled. The jury's verdict and the judgment thereon will not be disturbed.

No error.

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

STEPHEN G. DOBIAS AND WIFE, GRACE DOBIAS, v. C. S. WHITE AND WIFE, GEORGIA M. WHITE.

(Filed 13 October, 1954.)

1. Pleadings § 22b—

G.S. 1-167 relates to amendment out of term and in the absence of a judge, and does not limit the authority of the presiding judge to allow an amendment under G.S. 1-163 at term after the cause is calendared for trial and without notice to the adverse party.

2. Appeal and Error § 29—

Assignments of error not discussed in the brief are deemed abandoned.

3. Husband and Wife § 13a (3): Principal and Agent § 7d—

Where the wife claims the benefits of negotiations conducted by her husband on the theory that he was her agent therein, she may not disavow his agency in the premises to avoid the burdens.

4. Evidence § 13—

Confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents.

5. Same—

Only confidential communications between attorney and client are privileged, and if it appears by extraneous evidence or from the nature of the transaction or the communication that they were not regarded as confidential, or that they were made for the purpose of being conveyed by the attorney to others, they are not confidential and are not privileged.

6. Same—

As a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese.*

7. Same—

It being apparent in this case that the communications by plaintiff to his attorney were made for the very purpose of having the attorney relay the information to defendants, evidence thereof was competent, and the fact that the witness voluntarily incorporated in his answer other matters technically violative of the privileged communication rule will not affect this result when such other matters are collateral to the issue and could not have been prejudicial.

8. Accord and Satisfaction § 2: Mortgages § 27—

Defendants set up a verbal agreement under which defendants were to convey certain lands to plaintiffs in satisfaction of notes secured by a mortgage executed by defendants to plaintiffs. *Held:* If, pursuant to this agreement, defendants execute and deliver deed to the agent of plaintiffs and the deed is accepted by plaintiffs' agent, the contract of accord and satisfaction is fully executed, and the debt is paid and satisfied in full *eo instante* the deed is delivered and accepted, entitling defendants to the surrender of the notes and the cancellation of the mortgage.

9. Frauds, Statute of, § 9—

The Statute of Frauds has no application to a fully executed or consummated contract, but may be invoked only to prevent the enforcement of executory contracts. G.S. 22-2.

10. Mortgages § 30a—

Upon the satisfaction of a debt secured by a mortgage, the trustee is divested of authority to foreclose the instrument, and his deed executed pursuant to later foreclosure conveys nothing.

11. Accord and Satisfaction § 2: Mortgages § 27—

Defendants set up a verbal agreement under which defendants were to convey certain land to plaintiffs in satisfaction of certain notes secured by a mortgage executed by defendants to plaintiffs. *Held:* The agreement is executory until plaintiffs accept the deed pursuant thereto, and if defendants execute the deed and deposit it with an attorney for delivery to and acceptance by plaintiffs, but plaintiffs refuse to accept the deed from the attorney, the agreement remains executory, and plaintiffs' plea of the

Statute of Frauds is a valid and complete defense to its enforcement. G.S. 22-2.

12. Appeal and Error § 40d—

Ordinarily, where there is sufficient evidence to support the court's findings of fact and such findings constitute sufficient predicate for the judgment, the judgment will be affirmed even though the theory on which the lower court bases its judgment is erroneous. But this principle does not apply when the appellee has not alleged the facts necessary to support the judgment upon the applicable theory.

13. Pleadings § 24—

Proof without allegation is just as fatal as allegation without proof. Both are required.

14. Appeal and Error § 23—

An assignment of error must present a single question of law for consideration of the Court, and while more than one exception may be grouped under one assignment of error if all the exceptions relate to a single question of law, the grouping of exceptions which present different questions of law under a single assignment of error constitutes it a broadside assignment of error.

15. Appeal and Error § 50—

Where the findings of fact of the lower court are too conflicting to support the judgment, the cause will be remanded for a rehearing.

APPEAL by plaintiffs from *Moore (Dan K.), J.*, June Term 1954, McDOWELL.

Civil action to recover amount alleged to be due on four promissory sealed notes.

This cause was here on a former appeal from a judgment on the pleadings in favor of the plaintiffs. The defendants admitted the execution of the notes sued upon, and the court below held that the facts pleaded by the defendants do not constitute a valid affirmative defense to plaintiffs' action. We reversed. All the pertinent facts up to the time of that appeal are stated in our opinion in *Dobias v. White,* 239 N.C. 409.

Thereafter, defendants, by leave of court, filed an amendment to their answer in which they allege the foreclosure of the deed of trust executed to secure the payment of the notes sued upon and the purchase of said land by plaintiffs at said sale. They assert that their right to a decree of specific performance of the alleged contract of accord and satisfaction has been defeated by said foreclosure. They pray damages for the breach of said contract.

Plaintiffs amended their complaint so as to allege the last two of the series of four notes executed by defendants. They likewise filed a reply to the answer in which they deny the agreement of accord and satisfaction asserted by defendants and plead the Statute of Frauds.

When the cause came on for trial in the court below, the parties waived trial by jury and agreed that the judge presiding should hear the evidence, find the facts, and render judgment thereon.

The court found as a fact that the parties, prior to 7 August 1952, entered into an agreement "whereby it was UNDERSTOOD AND AGREED that if the defendants would execute a deed to the plaintiffs for the property described in the deed of trust mentioned in the pleadings, and deliver said deed to Paul J. Story, the plaintiffs would accept said deed in full satisfaction of the four (4) notes mentioned in the plaintiffs' Complaint, and would cancel said notes and said deed of trust." (Finding of fact No. 1.)

It further found: "2. That during all of the negotiations relative to the Agreement mentioned under No. 1 above, the plaintiff STEPHEN G. DOBIAS was acting as Agent for his wife, the plaintiff GRACE DOBIAS.

"3. That the plaintiffs, prior to the execution of the deed from the defendants to the plaintiffs, dated August 7, 1952, constituted and appointed PAUL J. STORY, as their Agent, to prepare said deed, and after the same was signed by the defendants, to accept delivery of the same for and on behalf of the plaintiffs.

"4. That the deed above mentioned was executed by the defendants and delivered to PAUL J. STORY, as Agent for the plaintiffs."

It also found that plaintiffs had breached the agreement of accord and satisfaction by refusing to accept the deed, surrender the notes, and cancel the trust deed of record (Findings Nos. 5 and 6); that they have procured the foreclosure of the trust deed and now hold title to the land under a foreclosure deed; that defendants are indebted to plaintiffs in the sum of the balance due on said notes; and that defendants have suffered damages in the identical amount by reason of the breach of said agreement by plaintiffs. It thereupon entered judgment "that the plaintiffs recover nothing of the defendants, and that the defendants recover nothing of the plaintiffs, on account of the matters and things set forth in the pleadings filed in this cause, and that the costs of this action be taxed against the plaintiffs." Plaintiffs excepted and appealed.

E. C. Carnes and William C. Chambers for plaintiff appellants.
Proctor & Dameron for defendant appellees.

BARNHILL, C. J. The plaintiffs assign as error the order of the court permitting defendants to file an amendment to their answer after the cause was calendared for trial and without ten days' notice to them. This exception is without merit. G.S. 1-167, upon which plaintiffs rely, was enacted to meet the specific situations therein recited and to provide a method for obtaining leave to amend a pleading out of term and in the

absence of a judge. G.S. 1-163 vests in the judge presiding almost unlimited authority to permit amendments either before or after judgment. The court below acted well within the authority thus conferred upon it in permitting the amendment in question. *Light Co. v. Bowman,* 231 N.C. 332, 56 S.E. 2d 602; *Comr. of Banks v. Harvey,* 202 N.C. 380, 162 S.E. 894.

The evidence discloses that the *feme* plaintiff was present only at the time of the original transaction between Dr. Dobias and defendants, and that thereafter he alone dealt with defendants, either directly or through his attorney. The court found as a fact "that during all of the negotiations relative to the Agreement mentioned under No. 1 above, the plaintiff STEPHEN G. DOBIAS was acting as Agent for his wife, the plaintiff GRACE DOBIAS."

Plaintiffs undertake to except to this finding of fact. However, they do not in their brief discuss it or cite any authority in support thereof. In thus abandoning this assignment of error they are well advised. The *feme* plaintiff executed the original deed and accepted the mortgage notes of defendants in part payment of the purchase price. She is now in court seeking to reap the benefits of that transaction. In so doing she alleges in her reply that the negotiations conducted by her husband were her negotiations and his action was her action. She cannot claim the benefits without assuming the burdens. *Herndon v. R. R.,* 161 N.C. 650, 77 S.E. 683; *Rudasill v. Falls,* 92 N.C. 222. Simple justice and fair play deny her the right, under these circumstances, to disavow his agency. Indeed, she did not attempt to do so in her pleadings.

Plaintiffs assign as error the admission, over their objection, of evidence of communications between Dr. Dobias and Mr. Story, his attorney, as pointed out by their exceptions 2 to 9, both inclusive, for that such communications were privileged, and evidence thereof was not admissible. It is, to say the least, doubtful whether plaintiffs have properly preserved the exceptions which form the bases of this assignment. In any event, they are without substantial merit.

It is an established rule of the common law that confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents. *Guy v. Bank,* 206 N.C. 322, 173 S.E. 600; *McNeill v. Thomas,* 203 N.C. 219, 165 S.E. 712; *Hughes v. Boone,* 102 N.C. 137 (159); *Jones v. Marble Co.,* 137 N.C. 237; 58 A.J. 214.

But the mere fact the evidence relates to communications between attorney and client alone does not require its exclusion. Only confidential communications are protected. If it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, 58 A.J. 274, or that they were made for the

purpose of being conveyed by the attorney to others, they are stripped of the idea of a confidential disclosure and are not privileged. *Michael v. Foil,* 100 N.C. 178; *Allen v. Shiffman,* 172 N.C. 578, 90 S.E. 577; *Hughes v. Boone, supra; Rosseau v. Bleau,* 30 N.E. 52; 58 A.J. 274; *ibid.,* 215.

Therefore, as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese. Carey v. Carey,* 108 N.C. 267; *Michael v. Foil, supra; Allen v. Shiffman, supra; Blaylock v. Satterfield,* 219 N.C. 771, 14 S.E. 2d 817; 58 A.J. 277; Anno. 141 A.L.R. 562.

Plaintiffs in their reply allege that defendants offered to convey the mortgaged property to plaintiffs in full settlement of the mortgage debt but that no agreement was reached such as would constitute a binding contract.

Dr. Dobias testified that defendants offered to convey the mortgaged property to plaintiffs in settlement of the debt evidenced by the mortgage notes; that he agreed and told Mr. Story to prepare the deed; that about two days later he went to Mr. Story's office at which time Story told him he (Story) had the deed ready; and that he then told Mr. Story he had changed his mind about it and "would not cancel the notes in exchange for the deed."

The male defendant testified that he offered to deed the property in exchange for the notes, that shortly thereafter Dr. Dobias told him that he and his wife had decided to accept the proposed settlement, and that he had instructed his attorney "if me and my wife wanted to come down and make him a title, for us to come to his attorney, Mr. Story, and make a deed," and that on 7 August 1952 he and his wife did execute a deed conveying the mortgaged property to the plaintiffs and delivered it to Mr. Story.

Mr. Story testified that both Dr. Dobias and Mr. White told him about the offer of settlement made by the defendants; that later Dr. Dobias called him from Old Fort and "told me that Charlie White had been to see him and he had decided to accept the offer and directed me to prepare a deed for the property to him and his wife"; that Mr. White told him Dr. Dobias had told him (White) he would take the deed in satisfaction of the debt; that he prepared the deed and defendants signed and acknowledged it in his office; that he wrote Dr. Dobias that he had the deed and for him to send the notes and trust deed so that it could be canceled of record at the same time the deed was put on record.

These and other conversations pertaining to the settlement about which these witnesses testified were in no sense privileged communications. The statements made by Dr. Dobias were made for the very purpose of

having the information relayed to defendants. Evidence thereof was clearly competent.

It is true Dr. Dobias testified as to advice given him by Mr. Story and his reason for accepting the offer. But this was voluntarily incorporated in the answer of the witness. And in any event, if it technically violated the privileged communication rule, it was harmless. His statements and conduct respecting the settlement constitute the material part of his testimony which defendants sought to elicit.

When Dr. Dobias notified his attorney that he had changed his mind, the deed had already been executed and delivered to Mr. Story. It was not until several days thereafter that defendants were notified that plaintiffs would not go through with the agreement. So then, all the testimony tends to show that the parties did enter into an agreement of accord and satisfaction. What was the exact nature of that agreement at the time plaintiffs repudiated or attempted to repudiate it? Was the settlement complete so as to discharge the debt, or was it still merely an executory contract to convey the property in satisfaction of the notes? Eventually, upon the answers to these questions the rights of the parties must be made to depend.

Should the contract, which is the real subject matter of this controversy, be classified as an executed or as an executory agreement of accord and satisfaction? On this determinative issue the findings of fact made by the court below may be readily divided into two sections.

If the findings numbered 1 to 4 inclusive are alone considered, the contract was fully executed and the mortgage debt was paid and satisfied in full *eo instante* the deed was delivered to and accepted by the agent of the plaintiffs. *Baird v. Hall,* 67 N.C. 230; *Grandy v. Abbott,* 92 N.C. 33; *Satterfield v. Kindley,* 144 N.C. 455; *Fertilizer Co. v. Smith,* 199 N.C. 722, 155 S.E. 606; *Bailey v. Bishop,* 152 N.C. 383, 67 S.E. 968; *Acceptance Corp. v. Fletcher,* 202 N.C. 170, 162 S.E. 234; *Assurance Society v. Lazarus,* 207 N.C. 63, 175 S.E. 705; *Millhiser v. Marr,* 128 N.C. 318, 130 N.C. 510; *R. R. v. R. R.,* 147 N.C. 368; 2 A.J. 271, sec. 349; 40 A.J. 748, sec. 52, and 756, sec. 60.

The surrender of the notes and the cancellation of the mortgage were not necessary to complete the transaction and make the acceptance of the deed payment of the debt. *Winborne v. McMahan,* 206 N.C. 30, 173 S.E. 278; *Millhiser v. Marr, supra; South v. Sisk,* 205 N.C. 655, 172 S.E. 193.

On the other hand, if the findings numbered 5 to 9 inclusive are accepted, then it was an executory contract which contemplated the conveyance of real estate and is voidable at the option of the party thereto sought to be charged. For convenience of discussion we will treat the

findings in this manner, referring to the first four as findings No. 1 and those numbered 5 to 9 as findings No. 2.

The Statute of Frauds, G.S. 22-2, has no application to a fully executed or consummated contract. *Choat v. Wright,* 13 N.C. 289; *Keith v. Kennedy,* 194 N.C. 784, 140 S.E. 721; *Bailey v. Bishop, supra; Herndon v. R. R., supra;* 2 Williston on Contracts 1552, sec. 528.

It may be invoked only to prevent the enforcement of executory contracts. *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171; *Bailey v. Bishop, supra; Choat v. Wright, supra; Davis v. Lovick,* 226 N.C. 252, 37 S.E. 2d 680; *Keith v. Kennedy, supra;* 2 Williston on Contracts 1522; 37 C.J.S. 763, sec. 252.

There can be no breach of an executed contract. Therefore, if the facts are as found by the court in findings No 1, then its findings No. 2 to the effect that plaintiffs, by their refusal to accept the deed delivered to the attorney and to cancel said notes and deed of trust, breached said agreement is an erroneous conclusion rather than a finding of fact. These latter findings could not, under those circumstances, be made the basis of a recovery of damages for breach of contract as set forth in finding No. 9.

Furthermore, if the debt was fully satisfied, the trustee was divested of authority to foreclose the trust deed, and his foreclosure deed conveyed nothing. *Blake v. Broughton,* 107 N.C. 220; *Crook v. Warren,* 212 N.C. 93, 192 S.E. 684; *Fleming v. Land Bank,* 215 N.C. 414, 2 S.E. 2d 3; *Burnett v. Supply Co.,* 180 N.C. 117, 104 S.E. 137.

On the other hand, if the deed was merely deposited with Story for delivery to and acceptance by plaintiff, the contract is still executory in nature, and plaintiffs' plea of the Statute of Frauds constitutes a valid and complete defense against its enforcement. G.S. 22-2; *Davis v. Lovick, supra; Keith v. Kennedy, supra; Kluttz v. Allison,* 214 N.C. 379, 199 S.E. 395; *Hall v. Misenheimer,* 137 N.C. 183; 2 Williston on Contracts 1402; 37 C.J.S. 593.

Therefore, it is quite apparent that there is a clear conflict in the two groups of findings. One invokes the application of principles of law entirely different in effect from the other. In one case the contract is fully executed in so far as the Statute of Frauds is concerned. In the other case the contract is still executory and voidable at the option of plaintiffs, *Hall v. Misenheimer, supra; Brown v. Hobbs,* 154 N.C. 544, 70 S.E. 906; *Lewis v. Murray,* 177 N.C. 17, 97 S.E. 750.

We may note in this connection that where the land has been conveyed to the vendee pursuant to an oral contract, the seller may recover from the purchaser the purchase price for the land. *Smith v. Arthur,* 110 N.C. 400; *Satterfield v. Kindley, supra; Bailey v. Bishop, supra; Farmer v. Willard,* 71 N.C. 284; 37 C.J.S. 763, sec. 252.

There is competent evidence in the record to support the court's findings of fact No. 1, and there is sound authority to the effect that where the court below has reached the correct result, the judgment may be affirmed even though the theory on which the result is bottomed is erroneous. *Rankin v. Oates,* 183 N.C. 517, 112 S.E. 32; *Perry v. Surety Co.,* 190 N.C. 284, 129 S.E. 721; *Rhodes v. Upholstery Company,* 197 N.C. 673, 150 S.E. 193; *Steel Co. v. Rose,* 197 N.C. 464, 149 S.E. 555; *Cauble v. Express Co.,* 182 N.C. 448, 109 S.E. 267.

Even so, we may not apply that principle here for the simple reason the defendants do not plead payment of the mortgage debt by the execution and delivery of a deed for the *locus* to the agent of plaintiffs. Instead, they admit the debt, plead an executory contract of accord and satisfaction and the breach thereof by the plaintiffs. *Dobias v. White,* 239 N.C. 409. It is not sufficient that defendants have a valid affirmative defense and can prove it. They must first plead it, then prove it. *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648.

Proof without allegation is just as fatal as allegation without proof. *Ingold v. Assurance Co.,* 230 N.C. 142, 52 S.E. 2d 366. Both are required. *Maddox v. Brown,* 232 N.C. 542, 61 S.E. 2d 613; *Bank v. Caudle,* 239 N.C. 270. Should we affirm the judgment entered, the plaintiffs would be compelled to suffer a judgment against them rendered on a defense of which they had no notice and which in effect is negatived by the allegations contained in the answer. Such is not the way of the Court. *King v. Coley, supra.*

An assignment of error must present a single question of law for consideration by the court. Even so, it is at times entirely proper to group more than one exception under one assignment. The assignments of error on this appeal constitute such a clear illustration of the rule which permits the grouping of several exceptions under one assignment without making the assignment broadside in nature that we pause to call attention thereto by way of *dicta* and for the information of the profession.

"Exceptions are grouped and assigned as error as follows:

"1. . . .

"2. PLAINTIFFS' EXCEPTIONS 2, 3, 4, 5, 7, 8 and 9 (R pp 21, 22, 29, 30, 31). The action of the Court in permitting testimony regarding the privileged communication between plaintiff S. G. Dobias and his attorney Paul J. Story.

"3. . . .

"4. PLAINTIFFS' EXCEPTION NO. 10 (R p 36). The action of the Court in finding the facts set forth in paragraphs 1, 2, 3, 4, 5, 6 and 9 of the Judgment, which findings of fact were made in the absence of evidence of the same, or are based upon incompetent testimony.

While the appellants group seven exceptions under their assignment No. 2, this is entirely proper. Each and every exception is directed to the question whether under the circumstances of this case the communications between Dr. Dobias and his attorney are privileged and evidence thereof is inadmissible over the objection of the plaintiffs. Assignment No. 3 is of like import. The six exceptions grouped thereunder are directed to the admissibility of evidence of the parol agreement of accord and satisfaction notwithstanding the plaintiffs' plea of the Statute of Frauds in their reply and their timely objections when the testimony was tendered by the defendants.

On the other hand, while only one exception is listed under assignment No. 4, the plaintiffs seek thereby to challenge the sufficiency of the evidence to support seven separate and distinct findings of fact. The evidence which tends to support one finding is not relied on to support the others. Different evidence relates to different findings. Testimony which tends to establish the agreement does not necessarily show that in accepting the deed executed by the defendants the attorney was acting as the agent of the plaintiffs or that the plaintiffs have breached the agreement. Hence this assignment attempts to raise seven different questions and is therefore nothing more than a broadside assignment of error which is insufficient to bring into focus the sufficiency of the testimony to support any particular finding of fact made by the court below.

As heretofore pointed out, the findings of fact made by the court below are too conflicting to support a judgment. We must therefore vacate the judgment entered and remand the cause for a rehearing. It is so ordered.

Error and remanded.

WILLIAM A. H. HOWLAND v. AMBER JUSTIZ STITZER, NOW REMARRIED AND KNOWN AS MRS. SHERMAN HAWES, JR.; AND FIRST NATIONAL BANK AND TRUST COMPANY IN ASHEVILLE, NORTH CAROLINA, A CORPORATION.

(Filed 13 October, 1954.)

1. Pleadings § 31: Divorce § 15½: Husband and Wife § 12d—

In the husband's action to cancel deed of separation, the wife's motion to strike allegations from his reply alleging that the separation agreement was merged in a subsequent decree of divorce is properly denied.

2. Appeal and Error § 2: Pleadings § 28—

The refusal to grant a motion for judgment on the pleadings is not appealable.

3. Appeal and Error § 1—

Even though an appeal be premature, the Supreme Court may, in the exercise of its discretionary right, express an opinion on the merits of a question of law argued on the appeal.

4. Husband and Wife § 12d: Divorce and Alimony § 15½—Separation agreement held not merged in subsequent divorce decree.

Husband and wife executed a separation agreement which provided for certain payments to the wife during her lifetime, and stipulated that its provisions should remain in full force and effect notwithstanding any subsequent judgment or decree obtained by either party in the state of their residence or any other state. Thereafter the wife obtained a decree of divorce in the State of New York, which decree contained a provision that the husband should provide for the support and maintenance of the wife in accordance with the separation agreement, which agreement "is incorporated in this judgment." *Held:* Under the laws of the State of New York the separation agreement was not merged in the divorce decree, but remains a valid and enforceable contract.

5. Contracts § 8—

The intention of the parties as expressed in the written agreement is controlling, and when such agreement is explicit, the court must so declare irrespective of what either party thought the effect of the contract to be.

APPEAL by defendant Mrs. Sherman Hawes, Jr., from *Whitmire, Special Judge,* July Term, 1954, of BUNCOMBE.

When this cause came on for hearing in the court below, Mrs. Hawes moved to strike certain portions of the amended reply of the plaintiff, filed 23 June, 1954, and also moved for judgment on the pleadings. Both motions were overruled and she appeals, assigning error.

William J. Cocke and C. N. Malone for plaintiff; Charles Rothenberg of counsel for plaintiff.

David H. Armstrong for defendant, appellant.

DENNY, J. Certain phases of the litigation involved in this appeal have been before us on two former appeals. The first action was instituted on 5 December, 1949, and the appeal therein was heard at the Spring Term, 1950, and the opinion of this Court, dismissing the action, is reported in 231 N.C. 528, 58 S.E. 2d 104.

The present action was instituted on 24 January, 1952, and was heard at the Fall Term, 1952, on an appeal from the denial of a motion to strike certain allegations in the plaintiff's reply. The opinion disposing of that appeal is reported in 236 N.C. 230, 72 S.E. 2d 583. The plaintiff thereafter filed a petition to rehear, which was denied. He then petitioned the Supreme Court of the United States for a *writ of certiorari* to review the opinion of this Court, which was denied. *Howland v.*

Stitzer, 345 U.S. 935, 73 S. Ct. 796, 97 L. Ed. 1362. Many of the facts involved in the present appeal are stated in detail in the former appeals and will not be restated except in so far as may be necessary to an understanding of the questions presented for determination.

The plaintiff and the defendant, Mrs. Sherman Haws, Jr., were formerly husband and wife, having been married on 6 January, 1941. Thereafter, on 18 September, 1946, the plaintiff and his wife, Amber Howland (the present Mrs. Hawes), entered into a separation agreement, the terms of which were to remain in force during the life of Mrs. Howland, or until her remarriage. The plaintiff found the terms of this agreement unduly burdensome to him. Therefore, he proposed a new separation agreement by the terms of which, in lieu of the benefits provided in the then existing agreement in favor of his estranged wife, he agreed to give her for life, irrespective of her future marital status, the income from certain stock which is held in trust under a trust indenture by the First National Bank and Trust Company in Asheville, North Carolina. His estranged wife, the present Mrs. Hawes, consented and entered into the new agreement which was executed on 2 April, 1947. The essential parts of this agreement in respect to the income from the stock are set out in the opinion disposing of the former appeal in this action.

Mrs. Howland instituted an action for divorce in the Supreme Court of New York, County of New York, on 13 February, 1947. She was given an interlocutory decree for absolute divorce from William Anthony Hoppin Howland, the plaintiff in the present action, which divorce became absolute on 15 October, 1947. The decree of the New York Court contained the following provision: "That the defendant (the plaintiff herein) shall provide for the support and maintenance of the plaintiff during the entire period of her lifetime in accordance with the terms of an agreement between the parties dated the 2nd day of April, 1947, which said agreement is incorporated in this judgment."

The plaintiff in this action remarried immediately after the effective date of the above decree. Mrs. Amber Howland later married Charles Stitzer, Jr. This marriage resulted in a divorce and the former Mrs. Amber Howland thereafter married Sherman Hawes, Jr.

The proceeds from the stock referred to in the separation agreement dated 2 April, 1947, were paid to the former Mrs. Amber Howland from 1 May, 1947, until 5 December, 1949, the date on which the first action referred to herein was instituted.

In June, 1950, the plaintiff filed a motion in the Supreme Court of New York, County of New York, requesting the New York Court to modify the decree entered in the original divorce action to the extent it required the plaintiff to support his former wife, on the ground that she

had remarried. The motion was granted and the former judgment amended as required in such cases upon the remarriage of the wife. New York Civil Practice Act, Section 1172c. However, the New York Court, in striking from its judgment the provision for support, entered this provision in its decree: ". . . and it is FURTHER ORDERED, that the disposition of the within motion is without prejudice to such rights as plaintiff may have pursuant to the terms of said agreement between the parties dated April 2, 1947."

We shall first consider the defendant's motion to strike. When this cause was before us at the Fall Term, 1952, on a similar motion, we held that the defendant's motion to strike from the plaintiff's reply all the allegations which attacked the validity of the separation agreement entered into on 2 April, 1947, should have been granted, and reversed the ruling to the contrary.

The plaintiff thereafter obtained permission from the court below to file an amended reply. This reply alleges in sum and substance that the agreement entered into on 2 April, 1947, was merged in the decree for a divorce entered in New York and the contractual rights thereunder did not survive the decree; that it was not the intention of the plaintiff that the separation agreement should survive the divorce judgment or remarriage of the defendant Hawes, but, to the contrary, it was his intent that it should be merged therein and not survive the decree. Therefore, the amendments to the previously amended reply do raise the question of merger, and the motion to strike was properly denied.

The refusal to grant the motion for judgment on the pleadings is not appealable. *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384; *Rodgers v. Todd*, 225 N.C. 689, 36 S.E. 2d 230; *Ornoff v. Durham*, 221 N.C. 457, 20 S.E. 2d 380; *Cody v. Hovey*, 216 N.C. 391, 5 S.E. 2d 165.

In the instant case, however, the appellee conceded in the oral argument before this Court that if the separation agreement, dated 2 April, 1947, was not merged in and made inoperative as a contract by its incorporation in the divorce decree entered in New York, which became effective on 15 October, 1947, the appellant is entitled to judgment on the pleadings. In fact, plaintiff's counsel (Mr. Rothenberg), directed substantially all his argument before this Court to the question of merger. Hence, we have decided to exercise our discretionary right to express an opinion on the merits of the plaintiff's purported allegations and contentions with respect to that defense. *Suddreth v. Charlotte*, 223 N.C. 630, 27 S.E. 2d 650.

Before reviewing the New York cases on the question of merger, it might be well to point out that if the parties to the respective separation agreements referred to herein, intended that the second agreement should be merged into a judgment for support in the nature of alimony and no

more, as contended by the plaintiff, then the appellant was almost inconceivably remiss in safeguarding her own rights. Under the original agreement she had the following benefits: (1) The plaintiff was obligated to pay her $4,200.00 per year in equal monthly installments of $350.00, payable in advance on the first of each and every month; (2) the plaintiff was required to procure a policy of insurance on his life in the sum of $25,000, pay the premiums thereon, and to make his wife the irrevocable beneficiary thereunder; and (3) she was to have the use and benefit of an apartment and the effects therein contained, located at 1060 Park Avenue, New York. She gave up all these benefits which had been secured to her for life, or until her remarriage, in exchange for an agreement to the effect that she should receive the income from certain stock, amounting to approximately $1,600.00 per year, for life, regardless of her marital status; and as further evidence of the intention of the parties as to whether such agreement should survive her remarriage, they had the following provisions written therein: "It is . . . agreed between the parties that the payments due hereunder . . . shall commence on the 1st day of May 1947, and shall continue during the lifetime of the party of the first part irrespective of the marital status of the said party of the first part.

"The parties hereto agree that the provisions of this instrument shall remain in full force and effect notwithstanding any action of any nature whatsoever taken by either party in the courts of this State, any other State or in any other Country; and the parties further agree that this instrument and all the provisions thereof shall remain in full force and effect notwithstanding any judgment or decree obtained by either party in this State, any other State or any other Country.

"That each party shall, and will, at any time, or times, make, execute and deliver, any and all further assurances, things and documents, as the other said party shall reasonably require, for the purpose of giving full force and effect to this agreement and to the covenants, conditions and provisions thereof.

"That all of the covenants, promises, stipulations and provisions herein contained shall apply to, bind and be obligatory upon, the heirs, executors, administrators and assigns of the parties hereto."

In *Kunker v. Kunker,* 230 App. Div. 641, 246 N.Y.S. 118, while the action for divorce was pending the parties entered into a written agreement in which the husband agreed to make certain monthly payments to his wife during his lifetime for the support of herself and two children. The agreement further provided that in case of the remarriage of the wife, or in case of the death of either or both the children, the husband might apply to the court for a modification of the monthly payments. It was further provided that the agreement was made subject to the

approval of the court and should be made a part of the final judgment of divorce to be entered in the action. Among other things, the Court said: "There is nothing in the statute giving jurisdiction to incorporate into the judgment formal private agreements made by the parties as to a division of their property and the like. Agreements or stipulations for support and security therefor, including many details, are sometime included in the judgment if they appear fair, rendering it unnecessary to take proof. So, here, it was possible for the parties to stipulate that certain provisions in the agreement relative to support should be included in the judgment for whatever advantage that might bring, and otherwise that the agreement should remain in force. . . . If a contract is made, the courts will not award a different sum. *Cain v. Cain,* 188 App. Div. 780, 177 N.Y.S. 178; *Levy v. Levy,* 149 App. Div. 561, 133 N.Y.S. 1084. If there is an existing contract, there is really no necessity for an application for alimony. There have been cases where such provisions have been incorporated in the judgment—for what purpose is uncertain, unless to give an additional remedy by contempt. *But they became a part of a judgment separate from the contract.*" (Italics ours.) The Court pointed out that the agreement between the parties in the *Kunker case* contained "no reservation that the contract should endure after it became part of the judgment."

Likewise in *Jaeckel v. Jaeckel,* 179 Misc. 994, 40 N.Y.S. 2d 491, the agreement with respect to support was entered into while the action for divorce was pending, and it provided that if the wife succeeded in her action the amount agreed upon should be incorporated in the final decree. The Court said: "So far as the defense of merger is concerned, where there is an intention to merge the agreement as to alimony in the decree and the decree embodies the agreement as to alimony, no right to enforce the alimony provisions of the agreement survives the decree. *Chester v. Chester,* 171 Misc. 608, 13 N.Y.S. 2d 502; *Zatz v. Zatz,* App. T. First Dept., 173 Misc. 229, 17 N.Y.S. 2d 553. . . ." The Court further said, however, that "In *Bell v. Bell,* 171 Misc. 605, 13 N.Y.S. 2d 500, an action on the contract fixing the amount of permanent alimony was upheld because the contract explicitly provided that 'this agreement shall still remain in full force and effect unless mutually modified or cancelled by the parties hereto, and this agreement may be incorporated in any decree of divorce or separation made by any court of competent jurisdiction.'"

In the case of *Schmelzel v. Schmelzel,* 287 N.Y. 21, 38 N.E. 2d 114, the parties entered into a separation agreement which provided that the terms thereof should be incorporated in any judgment in any action between them wherein provision was made for the support of the wife. Thus the separation agreement expressly contemplated a suit for separa-

tion in the future. Later the wife was granted a divorce. The decree required the parties to comply with the provisions of the separation agreement. The financial situation of the defendant husband having improved, the plaintiff, two and one-half years after the entry of the original decree, made a motion for an order to increase the alimony. The motion was allowed and the alimony increased. The defendant appealed and the Court of Appeals of New York, in reversing the lower court, said: "In the case at bar the final judgment of separation did not terminate the separation agreement, but as in the case of *Goldman v. Goldman,* 282 N.Y. 296, 26 N.E. 2d 265, 269, the judgment entered incorporated the terms of the separation agreement, which included fixing the amount of alimony for the support of the wife. Such incorporation was made pursuant to an express provision of the separation agreement. In such event, as the court pointed out in the *Goldman case,* 'the direction of the court that the defendant shall pay to the plaintiff a sum less than he agreed to pay does not relieve the defendant of any contractual obligation' and 'the plaintiff may still resort to the usual remedies for breach of a contractual obligation if there has been such a breach,' since 'so long as the contract remains unimpeached, the court will not compel the husband to pay to the wife for her support a sum greater than the wife agreed to accept, at least where such sum is not plainly insufficient.' *Goldman v. Goldman, supra,* 282 N.Y. at page 301, 305, 26 N.E. 2d at page 267. The decision in the *Goldman case* reaffirmed the rule as announced in the cases of *Galusha v. Galusha,* 116 N.Y. 635, 22 N.E. 1114, 6 L.R.A. 487, 15 Am. St. Rep. 453; *Id.,* 138 N.Y. 272, 274, 33 N.E. 1062, that a decree *or a subsequent order in a matrimonial action does not destroy the agreement or deprive the parties of their rights thereunder."* (Italics ours.)

In *Graham v. Hunter,* 266 App. Div. 576, 42 N.Y.S. 2d 717, the parties entered into a separation agreement on 31 December, 1932. Thereafter, the husband went to Nevada and obtained a divorce in February, 1933. The Nevada decree ratified, confirmed, and approved the separation agreement and adopted it in all respects. The former husband met the annual payments required under the separation agreement and the Nevada decree until his former wife remarried in July, 1941. From that time, he refused to make any further payments. The action was instituted to recover the balance alleged to be due for the remainder of the year 1941 under the separation agreement and the decree of the Nevada divorce. The lower court held that there was a triable issue as to whether or not payments by the husband were to be terminated upon the remarriage of the wife. The wife contended that the terms of the separation agreement and of the decree were unambiguous and that their meaning and construction presented a question of law for the court and not an issue of fact to be determined upon a trial. The Court held that the pro-

visions of the agreement manifested an intention of the parties that the payments to be made each year were not to cease upon the remarriage of the wife. The order of the lower court was modified and plaintiff's motion for summary judgment allowed. *Cf. Sureau v. Sureau,* 280 App. Div. 927, 116 N.Y.S. 2d 470; *s.c.,* 305 N.Y. 720, 112 N.E. 2d 786.

It is settled law that where the terms of a written instrument or contract are explicit, the court determines their effect by declaring their legal meaning. *Wilson v. Cotton Mills,* 140 N.C. 52, 52 S.E. 250; *Strigas v. Insurance Co.,* 236 N.C. 734, 73 S.E. 2d 788, and cited cases. Furthermore, the construction of a contract does not depend upon what either party thought, but upon the agreement of both. *Brunhild v. Freeman,* 77 N.C. 128; *Wilson v. Scarboro,* 163 N.C. 380, 79 S.E. 811. "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.,* 229 N.C. 518, 50 S.E. 2d 295.

In the instant case, it is crystal clear, we think, that plaintiff and his former wife, now Mrs. Hawes, the appellant herein, intended that the provisions contained in the separation agreement executed by them on 2d April, 1947, should survive any decree for divorce, alimony, or remarriage of the appellant. The agreement so provides in unambiguous terms. Therefore, in light of the above decisions of the New York courts, it is our opinion that the agreement was not merged with the divorce decree in New York, but on the contrary, is a valid and enforceable contract. *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118.

The ruling of the court below on the defendant's motion to strike is affirmed, and the cause is remanded for further proceedings agreeable to law.

Affirmed.

MRS. ANNIE L. ROBERSON v. D. C. WILLIAMS, JR.

(Filed 13 October, 1954.)

1. Contracts § 1—

Ordinarily, where persons *sui juris* enter into a lawful contract the law will not inquire into whether it is good or bad, wise or foolish, but such inquiry may be permitted when the execution of the contract is induced by the fraud of one of the parties thereto.

2. Fraud § 1—

Fraud is not defined lest the craft of men should find ways of circumventing or escaping a rule or definition, but generally fraud embraces all acts, omissions, or concealments involving a breach of legal or equitable duty resulting in damage, or the taking of undue or unconscientious advantage of another.

3. Fraud § 4—

It is not required that defendant have actual knowledge of the falsity of the representations made by him if he makes such representations with reckless indifference as to their truth or falsity and with intent that the other party should rely upon them.

4. Fraud § 12—Evidence of fraud held sufficient to be submitted to the jury.

Plaintiff's evidence was to the effect that defendant, a stranger, sought her out and repeatedly attempted to purchase timber rights on a tract of land owned by her, that plaintiff advised him she could not sell because she had not been on the land and had no knowledge of the amount of timber thereon, that thereafter defendant came to see plaintiff in company with a timber cruiser who stated positively his estimate of the amount of timber on the land, that defendant stated he would pay her full market value for this amount of timber, that plaintiff, in reliance on such representation, executed timber deed at the stipulated price, and that within a short time thereafter defendant sold the timber rights for almost double the price paid plaintiff and that the amount of timber was more than three times the amount estimated by defendant's cruiser and worth from two and one-half to three and one-half times the price paid by defendant. *Held:* The evidence was sufficient to be submitted to the jury on the issue of whether defendant procured the execution of the timber deed through fraud.

5. Fraud § 5—

The failure of plaintiff to make inquiry which would have disclosed the falsity of defendant's representations will not preclude plaintiff from maintaining an action for fraud in those instances in which there is nothing which would have put a reasonably prudent man upon inquiry. The law does not require a prudent man to deal with everyone as a rascal.

PLAINTIFF'S appeal from *Morris, J.*, March Term, 1954, MARTIN County Superior Court.

Plaintiff seeks to recover damages she alleges she sustained in the sale to the defendant of timber rights which she was induced to make by reason of the false and fraudulent representations made to her by the defendant with reference to the amount and value of the timber sold. She alleges in substance:

(1) She was the owner of a described tract of timber lands containing about 110 acres and located about 14 miles from her home. She had never seen the land and knew nothing of the amount or value of the timber.

(2) Defendant, whom she had not known, sought out the plaintiff and attempted to purchase her timber rights. He stated he would pay her a good price and the full market value. She declined to sell, giving as her reason that she did not know either the amount or value of her holdings. The defendant repeated his visits and efforts to make the purchase. Each time the plaintiff refused to sell, repeating the original reason given.

(3) On 31 October, 1952, the defendant again appeared at the home of the plaintiff and brought with him a man whom he claimed to be an expert timber cruiser with many years of experience. The cruiser stated he had thoroughly cruised the timber and that there was not in excess of 250,000 feet. Defendant stated that $10,000 was its highest market value.

(4) The plaintiff relied upon the statements made by the defendant, was deceived by them as to the amount and value of her timber, that she was induced to sell for $10,000 because of statements made to her by defendant and the cruiser, and upon the payment to her of $10,000, executed and delivered a deed to the defendant.

(5) At the time of the execution of the deed the tract of land contained not less than 700,000 feet of timber and was worth not less than $25,000.

(6) The representations of the defendant that the timber cruised only 250,000 feet and was worth only $10,000 were false and fraudulent, were known to be so by the defendant when he made them. They were made for the purpose of deceiving the plaintiff and did deceive her to her damage in the sum of not less than $15,000.

(7) The defendant, on 19 December, 1952, sold and conveyed to Barrow Manufacturing Co. the timber rights which he had purchased from the plaintiff and he received from Barrow Manufacturing Co. the sum of $19,000 as the purchase price.

(8) Since the defendant has conveyed the timber rights to an innocent purchaser, that plaintiff's only remedy is against the defendant for damages.

The defendant answered, admitting the purchase for $10,000, but denying that he made any statements about the amount or value of the timber.

On the trial the plaintiff testified:

"I am a widow and I live in Williamston, 14 miles from the timber lands. I had never been on the land, had never seen it, and had never had the timber cruised. On his first visit to my house, Mr. Williams, whom I had not previously known, brought with him Mr. Sparrow, whom I had known. I told them I did not want to sell because I did not know what I had. Mr. Williams came back shortly thereafter and again I told him I did not know what to decide about selling because I did not know the amount or value of the timber. The first time Mr. Sparrow came to my house Mr. Williams was with him. Mr. Sparrow had kept inching the price up, and asked me if I would talk with Mr. Williams again. I agreed to do so. Mr. Williams kept asking me what I wanted for the timber several times, and I told him I did not know what there was, and he told me he would pay me for it at the market price, a good market price. Ten thousand dollars was the last figure that I got on the

price. They commenced low and kept creeping. I don't know whether I saw Mr. Williams again before 31 October, 1952, or not.

"On 31 October, 1952, Mr. Williams, Mr. Sparrow and another man came to my house. They wanted to know if I had decided to sell. I told them I couldn't sell until I knew what I had. Mr. Williams had his cruiser with him. I do not know his name for they did not introduce him. Mr. Sparrow asked him how much did it cruise and he said, 250,000 feet. He told me he was sure, and after thinking for a few minutes I told them that if that was all there was, then it would be all right, for I thought they told me right and I depended on what they said. Mr. Williams said he had the money with him and that he had it ready and wanted me to go down to the office and have a deed written up. It was right at dinner time and I told them to wait until I fixed dinner, but before I could do so they were calling me to come down. When I got there, the deed was written and everything. I signed the deed and Mr. Williams paid me $10,000 in cash in $100 bills. I agreed to the price of $10,000 after the cruiser told me there was 250,000 feet. I did not have the timber cruised until Mr. Barrow started cutting. Then was when I found out there was more timber than I knew."

On cross-examination, the plaintiff testified: "I told them I wanted a few days to study it over and to see my brother. No deed had been drawn. My brother adjoins one of my farms but not the one on which this timber was located. My brother told me that he did not know anything about it and that he didn't know how much timber was there."

Edward Stewart, Jr., testified: "I am a consulting forester; have been in this type work for 17 years. I offer professional forestry service to the general public and about 80 per cent or 90 per cent of my work is the appraising of timber and estimating it. I received my degree in Forestry in 1937, and since that time I have been with the U. S. Forestry Service, the Department of Agriculture, working in various regions of the United States, and in World War II, I was with the Military Government Forestry in occupied countries and in complete charge of all forestry industries in the occupied countries. Since the War I have offered my services to the public and my clients are mostly lumber companies and pulp companies."

Upon this evidence the court found the witness to be an expert in the estimation of timber.

"On July 7, 1953, I made a cruise of the timber on the Roberson Tract of land in Robersonville, N. C., from a description furnished me, this being the same description as the one set out in the complaint. . . . the boundaries were well defined, on two sides there were natural boundaries, one a branch and the other a field, and the other boundaries had been bushed out. . . . From my cruise I found 657,000 feet of pine, 120,000

feet of gum, and 5,000 feet of poplar, and the fair market value of such timber as of October 31, 1952, was $35 per thousand for pine, $25 for gum, and $30 for poplar. In dollars and cents the fair market value . . . or total value of $25,935.00."

Luther Hardison testified: "I have been in the business of estimating timber for 20 or 25 years and I live in Williamston. The nature of my work is estimating and buying timber. . . . I am familiar with the lands of Mrs. Roberson and I went on one tract with Mr. Edward Stewart. . . . Each of us made our own individual cruise and when we got back together we were about 20 or 25,000 feet apart. He told me I was a little low and I told him he was a little high. We split it up and made one report. We had made an estimate of both the timber standing and the timber that had been cut. The figures were: Pine 651,000 feet, gum 120,000 feet, and poplar 5,000 feet. The fair market value of that timber at the time was $45 to $50 per thousand, the gum and poplar being the same price as the pine."

Deed for the timber, dated 31 October, 1952, from the plaintiff to the defendant and recorded in Book J-5, p. 293, Martin County Registry, and the deed dated 19 December, 1952, from D. C. Williams, Jr., to Barrow Manufacturing Co., recorded in Book J-5, p. 384 of the Martin County Registry, were introduced.

The following stipulation was entered into: "Counsel stipulate and agree that the deed from Mrs. Annie L. Roberson to D. C. Williams, Jr., dated October 31, 1952, and recorded in Book J-5, p. 293, of the Martin County Registry, consideration $10,000.00, contains the same description and is the same land that appears in deed from D. C. Williams, Jr. to Barrow Manufacturing Company, dated December 19, 1952, and recorded in Book J-5, p. 384, of the Martin County Registry, consideration $19,000.00."

At the conclusion of plaintiff's testimony, defendant made a motion for judgment as of nonsuit. The motion was granted and judgment signed, from which the plaintiff appealed.

Critcher & Gurganus for plaintiff, appellant.
Lucas, Rand & Rose and Clarence W. Griffin for defendant, appellee.

HIGGINS, J. The sole question presented here is whether the evidence of actionable fraud taken in the light most favorable to the plaintiff was sufficient to go to the jury. (If the evidence was insufficient, the judgment of nonsuit should be affirmed.) If it was sufficient, the case should go back for submission to the jury.

Ordinarily, when parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honor-

ably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish. However, under certain conditions, when fraud by one party is an inducement which influences the other party to contract to his prejudice, the law does permit inquiry.

"Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated 'that fraud is better left undefined,' lest, as *Lord Hardwicke* put it, 'the craft of men should find a way of committing fraud which might escape a rule or definition.' *Furst v. Merritt,* 190 N.C. 397 (p. 404), 130 S.E. 40. However, in general terms fraud may be said to embrace 'all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, or the taking of undue or unconscientious advantage of another.' 37 C.J.S., Fraud, Section 1, p. 204." *Vail v. Vail,* 233 N.C. 109, 113, 63 S.E. 2d 202.

"It is not always necessary in order to establish actionable fraud that a false representation should be knowingly made. It is well recognized with us that under certain conditions and circumstances if a party to a bargain avers the existence of a material fact recklessly or affirms its existence positively when he is consciously ignorant whether it be true or false he must be held responsible for a falsehood. Plaintiff must establish either positive fraud or that she was deceived and thrown off her guard by false statements designedly made at the time and that such statements were reasonably relied upon by her. *Butler v. Fertilizer Works, supra* (193 N.C. 632). False assurances and statements of the other party may, of themselves, be sufficient to carry the issue to the jury when there has been nothing to arrest the attention or arouse suspicion concerning them. *Butler v. Fertilizer Works, supra; McCall v. Tanning Co.,* 152 N.C. 648, 68 S.E. 136; *Whitehurst v. Ins. Co., supra* (149 N.C. 273); *Bank v. Yelverton,* 185 N.C. 314, 117 S.E. 299." *Ward v. Heath,* 222 N.C. 470, 473, 24 S.E. 2d 5.

In this case the plaintiff, a widow, was the owner of a tract of timber that she had never seen; it was located 14 miles from her home. The defendant sought out the plaintiff for the purpose of buying the timber rights. The permissible inference is that he knew the timber and he sought out its owner for the purpose of negotiating a deal. First off, he was met with the statement that she had never seen it, had never been on the land, and did not know the amount or value and did not want to sell for that reason. At every meeting, according to the evidence, she repeated lack of knowledge sufficient to enable her to make a contract. Finally, the defendant, on 31 October, 1952, again appeared at plaintiff's home and with him a Mr. Sparrow, who had been somewhat active in

attempting to close the deal. Also with them was another man whom they did not introduce other than as a timber cruiser. He was called on by Mr. Sparrow in the presence of the defendant, and answered by saying that the timber cruised 250,000 feet, and on being questioned by the plaintiff as to whether he was sure, replied that he was. Under these circumstances the jury may infer that the defendant took with him this cruiser for the purpose of meeting plaintiff's objection to the sale on account of her lack of knowledge. It is a permissible inference that defendant expected to overcome plaintiff's objection to a sale, for he had with him $10,000 in one-hundred-dollar bills. The defendant had assured plaintiff he would pay a good price, the full value of her timber, and that $10,000 was full value. Plaintiff replied that if 250,000 feet was all there was, she would sell for $10,000. The deal was closed somewhat hurriedly, according to the evidence. The deed was prepared before plaintiff could serve her dinner. She was paid $10,000 in one-hundred-dollar bills. She executed the deed by which title passed to the defendant.

A cruise of the timber showed 776,000 feet, more than three times the amount, and according to the evidence worth from $25,935 to $38,000, or two and one-half to three and one-half times what she was told it was worth. The defendant sold his purchase in 49 days for $19,000, or 90 per cent profit. Did he pay her full value? Had his cruiser cruised, or did he fix up a story to satisfy the widow's lack of knowledge and get her property for less than half its value?

If the evidence is to be believed, the statements as to the amount and value were false. They were made under circumstances which would permit the jury to infer the purpose was to deceive. They were relied on by the plaintiff. She was induced to part with her property for less than half its value. These are some of the inferences which a jury might draw from the evidence.

It would have been wiser, of course, for the plaintiff to have had a cruise made before, rather than after the sale. But the evidence discloses that she had inquired of her brother, who had advised her that he did not know anything about the timber. It was 14 miles away. She knew nothing about it. She relied on what the defendant and his companion told her.

In *Gray v. Jenkins*, 151 N.C. 80, 65 S.E. 644, this Court said: "The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract; that there must be a reliance on the integrity of man or else trade and commerce could not prosper."

In *Machine Co. v. Bullock*, 161 N.C. 1, 76 S.E. 634, this Court said: "We are not inclined to encourage falsehood and dishonesty by protecting

one who is guilty of such fraud on the ground that his victim had faith in his word and for that reason did not pursue inquiries that would have disclosed the falsehood."

Whether fraud was committed in this case is not for us to decide. We do decide, however, that there is sufficient evidence to require its submission to the jury.

Reversed.

GEORGE W. SANDLIN AND WIFE, LULA D. SANDLIN, v. MADELINE MASHBURN TAYLOR WEAVER, INDIVIDUALLY, AND AS TRUSTEE FOR MAMIE SANDLIN MASHBURN, AND MAMIE SANDLIN MASHBURN.

(Filed 13 October, 1954.)

1. Deeds § 5—

The date recited in a deed or other writing is at least *prima facie* evidence that the instrument was executed and delivered on such date.

2. Deeds § 11—

Where plaintiffs' rights are dependent upon whether the deed and a contract executed by grantees should be construed together as parts of one transaction, and there is conflicting evidence as to whether the instruments were executed at the same time, the plaintiffs' contention will be taken as true for the purpose of determining defendants' motion to nonsuit.

3. Vendor and Purchaser § 5a—Contract executed by grantees contemporaneously with delivery of deed held to constitute option.

Where a contract executed by grantees contemporaneously with the execution and delivery of the deed gives the grantors the right to repurchase upon the payment of a stipulated sum if grantees should elect to sell at any time in their lifetimes, with further provision that upon the death of the survivor grantee, the land should become the property of grantors upon the payment of a stipulated sum to the other heir of grantees *is held* to constitute an option, giving grantors the unilateral right to purchase during the lifetimes of grantees if they or the survivor should elect to sell, and the absolute right to purchase upon the death of the survivor grantee.

4. Same—

A contract by which an owner of real property agrees with another person that the latter should have the privilege of buying the property at a specified price within a specified time, or within a reasonable time in the future, and which imposes no obligation to purchase upon the person to whom it is given, is an option, which confers a mere right to acquire the property by exercising the option, but conveys neither ownership nor any interest in the property itself.

5. Same—

The fact that a contract describes the rights created thereunder as an option is not conclusive, but is a circumstance bearing upon the intent of the parties.

6. Same—

Where an option does not specify the time within which the right to buy may be exercised, such right must be exercised within a reasonable time.

7. Same—

Plaintiff grantors were given the absolute right to exercise their option to repurchase the land upon the death of the survivor grantee. *Held:* An attempt by plaintiffs to exercise the option more than 11 years after their rights became absolute is too late.

8. Wills § 44—

The beneficiary and executor of a will by accepting real and personal property devised and bequeathed to him by the will is estopped from asserting any interest in lands which the testatrix devises to a third person.

9. Limitation of Actions § 9—

If a trustee devises the trust property in fee simple, free from and contradictory to the terms of the trust, such devise is a repudiation or disavowal of the trust, and starts the running of the Statute of Limitations against the *cestui* who has actual knowledge thereof and constructive notice thereof by the probate of the will.

APPEAL by plaintiffs from *Dan K. Moore, J.*, February Term, 1954, of MCDOWELL.

Action for specific performance of contract to convey realty.

George W. Sandlin, plaintiff, and Mamie Sandlin Mashburn, defendant, are the children of J. C. Sandlin and wife, Susie Sandlin, now deceased.

George W. Sandlin owned a corner lot in the Town of Old Fort, fronting fifty feet on the north side of Main Street and extending at that width one hundred feet along the west side of Church Street. His parents owned a lot of like dimensions immediately to the west of the George W. Sandlin lot. Together, the property fronted 100 feet on Main and 100 feet on Church Street.

By deed dated 28 May, 1923, G. W. Sandlin and wife, Lula Sandlin, conveyed their said corner lot (50′ x 100′) to J. C. Sandlin and Susie Sandlin. This deed, containing the usual provisions of a fee simple warranty deed, was acknowledged 16 June, 1923, filed for registration 2 July, 1923, and duly recorded.

A contract, executed by J. C. Sandlin and Susie Sandlin, was acknowledged 5 December, 1923, filed for registration 26 December, 1923, and duly recorded. The contract is set out in full below.

"STATE OF NORTH CAROLINA
MCDOWELL COUNTY.

"For the sum of One Dollar to them in hand paid the receipt of which is hereby acknowledged J. C. Sandlin and his wife, Susie Sandlin, and

their heirs being mutually bound, and enter into the following contract, with G. W. Sandlin, and his wife, Lula Sandlin, and their heirs as follows: That the said J. C. Sandlin and his wife, Susie Sandlin, agree to the following conditions and covenant that the two lots on Main Street on which is built a brick dwelling, bounded as follows, on South by Main Street and East by Church St., on North by Betty Hamilton property and on West by Dr. Johnson property, the aforesaid two lots being one hundred feet square, shall be held at the option of G. W. Sandlin and Lula Sandlin and their heirs, if ever sold, and the sum to be paid for aforesaid property by G. W. Sandlin, Lula Sandlin and their heirs shall not exceed five thousand dollars, if sold in lifetime of either J. C. Sandlin or Susie Sandlin, and after the death of aforesaid J. C. Sandlin and Susie Sandlin, the aforesaid House and two lots shall become the property of G. W. Sandlin and Lula Sandlin and their heirs upon payment of a sum not to exceed twenty-five hundred dollars to Mayme Mashburn or her legal heirs, and the said Mayme Mashburn, her heirs shall be bound by this agreement, without recourse.

"This contract is made and entered upon in good faith for the reason that the said G. W. Sandlin and his wife, Lula Sandlin, for love and other valuable considerations sold to J. C. Sandlin and Susie Sandlin their one-half interest in the aforesaid property, as conveyed in deed dated May twenty-eighth, nineteen hundred and twenty-three, to the use of the aforesaid J. C. and Susie Sandlin for their use during their lifetime and it is understood that the aforesaid property shall revert back to the aforesaid G. W. Sandlin, Lula Sandlin and their heirs by paying in cash as aforesaid in this contract.

"This agreement and contract made and entered into May 28th, 1923."

J. C. Sandlin died 10 June, 1930. Susie Sandlin died 30 July, 1942, testate. Her Last Will and Testament bears date of 8 April, 1941, and was duly probated 3 October, 1942. In Item IX she devised five parcels of land to George W. Sandlin, plaintiff, and "a one-half undivided interest in and to all of the remainder and residue of my property, real, personal and mixed of whatsoever character, nature or kind, and wheresoever the same may be located at my death; subject, however, to the provisions of Item 10 of this will, as hereinafter set out." In Item X she devised to Madeline Mashburn Taylor, as trustee for her mother, Mamie Sandlin Mashburn, certain described real property, including "(b) That certain lot on the corner of Main Street and Church Street in the Town of Old Fort, North Carolina, on which is located my brick residence," and "a one-half undivided interest in all of the remainder and residue of my property, real, personal and mixed, of whatsoever character, nature or kind and wheresoever the same may be located at my death." George W. Sandlin, plaintiff, was named Executor of the Will.

It was stipulated that the property on which was located the brick residence, described in Item X (b) as set out above, was the property (100′ x 100′) located at the northwest corner of Main and Church Streets.

Plaintiffs alleged that defendants were renting the said property for a rental in excess of $50.00 per month.

It was stipulated that on 16 October, 1953, plaintiffs tendered to defendants the sum of $2,500.00 and demanded that defendants execute and deliver to them a fee simple deed for said property and that defendants rejected the tender and refused to comply with such demand.

After offering deeds and the contract of 28 May, 1923, the record shows: "Counsel for plaintiffs then offered in evidence, for the limited purpose of showing title to the lands in controversy in the defendants, subject to the Contract recorded in Deed Book 65, at page 337, the Last Will and Testament of Susie Sandlin, dated April 8th 1941, duly probated on October 3, 1942, . . ." The reference is to the contract of 28 May, 1923.

Plaintiffs allege that they are ready, able and willing to pay the $2,500.00. The prayer for relief is that plaintiffs be declared the owners of the property, free and clear of any claim or demand of the defendants, except the claim of $2,500.00, that a writ of possession issue, and that defendants be required to account to the plaintiffs for all rentals collected from said property from and after 16 October, 1953, together with interest on the same.

The evidence consisted wholly of the documents and the stipulations. There was no testimony.

The court below signed judgment of involuntary nonsuit at the close of plaintiffs' evidence. Plaintiffs excepted and appealed.

Proctor & Dameron for plaintiffs, appellants.
Styles & Styles for defendants, appellees.

BOBBITT, J. Plaintiffs contend that the two instruments, the deed and the contract, bearing date of 28 May, 1923, were executed at the same time. Defendants contend otherwise. "The date recited in a deed or other writing is at least *prima facie* evidence that the instrument was executed and delivered on such date." Stansbury on Evidence, sec. 229; *Turlington v. Neighbors*, 222 N.C. 694, 24 S.E. 2d 648; *Fortune v. Hunt*, 149 N.C. 358, 63 S.E. 82; *Kendrick v. Dellinger*, 117 N.C. 491, 23 S.E. 438.

On motion for judgment of nonsuit, we consider and construe the two instruments together as parts of one transaction. *Lewis v. Nunn*, 180 N.C. 159, 104 S.E. 470; 12 Am. Jur., Contracts, sec. 246; 17 C.J.S., Contracts, sec. 298.

In the transaction of 28 May, 1923, it was the intent of the parties for plaintiffs to have the option to purchase the property at $5,000.00 from J. C. Sandlin and Susie Sandlin if they desired to sell in their lifetime or in the lifetime of the survivor. It is noteworthy that the right to purchase during this period was not absolute but exercisable only if J. C. Sandlin and Susie Sandlin, or the survivor, desired to sell. According to the contract, their right to purchase became absolute upon the death of J. C. Sandlin and Susie Sandlin.

It is stated in 55 Am. Jur., Vendor and Purchaser, sec. 27: "An option to purchase real property may be defined as a contract by which an owner of real property agrees with another person that the latter shall have the privilege of buying the property at a specified price within a specified time, or within a reasonable time in the future, and which imposes no obligation to purchase upon the person to whom it is given. Until the holder or owner of an option for the purchase of property exercises it, he has nothing but a mere right to acquire an interest, and has neither the ownership of nor any interest in the property itself."

Rights of plaintiffs under the contract constitute option rights. The contract is unilateral. Plaintiffs are not legally bound to purchase the property from anybody at any price at any time. The contract itself describes plaintiffs' rights as an option. While this is not conclusive, it is a circumstance bearing upon the intent of the parties. *Lewis v. Nunn, supra.*

Treated as an option, plaintiffs' rights as against defendants accrued upon the death of Susie Sandlin. No election to exercise their option was made until their tender of $2,500.00 on 16 October, 1953, more than eleven years after their rights accrued. "No time being specified within which the right to buy may be exercised, that it must be exercised within a reasonable time is not subject to controversy." *Ritter v. Chandler,* 214 N.C. 703, 200 S.E. 398. Considered in the light most favorable to plaintiffs, they had to exercise their option rights within a reasonable time. We agree with the court below. Plaintiffs waited too long. Nothing was done within a reasonable time from the death of J. C. Sandlin and Susie Sandlin to exercise their option rights. *Ritter v. Chandler, supra; Francis v. Love,* 56 N.C. 321.

We have considered the case upon the assumption that the plaintiffs' option to purchase was valid. Attention is directed to the fact that the plaintiffs' option rights run in favor of plaintiffs, *and their heirs,* and purport to be binding upon J. C. Sandlin and Susie Sandlin, *and their heirs.* We need not now decide whether the contract itself was void as being an unreasonable restraint upon alienation. Anno., "Option to purchase as violation of rule against perpetuities or rule forbidding restraints on alienation." 162 A.L.R. 581 *et seq.*

Apparently, on 28 May, 1923, the parties had it in mind that J. C. Sandlin and Susie Sandlin would die intestate; and that in such case George W. Sandlin would inherit an undivided one-half interest in the property and would acquire the right to purchase at $2,500.00 the undivided one-half interest inherited by Mamie Mashburn. The fact that $2,500.00 (rather than $5,000.00) was to be paid to Mamie Mashburn, or her legal heirs, suggests that it was contemplated that she, upon the death of her parents, would own an undivided one-half interest. If this was the original intent, subsequent events indicate a radical departure therefrom. Presumably, J. C. Sandlin died intestate. Susie Sandlin died testate, devising this property in fee simple to or for the benefit of Mamie Mashburn. Other property was devised to George W. Sandlin. He was named as executor. Defendants went into possession of this property and have continued in possession thereof. If George W. Sandlin qualified as executor and accepted real and personal property of Susie Sandlin devised and bequeathed to him by her will, it would seem that he is estopped to assert any interest in property devised by Susie Sandlin in fee simple to Mamie Mashburn. As stated by *Denny, J.*, in *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183:

"The doctrine of election is based upon the principle that a devisee or donee cannot take benefits under a will and reject its adverse provisions. *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29. The beneficiary under a will is not required to elect unless two benefits are presented which are inconsistent with each other. And when the beneficiary chooses to accept one of them such choice is tantamount to a rejection of the other. He will not be permitted to take under the will and against it. And where the devisor purports to devise property which belongs to the beneficiary, giving it to another, and also devises property of his own to the beneficiary, such beneficiary must make a choice between retaining his own property, which has been given to another, or take the property which has been given him under the terms of the will. By electing to take the gift from devisor's estate, he is estopped from claiming his own property. *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162; 57 Am. Jur. 1060; 69 C.J. 1089."

Plaintiffs contend that the contract of 28 May, 1923, created a trust; that J. C. Sandlin and Susie Sandlin, during their lifetime, and defendants, after the death of the parents, were trustees for plaintiffs; and that there was no repudiation or disavowal of the trust until 16 October, 1953, when they rejected plaintiffs' tender of $2,500.00 and refused to convey the property to plaintiffs. While we cannot accept the interpretation that the contract created a trust, if this were true plaintiffs' action would be barred by the pleaded statutes of limitation. For if Susie Sandlin were a trustee, she repudiated and disavowed such trust unequivocally when

she devised the property in fee simple to or for the benefit of Mamie Mashburn; and it must be presumed, nothing else appearing, that defendants, who derive their title through the Will, took possession and have continued possession according to their rights as defined in the Will, that is, as owners in fee simple. When a trustee by devise disposes of trust property in fee simple, free from and in contradiction of the terms of the trust, this is a repudiation or disavowal of the trust. *Pownall v. Connell,* 155 Kan. 128, 122 P. 2d 730; *Bend v. Marsh,* 145 Neb. 780, 18 N.W. 2d 106; *Lassiter v. Bouche,* Tex. Civ. App., 5 S.W. 2d 831. The probate of the Will gave constructive notice of its provisions. *Bend v. Marsh, supra.* In appellants' brief, it is stated: "There is nothing in the record to show that the estate was finally settled and when the executor, the plaintiff, George W. Sandlin, filed his Final Report." Apparently, there is no question but that plaintiffs had actual as well as constructive notice of the provisions of the Will of Susie Sandlin. Indeed, the only inference to be drawn is that George W. Sandlin, the executor, offered it for probate. The result is that plaintiffs' action, if treated as an action for breach of trust, is barred by the statutes of limitation. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83; *Jarrett v. Green,* 230 N.C. 104, 52 S.E. 2d 223; G.S. 1-52; G.S. 1-56.

For the reasons stated, the judgment of the lower court is

Affirmed.

ANNIE CLARK v. JOHNNIE BUTTS AND MARY TRAFTON BUTTS.

(Filed 13 October, 1954.)

1. **Wills § 4—**

A written contract to devise a life estate in described lands in consideration of personal services to be rendered is specifically enforceable in a court of equity by the declaration of a trust in favor of the party performing the personal services in accordance with the agreement and in reliance thereon.

2. **Same—Evidence held sufficient to be submitted to the jury in action to enforce contract to devise.**

Evidence establishing that the owner of realty executed a written contract to devise plaintiff a life estate therein if plaintiff would stay with and look after him in his last days should he become disabled, together with evidence that plaintiff registered the agreement and, in reliance on the contract, performed the personal services contemplated for a period of two years, that plaintiff having nursed him to a state of health where he could get around by himself, the owner left plaintiff in his home and went to visit relatives in another state, and that the owner thereafter deeded the property to such relatives and later died, without having been again disabled, *is held* sufficient to overrule the grantees' motion to nonsuit in

plaintiff's action to recover possession of the land under her claim of a life estate.

3. **Contracts § 1—**

Persons *sui juris* have a right to make any contract not contrary to law or public policy.

4. **Frauds, Statute of, § 9—**

A written contract to devise realty in consideration of personal services to be rendered, which agreement is signed by the person to be charged, does not come within the ban of the statute of frauds. G.S. 22-2.

5. **Registration § 3—**

A contract to devise realty in consideration of services to be rendered, which contract is proven, probated, and registered in conformity with statute, G.S. 47-12, 47-17, 47-18, and 47-37, takes precedence over a subsequently executed deed to third persons.

6. **Limitation of Actions § 6d—**

A cause of action for breach of written contract to convey certain lands to plaintiff for life, if she should survive the obligor, arises upon the prior death of the obligor without devising the property in accordance with the agreement, and not upon the obligor's execution of deed to third persons subsequent to the execution and registration of the contract to devise.

APPEAL by defendants from *Carr, J.*, at March Term, 1954, of CAMDEN.

Civil action begun 27 January, 1949, to recover possession of a certain lot of land in Camden County, North Carolina, in which plaintiff claims a life estate.

Plaintiff alleges in her complaint and upon the trial in Superior Court offered evidence tending to show:

1. That on 21 April, 1942, plaintiff and one J. P. Askew (also referred to herein as Jonas P. Askew) entered into a contract in words and figures, as follows:

"NORTH CAROLINA
CAMDEN COUNTY

"It is agreed this day by J. P. Askew and Annie Clark that if the said Annie Clark will stay with me and look after me in my last days should I become disabled, I agree to leave to her, should she be the longest liver during her natural life, the house and lot in which I live, and at her death to go to my heirs as provided hereafter.

"Witness my hand this twenty-first day of April, 1942.

J. P. × ASKEW (SEAL)
his mark

ANNIE × CLARK (SEAL)
her mark

"Witness:
S. B. SEYMOUR."

2. That the execution of this instrument was proven before Clerk of Superior Court of Camden County, N. C., on 15 June, 1942, by the oath and examination of S. B. Seymour, the subscribing witness thereto, and the Clerk ordered that the same, with the certificate, be registered, and it was duly recorded in the office of the Register of Deeds of Camden County in Deed Book 25 at page 33 on 16 June, 1942.

3. That at the time of the execution of the contract above described J. P. Askew was disabled by illness, confined to his bed, and in a very weakened condition; that plaintiff, in reliance upon the contract, went to his home, where she rendered services for a period of two years; that the services consisted of house work, cooking, washing, taking care of the premises, and rendering personal services to him while he was in sickness and incapable of caring for himself.

4. That after two years the said J. P. Askew, having been nursed by the plaintiff into a state of health so that he could get around by himself, left his home and went into Virginia to visit with relatives, leaving the plaintiff in the house where he had lived; and she continued to live there until the house was burned.

5. That on 14 May, 1945, J. P. Askew, by deed, purported to convey to Johnnie Butts and wife, Mary Trafton Butts, the defendants herein, the property mentioned in said contract, which deed was probated 19 May, 1945, and recorded in Deed Book 26 at page 429 of Camden County Public Registry. (It being stipulated between counsel for plaintiff and defendant that the tract of land described in the deed just referred to is the same property upon which Jonas Askew was living on the 21st day of April, 1942, which is referred to in the contract between Clark and Askew.)

6. That Johnnie Butts and wife, Mary Trafton Butts, at the time of the purported conveyance by Jonas P. Askew to them, had full knowledge and formal notice of the agreement by the said Jonas Askew to leave the aforementioned property to Annie Clark.

7. That Jonas P. Askew died 7 January, 1949, without having devised the said property to Annie Clark for life.

8. That at all times after the said Jonas P. Askew left his home as aforesaid, plaintiff was ready, able and willing to perform any service that he might require; that he was never disabled again, but was in good health until he died; and that plaintiff has complied with all conditions precedent in the contract.

Thereupon plaintiff prays judgment that she be declared the owner of a life estate in the said property of Jonas P. Askew, and be put in possession, for costs, and for such other and further relief as to the court may seem just, right and proper.

Defendants, answering, admit the record of the alleged contract between plaintiff and Jonas P. Askew, that Jonas P. Askew left his home in Camden County and visited relatives in Virginia; and that on 14 May, 1945, Jonas P. Askew executed to them a deed conveying the property on which they now reside; and that Jonas P. Askew died 7 January, 1949, without having devised said property to plaintiff for life.

And for a further defense defendants aver: (1) "That if there was a contract entered into between the said Jonas P. Askew and Annie Clark affecting any of the property belonging to the said Jonas P. Askew, deceased, said contract was breached by the said Annie Clark or by the said Jonas P. Askew, either or both; and that if, by reason of the breach of contract by Annie Clark and-or Jonas P. Askew, the said Annie Clark is entitled to any relief or damages for such breach, then such damage growing out of the breach of the agreement between the said Annie Clark and Jonas P. Askew is entitled to be paid from the estate of Jonas P. Askew"; and

(2) "that there has never existed between plaintiff and defendants a contractual relationship entitling the plaintiff to any recovery of the defendants, nor has she alleged in the complaint any relationship of any kind entitling her to any claim upon the defendants growing out of any contract, tort or otherwise."

Thereupon defendants pray that plaintiff take nothing by her action, etc.

Upon the trial plaintiff, as hereinabove stated, offered evidence tending to support the allegations of her complaint.

Motion of defendants, entered at conclusion of plaintiff's evidence, for judgment as of nonsuit was denied. Defendants excepted. Exception No. 1.

Thereupon defendant John Butts gave testimony tending in the main to controvert evidence offered by plaintiff in respect to the care and attention she gave to Jonas P. Askew. And he testified: "I knew about the contract that Annie Clark had with Jonas Askew before I bought the land. I had heard of it. It was mentioned in my deed. Annie Clark was living in the house when I bought it. I knew that Annie Clark had lived with Jonas and had looked after him for a short while. I knew that Annie Clark was living in the house when I bought it and she stayed there until the house burned down. I didn't try to get her out . . . After he (Askew) came back from Virginia I didn't ask her to go up there and look after him because it wasn't my affair . . . I didn't get Annie Clark to come down there because Jonas Askew always said he didn't want her. I never let Annie Clark know he needed her because I didn't have anything to do with it. That was his business."

Defendants' motion for judgment as of nonsuit renewed at the conclusion of all the evidence was denied. Defendants excepted. Exception No. 2.

The case was submitted to the jury upon these issues which were answered by the jury as indicated:

"1. Did the plaintiff, Annie Clark, enter into a written contract with J. P. Askew, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, Annie Clark, perform all her obligations under the terms of said contract, as alleged in the complaint? Answer: Yes.

"3. Did the said J. P. Askew breach the terms of said contract by conveying the land described in the complaint to the defendants, Johnnie Butts and Mary Trafton Butts, and by failing to convey or devise a life estate in the land to plaintiff, as alleged in the complaint? Answer: Yes.

"4. Did the defendants, Johnnie Butts and Mary Trafton Butts, have notice of the written contract between plaintiff and J. P. Askew referred to in the complaint at the time said land was conveyed to them by J. P. Askew? Answer: Yes."

The court entered judgment on the verdict, adjudging "that the plaintiff is the owner of a life estate and entitled to the immediate possession of the land referred to in the complaint and described in a deed from Jonas P. Askew to the defendants herein, dated May 14, 1945, and recorded in Deed Book 26, page 429, of Camden County," and that defendants pay the costs, etc.

Defendants except thereto and appeal to Supreme Court and assign error.

M. B. Simpson, Jr., for plaintiff, appellee.
J. W. Jennette for defendants, appellants.

WINBORNE, J. The assignments of error, determinative of this appeal, as brought forward and discussed together in brief of attorney for defendants appellants, are based upon exceptions Numbers 1 and 2 to denial of their motions for judgment as of nonsuit aptly made, and upon exception Number 6 to the refusal of the court to give peremptory instruction for negative answer to third issue.

In this connection, taking the evidence offered upon trial in Superior Court in the light most favorable to plaintiff, and giving to her the benefit of every reasonable intendment thereon, and every reasonable inference to be drawn therefrom, there appears to be sufficient evidence, in the light of applicable principles of law, to support the verdict of the jury upon each and all of the issues submitted, and decisions of this Court support the judgment on the verdict.

The principle of law enunciated in *East v. Dolihite,* 72 N.C. 562, by *Rodman, J.,* that "No doubt a person may make a binding contract to devise his lands in a particular way, and a court of equity in a proper case will enforce in effect a specific performance of the contract" has been repeated and applied by this Court in numerous cases. See *Price v. Price,* 133 N.C. 494, 45 S.E. 855; *Stockard v. Warren,* 175 N.C. 283, 95 S.E. 579; *Grantham v. Grantham,* 205 N.C. 363, 171 S.E. 331; *Chambers v. Byers,* 214 N.C. 373, 199 S.E. 398; *Bohannon v. Trotman,* 214 N.C. 706, 200 S.E. 852.

In *Stockard v. Warren, supra, Clark, C. J.,* writing for the Court reiterates the above quotation from the *East case* and continues with this quoted language: " 'It is settled by a line of authorities which are practically uniform, that while a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement to make a will cannot be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent, and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will.' *Naylor v. Shelton,* Am. Ann. Cases, 1914, A. 394."

And in *Chambers v. Byers, supra,* in opinion by *Clarkson, J.,* it is declared: "Persons *sui juris* have a right to contract if it is not contrary to law or public policy." There as here the agreement was in writing and did not come within the ban of the statute of frauds. C.S. 988, now G.S. 22-2.

Indeed, the contract here involved is "in writing and signed by the party to be charged therewith," and it is proven, probated and registered, all in conformity with statutory requirements. G.S. 47-1, 47-12, 47-17, 47-18 and 47-37. And a contract to convey land for more than three years, so proven, probated and registered, is valid to pass the land, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, from the registration thereof within the county where the land lies. G.S. 47-18. The object of such registration is to give notice to creditors and purchasers for value, or others whose rights might otherwise be seriously and unjustly impaired by the deed. See *Bonding Co. v. Knox,* 220 N.C. 725, 18 S.E. 2d 436, 138 A.L.R. 1438.

Under this Section G.S. 47-18, a grantee in a deed acquires title to the land there conveyed as against subsequent purchasers for value from the date of the registration of the instrument. *Sills v. Ford,* 171 N.C. 733, 88 S.E. 636. And among two or more contracts to sell land, the first one registered will confer the superior right.

The contract in the case in hand was registered nearly three years before the deed from Askew to defendants was executed. The registration of it was constructive notice to them. And admittedly they had actual notice of it. So whatever rights they acquired by the deed from Askew to them were subservient to the rights of the plaintiff under her prior registered contract, which was binding on Askew. Therefore Askew could convey to defendants no greater right than he had.

Defendants contend, however, that if Askew breached the contract with plaintiff he did so at the time he made the deed to them, and that she has delayed too long in bringing this action. The position, in any event, is not tenable. Askew agreed to leave the land to her "should she be the longest liver." Therefore her right of action did not accrue until the date of his death. And she brought suit within six months thereafter.

Defendants, as disclosed by the record on this appeal, make other assignments of error but these are not brought up and discussed in their brief. Hence they are deemed to be abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 544, at pages 562-3.

For reasons stated, in the judgment below we find

No error.

LELAND ROBERT HARRIS, EMPLOYEE, v. ASHEVILLE CONTRACTING COMPANY, EMPLOYER; TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 13 October, 1954.)

1. Master and Servant § 40c—

Evidence tending to show that an employee, while carrying a heavy board in the course of his employment, slipped and fell, wrenching his back, together with expert testimony that the employee had a permanent partial disability of a general nature resulting from the injury to his back, *is held* sufficient to support the Commission's finding that the employee had suffered injury to his back from an accident which arose out of and in the course of his employment.

2. Master and Servant § 53b (1)—

While the employer's report of an accident to the Industrial Commission does not constitute a claim for compensation, a statement therein as to the employee's average weekly wage is competent upon the hearing after the filing of claim.

3. Same—Under facts of this case employer was not prejudiced by finding of average weekly wage in amount fixed by contract at time of injury.

Where the employer does not contend that plaintiff's employment was casual and offers no evidence as to the amount of wages earned by others engaged in similar employment in that community during the 52 weeks previous to plaintiff's injury, the employer may not object that the Com-

mission, in view of the fact that the employee had worked for the employer less than 40 hours at the time of his injury, fixed the employee's average weekly wage in accordance with the compensation under the contract of employment at the time of the injury, G.S. 97-2 (e), there being evidence that the employee had theretofore earned wages in excess of this sum for appreciable periods in other employments of like nature.

4. Master and Servant § 53c—

Where the Industrial Commission finds upon supporting evidence that plaintiff had suffered permanent partial disability, and awards compensation therefor, the Commission has no jurisdiction to retain the cause for 300 weeks from the date of injury to make adjustments for future fluctuations in claimants ability to work and earn wages during that period, except in unusual circumstances, since the parties have the right under G.S. 97-47 to apply to the Commission for review of the award upon changed conditions on request filed within the time prescribed by the statute.

5. Master and Servant § 55d—

On appeal from the Industrial Commission, the Superior Court deleted an erroneous conclusion of the Commission that it should retain the cause for 300 weeks, but otherwise affirmed the findings of fact of the Commission and its award thereon, without adding to, modifying, or changing any of the findings. *Held:* The action of the Superior Court in deleting, *ex mero motu*, the erroneous conclusion of law appearing on the face of the record does not support the contention that it exceeded its jurisdiction by modifying the award.

APPEAL by plaintiff and defendants from *Martin, Special Judge,* June Term, 1954, of BUNCOMBE.

Proceeding under Workmen's Compensation Act to determine liability of the defendants to the plaintiff employee.

In addition to the jurisdictional determination, the essential findings of the Industrial Commission follow:

1. That on and prior to 14 October, 1949, plaintiff was regularly employed by the defendant employer at an average weekly wage of $53.12, this being the amount indicated on I.C. Form 19 filed in this case by the defendant employer.

2. That on 14 October, 1949, plaintiff was carrying one end of a heavy green oak board while about his employer's business and fell when his feet slipped, wrenching and straining his back; that he sustained an injury by accident arising out of and in the course of his employment.

3. That plaintiff was temporarily totally disabled on account of his injury from 14 October, 1949, until 1 December, 1949, and from 15 July, 1950, until 15 September, 1950.

4. That plaintiff drove a school bus from 1 January, 1950, until 1 June, 1950, and from 15 September, 1950, until 1 June, 1951, and was able to earn $36.50 per month, or $9.13 per week; that during this period

he supplemented his wages approximately $1.00 per week by doing sedentary work at a poolroom, so that the total weekly wages he was able to earn during the above period were $10.13 in the same or any other employment; that he suffered a wage loss during said period of $42.99 per week and is entitled to compensation as for temporary partial disability at the rate of $24.00 per week for said period. That from 1 June, 1950, to 15 July, 1950, plaintiff did light work at a drink and refreshment stand at the Carolina Hemlock Camp and during said period was able to earn on an average of only $12.00 per week; that said sum was all plaintiff was able to earn in the same or any other employment during said period; that his average weekly wage loss for that period was $41.12, and for such temporary partial disability he is entitled to compensation at the rate of $24.00 per week.

5. That plaintiff reached his maximum improvement on or about 1 January, 1950, and now has a fifteen per cent impairment of function and loss of use of his back on account of his injury; that he did resume light work suitable to his impaired physical condition on 1 January, 1950; that no work of any kind has been tendered to him by defendant employer so that it became necessary for him to seek such employment as he could find and do; that his impairment of function and loss of use of the back has resulted in a permanent partial incapacity to work and is responsible for the wage losses plaintiff has sustained and was sustaining on the date of the hearing.

Upon the above findings the Commission awarded compensation and ordered that the cause be retained for three hundred weeks from the date of the injury for such future adjustments as may be necessary by reason of any fluctuations in claimant's ability to work and earn wages during said period.

The defendants appealed to the Superior Court and filed numerous exceptions to the Commission's findings of fact and conclusions of law. The court below held that the Commission's findings of fact were supported by competent evidence and that the conclusions of law and the award based thereon dated 6 January, 1953, to which exceptions had been entered, should be affirmed and overruled all the defendants' exceptions and assignments of error. However, his Honor, *ex mero motu*, modified the order of the Commission by striking therefrom that portion which purported to retain jurisdiction of the cause for three hundred weeks, but in all other respects affirmed the findings of fact, conclusions of law, and the award of the Commission. Plaintiff and defendants appeal, assigning error.

Bill Atkins and Charles Hutchins for plaintiff.
Uzzell & DuMont for defendants.

DENNY, J. The defendants challenge the correctness of the ruling of the lower court in overruling their exception to the Commission's finding of fact that the plaintiff had suffered injuries to his back from an accident which arose out of and in the course of his employment.

The exception is without merit. The finding is supported by competent evidence. Moreover, the physician who was a witness for the defendants and who had examined the plaintiff and made a medical report on his condition to the Commission, testified that the plaintiff had fifteen per cent permanent disability of a general nature resulting from the injury to his back.

The defendants also except to and assign as error the overruling of their exception to the finding of fact by the Commission that the plaintiff's average weekly wage was $53.12.

It is true, according to the record, the plaintiff had worked less than forty hours for the defendant employer at the time of his injury. Nevertheless, the plaintiff testified that he had worked for contractors driving a truck, operating a caterpillar tractor, or shovel, prior to accepting the job with the defendant employer, and had received $1.25 per hour for eight hours per day and time and a half for overtime; that he was employed by the defendant employer to work ten hours a day for five and one-half days per week at 85c per hour and time and a half for all over forty hours. That he was promised $1.10 an hour when he became an operator (presumably of a truck, tractor or steam shovel). Furthermore, the defendant employer in making its report of the accident to the Commission, certified that the plaintiff's wages were 85c an hour, $8.50 a day; that the number of days worked per week were five and one-half; and that his average weekly wages, including overtime, were $53.12. This report was introduced in evidence without objection.

While we have held that reporting an accident to the Industrial Commission, as required by law, does not constitute a claim for compensation, *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E. 2d 109, we know of no reason why the information contained in such report, with respect to wages paid by the employer, should not be admitted as evidence when a claim for compensation is filed and a hearing is held pursuant thereto.

It is provided in G.S. 97-2 (e): "Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which

during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community. But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

The defendants, in the hearing before the hearing commissioner, did not challenge the accuracy of the plaintiff's evidence with respect to his wages, or the correctness of the defendant employer's report as to his average weekly wages. Neither is there any suggestion that the employment of the plaintiff was of a casual nature. However, they contend the Commission did not take into consideration the average weekly amount which, during the fifty-two weeks previous to the injury, was being earned by a person of the grade and character, employed in the same class of employment, in the same locality or community. We think the contention is without merit. The defendants offered no evidence bearing on the wages of the plaintiff at the time of his injury, or as to what others had earned during the fifty-two weeks previous to plaintiff's injury who were engaged in similar employment in that community. Therefore, it would seem that the contract existing between the parties with respect to plaintiff's compensation, at the time of his injury, would most nearly approximate the amount which he would be earning had he not been injured. G.S. 97-2 (e). There is nothing in the record to indicate that the finding of the Commission, with respect to the wages of the plaintiff, is not fair and just to both parties. The exception is overruled.

The defendants' exceptions Nos. 22 and 24, upon which they base their assignments of error so numbered, are (1) to the striking out of the award that portion which provided for the retention of jurisdiction of the cause for three hundred weeks; and (2) that the modification of the award should not prejudice the plaintiff or the defendants with respect to their rights under G.S. 97-47.

The modification of the award made by the court below was proper. The Industrial Commission is without jurisdiction to retain this cause for three hundred weeks. In the case of *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865, the employer retained the injured employee and gave him light work and paid him the same wages he had earned previous to his injury. No such arrangement exists in the present case.

In the *Branham case*, this Court, speaking through *Barnhill, J.*, now *Chief Justice*, in approving the retention of jurisdiction by the Commission for three hundred weeks, gave the reason therefor in the following language: "To protect the employee against the possibility that the employer might, after the expiration of 12 months, sec. 24 (now codified as

G.S. 97-24), discontinue employment and thus defeat the rights of the employee . . ." *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438.

The parties to this appeal are expressly authorized by statute, G.S. 97-47, to apply to the Commission to review the award made in this proceeding, if there is a change in the condition of the plaintiff; provided, the request for such review is made within the time prescribed by the statute. *Murray v. Nebel Knitting Co.*, 214 N.C. 437, 199 S.E. 609; *Knight v. Ford Body Co.*, 214 N.C. 7, 197 S.E. 563; *Smith v. Swift & Co.*, 212 N.C. 608, 194 S.E. 106.

We have carefully examined the remaining exceptions and assignments of error of the defendants and no prejudicial error is made to appear.

PLAINTIFF'S APPEAL.

Plaintiff's assignment of error No. 1 is based on an exception to the modification of the award. We have discussed and disposed of that question on the defendants' appeal.

Plaintiff also assigns as error in that "the trial court undertook to, in his judgment, materially to change the findings of fact, award and opinion of the North Carolina Industrial Commission without authority of law."

The trial judge affirmed each and every finding of fact and conclusion of law to which the defendants entered an exception on their appeal to the Superior Court. He likewise affirmed the award made by the Commission in every respect except as to the retention of jurisdiction for three hundred weeks. He found no facts, neither did he undertake to alter or modify any of the Commission's findings. He simply corrected an erroneous conclusion of law that appeared on the face of the record and which neither the plaintiff nor the defendants had challenged. This assignment of error is overruled.

The judgment of the court below as to both appeals will be upheld.

On defendants' appeal—Affirmed.

On plaintiff's appeal—Affirmed.

JAMES MALLIE BARNES, ADMINISTRATOR OF THE ESTATE OF JAMES ARNOLD BARNES, DECEASED, v. NELSON E. CAULBOURNE.

(Filed 13 October, 1954.)

1. **Pleadings § 24—**

A plaintiff must make out his case *secundum allegata.*

2. **Trial § 31a—**

The failure to charge the law on the substantive features of the case arising upon the evidence is prejudicial error notwithstanding the absence of request for special instructions.

3. **Trial § 32—**

When the charge is in substantial compliance with the requirements of G.S. 1-180, a party desiring further elaboration or explanation must tender specific prayers for instructions.

4. **Negligence § 1—**

The elements of negligence are, first a legal duty, which varies according to the subject matter and the relationships, and second, the failure to exercise due care in the performance of such duty, which always means the care an ordinarily prudent person would exercise under the same or similar circumstances when charged with like duty.

5. **Automobiles § 17—**

When a motorist observes or should observe children on, near or approaching a highway, he is under the duty to exercise greater vigilance and caution because of their immaturity and impulsive nature, which is the care an ordinarily prudent person would exercise when confronted with the dangers inherent in such circumstances. The court's charge on this aspect of the case *is held* without error.

6. **Automobiles §§ 8j, 18i—**

The evidence disclosed that defendant was driving a truck-trailer following an automobile at an intersection of highways controlled by electrical traffic signals, that as defendant approached the intersection the signal facing him turned green, that he continued in low gear at a slow speed following the car when plaintiff's intestate, a 7-year-old boy, attempted to run across the street, after the car had passed, but directly in front of the truck. *Held:* The evidence discloses ample basis for the application of the doctrine of sudden emergency, and the court correctly charged thereon as law arising on the evidence.

7. **Automobiles § 18i—**

In this action to recover for the death of a 7-year-old boy, fatally injured when struck by defendant's truck-trailer, no issue of contributory negligence was submitted to the jury and the court charged that the jury should answer the issue of negligence in the affirmative if it found by the greater weight of the evidence that negligence on the part of the defendant was a proximate cause of the fatal injury, and that the issue should be so answered even though the jury should also find that the acts of intestate constituted one of the proximate causes thereof. *Held:* The instruction is without prejudicial error.

8. Trial § 31a—

The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that the jury was misled or misinformed in respect thereto.

9. Trial § 44—

A verdict cannot be impeached because of an opinion of a juror on a matter irrelevant to the issue and not presented by either allegation or evidence.

PARKER, J., concurs in result.

APPEAL by plaintiff from *Parker, J.*, March Term, 1954, of JOHNSTON. No error.

Civil action to recover damages on account of alleged wrongful death.

The facts, to which plaintiff relates allegations of negligence, are stated in the complaint as follows:

"4. That on or about the 13th day of February 1952, at or about nine o'clock p.m. the defendant, Nelson E. Caulbourne, was operating a motor vehicle owned and operated by the defendant, Nelson E. Caulbourne, in a northerly direction over and along U. S. Highway No. 301 in and around Kenly, North Carolina; that at the time the plaintiff's intestate, James Arnold Barnes, deceased, was standing on the easterly side of the said highway waiting to cross said highway and that at the point where the plaintiff's intestate was standing was approximately 75 feet from a stoplight and that the defendant, Nelson E. Caulbourne, slowed down and looked at the plaintiff's intestate; that the plaintiff's intestate started across the street and that the defendant ran into and over the plaintiff's intestate, resulting in almost sudden death."

The facts stated in the following numbered paragraphs are not in dispute.

1. On 13 February, 1952, about 9 p.m., plaintiff's intestate, a boy seven years old, was struck by a truck-trailer operated by defendant and died shortly thereafter as the proximate result of his injuries.

2. The fatal accident occurred in Kenly, North Carolina, near the intersection of Highway # 301 and Highway #222. At this intersection there was in operation an electric traffic signal. Highway #301 runs north and south. Highway #222 runs east and west.

3. A Sinclair service station was located on the northeast corner of the intersection. Across Highway #301 therefrom, on the northwest corner of the intersection, an Esso service station was located. The buildings and adjacent premises extended some distance north from Highway #222 and along Highway #301. At the north end of the Sinclair premises, some fifty feet or more north from Highway #222, concrete repair work,

covering a space 12 x 24 feet, was fenced off by a barricade consisting of 2 x 4's across the top of kegs. There was a strip, estimated to be from 6 to 8 feet in width between the west side of the barricade and the east edge of the hard surfaced portion of Highway #301. Highway #301, according to estimate, was 24 feet wide.

4. Plaintiff's intestate, with his parents, had been to the moving picture theatre located some 100 yards east of the intersection on Highway #222. Plaintiff (the father) left the theatre, walked (west) to the intersection, crossed to the Esso service station, and was inside the building when the fatal accident occurred. Shortly after his father had left, plaintiff's intestate left the theatre and approached the intersection on the sidewalk on the north side of Highway #222. He was struck by the bumper or grill of the truck-trailer, near the center of the highway, while attempting to cross Highway #301 from the Sinclair corner to the Esso corner.

5. Defendant was headed north on Highway #301. When he entered the intersection, the signal light facing him was green. His truck-trailer was behind a passenger car proceeding north along Highway #301. Plaintiff's intestate stopped on the east side of Highway #301, looked, waited for the car to pass, then ran onto the highway in the path of defendant's truck-trailer and was hit.

6. At all times the truck-trailer was proceeding slowly. At all times the intersection and adjacent area was well lighted and the truck-trailer was in plain view.

7. Defendant did not blow his horn or otherwise give warning of his approach. Proceeding slowly, he passed through the intersection and continued at same speed until plaintiff's intestate was struck.

Plaintiff offered evidence tending to show that plaintiff's intestate, walking along the sidewalk on the north side of Highway #222, stopped when he reached Highway #301; that the red traffic signal then faced travelers along Highway #222; that he stopped on the corner, at the edge of the highway, looked both ways, and waited for a car to pass going north; that, after the car passed, the boy "darted," or "trotted," or "ran" out behind it across the highway at an angle toward the (Esso) filling station; that when this occurred the defendant was about at the traffic signal; and that the boy was struck near the center of Highway #301, about 40 to 50 feet from where he started out from the sidewalk; and that he was not running fast enough to get across in front of the truck.

Defendant offered evidence tending to show that as he approached the intersection he slowed up, putting the truck in low third gear on account of the red signal light; that as he neared the intersection the light changed to green and that he went on through the intersection, traveling at a speed of ten to twelve miles per hour; that when he reached the traffic

signal the boy was standing on the east side of Highway #301, at the barricade, looking towards the approaching truck-trailer; that the boy was standing there when the car in front of him passed; that he gave no signal because the boy was watching him; that when the truck-trailer was 8 or 10 feet away the boy jumped out in front, running across Highway #301 directly in front of him; that he cut to the left and the grill hit the boy, near the center line of the highway; and that, after the boy suddenly ran out onto the highway he had no opportunity to blow the horn or stop the truck.

Bearing upon the defendant's duty to plaintiff's intestate, a seven-year-old boy, the court instructed the jury as follows:

"It has been frequently declared by the Supreme Court of North Carolina in decisions in a like situation, to be the duty of one operating a motor vehicle on a public street who sees, or by the exercise of due care should see, a child on the traveled portion of the street, or apparently having intention to cross, to use proper care with respect to speed and control of his vehicle, the maintenance of vigilant lookout and the giving of timely warning, to avoid injury to that child, recognizing the likelihood of the child's running across the street in obedience to childish impulses and without circumspection, and the operator is required to exercise a degree of care in keeping with the surrounding conditions and hazards, if any, and the test of liability for negligence is the departure from normal conduct of a reasonably prudent person, or the care which a reasonably prudent person, would employ under the circumstances. Now, that rule is constant; it remains there all the time, while the degree of care which a reasonably prudent person is required to exercise, varies with the surrounding conditions at the time."

Bearing upon the doctrine of sudden emergency, the court instructed the jury as follows:

"The Court instructs you that a person confronted with a sudden emergency is not held by law to the same degree of care as in ordinary circumstances, but only to that degree of care which an ordinarily prudent person would use under similar circumstances. The standard of conduct required in an emergency, as elsewhere, is that of a prudent person.

"The Court further instructs you that this principle is not available to one who by his own negligence, brought about or contributed to the emergency. That means in simple language, that a person who creates an emergency, or contributes to it, cannot take advantage of the principle.

"The Court instructs you that one who is required to act in an emergency is not held by 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."

The court overruled defendant's motions for judgment as of nonsuit; submitted to the jury the issues of negligence and damages; and, the jury having answered the negligence issue, "No," entered judgment for the defendant. Plaintiff excepted and appealed.

Wellons & Wellons and Hooks & Britt for plaintiff, appellant.
Shepard & Wood for defendant, appellee.

BOBBITT, J. It is noteworthy that the evidence upon which plaintiff relied tends to show a factual account of the tragic accident materially at variance with the allegations of the complaint; but, on plaintiff's appeal from an adverse jury verdict, we need not consider whether judgment as of nonsuit should have been entered on the ground of variance between allegation and proof. A plaintiff must make out his case *secundum allegata*. *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14, 139 A.L.R. 1147; *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470.

Plaintiff's assignments of error (1-5) challenge excerpts from the charge, not on the ground that they are incorrect as general statements of law, but on the ground that the court failed to "declare and explain the law arising on the evidence given in the case" as required by G.S. 1-180. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323, and cases cited. This failure, plaintiff contends, relates to instructions bearing upon (1) the legal duty of defendant to plaintiff's intestate, a seven-year-old child, and (2) the applicability of the doctrine of sudden emergency to the facts disclosed by the evidence in this case.

It is noted that plaintiff tendered no requests for special instructions. Even so, a failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522, and cases cited. On the other hand, when the charge is in substantial compliance with the requirements of G.S. 1-180, if a party desires further elaboration or explanation, he must tender specific prayers for instructions. *S. v. Gordon,* 224 N.C. 304, 30 S.E. 2d 43, and cases cited.

Strictly speaking, two elements compose the concept of negligence: first, legal duty, and second, a failure to exercise due care in the performance thereof. Due care always means the care an ordinarily prudent person would exercise under the same or similar circumstances and when charged with like duty. Legal duty, however, varies according to subject matter and relationships. Thus, when a motorist observes, or should observe, children on, near or approaching a highway, he is under the duty of exercising greater vigilance and caution because of their immaturity and impulsive nature, that is, care commensurate with the dangers inherent in the circumstances then existing, and an ordinarily prudent

person will use due care in relation to such duty. *Rea v. Simowitz,* 225 N.C. 575, 35 S.E. 2d 871.

The court's instructions bearing upon defendant's legal duty to plaintiff's intestate, a seven-year-old boy, are substantially in accord with the applicable rule as stated by this Court. *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129; *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331; *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343; *Rea v. Simowitz, supra; Yokeley v. Kearns,* 223 N.C. 196, 25 S.E. 2d 602.

Bearing upon the applicability of the doctrine of sudden emergency, suffice it to say that there was ample basis in the evidence for a finding that the defendant was confronted suddenly by an emergency situation, not caused in whole or in part by his own negligence. Hence, the instructions were instructions of law arising on the evidence and in accordance with the applicable rule. *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383; *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398; *Morgan v. Saunders,* 236 N.C. 162, 72 S.E. 2d 411; *Sparks v. Willis, supra; Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593, and cases cited.

There was no allegation or issue relating to contributory negligence on the part of plaintiff's intestate. The trial judge was careful to explain to the jury that the *sole* issue was whether they were satisfied from the evidence and by its greater weight that negligence on the part of the defendant was *a* proximate cause of the death of plaintiff's intestate. If so, his instruction was that the jury should answer the issue, "Yes," "even though you also find that the acts of the plaintiff's intestate, the little child, constituted also one of the proximate causes of his injury and death."

As stated by *Barnhill, J.* (now *C. J.*), in *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356: "The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that it was misled or misinformed in respect thereto." Such is the case here. There can be no doubt but that the jury understood the crucial issue to be decided. The jury was not satisfied from the evidence and by its greater weight that the tragic accident was caused in whole or in part by "a wrongful act, neglect or default" of defendant. G.S. 28-173.

The record shows that, after verdict, one of plaintiff's attorneys entered into a discussion with one of the jurors. Plaintiff undertook to offer the testimony of such juror that he had seen a trailer on the street during the progress of the trial with wheels wholly under the body thereof, upon which the trailer rested when the truck was detached, perhaps similar to wheels under defendant's trailer according to defendant's description of his equipment, and formed the impression that such wheels could not have

struck plaintiff's intestate. The trial judge declined to consider such evidence but permitted it for inclusion in the record as a basis for plaintiff's exception. Passing the question as to whether such testimony was competent to impeach the verdict, the incident is irrelevant. All the evidence tends to show plaintiff's intestate was struck by the front of the truck-trailer. Wheels under the trailer were not alleged or shown to have any causal relation to the collision.

The case was tried fairly; the jury has rendered its verdict; and we find no prejudicial error.

No error.

PARKER, J., concurs in result.

STATE OF NORTH CAROLINA ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. SKYLAND CRAFTS, INC., 402 SOUTH KING STREET, HENDERSONVILLE, N. C., EMPLOYER No. 31-45-002.

(Filed 13 October, 1954.)

1. Master and Servant § 57—

In order for an employer operating less than 20 weeks within a calendar year to be liable for unemployment compensation contributions under the provisions of G.S. 96-8 (f) (2), it is required that such new business not only buy the physical assets of a covered employer, but also that the new business succeed in some real sense to the organization, trade or business, or some part thereof, of the covered employer, ordinarily as a going concern, so that there be some continuity in the business or some part thereof of the former employing unit.

2. Same—Determination of whether new concern purchases substantially all assets of employer covered by the Employment Security Act.

Findings to the effect that a new corporation, almost 3 months after an employer covered by the Employment Security Act had ceased to do business, purchased the physical assets of the old corporation which the old corporation then had on hand, without evidence or findings as to the extent of assets of the old corporation on the date it ceased to do business or the date the new corporation purchased its specific personal property, and without findings that the new corporation purchased the accounts receivable, customer lists, good will, or trade name of the old corporation, would seem insufficient to support the conclusion that the new corporation acquired substantially all of the assets of the old within the meaning of G.S. 96-8 (f) (2), since the term "assets" ordinarily embraces all property, real and personal, tangible and intangible.

3. Same—Findings held insufficient to support conclusion that operations of new corporation were continuation of business of old corporation.

Findings that a new corporation purchased the tangible assets of an employer covered by the Employment Security Act almost 3 months after such employer ceased to do business, and that the new corporation then took over the premises where the old had operated and paid the rent due under the lease for the remainder of the term, without evidence or findings that the incorporators or persons interested in the new corporation were then or had ever been connected with or interested in the old, or that it employed persons who had worked for the old corporation in any manner other than on an individual basis, or that the new corporation purchased the accounts receivable, customer lists, good will, or trade name of the old corporation, are *held* insufficient to support judgment that the new corporation was a successor to the old so as to be liable for contributions under the Employment Security Act notwithstanding it was in business less than 20 weeks during the calendar year.

4. Master and Servant § 62—

An appeal lies from the Employment Security Commission to the Superior Court only after the Employment Security Commission has been given opportunity to pass upon exceptions filed to its original findings of fact and decision. G.S. 96-4 (m).

APPEAL by Skyland Crafts, Inc., from *Moore, J.*, May-June Term, 1954, of HENDERSON.

Proceeding under North Carolina Employment Security Law. G.S. Ch. 96.

The question for decision: Was Crafts, Inc., an "employer," and as such required to make contributions to the Unemployment Compensation Fund on wages paid its employees, during the calendar year 1952?

After due notice, there was a hearing of testimony by a deputy commissioner. The testimony then taken and transcribed was referred to the Commission. After due notice, the Commission (Chairman) heard the matter upon the transcript of evidence, made findings of fact and entered an opinion and order.

The findings of fact, of crucial significance, are set forth in full below:

"Findings of Fact:

"1. Skyland Crafts, Inc., of 402 S. King Street, Hendersonville, North Carolina, hereinafter called Crafts, Inc., is a corporation with its principal place of business located at Hendersonville, North Carolina, and is engaged in the business of manufacturing ladies' handbags from nylon materials, and on occasions has manufactured rugs. Such corporation was organized during the year 1952.

"2. Skyland Handbag Company, hereinafter referred to as the Handbag Company, was a corporation operating a place of business in Hendersonville, North Carolina, manufacturing ladies' handbags from nylon

materials, and on or about October 10, 1952 was a covered employer under the provisions of the Employment Security Law of North Carolina.

"3. That on July 15, 1952 the Handbag Company ceased operations and discontinued the manufacturing of its products. The Handbag Company had a lease on a building in Hendersonville, North Carolina, for the remainder of the year 1952, and continued to pay rent on said building until on or about October 10, 1952, at which time it transferred its lease to Crafts, Inc., and thereafter the rents were assumed and paid by Crafts, Inc. That simultaneously therewith Crafts, Inc. purchased from the Handbag Company all machines and looms then in the building acquired with the lease for a purchase price of $1,500, and in addition thereto they purchased the supply of raw nylon on hand for $8,500. The machines, looms, and nylon constituted all equipment then owned by the Handbag Company, and in addition Crafts, Inc. hired approximately forty individuals who were former employees of the Handbag Company. The Handbag Company formerly employed about eighty-two people; whereas, Crafts, Inc. used only forty-eight people in its operations, (and in addition acquired from the owners of the Handbag Company a list of accounts that the Handbag Company had previously sold bags to.)"

The Commission (Chairman) reached these conclusions of law:

1. The Handbag Company was a covered employer when it ceased operations on 15 July, 1952; and, under the Employment Security Law, G.S. 96-11 (a), continued as such during 1952.

2. Crafts, Inc., on or about 10 October, 1952, "acquired substantially all the assets of the Handbag Company in North Carolina; namely, the lease on building in which the plant was operated, its machines and tools, and raw materials then on hand"; and "became a successor to a covered employer and became an employer under the provisions of Section 96-8 (f) (2) . . . upon the acquisition of the assets, as set forth in the findings of fact above."

The Full Commission, upon consideration of exceptions filed by Crafts, Inc., struck out the last clause of finding of fact #3, enclosed within parenthesis above; and upon the remaining findings of fact adopted the original order as its final decision. G.S. 96-4 (m). Upon appeal, the court below affirmed the Commission's order and signed judgment in accordance therewith. Crafts, Inc., excepted to and appealed from such judgment.

W. D. Holoman, R. B. Overton, and D. G. Ball for plaintiff, appellee.
L. B. Prince for defendant, appellant.

BOBBITT, J. An "employer" (G.S. 96-8 (f)) is required to make "contributions" in prescribed amounts (G.S. 96-9 (b)) to the Unemploy-

ment Compensation Fund (G.S. 96-6) on "wages" (G.S. 96-8 (n)) for "employment" (G.S. 96-8 (g)) for each calendar year in which the employer is subject to the statute. G.S. 96-9 (a).

Basically, the term "employer" means "any employing unit which in each of twenty different weeks within either the current or the preceding calendar year . . . has, or had in employment, eight or more individuals . . ." G.S. 96-8 (f) (1). Crafts, Inc., was not an "employer" during the calendar year 1952 within this definition. The pivotal point here is whether, notwithstanding it engaged in business for less than twenty weeks in the calendar year 1952, it became an "employer" by reason of the provisions of G.S. 96-8 (f) (2), which, in pertinent part, gives the following definition of "employer":

"Any employing unit which acquired the organization, trade or business or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this chapter; provided, such other would have been an employer under paragraph (1) of this subsection, if such part had constituted its entire organization, trade, or business . . ."

Crafts, Inc., was incorporated in 1952. There is neither evidence nor finding of fact that any of its incorporators, or persons interested in the corporation, were then or had ever been connected with or interested in the Handbag Company. It was a new enterprise. On 10 October, 1952, it purchased from the Handbag Company physical assets, to wit, "all machines and looms *then* in the building" and "the supply of raw nylon on hand." (Italics added.) It was found as a fact that these "machines, looms, and nylon constituted all equipment *then* owned by the Handbag Company." (Italics added.)

Nearly three months earlier, to wit, on 15 July, 1952, the Handbag Company, which, during its operations at Hendersonville had some eighty-two employees, shut down. There is no finding of fact as to the extent of its physical assets on 15 July, 1952, or as to dispositions, if any, made between 15 July, 1952, and 10 October, 1952.

The transaction was one where Crafts, Inc., on 10 October, 1952, purchased *specific* personal property from the Handbag Company. Had Crafts, Inc., rented a different building and purchased similar machinery and raw materials from others, it would have no liability for contributions on wages during the closing weeks of 1952.

Crafts, Inc., when it began its operations, employed some forty individuals who had been former employees of the Handbag Company. They were not then employees of the Handbag Company but were employed elsewhere or unemployed. There is neither evidence nor finding of fact

that these persons were employed otherwise than on an individual basis. There is no suggestion that they were so employed pursuant to any sort of understanding or arrangement between the Handbag Company and Crafts, Inc. They were not "acquired" from the Handbag Company.

On 10 October, 1952, Crafts, Inc., took possession of the premises where the Handbag Company had operated. It paid the rent due under the lease for the remainder of its term, to wit, from 10 October, 1952, through 31 December, 1952. The undisputed evidence is that after 1 January, 1953, Crafts, Inc., continued in possession under a month to month rental contract.

The conclusion of law of the Commission is that on or about 10 October, 1952, Crafts, Inc., "acquired substantially all the assets of the Handbag Company in North Carolina; namely, the lease on building in which the plant was operated, its machines and tools, and raw materials then on hand." (The word "tools" does not appear in the findings of fact.) It would seem that this conclusion is not supported by the findings of fact. There is no evidence or finding of fact as to what assets the Handbag Company had on 15 July, 1952, or on 10 October, 1952. The term "assets" ordinarily comprehends all property, real and personal, tangible and intangible. But we need not undertake to define now the precise meaning of the phrase, "or substantially all the assets thereof," for in our view the insufficiency of the findings of fact does not turn on that point.

Read in context, G.S. 96-8 (f) (2) contemplates a transaction in which the purchaser, instead of buying physical assets as such, succeeds in some real sense to the organization, trade or business, or some part thereof, of a covered employer, ordinarily as a going concern. The underlying idea is that of continuity, the new employing unit succeeding to and continuing the business or some part thereof of the former employing unit. Under the facts found we do not think the requisite continuity existed between the Handbag Company and Crafts, Inc.

Crafts, Inc., was composed of new persons, engaged in a new business, under a new name. It did not purchase from the Handbag Company accounts receivable, customer lists, good will, right to use trade name, or any assets except the equipment and raw materials in the Hendersonville location on 10 October, 1952. There was no continuity of organization, trade or business. In fact, on 10 October, 1952, the Handbag Company had gone out of business. Crafts, Inc., did not purport in any sense to be a continuation of or successor to the Handbag Company. The circumstance that Crafts, Inc., was engaged in the same type of business formerly conducted by the Handbag Company is not determinative.

The decision in *Employment Security Com. v. Whitehurst,* 231 N.C. 497, 57 S.E. 2d 770, cited by appellee, has no application here. The

question there was whether two employing units should be treated as a single unit within G.S. 96-8 (f) (3) in determining whether the business had eight employees in each of twenty different weeks during the calendar year. There the second employing unit "acquired the organization, trade or business, or substantially all the assets thereof," of the first employing unit. A dry cleaning business, operated under the name of Colonial Cleaners, was leased by Perry to Whitehurst, a former employee. Whitehurst acquired the entire business, including all assets, as a going concern, and operated without interruption under the name of Colonial Cleaners at the same location. Hence, rather than support appellee's position, the cited case illustrates the requisite element of continuity.

True, as the Commission pointed out, if the Handbag Company had resumed operations in 1952, it would have been required to report and make contributions on wages paid incident to such further operations. G.S. 96-11 (a). But this did not occur. Our question relates solely to the liability, if any, of Crafts, Inc., an independent enterprise, during the closing weeks of 1952.

Our conclusion is that the findings of fact, considered in relation to G.S. 96-8 (f) (2), are insufficient to support the judgment. Therefore, the judgment of the court below will be reversed.

In the view we have taken, questions debated in the briefs as to procedural matters, such as the timely taking of exceptions, etc., become immaterial to decision. However, it may be of value to the profession to call attention to the statutory provisions as to procedure. Observance of procedural requirements is indispensable to the orderly administration of justice.

The Commission is vested with authority "to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any 'employing unit' or 'employer' as said terms are defined by G.S. 96-8 (e) and G.S. 96-8 (f) and subsections thereunder of this chapter." The procedure for hearings before the Commission and incident to appeal to the Superior Court is set forth in detail. G.S. 96-4 (m). But, in order to get a complete view of the procedure in this case, we must go back to G.S. 96-4 (a), which, in part, provides: "The chairman of said Commission shall, except as otherwise provided by the Commission, be vested with all authority of the Commission, including the authority to conduct hearings and make decisions and determinations, when the Commission is not in session and shall execute all orders, rules and regulations established by said Commission."

The steps in the procedure are these:

1. Order for and notice of hearing at which testimony is taken.

2. Notice of hearing by Commission (or Chairman), upon transcript of evidence (when Commission may require additional evidence), after

which the Commission (or Chairman) shall make findings of fact and its determinations predicated thereon.

3. Exceptions to the decision of Commission (or Chairman), stating the grounds of objection thereto, must be filed with the Commission within ten days after notice of such decision.

4. Commission (or Chairman), at a second hearing, passes upon the exceptions so filed; and if any exception is overruled then an appeal may be taken, within ten days after such decision, to the Superior Court, this appeal being from the order overruling the exceptions.

Emphasis upon two features may be helpful: First, where the exception to the original decision of the Commission (or Chairman) is broadside, *i.e.*, consists merely of an objection to and appeal from the decision, the only position reserved relates to the sufficiency of the findings of fact to support the judgment. Second, while the original determination in actual practice is usually, if not always, made by the Chairman, and the decision upon consideration of exceptions thereto in actual practice is usually, if not always, made by the Full Commission, both determinations are deemed the determinations of the Commission. Thus, in a strict sense, the procedure does not contemplate an appeal from the Chairman to the Full Commission; rather, the Commission, prior to appeal to the Superior Court, must be given an opportunity to pass upon exceptions filed to *its* original findings of fact and decision. It is from the latter determination that the appeal to the Superior Court is taken.

Reversed.

MRS. MADELINE B. WHITSON, ADMINISTRATRIX OF MONROE WHITSON, v. SHERRILL FRANCES, GEORGE FRANCES, AND GEORGE FRANCES, GUARDIAN AD LITEM FOR SHERRILL FRANCES.

(Filed 13 October, 1954.)

1. Evidence § 29½—

Plaintiff is not entitled to the introduction in evidence of allegations of the complaint which are denied by the answer, since such allegations are mere self-serving declarations.

2. Same—

Plaintiff is entitled to introduce in evidence admissions in the answer of distinct and separate facts pertinent to the facts at issue as proof of the facts admitted without reference to the corresponding allegation of the complaint.

3. Same—

Where an admission in the answer is categorical, but is more or less meaningless standing alone, plaintiff may offer such portion, and only such

portion, of the corresponding allegation of the complaint as serves to explain or clarify the specific admission.

4. Evidence § 42c—

Testimony of statements made by the driver of a motor vehicle after the collision as to the defective condition of one of his headlights just prior to the accident, is admissible against him.

5. Negligence § 19b (4)—

Circumstantial evidence of negligence must be submitted to the jury if the facts and circumstances establish actionable negligence as the more reasonable probability by logical inference, even though the possibility of accident may also arise on the evidence.

6. Same—

Physical facts and circumstances are insufficient to be submitted to the jury on the issue of negligence if the inference of negligence therefrom rests on mere conjecture or surmise.

7. Automobiles § 18h (2)—Proof of collision with pedestrian on highway is alone insufficient to warrant inference of actionable negligence.

Plaintiff's evidence tended to show the following facts and circumstances: The infant defendant was operating a truck on a public highway at night with knowledge that his right headlight was not burning. Plaintiff's intestate was walking on the highway headed in the opposite direction. The right front fender of the truck struck the intestate, apparently throwing his body up between the fender and the hood from which it fell or was thrown down a steep embankment, causing injuries from which he died. *Held:* The evidence was insufficient to be submitted to the jury on the issue of the actionable negligence of defendant driver, the position of intestate and the truck at the moment of impact, whether defendant driver could have seen him in time to have avoided the collision if he had been keeping a proper lookout and if his truck had been equipped with proper headlights, all being left in mere speculation and conjecture by the evidence.

APPEAL by plaintiff from *Pless, J.*, July Term 1954, MITCHELL. Affirmed.

Civil action to recover compensation for the alleged wrongful death of plaintiff's intestate.

About 8:00 p.m. on 27 December 1953, deceased left the home of one Willie Bennett, saying he was then on his way to Joe Street's store. This would take him by the place his body was later found. He then had some currency in his pocket—at least a one dollar bill and a ten dollar bill.

Shortly thereafter a motorist traveling north on Highway 26 along Big Rock Creek saw the bulk of a body standing "right close to where the body was found. . . . The best I could see he was off of the black-top, whoever it was. He was right close to the shoulder of the road."

As the motorist passed, he observed a pickup truck approaching from the opposite direction, going south. "At the time I saw the bulk of this

person the oncoming car or truck was coming down, meeting him. . . . I could not tell who it was. I saw the bulk of this person, I guess, about 50 feet above the steps." The approaching vehicle had one headlight on. Shortly thereafter, the body of plaintiff's intestate was found on the opposite side of the steps, about thirty feet from the creek.

Near the point the decedent's body was found there is a bank from the shoulder of the road which slopes down to Big Rock Creek. "It is an awful rough place between the road and the creek." A stairway—forty or fifty steps—leads down the embankment from the road to a foot log across the creek. The stairway has hand rails set on two by four uprights.

When witnesses arrived, the truck belonging to defendant George Frances was standing on the hard surface portion of the road to the right of the center line. The hand rails of the stairway were "bursted open" and broken. A locust bush or small tree about the size of an arm, growing about thirty feet down the embankment, was broken off, and there was blood on the hand rail and spots of blood on the rocks. There were tire marks on defendant's right hand side of the hard surface which began about thirty feet north of the stairway and extended south for a distance of one hundred forty feet. It was eighty-eight feet from the end of the tire marks to the truck and eighty-two feet four inches from the beginning point of the tire marks to the place the body was found. The right headlight of the truck was broken, and the right front fender and the hood were damaged. The Chevrolet emblem on the right side of the hood was broken, and a few strands of hair were caught underneath it. "The right front fender was mashed in on the side and just a dent on the right side of the hood."

Some little time after the body was discovered and people had gathered at the scene of the collision, a ten dollar bill and a one dollar bill were found a foot or two apart on the shoulder of the road, thirty or forty feet north of the steps. No dirt, glass, or other debris was found either on the hard surface or on the shoulder of the road.

The infant defendant had been operating the truck, and defendants admit in their answer that the truck struck or collided with the deceased. Before the collision he had been having some trouble with his right headlight. It would flicker on and off. He had trouble with the bulb. Two had burned out. "He said that if the glass was broken out of the headlight he didn't know it, but he had had trouble with the bulb in the headlight . . . he had had his brother to fix it two times." There was no evidence as to the speed of the truck at the time of the collision or as to whether the reflector glass to the right headlight was in place at the time of the collision. The highway was straight in both directions.

The course of the highway at the point of the collision is referred to in the record both as north-south and east-west. The highway map indicates that at that point its course is north-south. We so treat it. This means that deceased was walking in a northerly direction and the truck was headed south.

At the conclusion of plaintiff's evidence in chief the court, on motion of defendant, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

W. C. Berry, G. D. Bailey, and W. E. Anglin for plaintiff appellant.
Harkins, Van Winkle, Walton & Buck for defendant appellees.

BARNHILL, C. J. In paragraph 7 of his complaint plaintiff alleges various acts of negligence on the part of the operator of the pickup truck "causing said pickup truck to strike the plaintiff's intestate, Monroe Whitson, with crushing impact at a time when the said Monroe Whitson was lawfully walking upon his extreme left-hand side or shoulder of said highway going in a northerly direction."

The defendants in their answer deny all the allegations contained in said paragraph.

At the trial plaintiff tendered in evidence that part of paragraph 7 which is above quoted. On objection, this evidence was excluded. In this ruling there was no error.

Ex parte, self-serving declarations contained in a complaint are not admissible in evidence as proof of the facts alleged. It is the admissions in the answer which are available to and may be offered as evidence by the plaintiff as proof of the facts admitted.

Admissions of distinct and separate facts pertinent to the matters at issue contained in the answer may be offered in evidence as proof of the facts admitted without reference to the corresponding allegation in the complaint. When, however, the defendant makes an admission which is categorical in nature and, standing alone, is more or less meaningless, the plaintiff may offer such portion, and only such portion of the corresponding allegation of the complaint as serves to explain or clarify the specific admission tendered in evidence, but nothing more.

This question is discussed in *Winslow v. Jordan,* 236 N.C. 166, 72 S.E. 2d 228. Reference may be had to that decision and the authorities therein cited.

Statements made by the infant defendant after the collision relative to the condition of his headlight just prior to the mishap were admissible as against him. No doubt objection thereto was sustained because they were repetitious and the answer tended to place before the jury unverified

hearsay, neighborhood rumors. In discussing the primary question presented, we will treat these statements as if they had been admitted.

Did plaintiff offer evidence of sufficient probative force, when such evidence is considered in the light most favorable to her, to entitle her to have her cause submitted to a jury? This is the decisive question presented.

Direct evidence of negligence is not required. It may be inferred from facts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477.

When, in a case such as this, the plaintiff must rely on the physical facts and other evidence which is circumstantial in nature, he must establish attendant facts and circumstances which reasonably warrant the inference that the death of his intestate was proximately caused by the actionable negligence of the defendant. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670, and cases cited; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406.

The inferences contemplated by this rule are logical inferences reasonably sustained by the evidence when considered in the light most favorable to the plaintiff. *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Sowers v. Marley, supra.* It cannot be made to rest on conjecture or surmise. It must be "a permissible conclusion drawn by reason from a premise established by proof." *Sowers v. Marley, supra.*

Proof of a collision between a motor vehicle and a pedestrian on a public highway and the resulting death of the pedestrian is not sufficient to warrant an inference that the collision and death were proximately caused by the negligence of the motorist. *Ray v. Post,* 224 N.C. 665, 32 S.E. 2d 168; *Pack v. Auman,* 220 N.C. 704, 18 S.E. 2d 247; *Mitchell v. Melts, supra; Harward v. General Motors Corp.,* 235 N.C. 88, 68 S.E. 2d 855.

When the evidence contained in this record is sifted to its essentials and weighed in the balance provided by these rules of law, we find we have just these bare facts established, *prima facie,* by the evidence. The infant defendant was operating a pickup truck on Highway 26 at night. At the time, his right headlight was not on. The decedent, a pedestrian, was on the same highway, headed in the opposite direction. The right front fender struck deceased, apparently throwing his body up between the fender and the hood from which it fell or was thrown down the steep embankment. The decedent received injuries which caused his death. The defendants knew the headlight was not in proper working condition. Everything else is left to pure speculation.

There is no evidence from which it may be inferred that the tire marks were made by the truck. If they were, then they indicate that the vehicle was traveling on the hard-surface portion of the road. No debris was found on the hard surface. Neither was any found on the shoulder. Nor were there any tire marks on the shoulder. Deceased had a ten dollar bill and a one dollar bill wadded up. Similar bills were found on the shoulder about an hour after the collision. Did they belong to the deceased? How did they get there? Had they been knocked about by the crowd that gathered before they were found? The record fails to answer.

The hand rails to the steps were spread out, and one of the uprights was broken. Were the hand rails struck by the automobile or the body of the deceased as it fell or was cast from the truck? There was no mark on the truck identified as having been made by or corresponding to any part of the hand rail. The blood and the location of the body would seem to indicate that it was the body and not the truck that came in contact with the steps.

Where was deceased when he was struck? Was he standing or walking? If defendant had been keeping a proper lookout and his truck had been equipped with proper headlights, could he have seen deceased in time to avoid the collision, or did deceased fail to yield the right of way or suddenly step in front of the oncoming vehicle?

Thus it is the testimony does no more than engender speculation. *Ray v. Post, supra.* There is no evidence from which an inference may be drawn either one way or another. Consequently, the line of cases represented by *Pack v. Auman,* above cited, is controlling here.

The judgment entered in the court below is

Affirmed.

STATE v. VERNON R. TEMPLE.

(Filed 13 October, 1954.)

1. Abduction § 5—

In order to establish the defendant's guilt of eloping with a married woman in violation of G.S. 14-43, the State must establish that at the time of the commission of the offense the wife was innocent and virtuous.

2. Same—

Evidence that a married woman had retained her innocence and virtue through some 20 years of married life and through more than 15 months of professions of love for her by defendant, and that she did not yield to defendant until some six days prior to the actual elopement, and after he had asked her to marry him, is sufficient upon the question of her innocence and virtue, since the requirement of the statute is fulfilled if her

innocence and virtue existed at the beginning of the acts of the defendant which in sequence led to the elopement.

3. Same—

In a prosecution under G.S. 14-43, an instruction that the married woman must have been innocent and virtuous at the time of the elopment "or at sometime prior to the elopement," has the effect of denying the defendant the benefit of the proviso in the statute, and must be held for prejudicial error.

4. Criminal Law § 34e—

In order for testimony of hearsay statements to be competent as an implied admission of guilt on the part of defendant, it must not only appear that the statements were made in the presence of defendant, but also that the circumstances were such as to call for a denial on the part of defendant and that he had opportunity to do so.

APPEAL from *Parker, J.*, June 1954 Term, JOHNSTON Superior Court.

The indictment in this case charged that the defendant ". . . on April 20, 1953, with force and arms, unlawfully, willfully, and feloniously did elope with one Estelle Dunn, the wife of Fraddy Dunn, an innocent and virtuous woman, against the form of the statute . . ."

Estelle Dunn, a witness, testified: "I am 36 years old. Fraddy Dunn and I were married in 1932. We have eight children living and two dead. I had never seen Vernon Temple until 1951 when Fraddy rented a crop from him. We stayed on his farm until the last of December 1951, or the first of January 1952. Vernon came to our house frequently and brought liquor about every time he came. He and my husband would drink together and my husband would get drunk. Vernon had a wife and two children. They were not living together. We moved to a house on John A. Johnson's place. Vernon Temple did not make any improper advances toward me prior to the time we moved from his farm. After we moved to Johnson's place he told me he loved me and I told him I loved him. For about nine months, from January to November, I did not see him. However, he stayed at our house about two weeks in November. He and my husband would drink and eat together. My husband told him he was welcome to stay. During that time he did not suggest having sexual relations with me, but he told me he loved me and I told him I loved him. I did not see him again until March, 1953. I did not write to him and he did not write to me.

"In March, 1953, he came back up home and stayed off and on for about four weeks, until we left. He again told me he loved me. He had helped my husband work on the farm and I was glad he was there. My husband was drinking all the time from March until April, 1953. I was glad to get away from him because of his drunken condition. I told him about two weeks before if he didn't get sober and go to work I was going to leave

him. The first time Vernon promised to marry me was about a week before we left. Vernon first had intercourse with me, I think, on Tuesday morning about six o'clock in his automobile outside our house. The second time was on Thursday and the third time was on Friday. On Friday, I believe, he told me he had a case coming up in recorder's court on Monday and that he did not intend to face trial. On Saturday he mentioned to me for the first time about leaving. I did not tell anyone I was going. My husband had been drinking. We left in Vernon's 1952 Pontiac about 12 o'clock at night on Sunday. On Monday night we stayed in a road cabin in Harlem, Georgia, then went to Rosewell, Georgia. We stayed in Georgia from about April 20 until May 23. Then we left and went to Chicago. We first got a room and stayed in a hotel. Later we got an apartment and lived together as husband and wife until we were arrested on October 12, 1953."

The witness testified that she had never had sexual relations with any person except her husband and Vernon Temple. When asked the reason she submitted to the defendant, the plaintiff replied she did because she wanted to.

Estelle Dunn's father and her son both testified as to Temple's being at the Dunn home. The father testified that on one occasion he visited his daughter and as he entered the front door the defendant went out the back door. Fraddy was drunk at the time. The son, then 15, called the deputy sheriff to come and take Temple away from the home.

Evidence of the good character of Estelle Dunn was offered.

Ernie Beasley, a deputy sheriff, testified that he went to Fraddy Dunn's home on one occasion, found Fraddy drunk on the bed, and Vernon Temple in the house. "I do not believe that Estelle Dunn was there at that time. I went back on another occasion and the best I remember, Mrs. Dunn was there, Fraddy was drunk, and Vernon Temple was there.

"I began an investigation on information that I received regarding Vernon Temple and Estelle Dunn. I went to the Vernon Temple home and he was not there. I continued looking for him for around six or seven months. Pursuant to information I received, Mr. Haywood Starling, an agent of the SBI, and I went to Chicago by airplane. We found Vernon Temple and Estelle Dunn in the city jail. We took Temple and Mrs. Dunn and went to the apartment that they had lived in. We found their clothes in one of the rooms. Their stuff had been moved out and stored in another place in the basement. We brought Vernon Temple and Mrs. Dunn back to North Carolina. Vernon Temple told me that they left Johnston County and went to Georgia but they wound up in Chicago. He said that they had lived together as man and wife."

Lalon Barbour testified: "I live in Dunn and I am a sister of Estelle Dunn. On or about the 20th day of August (probably April) 1953, I

saw Vernon Temple at my home in Harnett County about 11:30 or a quarter to 12 in the nighttime. Well, they came up and blew the horn and woke us up. Estelle came to the door and called me. I got up and she came in. Temple was in the car. Vernon did not come in the house, not that night, but they came in the house, Estelle Dunn and Fraddy Dunn. Temple was in the car. Estelle's children and this colored man were along. I had a conversation with my sister about the children. That was not the first time Temple and my sister had been in my house. They had been several times. Sometimes they would come once or twice a week. My sister came to my house many times when Temple was not with her. I imagine I saw Vernon Temple at Estelle's and Fraddy Dunn's as many as 10 times."

At the conclusion of the State's evidence, motion for judgment as of nonsuit was made and overruled. Defendant excepted. The defendant rested without offering evidence and renewed the motion, which was again overruled. The defendant again excepted. The jury returned a verdict of guilty, judgment was pronounced, from which the defendant appealed.

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

J. R. Barefoot and E. Reamuel Temple, Jr., for defendant, appellant.

HIGGINS, J. The defendant was indicted under Section 14-43 of the General Statutes of North Carolina, as follows:

"*Abduction of married women.*—If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided further, that no conviction shall be had upon the unsupported testimony of any such married woman."

The indictment charged elopement, not abduction. Defendant's counsel contend the court should have sustained the motion for judgment as of nonsuit for the reason that Estelle Dunn at the time of the elopement was not an innocent and virtuous woman, for that she had admitted that on Tuesday, Thursday, and Friday before leaving on Sunday she had had sexual intercourse with the defendant because as she said, "she wanted to." The elopement was first planned on Saturday and the actual leaving took place on Sunday night. However, for more than a year the defendant had been professing his love for Mrs. Dunn. He seemed to have gained a welcome to the home by furnishing liquor to the husband and making love to the wife. The Dunn's spent the year 1951 on Temple's farm and made a crop there. The evidence showed that Temple was

frequently in and about the home. The last of December, 1951, or the first of January, 1952, the Dunn's moved away from the Temple farm and moved to the Johnson place. In November of 1952 the defendant spent approximately two weeks in the Dunn home. During that time the son of 15 became so concerned about what was going on that he went for the deputy sheriff and had the defendant arrested.

For approximately one month, 20 March to 20 April, the defendant had again lived in the Dunn home. According to the wife's story he had asked her to marry him about a week before they left. The proposal of marriage was before the first act of intercourse.

The indictment charges that at the time of the commission of the offense the wife was an innocent and virtuous woman. The law requires proof of that fact before a conviction can be had. Mrs. Dunn testified that even as to the defendant she had retained her innocence and virtue through more than 15 months of professions of love and until after he had asked her to marry him. It is not surprising, therefore, that this conduct led to elopement. If innocence and virtue existed at the beginning of the acts on the part of the defendant which in sequence led to the elopement, the requirement of the statute is fulfilled. In the case of *S. v. Hopper,* 186 N.C. 405, 413, 119 S.E. 769, this Court said:

"The statute was made to protect the home against the lust and passion of evil men, who subtly, slyly and cunningly would creep into the family circle and poison its fountain source—the woman in the home. Can a man, through fraud, persuasion or deceit, go into a home and seduce the wife, who up to that time was an innocent and virtuous woman, and then abduct or elope with her, and, after having despoiled her—'despoiled of innocence, of faith, of bliss'—claim she was not innocent and virtuous? We do not think he could thus escape the wrong done.

"It is a maxim of law, recognized and established, that *nullus commodum capere potest de injuria sua propria* (no one can obtain an advantage by his own wrong). Broom's Legal Maxim's, (8th Ed.), p. 279.

"In *Carpenter v. The People,* 8 Barbour's Supreme Court Reports (N.Y.), p. 603, . . . the Court, in passing upon the meaning of 'an unmarried female of previous chaste character,' said: 'We think the words referred to do mean actual personal virtue—that the female must be actually chaste and pure in conduct and principle up to the time of the commission of the offense. Not that this must be the case up to the moment of taking her away for the purpose mentioned, but that it must be so up to the commencement of the acts of the party accused—done with the purpose indicated, and which result in such taking away. The process of inveigling and enticing may be the work of time, and when commenced, the female must be of chaste character in the sense above defined.' "

In the *Hopper case* the first act of intercourse took place more than three months before the actual elopement.

While the motion for judgment as of nonsuit was properly overruled, nevertheless the case must go back for a new trial because of error committed in the charge, the objection to which is raised by defendant's exception No. 57. The court charged:

"So, in this case it is necessary for the State of North Carolina to satisfy you from the evidence, and beyond a reasonable doubt, that the defendant Vernon Temple abducted and eloped with the wife of another; (2) That at the time, or some time prior to the elopement, the married woman was a chaste and pure, or innocent and virtuous woman; (3) That there shall be supporting testimony as to the statements of Estelle Dunn, about which the Court has already instructed you; that is, that there is supporting testimony, but that the weight of that testimony is entirely within the discretion of you members of the jury; that is, the weight that you give to that testimony."

The court charged: "It is necessary for the State . . . to satisfy you from the evidence and beyond a reasonable doubt . . . (2) That at the time *or at some time prior to the elopement* the married woman was a chaste and pure, or innocent and virtuous woman."

The charge, as given, lifts part of the burden the statute placed upon the State. The statute says: "Provided, that the woman since her marriage has been an innocent and virtuous woman." The charge, as given, permitted the State to carry the burden imposed by showing that the woman, *at some time prior to elopement* was an innocent and virtuous woman. Every woman is innocent and virtuous *at some time.* The battle line of the case was whether the wife, *at the time of elopement* (as hereinbefore defined) was an innocent and virtuous woman as contemplated by the first proviso in the Act. The charge as given was equivalent to striking out this proviso. The error, therefore, was prejudicial.

Some serious questions arise on the record with respect to the admissibility of evidence. Witnesses were permitted to testify to hearsay statements of a prejudicial nature if made in the presence of the defendant, regardless of whether the statements were of such character as might be deemed to require an answer on the part of the defendant or that his failure to answer might lead to an inference of guilt or guilty knowledge. To make competent the statement of others, more must appear than the mere fact the statements were made in the presence of the defendant. With respect to the admissibility of this type of evidence, the correct rule is stated by former *Chief Justice Stacy* in the case of *S. v. Wilson,* 205 N.C. 376, 171 S.E. 338, from which we quote:

"When a statement is made, either to a person or within his hearing, implicating him in the commission of a crime, to which he makes no reply,

the natural inference is that the imputation is perhaps well founded, or he would have repelled it. *S. v. Suggs,* 89 N.C. 527. But the occasion must be such as to call for a reply. 'It is not sufficient that the statement was made in the presence of the defendant against whom it is sought to be used, even though he remained silent; but it is further necessary that the circumstances should have been such as to call for a denial on his part, and to afford him an opportunity to make it.' 16 C.J., 659.

"Silence alone, in the face or hearing of an accusation, is not what makes it evidence of probative value, but the occasion, colored by the conduct of the accused or some circumstance in connection with the charge, is what gives the statement evidentiary weight. *S. v. Burton,* 94 N.C. 947; *S. v. Bowman,* 80 N.C. 432. 'To make the statements of others evidence against one on the ground of his implied admission of their truth by silent acquiescence, they must be made on an occasion when a reply from him might be *properly expected.* But where the *occasion* is such that a person is not called upon or expected to speak, no statements made in his presence can be used against him on the ground of his presumed assent from his silence.' *Ashe, J.,* in *Guy v. Manuel,* 89 N.C. 83.

"Due to the manifold temperaments of people and their varying conceptions of the fitness of things, the character of evidence we are now considering is so liable to misrepresentation and abuse that the authorities uniformly consider it as evidence to be received with great caution and, except under well recognized conditions, hold it to be inadmissible altogether. Hence, unless the party at the time was afforded a fair opportunity to speak, or the statements were made under circumstances and by such a person as naturally called for a reply, the evidence is not admissible at all. *S. v. Jackson,* 150 N.C. 831, 65 S.E. 376. 'The silence of the accused may spring from such a variety of motives, some of which may be consistent with innocence, that silence alone is very slight evidence of guilt; and, aside from the inference which may arise from the attendant circumstances, should be received with caution as proof of guilt.' Underhill Crim. Ev. (3rd Ed.), sec. 209. It is readily conceded that 'mere shadows of confessions,' which arise from silence in the face of accusations, are not to be received in evidence unless they amount to admissions by acquiescence. *S. v. Butler,* 185 N.C. 625, 115 S.E. 889. *Qui tacet non utique fatetur, sed tamen verum est eum non negare.* 'He who is silent does not indeed confess, but yet it is true that he does not deny.' "

We refrain from discussing further the exceptions to the admissibility of evidence on the ground that the questions presented by them may not arise on another trial.

On account of the prejudicial error in the charge, the case must go back to the Superior Court of Johnston County for a

New trial.

STATE v. DAVID M. ROBERSON.

(Filed 13 October, 1954.)

1. Automobiles § 18g (4)—

While as a general rule, a person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile, where a motorist testifies he did not see the other car involved in the collision before the impact, his estimate of the speed of the other car is without probative value and is incompetent.

2. Automobiles § 29b—

In this prosecution under G.S. 20-140 there was no competent opinion evidence that defendant's car was traveling at excessive speed, and the physical facts at the scene of the collision *are held* insufficient, standing alone, to take the case to the jury on the charge of reckless driving, and defendant's motion to nonsuit should have been allowed.

3. Negligence § 23—

Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts.

4. Automobiles § 8g—

The skidding of an automobile, without more, does not imply negligence.

APPEAL by defendant from *Carr, J.*, at July Term, 1954, of WASHINGTON.

Criminal prosecution begun in Recorder's Court of Washington County, and transferred to the Superior Court for trial, defendant having requested a jury trial, and in Superior Court a true bill of indictment was returned by the grand jury, charging that defendant "did drive a motor vehicle upon a public highway carelessly and heedlessly in willful and 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 against the form of the statute," etc.

Defendant entered a plea of not guilty.

The record discloses that this prosecution grew out of a collision which occurred about 7 o'clock on the morning of 25 August, 1953, between a Chevrolet 2/4-ton pickup truck owned and operated by one D. O. Patrick, heading south on Highway #64 going toward the town of Roper, N. C., and a Chevrolet convertible automobile owned and operated by defendant in an easterly direction on a road by-passing the town of Roper and paralleling Highway #64.

The collision took place almost in the middle of the intersection. Patrick's truck was "just a little bit by the middle of the intersection."

It was moving from Roberson's left. As to whether construction on the by-pass was being carried on, the evidence is contradictory. There were no stop signs at either intersection. There was a sign at one end saying "Road under Construction." Other cars had been traveling the road while the work was going on.

And the highway patrolman, as witness for the State, testified: "It was not unusual for Mr. Roberson to be on it. It was not barricaded at that end, but it was at the other."

As to skid marks: The highway patrolman testified: "The skid marks . . . were mighty short . . . From the time he applied his brakes, that was 28 feet on a dirt road . . . from the point of collision."

As to speed of Roberson's car: Patrick, as witness for the State, testified: "I never even saw the Roberson car until it hit me . . . I had not more than got on the highway when he struck me." Then on being asked the question: "Do you have an opinion satisfactory to yourself as to how fast Mr. Roberson was driving?", the witness answered: "The way I think, around 65 miles per hour, from the way he drug his brakes and . . ." Thereupon, the court instructed the jury not to consider and to disregard that answer. But the witness continued: "Yes, I have an opinion satisfactory to myself as to how fast he was driving. In my opinion he was driving 65 miles per hour. . . . He hit the truck broadsided. It landed on side and then on the top . . . The chassis and the hood was torn all to pieces and the fenders and the glass broken all to pieces. The truck was driven 20 feet from the time it was hit until it landed by the impact of the Roberson car . . . It hit the truck, picked it off the ground, turned it over, struck on its side and then on its top."

Then, again quoting the witness Patrick: "He (Roberson) was traveling faster than he should ought to . . . Yes, I knew I was on the left right here. I went out without stopping to see if anybody was coming. No, I did not stop and neither did he . . . The way Mr. Roberson hit me and the way his tires drug on the road, I say I could tell he was going around 65 miles per hour. Yes, I was going forward when he hit me . . ."

The highway patrolman testified: "I investigated this accident . . . The skid marks were mighty short, but the impact, as Mr. Roberson said that day, was a pretty hard impact. I would say he was running about the speed limit. I could not say he was running over the speed limit which is 35 miles per hour there, but it had been a real solid blow, but judging from the shortness of the skid marks, I could not say definitely . . ." Then on cross-examination, the patrolman continued: "Yes, Roberson was driving about 35 miles per hour and that was the speed limit at that point. Yes, the skid marks were short. Yes, Mr. Patrick was to Mr. Roberson's left. There were no stop signs erected there at that intersection. At the end of the road Mr. Roberson went in there was no barri-

cade, just a sign saying 'Road under Construction.' Yes, there were other cars that had been using the road while work was going on. . . . Yes, it is a pretty blind intersection there, with weeds to cut off the view."

Motion of defendant at end of State's evidence for a directed verdict of not guilty was denied. Exception.

Defendant, as witness for himself, testified: "I live in Williamston . . . On August 25 I was on the way to Creswell . . . There were little patches of fog that morning. It was not a complete blackout of fog, but there seemed to be open holes in it, light places, then patches of fog when you could not see anything. I do not know whether that had . . . was the cause of this accident, for sure, or not. . . . When I got to the end of this by-pass here . . . Yes, the entrance in, there was not barricade up and there was a sign saying 'Road under Construction.' The tracks were very plain where other cars had been traveling there, so I turned and started through them. I do not know how fast I was going. I could not have been going very fast because I stopped down to where I had to change gears when I turned. Coming from Williamston I would have been on the right-hand side of the road. I had to make a left turn to cross the road, had to slow down and hold my hand out, to make the turn. I was only about 300 yards then to where we went together, so I could not have been driving very fast and could not have got up speed from almost a complete stop in that length of time. I saw Mr. Patrick before I hit him but it was too late to do anything about it, but I didn't see him time enough to know, but he admitted on the stand that he did not see me at all. He did not make any attempt to stop. I was not going as fast as 60 or 65 miles per hour. I could not have been going over 35 or 40 at the outside. Of course, I was not looking at the speedometer, but I could not have been going very fast. Mr. Patrick was on my left. No, I do not have an opinion exactly as to how fast Mr. Patrick was going, but I would say 45 miles per hour, something like that. I do not think he was exceeding the speed limit, but I believe he was running a little faster than I was. I struck his truck in the side and knocked it over and it stopped with the wheels up . . . The width of the road I was on was about the same width as the other road; it is wider than the other road. It has the right of way now. Yes, at that time it was under construction and just a dirt road. I knew the crossroad was a paved road."

Defendant renewed motion at end of his evidence for judgment as of nonsuit. Motion denied. Exception.

Verdict: Guilty as charged.

Judgment: Confinement in jail and assigned to work the roads, etc. Suspended on condition that defendant pay into office of Clerk of Superior Court of Washington County for the use of D. O. Patrick the sum of $250.00 on or before 1 October, 1954, and cost of action, that said sum

shall be applied by the said D. O. Patrick toward payment of any damage that he sustained in the collision between defendant's car and truck of said D. O. Patrick.

Defendant appealed therefrom, assigning error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

LeRoy Scott for defendant, appellant.

WINBORNE, J. The determinative assignment of error on this appeal is based upon defendant's exception to denial of his motion for judgment as of nonsuit. The exception is well taken.

While it is a general rule of law, adopted in this State, that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile, *Hicks v. Love,* 201 N.C. 773, 161 S.E. 394; *Jones v. Bagwell,* 207 N.C. 378, 177 S.E. 170; *Tyndall v. Hines Co.,* 226 N.C. 620, 39 S.E. 2d 828; *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327, one who did not see the moving object or automobile in motion is not competent to give an opinion as to its speed. *Tyndall v. Hines Co., supra,* and cases cited. Also *Carruthers v. R. R.,* 232 N.C. 183, 59 S.E. 2d 782.

Testing the evidence offered upon the trial in Superior Court as shown in case on appeal, by this rule, it appears that the opinion evidence as to speed of defendant's automobile comes from witnesses who did not see his automobile before the collision. The witness Patrick swore "I never even saw the Roberson car until it hit me." And the highway patrolman came to the scene to investigate the collision. Hence, neither Patrick nor the highway patrolman was a competent witness to testify as to the speed of defendant's car, and their testimony in this respect is without probative value, *Tyndall v. Hines, supra; Carruthers v. R. R., supra.*

In the *Carruthers case, supra,* each witness offered estimates of the speed of defendant's car based on the result of the impact—for which purpose it was held that each was not a competent witness.

Therefore, stripping the evidence of the State of the estimates of speed as given by these witnesses, there remains in the State's evidence no estimates of the speed of defendant's automobile. And defendant in his testimony stated that he could not have been going over 35 or 40 miles per hour at the outside.

Hence the question arises as to whether or not the physical facts, the skidding of defendant's car and the result of the impact upon Patrick's truck, under the attendant circumstances, standing alone, are sufficient to take the case to the jury on the charge of reckless driving as defined by G.S. 20-140. We hold that the answer should be "No."

This statute, G.S. 20-140, 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 . . ."

The language of this statute constitutes culpable negligence. And culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. Indeed, in the law of torts the mere fact of the skidding of an automobile is not of itself such evidence of negligence in the operation of an automobile as to render the owner liable for an injury in consequence thereof. Skidding itself does not imply negligence. *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 406; *Hoke v. Greyhound,* 227 N.C. 412, 42 S.E. 2d 593.

Moreover, it is not amiss to note (1) that the case on appeal discloses that Patrick has sued defendant in a civil action, and (2) that considerable space was given in the trial below to matters pertaining to civil issues. We think the controversy belongs in the forum of the civil courts.

Reversed.

STATE v. NED MOORE.

(Filed 13 October, 1954.)

1. Searches and Seizures § 1—

Where officers are lawfully on the premises of defendant, and defendant consents to a search of the premises by them, such consent dispenses with the necessity of a search warrant, and evidence obtained by such search is competent. G.S. 15-27.

2. Same: Criminal Law § 43—

Where defendant upon the trial objects to the admission of evidence obtained without a search warrant, and the court upon the *voir dire* finds upon conflicting evidence that defendant consented to the search of his premises by the officers without a warrant, the finding of the court, supported by evidence, is conclusive, and the evidence obtained by the search is competent.

APPEAL by defendant from *Bone, J.,* February Term, 1954, of BERTIE.

The defendant was convicted in the Recorder's Court of Bertie County upon a warrant charging him (1) with having in his possession a quantity of nontax-paid liquor, and (2) with having in his possession a quantity of intoxicating liquor for the purpose of sale. From the judgment imposed he appealed to the Superior Court where he was tried *de novo* upon

the warrant. The jury returned a verdict of guilty on the first count, and not guilty on the second count. The court pronounced judgment and the defendant appeals therefrom, assigning error.

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

Jones, Jones & Jones and John R. Jenkins, Jr., for defendant, appellant.

DENNY, J. It is disclosed by the State's evidence that on 5 January, 1954, the Sheriff of Bertie County, with one of his deputies and an agent of the State Bureau of Investigation, went to the home and place of business of the defendant, both of which are in the same building, for the purpose of looking for a large quantity of cigarettes, a watch, and a jacket, which had been stolen from Northcutt's store in Trap, North Carolina, the night before. The defendant's house is a one-story wooden building. The front room of the house is approximately 15 or 16 feet long and 12 feet wide. There was a piccolo in the room and the room was being used as a dance hall and for the sale of canned goods, cigarettes and soft drinks. There is a hall or bedroom between the front room and the kitchen. The officers, after informing the defendant about the theft at Northcutt's store, requested permission to look around the premises of the defendant for the stolen goods. The defendant said, "Go ahead, it is not around here but you are welcome to search." The officers did not have a search warrant.

The agent of the S.B.I. also inquired whether the defendant had a license to sell beer. The defendant said he did not; that he did not sell beer. Whereupon, the agent inquired whether he had any beer in his refrigerator. Defendant replied that he did not but that he was welcome to look.

The deputy sheriff and the agent of the S.B.I. searched the storeroom or dance hall for the stolen goods and then went through an open door into the kitchen where they found on a table just inside the kitchen door a tea kettle full of nontax-paid whiskey. The Sheriff and the defendant were still in the storeroom. The other officers called the Sheriff. The defendant accompanied the Sheriff into the kitchen and got a container for the liquor which the officers seized. After the liquor was discovered in the kitchen, the defendant was asked about a key to his barn. He delivered the key to the barn and the officers searched it but found no additional liquor. The defendant at no time objected to the search of his premises or any part thereof.

In the trial below, the defendant promptly objected and moved to strike the evidence with respect to the liquor found in his kitchen on the ground

that since the officers did not have a search warrant, G.S. 15-27 made such evidence incompetent.

The pertinent part of the above statute reads as follows: "Provided, no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action."

The first question posed is whether a search warrant was required to search the premises of the defendant if he consented to the search. The answer is no. It is generally held that the owner or occupant of premises, or the one in charge thereof, may consent to a search of such premises and such consent will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether. *S. v. Fowler,* 172 N.C. 905, 90 S.E. 408; *United States v. Williams,* 295 F. 219; *Cutting v. United States,* 169 F. 2d 951; *Calhoun v. United States,* 172 F. 2d 457; *Tomlinson v. State,* 129 Fla. 658, 176 So. 543; *State v. Hagan,* 47 Idaho 315, 274 P. 628; *People v. Swift,* 319 Ill. 359, 150 N.E. 263; *Shade v. State,* 196 Ind. 665, 149 N.E. 348; *Gray v. Commonwealth,* 198 Ky. 610, 249 S.W. 769; *Morris v. Commonwealth,* 306 Ky. 349, 208 S.W. 2d 58; *Hahn v. State,* 38 Ohio 461, 176 N.E. 164; *Dyer v. State,* 61 Okla. Crim. 202, 66 P. 2d 1104; *Camp v. State,* 70 Okla. Crim. 68, 104 P. 2d 572; *Nagel v. State,* 126 Tex. Crim. 265, 71 S.W. 2d 285; *State v. Montgomery,* 94 W. Va. 153, 117 S.E. 870; 79 C.J.S., Searches and Seizures, section 62 (a), page 816, *et seq.,* citing numerous authorities. "Where an officer is where he has a right to be and becomes a witness to an offense which necessitates acting as such officer, he may make the incidental search and seizure, but where he observes the offense after he has made an unlawful entry a subsequent search and seizure without a warrant may be illegal." 79 C.J.S., Searches and Seizures, section 68 (a), page 845, *et seq.,* citing *Phoenix Cereal Beverage Co.,* C.C.A.N.Y., 58 F. 2d 953; *Elder v. Camp,* 193 Ga. 320, 18 S.E. 2d 622; *Lee v. State,* 140 Tex. Cr. 155, 143 S.W. 2d 389; *Custer v. State,* 117 Tex. Cr. 164, 36 S.W. 2d 504; *State v. Hoffman,* 245 Wisc. 367, 14 N.W. 2d 146. See also *Hart v. Commonwealth,* 198 Ky. 844, 250 S.W. 108; *Traylor v. State,* 111 Tex. Cr. 58, 11 S.W. 2d 318; *State v. Vandetta,* 108 W. Va. 277, 150 S.E. 736.

The second question is whether the defendant consented for the officers to search his premises, including his kitchen. When the defendant objected to the admission of any evidence with respect to the liquor found in his kitchen, on the ground that such evidence was not competent, having been obtained without a search warrant, a preliminary question of fact was raised for the determination of the trial judge.

The court, in the absence of the jury, heard the testimony of the State's witnesses and that of the defendant as to whether the search of the defendant's premises was made with his consent. There was a conflict in the testimony. However, the court found as a fact that the defendant, at the request of the officers, voluntarily gave them permission to search his premises for stolen goods and that the officers, pursuant to such consent, proceeded to make a search of the defendant's premises in the course of which they discovered a tea kettle full of nontax-paid whiskey.

Upon the foregoing findings of fact the court held that the testimony offered by the State, with respect to the discovery of the nontax-paid whiskey, was competent and overruled the objection of the defendant to its admission and his motion to strike such evidence.

The ruling of a trial judge on a *voir dire,* as to the competency or incompetency of evidence, will not be disturbed if supported by any competent evidence. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Fain,* 216 N.C. 157, 4 S.E. 2d 319; *S. v. Moore,* 210 N.C. 686, 188 S.E. 421; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603; *S. v. Andrew,* 61 N.C. 205. Just as the voluntariness of a confession is the test of admissibility, *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84, so is the consent of the owner or person in charge of one's home or premises essential to a valid search thereof without a search warrant.

The defendant's exceptions present no prejudicial error, and in the trial below we find

No error.

C. L. MOODY v. WILLIAM ZIMMERMAN.

(Filed 13 October, 1954.)

Automobiles § 18h (3)—

Defendant's disabled automobile was standing obliquely on his right of the highway with its left rear bumper some distance over the center line. Plaintiff's own testimony was to the effect that he observed defendant's car some 500 feet ahead of him on the highway, with its headlights shining, but that he drove on and collided with the left side of the car, notwithstanding his wife was telling him that the car was over on his side of the road, and although he had room to pass on the shoulder to his right, or could have stopped at any point along the highway before hitting the car. *Held:* Plaintiff's own testimony discloses contributory negligence barring recovery as a matter of law.

APPEAL by defendant from *Bone, J.,* at March Civil Term, 1954, of VANCE.

Civil action in tort arising out of a collision of two motor vehicles, one of which was standing disabled on the highway.

The collision occurred at about 9:30 o'clock p.m., 4 July, 1951, on State Highway No. 158 about two miles east of Roxboro. The defendant, who operated a garage, was road-testing a 1949 Ford automobile he had repaired. He had just turned around at a side road near the bottom of a hill and had started back up the hill when the motor failed and the car stopped in its right-hand traffic lane. The defendant, in an attempt to get off the highway by letting the car roll back downhill to the side road, let the car roll backward about a car length, where it was stopped on the traveled portion of the highway as the plaintiff, driving his Chevrolet automobile, came over the crest of the hill and proceeded on down and collided with the disabled car. The plaintiff was not injured, but his car was damaged.

The plaintiff testified in pertinent part: ". . . after I reached the crest of the hill I saw the headlights of a car approximately 500 feet ahead of me; . . . I dimmed my lights and started on down the hill . . . the lights on the other car did not change so I dimmed my lights again and began to slow down. I proceeded on down the hill and still the lights on the other car did not dim, and I figured that the other automobile was too close over to me, and about 100 feet before I got to the car I dropped on to the shoulder of the road with my right-hand wheels and continued to slow down and give the other car room to pass. When I got down to where the beam of the headlights went out of my eyes I saw the car operated by the defendant Zimmerman was definitely on my side of the road. Q. Up to that time had the beam of the headlights been in your eyes? A. Yes. Then I applied my brakes and attempted to stop, and passed the front end of the car, and my left front fender struck the edge of the cowl and threw me off the hill and turned me over; . . . I flickered my lights several times in an effort to get the other man to dim his lights which he did not do, and I was slowing my car down all the time during the process. . . . After the collision my wife crawled out of the car first and just as she got out Mr. Zimmerman . . . came down the bank and . . . asked her if she was hurt. . . . he said, 'Lady, I am just as sorry as I can be, it was all my fault.' . . ." On cross-examination the plaintiff stated that he had traveled this highway for years and was familiar with it; that he did not see Preston Stanfield, a companion of the defendant, standing in front of the disabled car signaling; that he did not see the headlights on the disabled car "going up and down"; that he did not drive down the hill astraddle the white center line. The cross-examination of the plaintiff terminated with these admissions: "Q. Mr. Moody, could you have stopped your car at any point on the road from where you came over the hill to where you hit the car? A. Sure. Q. Were your brakes in good

condition? A. Yes. Q. You made no endeavor to stop it? A. No." Redirect-examination: "I did not come to a stop because I was trying to get far enough to the right to get by without hitting the defendant's car."

Mrs. C. L. Moody testified in pertinent part: ". . . when we passed the beam of the lights we saw the other car was so far over we did not have room to get by and he mashed on the brakes and hit the front door of the defendant's car and went down the bank and turned over. . . . Mr. Moody was traveling about 40 miles an hour when he came over the crest of the hill. . . ." Cross-examination: ". . . I told him (the plaintiff) to look out; that he (the defendant) was over on our side." Redirect examination: "I told him this when we were coming down the hill and he was touching his brakes and he was commencing to get over on the shoulder of the road."

Clarence Moody testified that he went to the scene of this wreck. He said: ". . . The Zimmerman car was damaged just in the front of the front door on the left side. I did not notice any dent from the door on back. His damage was all on the side of the car."

The defendant offered evidence in summary as follows: that the highway was paved with black top material about 18 feet wide, with a six-foot shoulder on the plaintiff's side and with a white center line all the way up the hill; that the highway was straight from where the plaintiff came over the hill to where the collision occurred; that the defendant's car was standing still when the plaintiff's headlights came over the hillcrest; that the disabled car was on its right-hand side of the highway "with just a part of the rear bumper over the center line 5 or 6 inches." In rolling back the car length it had stopped in that position, at an angle across the highway "with lights shining toward the bank." As the plaintiff's car approached, the defendant kept blinking his headlights "up and down," and one of his companions was out in front of the car "waving his hands" in the beams of the headlights; that the plaintiff came down the hill astraddle the center line, and immediately before the impact swerved to his right and then "hung into the middle" of the disabled car, striking it on the left side at the cowl, near the front door.

Patrolman Hudgins, who investigated the wreck, testified in part: ". . . My report shows that Mr. Zimmerman's car was parked diagonally across the highway. . . . the shoulder of the road at the point of impact on Mr. Moody's side was wide enough for a car to park. I parked my car there without being on the hard surface road. . . . If Mr. Zimmerman's left rear wheel was setting on the white line that would have left nine feet to his left of the hard surfaced part of the highway available to the traveling public clear. Including the shoulder that was six feet wide there would have been a clearance of 15 feet from the center of the road including the shoulder in the direction that Mr. Moody was traveling."

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 $700 in damages, the defendant appealed, assigning as error the refusal of the trial court to allow his motion for judgment as of nonsuit made in apt time.

Blackburn & Blackburn and Gholson & Gholson for plaintiff, appellee.
Melvin H. Burke for defendant, appellant.

JOHNSON, J. Here it appears from the plaintiff's own evidence that after he observed the disabled car some 500 feet ahead of him in the main traveled portion of the highway, with headlights shining and with no other obstruction in the highway, he drove on, with his wife telling him the disabled car was on his side of the road, and collided with the side of it, when admittedly he could have stopped his car at any point along the highway before hitting the other car. It is manifest, as the only reasonable inference deducible from the plaintiff's evidence, that he failed to exercise due care for his own safety and that such failure to exercise due care contributed to, and was a proximate cause of, his damage. This defeats recovery. The case is controlled by the principles explained and applied in *Morris v. Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845, and cases there cited.

The judgment below is
Reversed.

CHARLES M. BRITT COMPANY, INC., A NORTH CAROLINA CORPORATION, AND CHARLES M. BRITT, INDIVIDUALLY, v. BAREFOOT & TATUM DRUGS, INC., A NORTH CAROLINA CORPORATION.

(Filed 13 October, 1954.)

1. Appeal and Error § 8—

The theory of trial as fixed by the stipulations of the parties will be followed on appeal.

2. Bills and Notes § 19½—

This action was instituted by plaintiffs to recover for checks belonging to them which defendant cashed for the bookkeeper of the corporate plaintiff after the bookkeeper had forged endorsements of the payees. *Held:* Defendant's allegation that plaintiffs entrusted the checks to the bookkeeper, without more, fails to charge negligence on the part of plaintiffs proximately contributing to the cashing of the checks by defendant.

3. Same—

This action was instituted by plaintiffs to recover for checks belonging to them which defendant cashed for the bookkeeper of the corporate plain-

tiff after the bookkeeper had forged endorsements of the payees. *Held:* Allegations that the bookkeeper had forged numerous other checks is insufficient to charge negligence on the part of plaintiffs when it is not alleged whether these other forgeries were committed before or after those sued on, wherein plaintiffs were negligent in supervising the bookkeeper, or that there was any causal connection between failure to detect the other forgeries and the losses sued on. Nor would testimony of the plaintiffs' witnesses, mainly that adduced on cross-examination, be sufficient to establish negligence in this respect on the part of plaintiffs.

APPEAL by plaintiffs from *Dan K. Moore, J.*, and a jury, at July Term, 1954, of BUNCOMBE.

Civil action to recover for certain checks belonging to the corporate plaintiff, obtained by the defendant and collected by it on forged endorsements.

The plaintiffs alleged and offered evidence tending to show that the corporate plaintiff operates a grocery brokerage business in the City of Asheville; that between 3 August, 1951, and 16 October, 1951, eleven customer checks totaling $570.54 belonging to the corporate plaintiff, some payable to its order, others to the order of the individual plaintiff, but all the property of the corporate plaintiff, were wrongfully appropriated by its bookkeeper, one Phillip W. Bennett, who forged the signature of the named payees and presented each check to the defendant, who accepted them and paid over the face amount of each to Bennett, who in turn appropriated the proceeds to his own use.

Thereafter the checks were endorsed by the defendant and deposited in one of its depository banks in Asheville, following which the checks "promptly cleared" through banking channels and the defendant received and retained cash or credit for the full, face amount of the checks.

The defendant by way of affirmative defense attempted to allege negligence on the part of the plaintiffs in bar of recovery.

The case was submitted to the jury on these issues:

"1. Were the endorsements on the checks which were introduced in evidence forged by Phillip W. Bennett, as alleged in the complaint?

"2. Were the checks cashed by the defendant for Phillip W. Bennett and credit or cash received thereon from the bank by the defendant, as alleged in the complaint?

"3. Did the negligence of the plaintiffs proximately contribute to the cashing of the checks, as alleged in the answer?

"4. What amount, if any, is the defendant indebted to the plaintiffs?"

By stipulation of the parties it was agreed that the answer to the first and second issues would be "Yes," and that if the jury should answer the third issue "No," the fourth issue should be answered by consent "$570.54, with interest from November 19, 1951."

Each of the first three issues was answered "Yes" and the fourth "Nothing."

From judgment entered on the verdict, the plaintiffs appealed, assigning errors.

Lee & Marler for plaintiffs, appellants.
George Pennell for defendant, appellee.

JOHNSON, J. The stipulations of the parties charted the course of the trial and established the alleged acts of forgery so as to entitle the corporate plaintiff to recover the face amount of the forged checks (50 Am. Jur., Stipulations, Sec. 9; 7 Am. Jur., Banks, Sec. 697; Annotations: 31 A.L.R. 1068, 67 A.L.R. 1535), unless the right of recovery was defeated by the defendant's plea in bar based on negligence of the plaintiffs. The plea in bar was submitted to the jury under the third issue. It was resolved against the plaintiffs. Necessarily, then, since the appeal follows the theory of the trial as fixed by the stipulations (*Thrift Corp. v. Guthrie* 227 N.C. 431, 42 S.E. 2d 601; *Lyda v. Marion,* 239 N.C. 265, 79 S.E. 2d 726), we are concerned here only with the rulings below which relate to the defendant's plea in bar.

The validity of this plea was challenged by the plaintiffs at every crucial procedural stage of the proceedings below—first by demurrer *ore tenus,* next by objection and exception to the submission of the third issue, and finally by motion for directed verdict on the issue. The plaintiffs thus challenged (1) the sufficiency of the defendant's further answer to state a valid defense or plea in bar, and (2) the legal sufficiency of the evidence to support a verdict in favor of the defendant.

In gist, the defendant alleges: (1) that the plaintiffs were negligent in reposing confidence in bookkeeper Bennett by entrusting to him the handling of checks, and (2) that over a long period of time Bennett not only forged the checks here sued on but numerous others running into thousands of dollars, and that the plaintiffs should have discovered "these acts and omissions," and that their failure to do so was negligence barring recovery.

The allegation that the plaintiffs entrusted the company's checks to bookkeeper Bennett, without further averment, falls short of charging negligence. *California Stucco Co. v. Marine Nat. Bank,* 148 Wash. 341, 268 P. 891, 67 A.L.R. 1531. See also Annotations: 31 A.L.R. 1068 and 67 A.L.R. 1535; *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193.

Next, as to the allegation that Bennett forged numerous other checks, it is nowhere alleged (1) whether these acts were committed before or after those here complained of, (2) wherein the plaintiffs were negligent

in supervising Bennett, or (3) that there was any causal connection between a failure to detect the other forgeries and the losses here sued on.

It necessarily follows that the challenged pleading fails to state facts sufficient to constitute a defense. The plaintiffs' demurrer *ore tenus* should have been sustained. The court below erred in overruling it.

In this view of the case we do not reach for decision the question of the sufficiency of the evidence to support the verdict in favor of the defendant on the third issue. Suffice it to say the defendant offered no evidence in support of the plea. It rested its defense upon the testimony of the plaintiffs' witnesses—mainly that adduced on cross-examination. This was wholly insufficient to establish negligence in bar of recovery.

The judgment below will be vacated, the verdict on the third and fourth issues set aside, and the cause remanded to the court below for further proceedings in conformity to law and the decision here reached.

Error and remanded.

MRS. MARY E. STRICKLAND, GEORGE STRICKLAND AND WIFE, LEE STRICKLAND; HERMAN STRICKLAND AND WIFE, LILLIAN STRICKLAND; GARLAND STRICKLAND AND WIFE, FLORA STRICKLAND; MAJOR STRICKLAND AND WIFE, LUCILLE STRICKLAND; BESSIE STRICKLAND (UNMARRIED); CALLIE STRICKLAND (UNMARRIED); MARY S. REGISTER AND HUSBAND, B. R. REGISTER; EFFIE S. ADAMS AND HUSBAND, BRAXTON ADAMS; ESSIE S. HOWELL AND HUSBAND, B. D. HOWELL; MAYBELLE S. PRICE AND HUSBAND, SIMPSON PRICE; KATTIE S. CREECH AND HUSBAND, ROBERT CREECH, v. LIZZIE KORNEGAY AND LAMONT KORNEGAY.

(Filed 13 October, 1954.)

1. Judges § 2b—

Where a cause comes on to be heard at a term of court presided over by an emergency judge duly commissioned, and the parties agree that the court should find the facts and render judgment thereon out of term and out of the county, judgment so rendered is within the jurisdiction of the emergency judge, since the judge, having acquired jurisdiction in term, had power to sign the judgment out of term and out of the county by consent of the parties.

2. Boundaries § 6—

The statutory direction that processioning proceedings be brought originally before the clerk is not jurisdictional, and the parties may agree that the cause be heard and determined in the first instance by the presiding judge.

3. Appeal and Error § 29—

Exceptions not brought forward and discussed in the brief are deemed abandoned.

APPEAL by defendants from *Grady, Emergency Judge,* at March Term, 1954, of WAYNE.

Processioning proceeding under G.S. 38-1 *et seq.*, to locate disputed boundaries between adjoining property owners, heard below on waiver of jury trial by the presiding Judge, who found facts and entered judgment substantially in accord with the plaintiffs' contentions.

From the judgment so entered, the defendants appeal.

J. Faison Thomson & Son and George R. Britt for plaintiffs, appellees.
Jones, Reed & Griffin for defendants, appellants.

JOHNSON, J. This cause was heard during the second week of the Wayne term of court which convened 1 March, 1954. By stipulation of the parties, it was agreed "that the presiding Judge might sit without a jury, hear the evidence, find the facts and enter judgment thereon, out of term and out of the county, to have the same effect as if entered during the term." Thereupon Judge Grady proceeded to hear the evidence offered by each side. It consisted of the testimony of eighteen witnesses and various documents. At the conclusion of the trial Judge Grady returned to his home at Pine Crest on the Neuse, in Craven County, where on 12 March, during the week of the trial, he prepared and signed the judgment.

The defendants, represented in this Court by counsel who did not appear below, now contend, notwithstanding their agreement that Judge Grady might enter judgment out of term and out of the county, that he was without jurisdictional power to so enter judgment. The defendants cite and rely upon the provisions of Chapter 88, Session Laws of 1951, now codified as G.S. 7-52, which defines and fixes the jurisdiction of emergency judges as follows:

"Emergency superior court judges are hereby vested with the same power and authority in all matters whatsoever, in the courts in which they are assigned to hold, that regular judges holding the same courts would have. An emergency judge duly assigned to hold the courts of a county or judicial district shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, *which jurisdiction in chambers shall extend until the term is adjourned or the term expires by operation of law, whichever is later.*" (Italics added.)

The defendants, relying on the language of the statute italicized above, contend that Judge Grady's jurisdiction ended with the adjournment or termination of the term of court which he was assigned to hold. The contention is untenable. True, under the language of the statute the "in chambers" jurisdiction of an emergency judge extends only until the

adjournment or termination of the term of court he is assigned to hold, but the statute places no such limitation on the "in term" jurisdiction of an emergency judge. In the case at hand Judge Grady acquired jurisdiction in term time. Having so acquired jurisdiction, he, by consent, had full power to sign the judgment out of term and out of the county. *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445; *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576.

Next, the defendants contend that this being a processioning proceeding brought under G.S. 38-1 *et seq.,* the clerk of the Superior Court had exclusive original jurisdiction, and that Judge Grady was without jurisdiction to hear the cause in the first instance. This contention likewise is untenable. True, the statute directs that a proceeding of this kind be heard first by the clerk. But the direction is not jurisdictional. We have so held. *Lance v. Cogdill,* 236 N.C. 134, 71 S.E. 2d 918. See also *Woody v. Barnett,* 235 N.C. 73, 68 S.E. 2d 810. The stipulation by which the parties agreed to by-pass the clerk and have the case heard and determined in the first instance by the presiding Judge will be upheld.

No merit has been made to appear in any of the defendants' remaining exceptions. We treat most of them as abandoned for failure of counsel to bring them forward in their brief. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562, *et seq.; Dillingham v. Kligerman,* 235 N.C. 298, 69 S.E. 2d 500.

The findings of fact below support the judgment. It will be upheld.

Affirmed.

EDGEWOOD KNOLL APARTMENTS, INC., v. M. P. BRASWELL, SR., AND M. P. BRASWELL, JR., DOING BUSINESS AS M. P. BRASWELL & SON, AND UNITED STATES CASUALTY COMPANY, A CORPORATION.

(Filed 13 October, 1954.)

Principal and Surety § 6—

The surety on a contractor's bond is not entitled to a credit for the sum required to be retained by the owner during the progress of the work when it appears from the surety's own pleadings and evidence that final payment to the contractor, including the percentage retained, had been made under the contract and that the claim arose after final acceptance of the work and related to defects which were undiscoverable when the work was approved by the FHA inspector, and which under the terms of the contract were not waived by final acceptance and payment for the work in full.

PETITION to this Court by defendant, United States Casualty Company, a corporation, appellant, to rehear this case, reported in 239 N.C. 560,

80 S.E. 2d 653, allowed on one question only, to wit: "Is defendant Surety Company entitled to credit in the amount of the sum retained by plaintiff during the progress of the work as provided by the contract and later paid to Braswell Bros.?"

The facts shown in the record on appeal are sufficiently stated in the opinion to which the petition to rehear relates.

Harkins, Van Winkle, Walton & Buck for plaintiff, appellee.
Meekins, Packer & Roberts for defendant, petitioner.

WINBORNE, J. In the closing paragraph of the opinion in the case reported as above set forth it is stated: "The appellant, Casualty Company, brings forward in its brief assignments of error based upon exceptions relating . . . to the refusal to submit issues tendered, . . . 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 . . . All these have been duly considered, and express treatment of each serves only to unduly extend this opinion, since no prejudicial error in them is made to appear." And, after due consideration of arguments advanced and authorities cited in brief of petitioner, appellant Casualty Company, the conclusion there reached is held to be correct.

At the threshold, it is seen that the United States Casualty Company, answering the complaint of plaintiff, makes no reference to any retained percentage, or to matter of over-payment to the contractor. Indeed, the only affirmative defense pleaded by it, 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 limit. And in this connection, it averred "that although the aforementioned contract between the plaintiff and the defendants . . . Braswell . . . specified no date for the completion of such contract, said contract was in fact completed on or about 15 August, 1950, and the work thereunder approved by the Federal Housing Administration and accepted by the plaintiff on or about said date." This was the theory of the defense upon the trial in Superior Court. And upon such trial all the evidence tended to show, and appellant, Casualty Company, in original brief filed on the appeal to this Court, states, that on 19 December, 1950, final payment was made by the plaintiff to the defendants.

It is now 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 disbursement made under FHA loan." The date when this was done was 19 December, 1950.

Furthermore, this action grows out of a condition that came to light several months after it was thought that the project had been completed. Under the specification for plastering it was stipulated that, if desired, vermiculite might be used as aggregate in lieu of sand for the base coat of plaster in all spaces except baths. And when the plastering in all the bathrooms began to fall, it was ascertained that vermiculite had been substituted for sand. This violation was not known to the plaintiff, nor was it known to the FHA inspector at the time he approved the project as complete. And the recovery of the consequent damage is the gravamen of the present action.

In this respect, the contract provides that: Braswell "guarantees . . . that the lathing and plastering shall be installed in a thorough manner . . . and shall be approved by the FHA project inspector; and shall be responsible for defects which develop due to faulty workmanship during the period of one year from date of final acceptance of the work at no charge to the party of the first part (the owner). Final acceptance and payment in full for such work will not waive any of this guarantee." Hence the matter of balance of contract price had no connection with this case.

Therefore, in the light of these observations, the conclusion reached in the opinion as reported in 239 N.C. 560 in respect to the question here involved, is held to be correct. The petition to rehear is denied.

Petition denied—Appeal dismissed.

C. R. SCOTTEN v. WILLIAM LANGLEY AND V. M. DORSETT, TRADING AS D & L DRIVE-IN AND CITY TAXI.

(Filed 13 October, 1954.)

APPEAL by plaintiff from *Hubbard, Special Judge,* August 1954 Term of CHATHAM.

Civil action to recover damages for personal injuries from both defendants on the alleged grounds that plaintiff's injuries were caused by the alleged actionable negligence of the defendant William Langley in the operation of an automobile, and from the defendant V. M. Dorsett upon the alleged ground that the defendants were engaged in the business of operating a place of business known as the D & L Drive-In and a taxi service to the general public in the Town of Siler City, known as City Taxi, and that the defendant Langley, while operating one of the taxis of Dorsett and Langley, struck the plaintiff with the taxi injuring him.

At the close of plaintiff's evidence, the defendant V. M. Dorsett moved for judgment of nonsuit, which the court allowed, and the plaintiff excepted.

Appropriate issues were submitted to the jury as to the defendant William Langley, and were answered in favor of the plaintiff—the issue of damages being answered $28,000.00. Judgment was entered in accord with the verdict.

The plaintiff alone appeals. His sole assignment of error is that the lower court erred in signing judgment of nonsuit as to his cause of action against the defendant V. M. Dorsett.

Seawell & Wilson
By: H. F. Seawell, Jr., for Plaintiff, Appellant.
Claude Bittle for Defendant, Appellee.

PER CURIAM. We have carefully studied the evidence in the Record, considering it in the light most favorable to the plaintiff, and giving him the benefit of every inference which the evidence fairly supports. A serious question arises as to whether the plaintiff has alleged a partnership between the defendants. Conceding, but not deciding that he has, we are of opinion, and so hold, that the evidence totally fails to make out a case to be submitted to the jury as against the defendant V. M. Dorsett. The ruling of the lower court nonsuiting plaintiff's cause of action against V. M. Dorsett was correct, and is

Affirmed.

JOHN FRANKLIN BUTTS, JR., MINOR, BY HIS NEXT FRIEND, JOHN FRANKLIN BUTTS, v. JOHN L. HART.

(Filed 13 October, 1954.)

APPEAL by defendant from *Grady, Emergency Judge,* and a jury, at June Term, 1954, of WAYNE. No error.

Civil action in tort to recover for personal injuries, due to the alleged negligence of the defendant. Issues of negligence and damages were answered by the jury in favor of the plaintiff, and from judgment on the verdict, the defendant appealed, assigning errors.

J. Faison Thomson & Son and N. W. Outlaw for plaintiff, appellee.
Paul D. Edmundson for defendant, appellant.

PER CURIAM. Upon the argument in this Court counsel for the defendant with commendable frankness conceded, and correctly so, that the record does not disclose reversible or prejudicial error. Therefore the verdict and judgment below will be upheld.

No error.

MRS. COLLIE D. BELCH, A. T. BELCH, JR., AND PERRY HUGHES, TRUSTEES; AND MRS. COLLIE D. BELCH, A. T. BELCH, JR., ELIZABETH B. HUGHES, ARLINE B. MORRIS, CAROL BELCH, DOROTHY BELCH, DONALD BELCH, AND LEWIS E. BELCH, INDIVIDUALLY, v. L. D. PERRY AND J. A. PRITCHETT, TRUSTEE.

(Filed 20 October, 1954.)

1. Pleadings § 15—

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.

2. Pleadings § 3a—

A complaint must contain a plain and concise statement of the facts constituting the cause of action. G.S. 1-122.

3. Pleadings § 2—

Plaintiff may unite in the complaint causes of action, legal or equitable, or both, which arise out of the same transaction, or transactions connected with the same subject of action. G.S. 1-123.

4. Pleadings § 15—

Upon demurrer, a pleading must be construed with a view to substantial justice between the parties, giving the pleader every reasonable intendment and presumption therefrom, and a pleading must be fatally defective before it may be rejected as insufficient. G.S. 1-151.

5. Fraud § 9—Allegations held insufficient to state cause of action for fraud in sale of interest in partnership.

Allegations to the effect that defendant had been in active and exclusive control of the books and records of a certain partnership, and that the other partner during his lifetime, and plaintiff trustees after his death, relied upon defendant's statements as the basis of settlements, and that plaintiffs thereafter purchased defendant's interest in the partnership, with further averment that an accounting would disclose that defendant owed plaintiffs a large sum of money, *is held* insufficient to state a cause of action against defendant for fraud in the sale of his interest in the partnership, it not being alleged that plaintiffs were induced to purchase the assets in reliance on any representation made to them by defendant.

6. Partnership § 7—

An action against one partner upon allegations that the partnership was indebted to plaintiffs in a large amount in connection with sale by plain-

tiffs of their interest in the partnership, cannot be maintained when the other partner is not made a party.

7. Pleadings § 19b—

A cause of action against defendant for breach of an alleged agreement by him that he would not engage in business in competition with plaintiffs after he had sold his interest in a partnership to plaintiffs, is improperly joined with a cause of action by plaintiffs for defendant's fraud in inducing them to purchase his interest in the partnership, and a cause of action by plaintiff trustees for an accounting of the partnership business, and to recover from another partnership funds alleged to be due by reason of plaintiffs' sale of the assets of such other partnership.

APPEAL by plaintiffs from *Bone, J.*, at May Term, 1954, of BERTIE.

Civil action for an accounting between parties hereto, for restraining L. D. Perry from foreclosure of certain deed of trust, and from negotiation by him of evidences of indebtedness, for recovery by plaintiffs of damages for breach of contract by L. D. Perry, for recovery by them of L. D. Perry of such amounts as may be due them upon an accounting, etc., heard upon demurrer by defendants to complaint of plaintiffs.

Plaintiffs in their complaint make these allegations:

"FIRST: That . . . the plaintiff Trustees are such under the last will and testament of the late A. T. Belch, who died in 1945 . . .

"SECOND: That for many years prior to his death, the said A. T. Belch and the defendant L. D. Perry were partners trading under the name of Perry-Belch Fish Company, with their principal place of business at Colerain, in said county, each owning an equal interest in said business. That for many years prior to his death the said A. T. Belch was likewise a partner with the said L. D. Perry and one Leo Wynn in a similar business, operating under the name of Chowan Packing Company, its principal place of business likewise being at Colerain, said Belch and Perry having each owned a one-fourth interest, and the said Leo Wynn the other one-half in said business.

"THIRD: That during the entire time that said A. T. Belch was a partner in said Perry-Belch Fish Company the defendant L. D. Perry was in the active and exclusive charge of the books and records of said partnership, and, as plaintiffs are informed, believe and allege, all purported settlements as between the partners were made on the basis of statements rendered either orally or in writing by the said Perry to the said Belch, the said Belch having had great confidence in and reliance upon the said L. D. Perry. That since the death of the said Belch, and until on or about February 27, 1953, the said Belch interest in said partnership were represented by the plaintiff trustees, and during said period of time the situation as between them and the said Perry was the same as it had

obtained between the said Perry and A. T. Belch, and, as heretofore set out in this section of the complaint, said Trustees, because of their lack of knowledge of the affairs of said business, having had to rely upon the defendant Perry, even to a greater extent than had the said A. T. Belch. That the said A. T. Belch for a substantial time prior to his death had been an invalid, confined to his home, and unable to attend actively to any of the partnership business.

"FOURTH: That on or about the 27th day of February, 1953, the plaintiff trustees purchased the interest of the said L. D. Perry in said Perry-Belch Fish Company, other than accounts receivable, for the agreed price of $30,000.00, having paid $10,000.00 in cash, and having executed a note or notes to the said Perry in the amount of $20,000.00, payable in two annual installments of $10,000.00 each, the first of which was due and payable on January 1, 1954. That said note or notes were secured by a deed of trust on all of the properties of the said Perry-Belch Fish Company, other than accounts receivable, the defendant J. A. Pritchett being the trustee in said instrument.

"FIFTH: That since said sale and purchase, the books of said partnership business have for the first time come into the possession of the plaintiffs; and the plaintiffs are informed, believe and allege that upon a true accounting of the dealings between said L. D. Perry, on the one hand, and the said A. T. Belch and the plaintiffs, on the other hand, the said L. D. Perry is indebted to the plaintiffs in some large amount, and in an amount sufficient to pay and discharge the aforesaid indebtedness secured by said deed of trust. That the exact amount owing by the said L. D. Perry to the plaintiffs cannot be determined except upon a verified audit of said partnership business from its inception, and such an audit is respectfully requested and demanded by the plaintiffs as a part of their asserted cause of action.

"SIXTH: That the aforesaid accounts receivable are in the approximate amount of $20,000.00; that, as plaintiffs are informed, believe and allege, a complete accounting between plaintiffs and the said L. D. Perry of necessity includes said accounts, and that the plaintiffs are entitled to have the same collected by a collector or a receiver to be appointed by the court, and the proceeds impounded pending a final determination of said accounting.

"SEVENTH: That about one year ago the said A. T. Belch Estate bargained with the said Leo Wynn to sell to him for $2,500.00 its one-fourth interest in said Chowan Packing Company, exclusive of accounts receivable. That prior to the sale by L. D. Perry of his aforesaid interest in the Perry-Belch Fish Company, he had represented to the plaintiffs that he would not thereafter engage in the fish business in competition with plaintiffs. That the representatives of the said A. T. Belch Estate were

advised that the said L. D. Perry was advancing for Leo Wynn the aforesaid purchase price of $2,500.00, and that because thereof the instrument of sale of said estate in the Chowan Packing Company was to be made and was made in the name of L. D. Perry, rather than Leo Wynn. That upon the consummation of the said sale, and in breach of his said representations to the plaintiff, the defendant L. D. Perry immediately became active in the fish business of Chowan Packing Company. That in addition thereto he has wrongfully and unlawfully and in breach of his representations to the plaintiff, organized a new fish business under the name of Perry-Wynn Fish Company, and has erected a large plant now being operated by said last named Company, all in competition with these plaintiffs and their said business, and all to their great injury and damage in the sum of $10,000.00, or some other large sum.

"EIGHTH: That as a part of the accounting to which plaintiffs are entitled, and between them and defendant L. D. Perry, they are entitled to a further credit by virtue of the fact that the said Chowan Packing Company owes to the plaintiffs, t/a Perry-Belch Fish Company, the sum of $4,000.00, or some other large sum.

"NINTH: That the defendant L. D. Perry has wrongfully and unlawfully called upon the defendant Trustee to advertise and sell the properties described and conveyed in the aforesaid deed of trust from plaintiff Trustees, dated February 27, 1953, and recorded in the Public Registry of Bertie County, N. C., in Book 432, page 2, which said instrument for a description of said property is by reference made a part hereof. That said Trustee has advertised said property for sale for 12 o'clock Noon on April 17, 1954; and if said sale is not restrained by this Honorable Court, then the plaintiffs will suffer irreparable injury. That as aforesaid, the plaintiffs are entitled to a full accounting from the defendant L. D. Perry because of the various and sundry matters hereinbefore set out, and upon said accounting it is alleged that the plaintiffs will in truth and in fact owe the defendant L. D. Perry nothing, either on the alleged indebtedness secured by the aforesaid deed of trust, or otherwise. That plaintiffs will suffer further irreparable injury unless the defendant L. D. Perry is restrained from the negotiation or assignment, or attempted negotiation or assignment, of the said note or notes evidencing the purported $20,000.00 indebtedness, and the aforesaid accounts receivable of the Perry-Belch Fish Co.

"TENTH: That the plaintiffs stand ready, able and willing to pay such amount, if any, as may be finally determined as owing by them on the indebtedness secured by the deed of trust hereinbefore referred to.

"ELEVENTH: That summons has issued in this cause against the defendants."

Defendants demur to the complaint and pray that the action be dismissed for that:

"1. There is a misjoinder of causes of action, and of parties.

"2. The complaint does not state facts sufficient to constitute a cause of action, (a) with respect to any credits from the Chowan Packing Company, (b) as to the payment of said deed of trust or any part thereof, or (c) to allege that legal payment has been made of an admittedly valid existing indebtedness secured by the deed of trust; and that plaintiffs have not set out sufficient facts to entitle them to the equitable relief prayed for."

The cause coming on to be heard upon defendants' written demurrer to the complaint, and upon the motion to continue the restraining order in effect until the hearing, and the matters being heard in open court, and the court being of the opinion and so holding that defendants' demurrer should be sustained for failure of the complaint to state a cause of action; and plaintiffs' counsel having stated they do not desire to amend: Thereupon the court ordered that the demurrer be sustained, and that the action be dismissed, and that plaintiffs pay the costs to be taxed by the Clerk.

Plaintiffs except thereto, and appeal to Supreme Court and assign error.

Marvin Wilson and John H. Hall for plaintiffs, appellants.
Pritchett & Cooke for defendants, appellees.

WINBORNE, J. Did the trial court err in sustaining the demurrer to the complaint for failure to state a cause of action? This is the sole question presented on this appeal.

In this connection, "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," *Stacy, C. J.*, in *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452, and numerous other cases.

A complaint must contain a plain and concise statement of the facts constituting a cause of action, G.S. 1-122. And "plaintiff may unite in the complaint several causes of action, of legal or equitable nature, or both, where they all arise out of the same transaction, or transactions connected with the same subject of action . . .," G.S. 1-123.

Both the statute G.S. 1-151 and decisions of this Court require that in the construction of a pleading for the purpose of determining its effect its allegations shall be construed with a view to substantial justice between the parties. Every reasonable intendment and presumption must

be in favor of the pleader. Indeed, a pleading must be fatally defective before it will be rejected as insufficient. *Ins. Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369; *Cotton Mills v. Mfg. Co.,* 218 N.C. 560, 11 S.E. 2d 550; *Dickensheets v. Taylor,* 223 N.C. 570, 27 S.E. 2d 618; *King v. Motley,* 233 N.C. 42, 62 S.E. 2d 540; *Clinard v. Lambeth, supra.* See also *Childress v. Abeles, ante,* 667.

Applying these principles and statutory provisions in testing the sufficiency of the allegations of the complaint to withstand the challenge of the demurrer filed in case in hand, it is apparent from a reading of the complaint that plaintiffs have undertaken to state three or more causes of action, no one of which is explicit in statement of facts on which it is based.

The first attempt is to state a cause of action against L. D. Perry in connection with plaintiffs' purchase of his interest in the partnership trading under the name of Perry-Belch Fishing Company, exclusive of its accounts receivable. And while it is alleged that for many years L. D. Perry had been in active and exclusive control of the books and records of the said partnership, and that A. T. Belch in his lifetime and plaintiffs after his death had relied upon reports made by L. D. Perry; and that plaintiffs now believe that upon an accounting L. D. Perry will be indebted to them in some large amount, it is not alleged that plaintiffs were induced to buy in reliance upon any misrepresentation made to them by Belch or that they were misled in any manner in making the purchase, that is, plaintiffs fail to allege wherein L. D. Perry is indebted to them in such large amount. But if relief is sought in respect to accounts receivable, it may be that the allegations, liberally interpreted in favor of the pleader, are sufficient bases for such relief, if they were separated from the other allegations of the complaint.

The second attempt to state a cause of action is against the partnership of the Chowan Packing Company in connection with sale by plaintiffs of their interest therein, exclusive of accounts receivable, to one Leo Wynn, payment for which was made by L. D. Perry to whom the "instrument of sale" was made, and that upon an accounting the Chowan Packing Company owes plaintiffs the sum of $4,000, or some other large sum. In connection with these allegations, it is noted that Chowan Packing Company is not a party to this action, but if it were, there would be a misjoinder of both parties and causes of action,—requiring that demurrer therefor be sustained and the action dismissed. *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481; *Sellers v. Ins. Corp.,* 233 N.C. 590, 65 S.E. 2d 21.

The third attempt to state a cause of action is against L. D. Perry for damages for breach of an alleged agreement by him that he would not engage in the fish business in competition with plaintiffs. This would constitute a separate cause as basis for a separate action.

In the light of the state of the allegations of the complaint, this Court is constrained to sustain the ruling of the trial court, and to affirm the judgment from which appeal is taken.

Affirmed.

ALFONSO OWENS v. JESSE KELLY.

(Filed 20 October, 1954.)

1. Damages § 1a—

Plaintiff is entitled to recover for negligent personal injury the present worth of all damages sustained in consequence of defendant's tort, embracing indemnity for loss of time, or loss from inability to perform ordinary labor, or capacity to earn money, which are the *immediate and necessary* consequences of his injury.

2. Damages § 11—

In actions to recover damages for personal injury, wide latitude is allowed in the introduction of evidence to aid in determining the extent of the damages.

3. Same—

In an action to recover damages for personal injury negligently inflicted, the age and occupation of plaintiff, the nature and extent of his employment, the amount of his income at the time, from either wages or salary, are competent to be considered by the jury on the issue of damages.

4. Same—

Evidence of plaintiff's wages, prior and subsequent to his injury, should be considered by the jury only for the purpose of estimating his loss of earning capacity in comparison with what he earned previous to the injury, and should be considered on the question of his impaired capacity to earn money rather than the wages he actually received.

5. Same: Husband and Wife § 6—

Where plaintiff and his wife were working as a team prior to the injury, but the wife is unable to work thereafter, evidence of their joint earnings is competent, but the jury, in considering evidence of the husband's income prior to the injury, should not augment it by the amount the wife was earning, since her earnings are her sole and separate property. G.S. 52-10.

6. Evidence § 7a: Appeal and Error § 39h—

The burden of proof is a substantial right, and erroneous and conflicting instructions thereon ordinarily constitute prejudicial error.

7. Trial § 31d: Appeal and Error § 39h—

An instruction to the effect that plaintiff had the burden of proving defendant's negligence by the greater weight of the evidence in order to make out a *prima facie* case, and that on a *prima facie* case the jury could answer the first issue "Yes," must be held for prejudicial error.

8. Negligence § 17—

In an action to recover for negligent injury, the burden of proof is upon plaintiff to satisfy the jury by the greater weight of the evidence that the defendant was guilty of actionable negligence.

9. Negligence § 20—

The court charged the jury to the effect that the burden was on defendant to satisfy the jury by the greater weight of the evidence that defendant was guilty of contributory negligence. The court then corrected the error, and charged that the burden was upon defendant to satisfy the jury that plaintiff was guilty of contributory negligence. Thereafter the court again charged that the burden was upon defendant to prove that defendant was negligent. *Held:* The charge was prejudicial and entitles defendant to a new trial.

10. Negligence § 17—

The burden of proof upon the issue of contributory negligence is upon the defendant.

11. Negligence § 11—

Plaintiff's contributory negligence, to bar recovery, need not be the sole proximate cause of the injury, but it suffices for this purpose if it contributes to the injury as a proximate cause, or one of them.

12. Appeal and Error § 39f—

Conflicting instructions upon a material aspect of the case must be held for prejudicial error, since the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly.

APPEAL by defendant from *Martin, Special Judge,* June Mixed "A" Term 1954 of BUNCOMBE.

Action to recover damages for personal injuries allegedly caused by the actionable negligence of the defendant in the operation of an automobile.

The jury answered the issue of negligence Yes, the issue of contributory negligence No, and the issue of damages $4,500.00. Judgment was entered in accord with the verdict.

Defendant appeals assigning error.

Uzzell & DuMont for Plaintiff, Appellee.
Meekins, Packer & Roberts for Defendant, Appellant.

PARKER, J. The defendant contends by his assignments of error brought forward and discussed in his brief that the court erred in the admission of evidence, and in charging the jury.

The plaintiff testified in substance as follows: That prior to his injuries received in the automobile collision between defendant and himself, he and his wife worked for Mr. Chapuisat. That he worked as cook, chauffeur, yard work, house work and those sort of things. That when

he returned to work after the collision, he worked for Mr. Chapuisat for a month. Then he quit, because he was not able to carry on his work by reason of his back injury. His wife stopped at the same time; they customarily worked at the same place, and have for a number of years. Then he and his wife went to work for Mr. and Mrs. T. N. Ward. After working there around six months, his wife got sick. He had to change jobs after that. He then went to work for Mr. Buchanan as a cook. He quit that work after eight months, as he was not physically able to do the work. He then went to work for Judge Junius G. Adams. On cross-examination he testified his wife was sick and couldn't work, and he had to make what he could working without his wife working with him. The plaintiff did not testify, either on direct or cross-examination, as to the amount of wages paid to him or his wife, or to them as a team—not a word as to his earnings.

Defendant's wife on direct and cross-examination made no mention of any amount received by her or her husband, or both, for working. On re-direct examination she testified in substance: We (meaning plaintiff and herself) worked together at Mr. Chapuisat's. He did the biggest portion of the work. She looked after the baby, and helped him with the house work when she could. He cooked, did the heavy cleaning, and drove and looked after the yard when he had to. She was then asked this question: "What amount of money did Mr. Chapuisat pay for the services?" Objection by defendant, sustained, exception by plaintiff. After argument by plaintiff's counsel the court reversed its ruling, overruled the defendant's objection, and the defendant excepted. The question was not answered. Plaintiff's counsel then asked this question: "How much did you make at Mr. Chapuisat's?" A. "$300.00 a month." The defendant made a motion to strike, which the court denied, and the defendant excepted. Plaintiff's counsel then asked this question: "How much did you make at Mrs. Ward's?" Objection by defendant, overruled, and exception by defendant. A. "$200.00." On re-cross-examination she said in substance: He made $55.00 a week working at Buchanan's Restaurant—he made more there than both of us working at Ward's and Chapuisat's.

After the defendant rested its case, the plaintiff was recalled to the stand. He testified that he made $30.00 a week working for Judge Adams. On cross-examination he said he and his wife were working for $300.00 a month for Mr. Chapuisat.

What appears above is a summary of all the evidence in the Record as to plaintiff's earnings. Neither Mr. nor Mrs. Chapuisat, nor Mr. nor Mrs. Ward were called as witnesses.

In an action to recover damages for personal injury resulting from defendant's negligence, the plaintiff is entitled to recover the present worth of all damages sustained in consequence of defendant's tort. These

are understood to embrace indemnity for loss of time, or loss from inability to perform ordinary labor, or capacity to earn money, which are the immediate and necessary consequences of his injury. The age and occupation of the plaintiff, the nature and extent of his employment, the value of his services, and the amount of his income at the time, whether from fixed wages or salary, are matters properly to be considered by the jury. We have not stated the full rule of damages in such cases, but only so much of it as is pertinent to the question of evidence before us. *Mintz v. R. R.*, 233 N.C. 607, 65 S.E. 2d 120; *Ledford v. Lumber Co.*, 183 N.C. 614, 112 S.E. 421; *Rushing v. R. R.*, 149 N.C. 158, 62 S.E. 890.

"In personal injury actions great latitude is allowed in the introduction of evidence to aid in determining the extent of the damages; and as a broad general rule any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of defendant's acts is admissible in such actions, if otherwise competent." 25 C.J.S., Damages, §146, p. 794 (quoted verbatim in *Mullinax v. A. & P. Tea Co.*, 221 S.C. 433, 70 S.E. 2d 911).

Plaintiff was entitled to show the wages Mr. Chapuisat was paying him at the time of his injury, and what wages the Wards paid him for six months shortly after his injury. *Fox v. Army Store*, 216 N.C. 468, 5 S.E. 2d 436; *Rushing v. R. R., supra*; *Wallace v. R. R.*, 104 N.C. 442, 10 S.E. 552; *Stynes v. Boston Elevated Ry. Co.*, 206 Mass. 75, 91 N.E. 998, 30 L.R.A. (N.S.) 737; 15 Am. Jur., Damages, p. 504; 25 C.J.S., Damages, Sec. 86. However, while this evidence is competent for the jury's consideration, it would seem that the jury should estimate the damages on the injured party's ability to earn money rather than what he actually received, and the amount which plaintiff is capable of earning, and not that which he has actually earned since the injury, is to be taken for the purpose of comparison with his previous earnings as showing the diminution of earning capacity. 25 C.J.S., Damages, p. 620, and cases cited.

In an action for damages for wrongful death we have held that direct evidence of the earnings of the deceased is not essential. *Hicks v. Love*, 201 N.C. 773, 161 S.E. 394.

G. S. N. C. 52-10 provides that the earnings of a married woman shall be her sole and separate property as fully as if she had remained unmarried.

In our opinion, the ruling of the court was correct in admitting this evidence for the consideration of the jury. However, while plaintiff and his wife were working as a team, his wages could not be augmented by what she was receiving, or entitled to receive, for her services. *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735.

The defendant's assignment of error No. 9 is to the charge of the court on the first issue as to burden of proof. The first issue is as follows:

"Was the plaintiff damaged by the negligence of the defendant, as alleged in the complaint?" After reading the issue to the jury, the court properly placed upon the plaintiff the burden of proof to satisfy the jury by the greater weight of the evidence that the injury complained of was caused by the negligence of the defendant. Then the court charged as follows: "Burden of proof is an expression that means the duty to establish the truth of the complaint of the person who has the burden of proof by the preponderance or greater weight of the evidence in order to make out a *prima facie* case. A *prima facie* case means a case which the jury can consider, but, not necessarily must, but may, find in the person's favor who seeks the affirmative of the issue, in this case on the first issue, the plaintiff."

"The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and therefore, it should be carefully guarded and rigidly enforced by the courts." *Hosiery Co. v. Express Co.,* 184 N.C. 478, 114 S.E. 823; *Hunt v. Eure,* 189 N.C. 482, 127 S.E. 593; *Boone v. Collins,* 202 N.C. 12, 161 S.E. 543. Error in respect thereof usually entitles the aggrieved party to a new trial. *Vance v. Guy,* 224 N.C. 607, 31 S.E. 2d 766.

In *Vance v. Guy, supra,* the following instruction in the charge was held to be prejudicial error. Speaking to the burden of proof, "the court instructed the jury that the plaintiff had the burden of the issue, which never shifted, but 'when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him.' "

The trial judge in effect instructed the jury that on the first issue the plaintiff had the burden of proof by the greater weight of the evidence in order to make out a *prima facie* case, and that on a *prima facie* case the jury could answer the first issue Yes. It is elementary learning that the plaintiff has the burden of proof to satisfy the jury by the greater weight of the evidence that the defendant was guilty of actionable negligence as alleged to prevail; and if he does not carry such burden, he fails. The inexactness of this instruction may well have been the decisive factor on the trial, as the contention of plaintiff that he was injured by the actionable negligence of the defendant was sharply contested. A *prima facie* case simply carries the case to the jury for determination and no more. *Vance v. Guy, supra; McDaniel v. R. R.,* 190 N.C. 474, 130 S.E. 208; *Hunt v. Eure, supra.*

The defendant's assignments of error Nos. 11 and 12 are to the court's instructions as to the second issue of contributory negligence of the plaintiff. The court instructed the jury that the burden of proof is upon the defendant to satisfy the jury by the greater weight of the evidence that

the defendant was negligent in one or more of these respects, and that his, the plaintiff's negligence was a proximate cause of plaintiff's injuries. Counsel for defendant immediately called the court's attention to the fact that the court had "stated that the burden is upon the defendant to prove that the defendant was negligent." The court thanked defendant's counsel, and instructed the jury that the burden of proof was upon the defendant to satisfy the jury that the plaintiff was guilty of contributory negligence. Then immediately thereafter the court charged: "If you so find, that *the defendant was negligent,* and you find it by the greater weight of the evidence, burden being upon the defendant to so prove, it would be your duty to answer that issue" (the second issue) "Yes." The above is all the court charged as to burden of proof on the second issue. The court then proceeded to the issue of damages.

It is settled law that the burden of proof of contributory negligence under the second issue is upon the defendant. *James v. R. R.,* 233 N.C. 591, 65 S.E. 2d 214.

Plaintiff's contributory negligence, to bar recovery, need not be the sole proximate cause of the injury, as this would exclude any idea of negligence on defendant's part. *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137. It suffices, if it contributes to the injury as a proximate cause, or one of them. *McKinnon v. Motor Lines,* 228 N.C. 132, 44 S.E. 2d 735.

"The very term 'contributory negligence' *ex vi termini* implies, or presupposes negligence on the part of the defendant." *Scenic Stages v. Lowther,* 233 N.C. 555, 64 S.E. 2d 846.

Three times the court instructed the jury on the burden of proof as to the second issue. The first time incorrectly, the second time correctly, and the third and last time incorrectly. "The members of the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly." *Templeton v. Kelley,* 217 N.C. 164, 7 S.E. 2d 380; *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767.

The conflicting instructions were material and prejudicial, since the jury may have acted upon the incorrect instruction. *S. v. Brady,* 238 N.C. 404, 78 S.E. 2d 126.

Another trial seems necessary. It is so ordered.

New trial.

JAMES H. JENKINS, ADMINISTRATOR OF THE ESTATE OF EDWIN G. JOHNSON, DECEASED, v. JOHN EVERETT FAIRBANKS FIELDS, NORFOLK TALLOW COMPANY, INC., AND GREENVILLE BY-PRODUCTS COMPANY, INC.

(Filed 20 October, 1954.)

1. **Compromise and Settlement § 1—**

A completed compromise and settlement fairly made between persons legally competent to contract and having the authority to do so with respect to the subject matter of the compromise, and supported by sufficient consideration, operates as a merger of, and bars all right to recover on, the claim or right of action included therein.

2. **Pleadings §§ 20, 31—**

Plaintiff may test the sufficiency of new matter alleged in the answer to constitute a defense or bar either by demurrer or motion to strike, which will be treated as a demurrer *ore tenus*.

3. **Pleadings § 16—**

Failure of a pleading to state a cause of action, or want of jurisdiction over the subject matter of the action, is not waived by pleading to the merits, but objection on these grounds may be made at any stage of the case.

4. **Pleadings §§ 20, 31—**

A demurrer and motion to strike allegations of the answer on the ground that they fail to state a defense or bar should not be granted if they state any fact, or combination of facts, which, if true, entitle defendants to some relief.

5. **Compromise and Settlement § 1—Answer held to allege settlement under suspended judgment in criminal prosecution in satisfaction of claim for damages arising out of collision.**

In this action to recover for wrongful death resulting from an automobile collision, defendant alleged that in a prior criminal prosecution growing out of the same collision, he paid, with the consent of the court, a stipulated sum to plaintiff administrator, and agreed to pay a further sum each year for three years, in settlement of damages in the cause, and that in consideration of the settlement, the court signed a suspended judgment which directed that the money be paid plaintiff administrator for the benefit of intestate's children. Defendant further alleged on information and belief that plaintiff accepted the settlement in full for damages to plaintiff's intestate, and pleaded said facts as an accord and satisfaction in bar and as an estoppel. *Held:* Plaintiff's demurrer to such new matter set up in the answer and his motion to strike same were properly denied.

6. **Appeal and Error § 5—**

A question as to the rights of the parties if the facts had been otherwise than as alleged presents a moot question which will not be considered on appeal.

APPEAL by plaintiff from *Bone, J.*, at February Term, 1954, BERTIE. Affirmed.

Civil action to recover damages for the death of plaintiff's intestate as the result of an automobile collision allegedly caused by the actionable negligence of the three defendants.

There is a stipulation in the Record signed by counsel of record that the appeals from the two orders of Bone, J., on plaintiff's motion to strike and on his demurrer as to the defendant Norfolk Tallow Company, Inc., will not be taken up, and the appeals from those two orders shall be controlled and determined by the decision of the Supreme Court on plaintiff's appeals as to the defendant Greenville By-Products Co., Inc.

The complaint against the defendant John Everett Fairbanks Fields and the complaint against the defendant Greenville By-Products Co., Inc., are practically verbatim. Both complaints allege that the defendant Fields was guilty of actionable negligence in the driving of an automobile which had a collision with the automobile being operated by plaintiff's intestate, which resulted in the death of plaintiff's intestate, and that at the time of collision Fields was the employee and agent of the defendant Greenville By-Products Co., Inc., and engaged in the performance of his duties for said company. Each of these two defendants filed separate answers. Paragraph Five of the defendant Fields' further defense and as a bar to plaintiff's recovery alleges: "That the defendant was indicted in the Superior Court of Bertie County for manslaughter in connection with the collision set forth in the cause and that the criminal action was called for trial at the August 1951 Term, and that the plaintiff was represented at said trial by John R. Jenkins, Jr., and Jones, Jones & Jones, Attorneys, the said attorneys appeared as private prosecution in the said cause at the request of plaintiff, and after the case was called for trial, the defendant offered a sum of money as a settlement of damages in said cause, and after various conferences between his attorney and the attorneys representing the plaintiff, he, with the consent of Honorable W. C. Harris, Judge of the Superior Court presiding, paid the sum of $2,000 and agreed to pay the further sum of $500 each year for three (3) years in settlement for damages in the said cause and in consideration of the said settlement for damages in the said cause, the court signed a suspended judgment order against him with the direction in the said judgment that the said money be paid to the plaintiff in this cause for the use and benefit of the children of plaintiff's intestate." Paragraph Six of the further defense alleges: "That defendant understood that he was settling damages for the death of plaintiff's intestate and Mrs. Lillian Gertrude Johnson, when he made the settlement as aforesaid, and that he is advised and believes that the plaintiff accepted the said money as a settlement in full for damages to the plaintiff's intestate, and that he specifically pleads said accord and satisfaction as a bar to plaintiff's recovery in this action." Paragraph Seven of the further defense pleads such facts as *res judicata.* Paragraph

Eight of the further defense pleads such facts as an estoppel. The defendant Greenville By-Products Co., Inc., in its further defense in Paragraphs Five, Six, Seven and Eight alleges the same facts as pleas in bar in practically the same words.

Upon the filing of the answer by the defendant Fields, the plaintiff filed a motion that upon the calling of the case for trial he would move to strike from Fields' further defense all of Paragraphs Five, Six, Seven and Eight, because they allege no valid defense. Upon the day the motion to strike was filed the plaintiff demurred to the defendants' answer as not sufficient to sustain the pleas of accord and satisfaction, *res judicata* and estoppel. The plaintiff filed a similar motion to strike and a demurrer as to the answer of the defendant Greenville By-Products Co., Inc. After the motions to strike and the demurrers were filed, the plaintiff filed a reply in each case denying Paragraphs Five, Six, Seven and Eight of the further answers.

Judge Bone entered an order striking Paragraph Seven from Fields' further defense, and denying the motion to strike out Paragraphs Five, Six and Eight. Judge Bone entered a similar order on the motion to strike in the case of plaintiff against the Greenville By-Products Co., Inc. In each case Judge Bone entered an order sustaining the demurrer as to Paragraph Seven, and overruling it as to Paragraphs Five, Six and Eight.

Plaintiff appeals assigning errors.

Jones, Jones & Jones and John R. Jenkins, Jr.
By: John R. Jenkins, Jr., for Plaintiff, Appellant.
Bertram S. Nusbaum and Alvin J. Eley for Defendants, Appellees.

PARKER, J. A completed compromise and settlement fairly made between persons legally competent to contract and having the authority to do so with respect to the subject matter of the compromise, and supported by sufficient consideration, operates as a merger of, and bars all right to recover on, the claim or right of action included therein, as would a judgment duly entered in an action between said persons. *Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805; *Hinson v. Davis,* 220 N.C. 380, 17 S.E. 2d 348; *Armstrong v. Polakavetz,* 191 N.C. 731, 133 S.E. 16; *Sutton v. Robeson,* 31 N.C. 380; 11 Am. Jur., Compromise and Settlement, Sec. 23.

Perhaps the earliest compromise recorded was when Abram and Lot settled the strife between them over grazing lands for their cattle. Genesis, Ch. 13, Verses 8 and 9. The law looks with favor on litigants compromising and settling their differences. *Armstrong v. Polakavetz, supra.*

When the defendants alleged new matter in Paragraphs Five, Six, Seven and Eight of their answers by way of affirmative defense as bars to plaintiff's action, the plaintiff had the right to test the sufficiency of

the pleas either by demurrer or motion to strike. *Williams v. Hospital Asso.*, 234 N.C. 536, 67 S.E. 2d 662; *Smith v. Smith*, 225 N.C. 189, 34 S.E. 2d 148, 160 A.L.R. 460. A motion to strike out new matter in an answer because it alleges no valid defense will be treated as a demurrer *ore tenus*. *Bank v. Hill*, 169 N.C. 235, 85 S.E. 209.

"The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a . . . defense; and he may demur to one or more of such defenses . . ., and reply to the residue." G.S. 1-141; *Williams v. Hospital Asso., supra*. Failure to state a cause of action, or want of jurisdiction over the subject matter of the action, is not waived by pleading to the merits, and those points can be made at any stage of a case. *Davis v. Rhodes*, 231 N.C. 71, 56 S.E. 2d 43.

Paragraphs Five, Six and Eight of the defendants' answers cannot be stricken out on motion, nor be overthrown by demurrer, if the paragraphs allege any fact, or combination of facts, which, if true, entitles defendants to some relief. *Mills Co. v. Shaw, Comr. of Revenue*, 233 N.C. 71, 62 S.E. 2d 487; *Fairbanks, Morse & Co. v. Murdock Co.*, 207 N.C. 348, 177 S.E. 122.

Paragraph Five of the defendant Fields' answer alleges: that he "paid the sum of $2,000.00 and agreed to pay the further sum of $500.00 each year for three years in settlement for damages." Paragraph Five of the answer of the defendant Greenville By-Products Co., Inc., alleges, upon information and belief: that the defendant Fields "paid or agreed to pay the sum of $3,500.00 in settlement for damages." These paragraphs do not allege that the sum of $3,500.00 has in fact been paid by Fields to plaintiff. According to the defendants' allegations the plaintiff is still entitled to recover $1,500.00 from Fields, as no part of this amount is alleged to have been paid him. See *Dobias v. White*, 239 N.C. 409, 80 S.E. 2d 23. Therefore, the trial judge was correct in refusing to strike out Paragraphs Five, Six and Eight of the further answer and defense in each case, and in overruling the demurrers to said paragraphs in each case.

Whether the alleged pleas in bar would be valid, if the defendants in addition to the facts alleged, had alleged the actual payment to plaintiff of the sum of $3,500.00, is a moot question not before us for decision, and on this we express no opinion. "The uniform rule adopted by this Court is to the general effect that such questions will not be considered." *Glenn v. Culbreth*, 197 N.C. 675, 150 S.E. 332.

The plaintiff contends in his brief that *Hester v. Motor Lines*, 219 N.C. 743, 14 S.E. 2d 794, is "on all fours with the present cases." The joint answer of the Motor Lines and Helms alleges: that when Coleman was given the suspended sentence "that the mother of the intestate, Mil-

dred Hester, the plaintiff herein, in open court expressly acquiesced and consented to said judgment, and defendants aver that said judgment determines the rights of the plaintiff herein; that any amount which she might have recovered as a result of the death of her daughter has been adjudicated, ordered paid, and has been paid and accepted by the plaintiff herein; and these defendants plead that plaintiff is estopped thereby . . ." The defendant Coleman in his answer alleged the same facts as an estoppel. The allegations of the defendants in the present cases are quite different.

The rulings of the lower court are

Affirmed.

STATE v. ODESSA WILLIAMS SIMMONS.

(Filed 20 October, 1954.)

1. **Criminal Law § 52a (1)—**

   Upon motion to nonsuit under G.S. 15-173, the evidence is to be taken in the light most favorable to the State.

2. **Criminal Law §§ 42f, 52a (2)—**

   When the State introduces testimony of an exculpatory statement made by defendant it presents such statement as worthy of belief, and while the State is not precluded from showing the facts to be otherwise, defendant is entitled to whatever advantage the statement affords, even to an acquittal when the statement is wholly exculpatory and there is no evidence tending to show the facts to be otherwise.

3. **Criminal Law § 52a (3)—**

   In order for circumstantial evidence to be sufficient to be submitted to the jury, the facts and circumstances adduced by the evidence must be of such nature and so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis.

4. **Criminal Law § 51—**

   While the probative weight of legal proof is for the jury, the sufficiency of proof in law is for the court.

5. **Criminal Law § 52a (2)—**

   In order to be sufficient to be submitted to the jury, the State's evidence must tend to prove the fact at issue as a fairly logical and legitimate conclusion, and evidence which merely raises a suspicion or conjecture is insufficient to withstand motion to nonsuit.

6. **Automobiles § 29b—Evidence held insufficient to be submitted to the jury in this prosecution for reckless driving.**

   The evidence disclosed that an automobile driven by defendant left the highway and traveled some 514 feet before coming to a stop after striking

the kitchen of a house, leaving skid marks on the highway and ground and causing damage to the house and car. The State introduced testimony of statements by defendant that as she approached the cross-roads at the scene, the lights of a car parked on the opposite side of the cross-roads were switched on, that she was blinded by these lights, and, in an effort to avoid striking the car head-on, turned off the highway into a dirt driveway or pathway leading to the kitchen of the house, and that she thought she was driving not more than 50 miles per hour. *Held:* If defendant was not driving in excess of 50 miles per hour and turned off the highway in an instinctive effort to avoid collision with the other car in the sudden emergency created by the switching on of its lights, defendant would not be guilty of careless and reckless driving, and the physical facts and circumstances at the scene do not establish as the sole reasonable hypothesis that she was driving with reckless disregard to the rights and safety of others, and therefore her motion to nonsuit should have been allowed.

APPEAL by defendant from *Parker, J.*, at April Criminal Term, 1954, of WAYNE.

Criminal prosecution upon a warrant issued out of County Court of Wayne upon affidavit charging "that at and in said County on or about the 17th day of October, 1953, Odessa Williams Simmons did unlawfully and willfully operate a motor vehicle on the public highways of Wayne County, N. C., in a careless and reckless manner with a willful and wanton disregard for the rights and safety of others against the form of the statute in such cases . . .," and tried in Superior Court upon appeal thereto, upon original warrant, and not upon a bill of indictment by the grand jury.

Upon the trial in Superior Court the State introduced two witnesses, Lee Wooten and W. L. Morrow. Lee Wooten testified:

"I live in Parkstown, 10 or 11 miles from Goldsboro . . . on the Parkstown-Goldsboro hard surface road, 25 or 30 feet from the road. I . . . lived in a rented house. On the night of the 17th of October, my wife, baby and I were in bed in our house when a car hit our house. I got up and pulled my light cord but there were no lights. The power was off. When she hit the house she bumped the lights off. Just before my house was struck, I heard a noise coming down the road; it sounded like an airplane. It scared me. The car made that noise in its approach up to the time of the collision. The noise sounded like it was on the ground. I couldn't get a light so I took my wife and baby and went to the front door because I was scared to go around the house to see what happened. The back porch of my house and the kitchen were struck by the automobile. That is the back part of the house. I did not see the car until the next morning. It was in the field about as far as from here to the back side of the courtroom (about 60 feet).

"It was a Buick automobile 1950 or 1951 model. I did not know who was driving because the driver did not come out that night. No one came

to my house from the car. . . . I saw no one get out of the car for it was dark. I did not see the lights burning on the car. I did not see the car come down the road and I do not know whether the lights were burning. We . . . did not go back until the next morning. Everything in my kitchen was torn up. The dinette set, oil stove, the wood stove and the refrigerator and what groceries I had were knocked over. All of my dishes were broken. There was nothing in the kitchen that was not torn up.

"I did not know Odessa Williams Simmons and saw her the first time the next day after the collision. Then she wanted a wrecker truck. She talked to my landlord at my house the next morning but I heard nothing that she said. She has said nothing to me since my house was struck.

"I examined the tire tracks of the automobile the next morning outside my house. I followed them from the highway where the car jumped the ditch and I saw the track where it jumped the ditch. The track was traveling from toward Parkstown and it came from the highway direct to my kitchen and cut over in the field."

And W. L. Morrow testified:

"I am a member of the State Highway Patrol and investigated the collision at the home of Wooten. They called me about 6:30 a.m. and I was there a little after 7 a.m. I found that the house is in a slight curve and the house is on the outside of the curve about 45 feet of the roadway. The whole back end of the house was completely torn off and there was a Buick automobile setting in the back of an open field on the back side of this house. I made measurements. The kitchen was on the back of the house behind the front of the house from the road. I measured the skid marks leading from the 1951 Buick found near the house. Leading from the back of the Buick automobile there were three tire tracks that looked like the wheels had been rolling and the right front wheel appeared to have been locked and skidded because there were no tread marks and a furrow of 362 feet from the house up to where the car stopped. The place I found the car up to the house was 362 feet and from the house back up toward the highway was 40 more feet of light skid marks which appears to be where the tires had been skidding. From the house there were skid marks leading to the highway for a distance of 40 feet to a guy wire on a telephone pole that had been broken. The post was between the road and the house at one end of the house, the east end. The guy wire was a one-half inch cable and from the highway skid marks came off the highway about 100 feet up a 3-foot embankment. The measurements were 362 feet from the car to the house, 40 feet from the house to the guy wire and 100 feet from the guy wire to the highway where the skid marks began, a total of 502 feet plus the 12 ft. width of the house, making a total of 514 feet. There were several people out there at the Buick car

when I arrived and in five minutes a wrecker came up with this colored fellow on it, whose name I do not have. The chimney was knocked out and the roof moved to one side.

"Odessa told me that she was driving her car and that the accident or collision occurred about midnight. She appeared somewhat nervous and her eyes were red but I did not detect any odor of alcohol. She made the statement to me that as she approached this cross-roads a parked car on the opposite side of the cross-roads switched on its lights and that she was blinded by these lights and in an effort to avoid striking the car head-on, she turned off the highway and into the dirt driveway or pathway leading to the kitchen of the house. She further stated that she thought she was driving not more than 50 miles an hour and that if she got over that speed the accelerator would hang up. I returned to the scene and examined the car. The front end was pretty badly damaged. I examined the accelerator and found it to be in perfect working order."

Verdict: Defendant is guilty as charged.

Judgment: That defendant be confined in the quarters provided for women and assigned to work under the supervision of the State Highway & Public Works Commission for six months. Execution of sentence suspended upon condition that defendant pay the costs of the court and upon the further condition that she pay $475.00 into the court for the use and benefit of Lee Wooten of any civil liability growing out of the charges of this trial.

Defendant objects and excepts to the foregoing judgment, and in open court gives notice of appeal, and appeals to Supreme Court and assigns error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and William P. Mayo, Member of Staff, for the State.

Matt H. Allen and Paul B. Edmundson for defendant, appellant.

WINBORNE, J. The sole assignment of error presented on this appeal challenges the ruling of the trial court in denying defendant's motions for judgment as of nonsuit, aptly made, pursuant to the provisions of G.S. 15-173.

When the sufficiency of the evidence offered on the trial in Superior Court is challenged by motion for judgment as of nonsuit under G.S. 15-173, the evidence is to be taken in the light most favorable to the State.

Nevertheless, when the State, as in the case in hand, has introduced in evidence the statement of defendant, the statement is presented as worthy of belief. And when such statement tends to exculpate defendant, he is entitled to whatever advantage it affords, even to an acquittal when it is wholly exculpatory. However, the State by offering the statement of

defendant is not precluded from showing that the facts were different. See *S. v. Fulcher,* 184 N.C. 663, 113 S.E. 769; *S. v. Cohoon,* 206 N.C. 388, 174 S.E. 91; *S. v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; *S. v. Baker,* 222 N.C. 428, 23 S.E. 2d 340; *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Gordon,* 225 N.C. 757, 36 S.E. 2d 143; *S. v. Phillips,* 227 N.C. 277, 41 S.E. 2d 766; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *S. v. Jarrell,* 233 N.C. 741, 65 S.E. 2d 304; *S. v. Tolbert,* 240 N.C. 445, 82 S.E. 2d 201.

In this connection the statement of defendant, made to the State Highway patrolman, considered as worthy of belief, would exculpate the defendant of the single charge against her, that is, that she "did unlawfully and wilfully operate a motor vehicle on the public highways of Wayne County, N. C., in a careless and reckless manner with a wilful and wanton disregard for the rights and safety of others." She thought she was not driving more than 50 miles per hour, that is, within the limit of the law. No one contradicts her. And she argues through her attorney that she was confronted with a sudden emergency, created by the switching on of lights of another automobile. They contend that she followed what this Court said in *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337, and in *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246, is "a human instinct when a collision is impending between two vehicles to turn or cut away from the other vehicle"; and that in those cases the evidence discloses that the turning or cutting away was done in an effort to avoid the collision. To this the Court said that "there is no circumstance tending to show that it was other than what a man of reasonable prudence would have done." If this be so, then a "Wilful and wanton disregard of the rights of others" is absent from her conduct under the circumstances.

But it is contended by the State that there is evidence of circumstances from which it may be reasonably inferred that defendant was driving at an excessive rate of speed, and that the course of her automobile after it left the highway is indicative of "wilful and wanton disregard" with which she was operating it on the highway.

However, in passing upon the legal sufficiency of this evidence, it must be borne in mind that when the State relies upon circumstantial evidence for a conviction of a criminal offense, as in this case, "the rule is that the facts established or advanced on the hearing must be of such nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis." *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Coffey, supra; S. v. Hendrick, supra,* and cases cited.

While the probative weight of legally sufficient proof is for the jury, the sufficiency of proof in law is for the court. *S. v. Prince,* 182 N.C. 788, 108 S.E. 330.

So, in considering a motion for judgment of nonsuit under G.S. 15-173, the general rule, as stated in *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730, and in numerous other cases before this Court, is that "if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." But where there is merely a suspicion and conjecture in regard to the charge in the bill of indictment against defendant, the motion for judgment of nonsuit will be allowed.

Hence in the light of defendant's statement taken in connection with other evidence of facts and circumstances in respect to the movement of the automobile after it left the highway, this Court is constrained to hold that the evidence leaves the case in conjecture in regard to the charge against defendant,—entitling her to a nonsuit.

Reversed.

CHARLES McLEAN, SR., v. W. B. MATHENY, T/A MATHENY MOTOR COMPANY.

(Filed 20 October, 1954.)

Pleadings § 22b: Process § 14: Limitation of Actions § 11—

While the court may permit amendment to process and pleadings to cure a misnomer where the proper party is before the court, the joinder of a corporation not named in the process or pleading as an additional party defendant, or the substitution of the corporation in lieu of the purported partnership without the corporation's consent, either expressed or by its entering a general appearance, constitutes a new action as to the corporation, instituted as of the date of service on it, and when the cause against it is then barred by the applicable statute of limitations duly pleaded, the action against it is properly dismissed.

Appeal by plaintiff from *McKeithen, Special Judge,* May Term, 1954, of Caldwell.

Civil action instituted on 14 March, 1950, against W. B. Matheny, trading as Matheny Motor Company, to recover the sum of $1,712.00 alleged to be due on an unpaid check. The facts pertinent to this appeal are as follows:

1. Plaintiff in his original complaint alleged that on or about 2 February, 1950, the defendant's agent, servant and employee, one H. E.

Head, attended an automobile auction sale in Charlotte, North Carolina, and purchased a number of automobiles for and on behalf of the defendant W. B. Matheny, trading as Matheny Motor Company.

2. That among the automobiles purchased by the said H. E. Head for the defendant, was one offered for sale by the plaintiff, to wit: a Ford Club Coupe, for which the said H. E. Head executed a check in the amount of $1,710.00; that the check was drawn on the Union Trust Company of Forest City, North Carolina and deposited in the usual course of business; that the check was protested and returned unpaid.

3. Plaintiff prayed for judgment against W. B. Matheny, trading as Matheny Motor Company, for the sum of $1,712.00, which included a protest fee of $2.00, together with interest from 2 February, 1950.

4. The defendant W. B. Matheny filed an answer to plaintiff's complaint on 13 April, 1950, in which he admitted that he was a citizen and resident of Rutherford County, North Carolina, but denied all other pertinent allegations of the complaint.

5. On 2 November, 1953, the plaintiff, through his counsel, moved that he be allowed to make Matheny Motor Company, a corporation, an additional party defendant and to file an amendment to his complaint. The motion was allowed and a summons for Matheny Motor Company, Inc., was issued on 20 November, 1953, and duly served on 23 November, 1953.

6. The defendant W. B. Matheny, on 26 April, 1954, demurred to the amended complaint on the ground that it did not state a cause of action against him. The demurrer was sustained.

When this cause came on to be heard at the May Term, 1954, of the Superior Court of Caldwell County, the corporate defendant moved for judgment on the pleadings and to dismiss the action on the ground that the three-year statute of limitations had been pleaded, and that it appears from the plaintiff's pleadings that the alleged cause of action arose more than three years prior to the date the summons was issued and served on said corporate defendant. The motion was allowed and the action dismissed. Plaintiff appeals, assigning error.

W. H. Strickland for appellant.
C. H. Gover for appellee.

DENNY, J. It would seem to be unfortunate that this action has not been disposed of heretofore on its merits. However, we are bound by the record now before us and may consider only the question of law presented for determination.

This appeal turns on whether the cause of action against the corporate defendant dates from the time summons was issued and served upon it, or whether such service relates back to the commencement of the action.

Ordinarily, under the comprehensive power to amend process and pleadings where the proper party is before the court, although under a wrong name, an amendment will be allowed to cure a misnomer. *Lane v. Seaboard & R. R. Co.,* 50 N.C. 25; *Fountain v. Pitt County,* 171 N.C. 113, 87 S.E. 990; *Chancey v. Norfolk & W. R. R. Co.,* 171 N.C. 756, 88 S.E. 346; *Drainage District v. Cabarrus County,* 174 N.C. 738, 94 S.E. 530; *Gordon v. Gas Co.,* 178 N.C. 435, 100 S.E. 878; *Chowan County v. Com'r. of Banks,* 202 N.C. 672, 163 S.E. 808; *Clevenger v. Grover,* 212 N.C. 13, 193 S.E. 12, 124 A.L.R. 82; *Lee v. Hoff,* 221 N.C. 233, 19 S.E. 2d 858; *Propst v. Trucking Co.,* 223 N.C. 490, 27 S.E. 2d 152; *Electric Membership Corp. v. Grannis Bros.,* 231 N.C. 716, 58 S.E. 2d 748; *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559; 39 Am. Jur., Parties, section 125, page 1004.

In the instant case, however, the motion of the plaintiff was not to cure a misnomer by substituting the correct name of a proper party who was before the court in lieu of the purported partnership. On the contrary, the motion was to make the defendant corporation an additional party and to file an amendment to the complaint. Therefore, under our decisions, the cause of action, in so far as it relates to the corporate defendant, dates from 20 November, 1953. *Camlin v. Barnes,* 50 N.C. 296; *Plemmons v. Improvement Co.,* 108 N.C. 614, 13 S.E. 188; *Bray v. Creekmore,* 109 N.C. 49, 13 S.E. 723; *Jones v. Vanstory,* 200 N.C. 582, 157 S.E. 867; *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789; *Electric Membership Corp. v. Grannis Bros., supra; Bailey v. McPherson, supra. Cf. Insurance Co. v. Locker,* 214 N.C. 1, 197 S.E. 555. And as held in *Plemmons v. Improvement Co., supra,* if the plaintiff had moved in the court below to substitute the Matheny Motor Company, Inc., in lieu of the purported partnership, the court could not have brought the corporation in as a party defendant without its consent, either expressed or by entering a general appearance, except by causing summons to be served upon it. Hence, if such motion had been made and granted, the status of the plaintiff, with respect to the plea of the statute of limitations, would not have been changed.

It follows, therefore, that since more than three years elapsed after the plaintiff's cause of action arose before the corporate defendant was made a party to the action and served with summons, such action was barred by the three-year statute of limitations duly pleaded by said corporate defendant. G.S. 1-52. Hence, the ruling of the court below must be upheld.

Affirmed.

IDA FLORENCE MOSS v. A. HICKS.

(Filed 20 October, 1954.)

1. Landlord and Tenant § 1: Master and Servant § 4b—

A contract under which the owner of land furnishes a house and the land and one-half of the fertilizer, and the other party furnishes the labor for cultivating the crops and one-half of the fertilizer, with provision for division of the crops, creates the relationship between the parties of landlord and tenant and not that of master and servant.

2. Landlord and Tenant §§ 10, 11—

The landlord in an agricultural tenancy is not liable for injury suffered by the tenant when the steps of the house furnished the tenant collapse by reason of disrepair, even though the condition of the steps had theretofore been brought to the landlord's attention and he had agreed to repair same.

APPEAL by plaintiff from *Morris, J.*, at April Civil Term, 1954, of NASH.

Civil action to recover for alleged actionable negligence of defendant in respect to repair and keeping in repair steps to his house on his land, in which plaintiff and her husband resided,—heard upon demurrer to complaint.

The complaint (disregarding the numbering of paragraphs) alleges substantially the following:

1. That on and prior to 9 June, 1953, plaintiff and her husband, William Pharaoh Moss, were engaged as agricultural tenants and sharecroppers on the lands of defendant,—having moved thereto several years previously under an agreement and contract which (a) "required the landlord to furnish the land, buildings in which plaintiff and her family and other laborers should reside, and buildings for the team, tools and farming implements and to house the crop made on the said land and to furnish one-half of the fertilizers, and whereby defendant agreed to make advancements to plaintiff and her husband to enable them to make, cultivate and harvest crops on said land," and (b) "plaintiff and her husband and family and other laborers were required to live in buildings furnished by defendant and said tenants were required to furnish the labor and pay for one-half of the fertilizers"; and (c) "the proceeds from the sale of crops, in accordance with said contract, were divided one-half to plaintiff and her husband, and one-half to defendant."

2. That the house on the farm assigned to plaintiff and family as their residence while they cultivated and harvested crops on said land pursuant to said contract was an old house, but at the time plaintiff and her family moved to the premises the house was in a state of repair that made

it apparently safe for occupancy and sufficient for the use of plaintiff and her family as a residence.

3. That the only means of ingress and egress to and from the said house were by steps consisting of six steps leading to the front and back porches, five feet above the ground, and front and back doors; that both front and back steps became rotten and weak and dangerous for use by plaintiff and other members of her family; that plaintiff and her husband repeatedly over a period of several months requested defendant to make the necessary repairs or replace the steps, and put them in a safe condition; and that defendant repeatedly promised plaintiff and her husband to accede to their requests; that prior to 9 June, 1953, the front steps having broken and dropped to the ground, plaintiff and her husband were left with no alternative except to use the back steps and back door; that though plaintiff and her husband informed defendant of this condition, and he observed it, and though he repeatedly promised to repair the house and make the steps safe, he failed and neglected (a) to furnish plaintiff and her family a safe place in which to live, and (b) to repair either the front or back steps "as it was his duty to do under the original contract of rental which governed the agricultural contract in force on June 9, 1953."

4. That on 9 June, 1953, when plaintiff undertook to ascend the back steps, they gave way and crashed to the ground causing her to fall, resulting in personal injury to her in manner and to the extent alleged, by reason of which plaintiff is damaged in sum specified for which she prays judgment.

Defendant demurred to the complaint for that it appears upon the face of it that the allegations are not sufficient to constitute a cause of action against defendant in that defendant, as the plaintiff's landlord, was under no legal obligation to plaintiff to make repairs to the house occupied by her, a tenant on defendant's farm.

The cause coming on for hearing upon the said demurrer, the court being of opinion that the allegations of the complaint are not sufficient to constitute a cause of action, entered an order sustaining the demurrer. Plaintiff excepted thereto and appeals to Supreme Court, and assigns error.

Davenport & Davenport for plaintiff, appellant.
S. L. Arrington for defendant, appellee.

WINBORNE, J. Did the trial court err in sustaining the demurrer to the complaint? This is the question presented on this appeal. And upon it arises the basic question as to whether the relation between plaintiff and defendant is that of landlord and tenant, or of master and servant. Plaintiff contends for the latter. But the decisions of this Court, and the

Landlord and Tenant Act, Chap. 42 of the General Statutes, lead to the conclusion that the relation is that of landlord and tenant. See among other cases *Pleasants v. Barnes,* 221 N.C. 173, 19 S.E. 2d 627, which cites *S. v. Hoover,* 107 N.C. 795, 12 S.E. 451, and *S. v. Etheridge,* 169 N.C. 263, 84 S.E. 264. Compare *S. v. Smith,* 100 N.C. 466, 6 S.E. 84; *Tucker v. Yarn Mill Co.,* 194 N.C. 756, 140 S.E. 744, and *Simmons v. Lebrun,* 219 N.C. 42, 12 S.E. 2d 644.

Clearly from these decisions the contract between the defendant on the one hand, and the plaintiff and her husband, on the other, established as between them the relation of landlord and tenant with respect to the cultivation of the lands of defendant, and with respect to the occupancy of the house by plaintiff and her husband.

In the *Pleasants case, supra,* plaintiff rented from defendants a farm in Johnston County, owned by them, for cultivation by him in the year 1940 on "half shares, the old-fashioned way," that is, plaintiff to "furnish labor and one-half the guano," and receive half of the crops, and defendants to furnish "teams and tools" and receive the other half of the crops. Plaintiff was injured while engaged in pulling stumps on the land. This Court held that the relation of landlord and tenant existed between defendants and plaintiff with respect to the cultivation of the farm, and treated and disposed of the case in respect to the theory on which plaintiff brought the action, that is, that he was servant of defendant in doing the work of pulling stumps.

In *S. v. Hoover, supra,* where defendant was charged with enticing a servant, the contract, as testified to by the prosecutor, was as follows: "Jackson was to cultivate certain of the prosecutor's land, amounting to about 8 or 9 acres, for the year 1890, and pay him as rental the sum of $33 or one 400-pound bale of cotton, with the understanding that Jackson was to work for the prosecutor whenever he needed Jackson and he (Jackson) could leave his own crop, at 50 cents a day." The Court held that the relation of master and servant did not exist, for the reason that Jackson was not in the employment of the prosecutor,—that the relation between them was that of landlord and tenant.

The case of *S. v. Etheridge, supra,* was of similar nature to the *Hoover case, supra.* The decision of the Court was to like effect. Moreover, in the *Etheridge case* the Court said, "We have never understood that, in law, either a tenant or cropper is a servant of the landlord." See also *Parker v. Brown,* 136 N.C. 280, 48 S.E. 657.

And in *Tucker v. Yarn Mill Co., supra,* in opinion by *Connor, J.,* it is declared: "It is well settled by the decisions of this Court that ordinarily a landlord owes no duty to the tenant to repair the premises, and is not liable for personal injuries sustained by the tenant, although such injuries are caused by the negligent breach of an agreement to repair."

See *Jordan v. Miller,* 179 N.C. 73, 101 S.E. 550; *Hudson v. Silk Co.,* 185 N.C. 342, 117 S.E. 165. Indeed, the instant case presents no facts to take it out of this rule.

So holding, the judgment below will be, and is

Affirmed.

JIM WHITE v. H. A. LOGAN, JR.

(Filed 20 October, 1954.)

1. Payment § 9—

The plea of payment is an affirmative defense and the general rule is that the burden of showing payment must be assumed by the party interposing it.

2. Evidence § 7a—

The burden of proof is a substantial right.

3. Bills and Notes § 35—

Where, in an action on a note, defendant admits the execution of the note and pleads payment in full, the burden is upon him to prove this defense, and an instruction that the plaintiff had the burden of establishing by the greater weight of the evidence that defendant was indebted to him in some amount, and the amount of the indebtedness, must be held prejudicial error.

APPEAL by plaintiff from *Pless, J.,* and a jury, at March-April Term, 1954, of CLEVELAND.

Civil action on promissory note. The plaintiff alleges a balance due of $1,089.20. The defendant in his further defense admits the execution of the note and pleads payment in full. On the issue of payment thus raised the trial court charged the jury, among other things, that "the plaintiff, Mr. White, has the burden of establishing by the greater weight of the evidence that the defendant, Mr. Logan, is indebted to him in some amount, and the amount of it." Exception by plaintiff.

The jury found for their verdict that the defendant owes a balance of $200. From judgment on the verdict, the plaintiff appeals.

Horace Kennedy for plaintiff, appellant.
No counsel contra.

JOHNSON, J. It is well settled that the plea of payment is an affirmative one, and the general rule is that the burden of showing payment must be assumed by the party interposing it. *Davis v. Dockery,* 209 N.C. 272, 183 S.E. 396; *Furst v. Taylor,* 204 N.C. 603, 169 S.E. 185; *Collins v.*

Vandiford, 196 N.C. 237, 145 S.E. 235; *Swan v. Carawan,* 168 N.C. 472, 84 S.E. 699. See also *Joyce v. Sell,* 233 N.C. 585, 64 S.E. 2d 837; 8 Am. Jur., Bills and Notes, Sec. 1035; 40 Am. Jur., Payment, Sec. 278. The burden of proof is a substantial right. *Davis v. Dockery, supra; Collins v. Vandiford, supra.*

Here the defendant's plea of payment cast on him the burden of proving the affirmative of the issue thus raised. However, the trial court inadvertently placed the burden of proof on the plaintiff. This entitles the plaintiff to a

New trial.

STATE v. ALONZO MOORE.

(Filed 20 October, 1954.)

Criminal Law § 73a—

The dropping of the appeal papers, suspended by a string, through the transom of the solicitor's office in such way as to cause them to be pushed behind the door and out of sight when the door was opened, so that the papers were not seen until after time for service of case on appeal had expired, is not a sufficient service.

DEFENDANT'S appeal from *Williams, J.,* May-June Term, 1954, CRAVEN.

The defendant was tried at the May-June Term, 1954, Superior Court of Craven County, upon a bill charging murder in the first degree. However, at the call of the case the Solicitor for the State announced that he would not ask for a verdict of guilty of the capital felony, but for a verdict of guilty of murder in the second degree. Upon the trial the defendant was convicted of murder in the second degree and from judgment imposed gave notice of appeal to the Supreme Court. The defendant was given 15 days in which to file and serve case on appeal, and the solicitor 10 days thereafter to serve countercase or file exceptions. The time for service of the case expired on Saturday, 19 June. On that day the defendant's counsel attempted to serve the case by going to the office of the solicitor at 11:30 at night in company with a deputy sheriff. The solicitor's office was closed and the door locked. The attorney and the deputy sheriff pried open the transom above the solicitor's office door, tied the appeal papers to the end of a string, pushed them through the transom, to which the other end of the string was fastened, in such a way as caused the papers and the string to be pushed behind the door and out of sight upon its being opened. The solicitor did not discover the papers until 3 July. Defendant's counsel had the deputy sheriff to mark the

papers "return of case on appeal as served" and immediately thereafter filed the papers as the case on appeal in this Court. Before the papers constituting defendant's case on appeal were discovered, the solicitor's time to file exceptions had expired. On failure of the solicitor and defense counsel to agree on exceptions, the solicitor served notice on defense counsel of record to appear before Judge Williams, before whom a motion was made to "strike out the defendant appellant's statement of case on appeal and dismiss the appeal."

After hearing affidavits and argument, Judge Williams, on 9 August, entered an order: "And the court finding and concluding that the mode of service attempted to be made pursuant to these findings of fact was and is not legal service of the statement of case on appeal, and in fact no service as contemplated by the statute, doth consider, order and adjudge that the return of the deputy sheriff upon the said statement of case be stricken out, that the statement of case on appeal by defendant has not been legally served upon the Solicitor for the State, and that said statement of case on appeal be stricken from the record in this case and dismissed."

To this order and the findings of fact therein, defendant objected, excepted and appealed to the Supreme Court.

The Attorney-General filed a motion to dismiss and to affirm judgment of the Superior Court. Defendant filed a petition for *certiorari,* and the Attorney-General filed an answer thereto.

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

Charles L. Abernethy, Jr., for defendant, appellant.

PER CURIAM. The questions presented in this appeal are settled by the decision in *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66.

Certiorari, disallowed.

Motion to dismiss, denied.

Motion to affirm, granted.

MRS. OLEEN CONNOR v. DR. SAM SCHENCK.

(Filed 20 October, 1954.)

Limitation of Actions § 5b—

This action to recover for alleged malpractice in the diagnosis and treatment of plaintiff's broken ankle was instituted some eleven years after the treatment. Plaintiff alleged that defendant concealed his own negligence and prevented plaintiff from securing other medical attention before further complications developed, but plaintiff's evidence was to the effect that she talked to defendant after the treatment from time to time across the years and complained of the condition of her ankle. *Held:* There is no evidence of fraudulent concealment such as to toll the statute of limitations, and judgment of nonsuit upon the plea of the three year statute, properly pleaded, is without error.

APPEAL by plaintiff from *Pless, J.*, March Term, 1954, of CLEVELAND. Affirmed.

Action commenced 13 May, 1953, for damages for personal injuries allegedly caused by malpractice of defendant.

Plaintiff's evidence tends to show that on 17 February, 1942, she fell and broke her ankle; that defendant, a physician, X-rayed the ankle, gave the diagnosis that the main bone was not broken, only the little bone, and defendant's treatment was by splint and bandages; that this diagnosis and treatment was in 1942, during the three months following her injury; that defendant did not treat her further but that she talked with defendant thereafter from time to time across the years and complained of the condition of her ankle.

Plaintiff's action is based on the alleged negligence of defendant in connection with the X-ray, diagnosis and treatment of plaintiff's ankle in 1942. She alleged further that defendant "persisted in fraudulently concealing his own negligence thereby preventing the Plaintiff from seeking further medical attention and correcting the injury before further complications developed."

Defendant denied all allegations of negligence and pleaded the three-year statute of limitations. Replying to the latter plea, plaintiff alleged that "the running of the statute of limitations was tolled by the fraudulent concealment of the facts by the Defendant."

At the close of plaintiff's evidence, the court entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

C. B. Cash, Jr., for plaintiff, appellant.

Jones & Small and Horace Kennedy for defendant, appellee.

PER CURIAM. Conceding, but not deciding, the plaintiff's evidence was sufficient for submission to the jury on the issue of defendant's negligence in 1942, we are confronted by the fact that plaintiff waited some eleven years before commencing this action; and careful consideration of plaintiff's evidence compels the conclusion that there is no evidence whatever of defendant's fraudulent concealment such as would constitute a basis of liability or such as would operate to toll the running of the statute of limitations. Hence, plaintiff's action is barred by the three-year statute; and we need not consider other grounds urged by defendant in support of the judgment of involuntary nonsuit.

Affirmed.

S. D. ELLISON v. J. W. HUNSINGER; PLANTERS & MERCHANTS WAREHOUSE, INC.; J. E. NOGGLE, MANAGER OF PLANTERS & MERCHANTS WAREHOUSE, INC.; A. B. FAIRLEY, STATE WAREHOUSE SUPERINTENDENT; AND BRANDON P. HODGES, TREASURER OF THE STATE OF NORTH CAROLINA.

(Filed 20 October, 1954.)

APPEAL by defendants Planters & Merchants Warehouse, Inc., and J. E. Noggle from *Pless, J.,* March Term 1954, CLEVELAND. Affirmed.

Civil action to recover the value of forty-three bales of lint cotton stored with defendant warehouse corporation.

This cause was here on a former appeal, *Ellison v. Hunsinger,* 237 N.C. 619, 75 S.E. 2d 884. The essential facts are there fully stated. On the rehearing in the court below the parties reaffirmed the stipulations theretofore entered of record and agreed that the fair market value of the cotton at the time it was put in storage was $8,878.85. Thereupon the court entered judgment against the warehouse corporation and its local manager, and they excepted and appealed.

D. Z. Newton and George F. Coleman for plaintiff appellee.

Joseph C. Whisnant and Horace Kennedy for defendant appellants.

PER CURIAM. The law as stated in the opinion of *Parker, J.,* speaking for the Court, on the former appeal, *Ellison v. Hunsinger,* 237 N.C. 619, 75 S.E. 2d 884, is the law of this case. What is there said needs no amplification or clarification.

On this record it is crystal clear that the appellants received for storage forty-three bales of cotton belonging to the plaintiff. When they issued the warehouse certificates without complying with the requirements of

the statute or making any investigation as to the ownership of the cotton, they rendered its legal return to the plaintiff beyond the pale of possibility. They have failed to offer any legal justification for their failure to account to him for that which is his. The court below concluded that under these circumstances the appellants are indebted to plaintiff, as a matter of law, in a sum equal to the fair market value of the cotton at the time they received it and entered judgment accordingly. We concur. Therefore, the judgment entered is

Affirmed.

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ANALYTICAL INDEX.

ABDUCTION.

§ 5. Abduction of Married Woman.

In order to establish the defendant's guilt of eloping with a married woman in violation of G.S. 14-43, the State must establish that at the time of the commission of the offense the wife was innocent and virtuous. *S. v. Temple*, 738.

Evidence that a married woman had retained her innocence and virtue through some 20 years of married life and through more than 15 months of professions of love for her by defendant, and that she did not yield to defendant until some six days prior to the actual elopement, and after he had asked her to marry him, is sufficient upon the question of her innocence and virtue, since the requirement of the statute is fulfilled if her innocence and virtue existed at the beginning of the acts of the defendant which in sequence led to the elopement. *Ibid.*

In a prosecution under G.S. 14-43, an instruction that the married woman must have been innocent and virtuous at the time of the elopement "or at sometime prior to the elopement," must be held for prejudicial error. *Ibid.*

ACCORD AND SATISFACTION.

§ 3. Enforcing Performance of Agreement.

Whether agreement was executed or executory depended on whether person to whom deed was delivered was agent or mere intermediary, and therefore cause is remanded for clarification of findings so that plea of statute of frauds may be determined. *Dobias v. White*, 680.

ADMINISTRATIVE LAW.

§ 4. Exclusiveness of Procedure.

Where a statute provides a valid remedy, such remedy is exclusive. *Lawson v. Bennett*, 52.

§ 6. Review of Orders or Determinations of Administrative Boards.

Upon *certiorari* to review the action of an administrative board, the hearing in the Superior Court is solely upon the record of such board as certified, without the introduction of evidence in the Superior Court. *Baker v. Varser*, 260.

In reviewing an order of an administrative board, the findings of fact made by the board are conclusive when supported by the evidence before it, and are not reviewable by the courts. *Ibid.*

An order of an administrative board supported by its findings of fact will not be interfered with by the courts except upon a showing of capricious, unreasonable or arbitrary action, or disregard of law. *Ibid.*

The conclusiveness of findings of fact by an administrative agency or board is not affected by the fact a minority of its members disagree. *Ibid.*

ADVERSE POSSESSION.

§ 1. Nature and Requisites in General.

Adverse possession means actual possession, with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordi-

ADVERSE POSSESSION—*Continued.*

nary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. *Lindsay v. Carswell,* 45.

§ 3. Actual, Hostile and Exclusive Possession in General.

Adverse possession under known and visible lines and boundaries must be not only continuous, but also adverse or hostile. *Lindsay v. Carswell,* 45.

§ 8. Lappage.

Where there is a lappage in the deeds of the respective parties, and neither is in actual possession of the lappage, the party having the better paper title has presumptive possession of the lappage. *Lindsay v. Carswell,* 45.

§ 19. Sufficiency of Evidence, Nonsuit and Directed Verdict.

This action involved title to lappage in the respective deeds of the parties. Evidence to the effect that defendants' predecessors in title cut timber from time to time from their land, without evidence that the timber was cut from the lappage in dispute, and that their predecessors in title sold timber from their land, including the lappage, on two separate occasions, without evidence that any of defendants' predecessors in title lived on that part of the land within the lappage, and without sufficient evidence showing that the oirginal deed in their chain of title antedated that of the adverse party, *is held* insufficient to ripen title in defendants to the lappage by adverse possession under color. *Lindsay v. Carswell,* 45.

In this action involving the true dividing line between the respective tracts of the parties, plaintiffs' evidence of adverse possession of the disputed area *is held* sufficient to be submitted to the jury under claim of title by seven years adverse possession under color. G.S. 1-38. *Newkirk v. Porter,* 296.

AGRICULTURE.

§ 1a. Landlord's Lien for Rent and Advancements.

The landlord's lien for rent attaches to the entire crop until the rent is paid regardless of whether the relationship is that of landlord and tenant or that of owner and cropper. *Hall v. Odom,* 66.

The landlord's lien for rent in agricultural tenancies exists solely by virtue of statute in this State, and the statute itself gives notice thereof so that no registration or written instrument is required or contemplated. *Ibid.*

§ 5d. Rights and Remedies of Lienholder Against Third Persons.

Where the rent is payable in a fixed amount of money, the tenant owns the crop subject to the landlord's lien for rent and has the right to sell, but the purchaser takes subject to the landlord's lien, and when the crop is sold on the floor of a tobacco warehouse, the warehouseman, as selling agent, deals with the crop with statutory notice of the lien and may be held accountable by the landlord on the basis of money had and received up to the balance due as rent. *Hall v. Odom,* 66.

A landlord may waive his lien for rents by agreement, express or implied, or may be estopped from asserting his lien by acts and conduct constituting the tenant his agent to sell the crop for their joint benefit and account to the landlord for his share out of the proceeds of sale. *Ibid.*

In accordance with the custom in a county, quota marketing card was issued in the name of the tenant alone as the "operator" (7 Code of Federal Regula-

AGRICULTURE—*Continued.*

tions, secs. 725-230, *et seq.*). There was no evidence that the landlord procured the card to be so issued or participated in any way in its issuance. *Held:* In the landlord's action against the warehousemen to recover the amount of his lien for rents on tobacco sold by the tenant and collected for by the tenant without accounting to the landlord, defendant's evidence makes out a *prima facie* case on the question of waiver or estoppel sufficient to require the submission of the issue to the jury, but nonsuit of plaintiff on the defense is error. *Ibid.*

A warehouseman selling the crop of a tenant covered by a registered lien for advancements may be held liable by the lienholder for the amount paid to the tenant for the crop which the tenant fails to apply to the lien. *Turnage Co. v. Morton*, 94.

In an action by the owner of a crop lien for advancements against the warehouseman selling the crop, findings that the crop was in the possession of the landlord, that the lienholder made no objection to the sale of the crop by the landlord and the tenant but expected to be paid out of the proceeds of sale, and that the lienholder knew that the landlord and tenant had sold a quantity of tobacco at defendant's warehouse on a previous date during the same season, *are held* insufficient in law to constitute a waiver or estoppel of the lienholder. *Ibid.*

In order for the owner of a registered crop lien for advancements to be estopped from asserting his rights as against the warehouseman selling the crop, it is necessary that the lienholder constitute the tenant, by express or implied agreement, his agent to sell the crop for their joint benefit and account to the lienholder for the amount due him out of the proceeds of sale. *Ibid.*

ANIMALS.

§ 2. Liability for Damage Inflicted by Domestic Animals Running at Large.

Evidence tending to show that plaintiff was driving his car on a bright moonlight night on a straight highway, that a mule grazing beside the road started walking across the highway when plaintiff was one hundred yards distant, that plaintiff, without slackening speed, drove on and collided with the mule when only her hindquarters and rear feet were on the hard surface, and that plaintiff was not meeting any oncoming traffic and had plenty of room to turn left and avoid the collision, *is held* to disclose contributory negligence on the part of plaintiff as a matter of law barring recovery for personal injury and property damage caused by collision of the automobile with the mule. *Johnson v. Heath*, 255.

The owner of a reputable dog is not answerable in damages for its entry upon the lands of another upon its own volition under circumstances amounting to an unprovoked trespass, but a dog owner may be held liable if it is shown that the dog was not reputable but possessed a propensity to commit the depredation complained of, and that the owner knew, or was chargeable with knowledge, of such propensity. *Pegg v. Gray*, 548.

The owner or keeper of a dog for the purpose of sport, who, in the absence of permission to hunt previously obtained, intentionally sends his dog on the land of another or releases the dog with knowledge, actual or constructive, that it will likely go on the lands of another in pursuit of game, is liable for trespass, even though he himself does not go upon the lands. *Ibid.*

Evidence tending to show that the owner of dogs, without permission to hunt previously obtained, on numerous occasions intentionally and for the purpose of sport sent his pack of dogs, or released them, knowing that the dogs were

ANIMALS—*Continued.*

likely to go on, over and across the lands of plaintiff in pursuit of foxes, whereby plaintiff sustained substantial damage to his fences and other property, *is held* sufficient to carry the case to the jury on the theory of trespass. *Ibid.*

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction of Supreme Court in General.

The Supreme Court on appeal is limited to consideration of errors of law in the court below. *Jyachosky v. Wensil*, 217.

Even though appeal is subject to dismissal as premature, Supreme Court may decide question in exercise of supervisory jurisdiction. *Edwards v. Raleigh*, 137; *Howland v. Stitzer*, 689. Supreme Court will protect interests of persons *in posse ex mero motu. McPherson v. Bank*, 1.

Where the constitutionality of a statute is not raised in the lower court, the question cannot be raised for the first time in the Supreme Court on appeal. *Baker v. Varser*, 260; *Mahan v. Read*, 641.

The Supreme Court will not decide questions on appeal which have not been adjudicated in the court below. *Burton v. Reidsville*, 577.

The Supreme Court will not decide the constitutionality of a statute when the appeal may be disposed of upon a question of less moment. *Mahan v. Read*, 641.

Supreme Court will take cognizance of fatal defect of party plaintiff, *ex mero motu. Ibid.*

§ 2. Judgments Appealable.

An order of the Superior Court remanding the cause to the Industrial Commission is an interlocutory order, and an appeal therefrom to the Supreme Court is premature and is subject to dismissal. G.S. 1-277. However, the Supreme Court in the exercise of its supervisory jurisdiction may, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. *Edwards v. Raleigh*, 137.

Where, upon demurrer, a cause of action is dismissed, and at a subsequent term plaintiff is allowed to withdraw her appeal from the final judgment and file an amended complaint, such order affects a substantial right of the defendant and he is entitled to appeal therefrom. *Mills v. Richardson*, 187.

Denial of motion for judgment on pleadings is not appealable. *Howland v. Stitzer*, 689.

§ 5. Moot Questions and Advisory Opinions.

When pending appeal from the denial of plaintiff's application for a temporary restraining order, the act sought to be restrained has been consummated, whether defendant should have been restrained *pendente lite* becomes an academic question, and the appeal will be dismissed. *Austin v. Dare County*, 662.

A question as to the rights of the parties if the facts had been otherwise than as alleged presents a moot question which will not be considered on appeal. *Jenkins v. Fields*, 776.

§ 6c (1). Necessity for Objections and Exceptions in General.

Challenges to the admissibility of certain evidence and the sufficiency of the evidence to carry the case to the jury may not be raised initially in the Supreme

APPEAL AND ERROR—*Continued.*

Court, but must be presented by exceptions and assignments of error duly made in the lower court. *S. v. Ayscue*, 196.

§ 6c (2). Exception to Judgment or to Signing of Judgment.

An exceptive assignment of error to the judgment presents the sole question whether the facts found are sufficient to support the judgment. *Turnage Co. v. Morton*, 94.

An exception to the judgment presents the sole question of whether the facts found are sufficient to support the judgment, and does not present the sufficiency of the evidence to support the findings of fact. *Beaver v. Paint Co.*, 328.

An appeal itself is an exception to the judgment, but where the judgment is regular in form and is supported by the verdict, a sole challenge by appeal must fail. *S. v. Ayscue*, 196.

An exception to the signing and rendition of the judgment of the Superior Court affirming the award of the Industrial Commission presents the sole question of whether error in matters of law appear from the face of the record. *Willingham v. Rock & Sand Co.*, 281.

An exception to the judgment and to the conclusions of law set out therein presents for review only whether the facts found are sufficient to support the judgment and does not present for review the findings of fact or the evidence upon which they are based. *Nelson v. Simpkins*, 406.

A sole exception to the judgment presents only the face of the record proper for review, and when no error appears thereon, the appeal must fail. *Moore v. Crosswell*, 473.

§ 6c (5). Objections and Exceptions to Charge.

Assignments of error to the charge which do not point out the alleged error are ineffectual. *Crowell v. Air Lines*, 20; *S. v. Stantliff*, 332.

While exceptions to the charge may be noted after trial, such exceptions should be included in appellant's statement of case on appeal as served on appellee. *Moore v. Crosswell*, 473.

§ 6c (5½). Objections and Exceptions to Issues.

Where a defendant tenders no issue as to primary and secondary liability and the cause is not tried upon this theory in the lower court, appellant may not object to the failure of the court to submit such issue. *Crowell v. Air Lines*, 20.

§ 6c (6). Requirement That Matter Be Brought to Trial Court's Attention to Support Exception to Charge.

A misstatement of a contention need not be brought to the trial court's attention when such misstatement presents an erroneous view of the law or an incorrect application of it. *Harris v. Construction Co.*, 556.

§ 6c (7). Objections and Exceptions to Proceedings in Superior Court on Appeal from Inferior Courts or Administrative Boards.

On appeal from judgment of the Superior Court affirming or reversing an award of the Industrial Commission, the Supreme Court will review only such exceptive assignments of error as are properly made to rulings of the Superior Court alone. *Lewter v. Enterprises*, 399.

Where the appellants from an award of the Industrial Commission request the Superior Court to rule upon their exceptions duly entered to the proceedings

APPEAL AND ERROR—*Continued.*

before the Commission, and except to the action of the Superior Court in declining to make rulings on each of such exceptions, and appeal from the judgment affirming the award, *held*, the action of the Superior Court in refusing to rule on the exceptions is in effect an overruling of each and all of them, and the record presents for review each of the alleged errors of law thus designated. *Ibid.*

§ 8. Theory of Trial in Lower Court.

An appeal and appellant's exceptions will be considered in the light of the theory of trial in the lower court. *Crowell v. Air Lines*, 20; *Baker v. Varser*, 260; *Pegg v. Gray*, 548; *Britt Co. v. Drugs, Inc.*, 755.

§ 19. Necessary Parts of Record.

When the pleadings upon which the case was tried are not in the record, the appeal must be dismissed. *Macon v. Murray*, 116.

§ 23. Form and Sufficiency of Assignments of Error.

On appeal from order striking two paragraphs and parts of six other paragraphs or allegations in the answer or further answer, an assignment of error to the ruling of the court "as to the individual section stricken" and to the orders of the court generally, and to the signing of the orders, is a broadside assignment of error presenting no question for decision. *Insulation Co. v. Davidson County*, 336.

The function of the assignment of errors is to group and bring forward such of the exceptions previously noted as the appellant desires to preserve and present to the Court, and may be prepared after service of case on appeal. *Moore v. Crosswell*, 473.

Assignments of error must be filed in the trial court and certified with the case on appeal. An assignment of error filed initially in the Supreme Court will be disregarded. *S. v. Dew*, 595.

An assignment of error must present a single question of law for consideration of the Court, and while more than one exception may be grouped under one assignment of error if all the exceptions relate to a single question of law, the grouping of exceptions which present different questions of law under a single assignment of error constitutes it a broadside assignment of error. *Dobias v. White*, 680.

§ 24. Necessity of Exceptions to Support Assignments of Error.

As a general rule only assignments of error which are supported by exceptions duly taken will be considered. *S. v. Taylor*, 117; *Moore v. Crosswell*, 473.

An assignment of error to the findings of fact by the court below must be supported by an exception to such facts. *Donnell v. Cox*, 259; *Beaver v. Paint Co.*, 328.

§ 29. Abandonment of Exceptions by Failure to Discuss in the Brief.

Exceptions not set out and discussed in the brief are abandoned. *S. v. Stantliff*, 332; *Dobias v. White*, 680; *Strickland v. Kornegay*, 758.

§ 38. Presumptions and Burden of Showing Error.

The burden is on appellant not only to show error but also that the alleged error is material and prejudicial. *Daniel v. Gardner*, 249; *Johnston v. Heath*, 256.

APPEAL AND ERROR—*Continued.*

The action of the court in setting aside the verdict as a matter of law will be presumed correct, and where the record fails to show upon what matter of law the court acted, no error is made to appear. *Roberts v. Hill*, 373.

The refusal of the court to find the facts tendered in writing by defendants is not made to appear erroneous when the record fails to contain the evidence before the lower court. *Nelson v. Simpkins*, 406.

Where the record is silent upon a particuluar point, the action of the trial court will be presumed correct. *S. v. Dew*, 595.

§ 39c. Error Harmless Because Appellant Not Entitled to Relief on Any Aspect of Case.

When plaintiff's own evidence discloses contributory negligence barring recovery as a matter of law, so that it is apparent he is not entitled to prevail in any view of the case, a new trial will not be awarded for mere technical error. *Johnson v. Heath*, 255.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where it is determined on motion to nonsuit that the plaintiff's evidence, taken as true, is insufficient to be submitted to the jury, the exclusion of corroborative evidence cannot be prejudicial. *Reese v. Piedmont, Inc.*, 391.

Where it is determined that the light burning in lessor's rest room at the time of the injury was sufficient for plaintiff invitee to have seen the step-down had she looked, the exclusion of evidence bearing on the regularity of inspection and maintenance of other lights in the restroom cannot be prejudicial. *Ibid.*

Since the maintenance of a rest room with two floor levels and a step between the levels is not negligence unless the location and conditions are such that a reasonably prudent person would not be likely to expect a step or see it, where the evidence discloses that there was sufficient light in the rest room to have enabled the plaintiff to see the step-down had she looked, the evidence does not disclose that the rest room presented a dangerous condition, and therefore evidence tending to show that lessor had knowledge of the condition of the rest room prior to the injury is properly excluded. *Ibid.*

Where the jury does not award plaintiff punitive damages, the exclusion of the defendants' evidence tending to show absence of actual malice cannot be prejudicial. *Childress v. Abeles*, 667.

§ 39f. Harmless and Prejudicial Error in Instructions.

Exceptions to charge will not be sustained when the charge is free of prejudicial error construed contextually. *S. v. Taylor*, 117; *S. v. Bournais*, 311.

Upon an issue relating solely to whether a truck involved in an accident was owned by defendant employer, the liability of the employer under the doctrine of *respondeat superior* being presented under a subsequent issue, an instruction that the issue presented a question of fact and that "There is no law involved in that question." *Held:* Not prejudicial when considered in context. *Jyachosky v. Wensil*, 217.

Inadvertence of the court in referring to the truck in question as a "panel" truck when in fact the truck was a pickup truck, *held*, not prejudicial, it being apparent that the jury was not misled and there being no request by counsel at the time that the inadvertence be corrected. *Ibid.*

APPEAL AND ERROR—*Continued.*

Conflicting instructions upon a material phase of the case must be held for prejudicial error. *Graham v. R. R.*, 338; *Owens v. Kelly*, 770.

Insurer in an automobile collision policy elected to have the damaged car repaired. After initial delivery of the car to insured by the repairman, additional repairs were made. Instructions that the measure of damages would be the difference between the fair market value of the car immediately before it was damaged and its fair market value after it was repaired, *held* not prejudicial as excluding the additional repairs from the consideration of the jury, it appearing that in other portions of the charge the court called the jury's attention to the additional repairs and to the testimony as to the fair market value of the car after all the repairs had been made. *Pierce v. Ins. Co.*, 567.

Conflicting instructions on burden of proof is prejudicial error. *Owens v. Kelly*, 770.

§ 40d. **Review of Findings of Fact.** (Sufficiency of exceptions to present findings see *supra* §§ 6c (2), 6c (3).)

Where the parties waive a trial by jury and agree that the presiding judge find the facts under G.S. 1-184, the judgment will be reviewed in the light of the court's findings and not the facts alleged in the pleadings. *Turnage Co. v. Morton*, 94.

Where the board of education and board of county commissioners are unable to agree on the amounts set up in the school budget, and the procedure prescribed by G.S. 115-160 is invoked, the findings of the Superior Court on appeal from the decision of the clerk of the Superior Court acting as arbitrator, are conclusive unless arbitrary or in abuse of statutory duty. *Board of Education v. Comrs. of Onslow*, 118.

When no exception is taken to the findings of fact it will be presumed that the findings are supported by the evidence. *Donnell v. Cox*, 259; *Beaver v. Paint Co.*, 328.

Facts found under misapprehension of law will be set aside. *Griffith v. Griffith*, 271.

Facts admitted by the parties are conclusive. *R. R. v. R. R.*, 495.

Findings of fact by the trial court under agreement of the parties are conclusive when supported by competent evidence. *Ibid.; Gasperson v. Rice*, 660.

Ordinarily, where there is sufficient evidence to support the court's findings of fact and such findings constitute sufficient predicate for the judgment, the judgment will be affirmed even though the theory on which the lower court bases its judgment is erroneous. But this principle does not apply when the appellee has not alleged the facts necessary to support the judgment upon the applicable theory. *Dobias v. White*, 680.

§ 40f. **Review of Orders on Motions to Strike.**

Refusal of a motion to strike portions of a pleading will not be disturbed on appeal when appellant fails to show he was prejudiced thereby. *In re Will of Wood*, 134.

The denial of a motion to strike matter from a pleading will not be disturbed on appeal unless appellant shows that the matter is irrelevant or redundant, and further shows that its retention in the pleading will cause harm or injustice. *Daniel v. Gardner*, 249.

On appeal from denial of motion to strike, the Supreme Court will not undertake to chart the course of the trial. *Ibid.*

APPEAL AND ERROR—*Continued.*

§ 43. Petitions to Rehear.

Where the Supreme Court is evenly divided in opinion as to the points raised as grounds for rehearing, one Justice not sitting, the petition will be denied. *Power Co. v. Ins. Co.*, 196.

Petition to rehear denied. *Edgewood Knoll Apts. v. Braswell*, 760.

§ 50. Remand.

Where facts are found under misapprehension of law, cause will be remanded. *Griffith v. Griffith*, 270.

Where it is impossible to determine from the record whether the court below set aside the verdict as to one of defendants for insufficiency of the evidence, which the court had no power to do, or whether the court set aside the verdict as contrary to the greater weight of the evidence in the exercise of its discretion, which order is not reviewable, the cause will be remanded for a new trial. *Roberts v. Hill*, 373.

Where the findings of fact are insufficient to support the judgment, the cause will be remanded. *Wall v. Hardee*, 465.

Where the findings of fact of the lower court are too conflicting to support the judgment, the cause will be remanded for a rehearing. *Dobias v. White*, 680.

§ 51b. Stare Decisis.

The doctrine of *stare decisis* does not apply where it conflicts with a pertinent statutory provision to the contrary. *S. v. Mobley*, 476.

The doctrine of *stare decisis* should never be applied to perpetuate palpable error. *Ibid.*

The mere fact that a state court overrules its previous decision on a question of state law does not constitute a denial of due process under the Fourteenth Amendment to the Constitution of the United States. *Summrell v. Racing Asso.*, 614.

APPEARANCE.

§ 2. General Appearance.

Where the Industrial Commission, upon the hearing of a claim for compensation, joins another employer as an additional party defendant, notwithstanding that no notice or claim had been filed against such employer, *held:* The employer by appearing at the time and place of the hearing and stipulating that it was subject to the Compensation Act and joining in the hearing on the merits, makes a general appearance and submits itself to the jurisdiction of the Commission. *Willingham v. Rock & Sand Co.*, 281.

ARBITRATION AND AWARD.

§ 2. Agreement as Bar to Action or Other Proceedings.

A provision in an agreement that dispute between the parties thereto as to the proper meaning and interpretation of the agreement should be referred to arbitrators upon the request of either of the parties, gives to each party the right but not the duty to invoke the arbitration provision, and when neither has done so the agreement to arbitrate will not preclude an action on the contract. *R. R. v. R. R.*, 495.

A supplemental agreement to a contract which provides for arbitration of a dispute between the parties as to the meaning and interpretation of the supple-

ARBITRATION AND AWARD—*Continued.*

mental agreement will not preclude a party to the agreement from bringing action to settle a dispute as to matter embraced within the original contract but not the supplemental agreement. *Ibid.*

ARREST AND BAIL.

§§ 1a, 1b. Persons Who May Make Arrest—Officers and Citizens Without Warrant.

Under the general common law rule, an arrest may not be made ordinarily without a warrant, and the exceptions to this common law rule are defined and limited entirely by statute in this State. *S. v. Mobley*, 476.

An arrest without warrant except as authorized by statute is illegal in this State. *Ibid.*

A peace officer may make an arrest without a warrant if he has reasonable ground to believe that a felony has been committed or a dangerous wound inflicted, and that the suspect is guilty and will escape unless immediately arrested, G.S. 15-41. Under this rule it is not required that the offense be committed in the presence of the peace officer or in fact that the offense should have been actually committed if the arresting officer has reasonable ground to believe that it has been committed. *Ibid.*

Where a felony actually has been committed in the presence of a private citizen, such private citizen may forthwith arrest without warrant the person he knows to be guilty or the person he has reasonable ground to believe guilty. If it turns out the offense is not a felony, such private person may not justify taking the suspect into custody. G.S. 15-40. *Ibid.*

A peace officer or a private citizen on equal terms may arrest without warrant a person whose conduct in his presence amounts to a breach of the peace, or a threat of breach of the peace together with some overt act in attempted execution of the threat such as reasonably justifies a belief that the perpetration of an offense amounting to a breach of the peace is imminent. G.S. 15-39. *Ibid.*

The test of the right of a peace officer or private citizen to arrest without warrant under G.S. 15-39 is not whether the offense be a misdemeanor, but whether arrest is necessary to prevent or suppress a breach of the peace. The statute does not justify arrest when the facts furnish reasonable ground to believe an offense covered by the statute is being committed, but the person making the arrest must determine, at his peril, preliminary to proceeding without warrant, whether an offense arrestable under the statute is being committed. *S. v. McNinch*, 90 N.C. 695, overruled on this point. *Ibid.*

Mere drunkenness unaccompanied by language or conduct which creates, or is reasonably calculated to create, public excitement or disorder amounting to a breach of the peace, will not justify arrest without warrant under G.S. 15-39. *Ibid.*

A nuisance is not *per se* a breach of the peace, and neither a police officer nor a private citizen may arrest a person without warrant for creating a nuisance which does not amount to a breach or threatened breach of the peace. *Ibid.*

§ 3. Resisting Arrest.

A person has the right to resist an unlawful arrest by the use of force, as in self-defense. *S. v. Mobley*, 476.

ARREST AND BAIL—*Continued.*

A person resisting an unlawful arrest may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty, and where he uses excessive force, he may be guilty of assault, or, if death ensues, even of homicide. *Ibid.*

The State's evidence tended to show that defendant resisted arrest without warrant by a municipal police officer on a charge of public drunkenness under G.S. 14-335. The municipal charter conferred no power on its police officers to arrest without warrant in misdemeanor cases. *Held:* In the absence of evidence tending to show *prima facie* that defendant's conduct at the time amounted to an actual or threatened breach of the peace, the arrest was illegal, and defendant's motion to nonsuit on the charge of resisting arrest should have been allowed. *Ibid.*

Where the State's evidence fails to show that defendant used excessive force in resisting an illegal arrest, defendant's motion to nonsuit on the charge of assaulting the police officer should have been allowed. *Ibid.*

§ 8. Liabilities on Bail Bonds.

Where the surety's answer to a *scire facias* amounts to nothing more than a plea for additional time, without allegation of facts disclosing excusable neglect or constituting a legal defense or appealing to the conscience and sense of fair play, judgment absolute against the surety is proper. *S. v. Dew*, 595.

The liability of a surety on an appearance bond is primary, and therefore service of *scire facias* on the principal is not a prerequisite to judgment absolute against the surety. *Ibid.*

The service of a *scire facias* on the surety gives the surety notice to appear at the next term of court, and no other notice by the judge, the solicitor, or calendar is necessary, it being a term-time matter. *Ibid.*

Where the original answer to a *scire facias* presents no legal defense or matters appealing to the conscience or sense of fair play, and there is no exception to the court's refusal to permit the surety to file an unverified, amended answer setting forth a legal defense, the refusal of the court to grant the surety's verified motion to vacate the judgment absolute on the bond will not be held for prejudicial error, since upon the record if the judgment were vacated the State would be entitled to have the same judgment re-entered. *Ibid.*

Where judgment absolute has been entered against the surety on an appearance bond, the surety is entitled upon the later apprehension and delivery of the defendant to the authorities of that county for trial, to be heard under the provisions of G.S. 15-116 upon its motion to vacate or modify the judgment absolute. *Ibid.*

The subsequent arrest of defendant does not *ipso facto* discharge the original forfeiture of bail, but entitles the surety to move that the judgment absolute against it be modified. *S. v. Simms*, 600.

ASSAULT.

§ 4. Pleadings.

In this civil action to recover damages for assault and battery, allegations as to the peaceful and gentlemanly character of plaintiff and that defendant had been involved in many criminal cases charging him with violation of the liquor laws and engaging in assaults with deadly weapons, and as to the wild and drunken conduct of defendant previous to the occasion in suit, should have been stricken on motion aptly made. *Daniel v. Gardner*, 249.

ASSIGNMENTS.

§ 2. Requisites and Validity of Assignments.

Notice of assignment of account stamped on invoice delivered to purchasing agent *held* notice to purchaser. *In re Mfg. Co.*, 586.

§ 5. Rights and Remedies of Assignee.

Purchaser may not offset account against debt due him by seller when purchaser has notice of assignment of account at time of delivery of goods. *In re Mfg. Co.*, 586.

Merchandise was delivered to the purchaser with copies of the invoice, one of which was stamped with notice that the account had been assigned to a named factor. The factor paid the seller for the account. The goods were refused by the purchaser on the ground that they were defective, and returned to the seller. Upon receivership of the seller, the receiver sold the same goods to the original customer at a reduced price. *Held:* Under the provisions of G.S. 44-84 the purchase money received from the sale of the goods by the receiver was impressed with a trust in favor of the assignee, and the assignee may assert his claim therefor as against the receiver. *Ibid.*

ATTORNEY AND CLIENT.

§ 1. Office of Attorney in General.

An attorney at law is a sworn officer of the court indispensable to the administration of justice, and has an obligation to the public as well as to his clients. *Baker v. Varser*, 260.

§ 2. Qualifications and Admission to Practice.

The burden of showing that he has the qualifications prescribed by Rule Five of the Rules Governing Admission to Practice Law in North Carolina rests upon the applicant. *Baker v. Varser*, 260.

The requirement of Rule Five of the Rules Governing Admission to Practice Law in North Carolina in regard to "residence" means "domicile." *Ibid.*

The Board of Law Examiners of the State of North Carolina has been entrusted by statute with the duty of examining applicants for license and providing regulations for admission to the Bar. G.S. 84-24. *Ibid.*

A person does not have a natural or constitutional right to practice law; it is a privilege or franchise to be earned by hard study and compliance with the qualifications for admission to practice law prescribed by law. *Ibid.*

Evidence *held* to support finding of Board of Law Examiners that applicant was not a resident of the State as required by Rule Five. *Ibid.*

§ 6. Scope of Authority of Attorney.

The relation of attorney and client rests on principles of agency and not those of guardian and ward, and while an attorney has implied authority to make procedural stipulations and decisions in the management or prosecution of an action, in the absence of special authority the attorney ordinarily has no power to enter a stipulation operating as a surrender of a substantial right of the client. *S. v. Barley*, 253.

Attorney may not enter plea of *nolo contendere* over protest of client. *Ibid.*

A casual, hasty or inconsiderate admission made by one of the attorneys for plaintiffs, which admission is in irreconcilable conflict with defendants' admission and the theory of plaintiffs' case, and which is repudiated in express terms by other counsel for plaintiff, is not binding on plaintiffs. *Newkirk v. Porter*, 296.

AUTOMOBILES.

§ 5. Sale and Transfer of Title.

The courts will take judicial notice as a fact within common knowledge that automobile manufacturers sell cars to ultimate purchasers solely through local authorized dealers. *Wetherington v. Motor Co.*, 90.

§ 7. Violation of Safety Statutes and Ordinances.

Where the violation of a safety statute constitutes a criminal offense, such violation is negligence *per se*, but in order to constitute the basis for recovery in a civil action such violation must be shown to be the proximate cause of the injury, including the essential element of foreseeability. *Aldridge v. Hasty*, 353.

§ 8a. Due Care in General.

It is the duty of the driver of an automobile to keep a reasonably careful lookout in the direction of travel so as to avoid collision with animals, persons and vehicles on the highway. *Johnson v. Heath*, 255.

The duty of a motorist to observe traffic regulations is a duty owed not only to others using the highways, but also to every person on or about the highways who may suffer injury to his person or damage to his property as a natural and proximate result of a violation thereof. *Aldridge v. Hasty*, 353.

§ 8d. Collision With Parked or Disabled Car on Highway.

In this action to recover for collision with defendant's vehicle parked on highway without lights, evidence *held* for jury on issues of negligence and contributory negligence. *Bryant v. Watford*, 333.

Evidence that plaintiff hit defendant's car, which was standing disabled on highway, but with lights burning, *held* to show contributory negligence as matter of law. *Moody v. Zimmerman*, 752.

§ 8g. Skidding.

The skidding of an automobile, without more, does not imply negligence. *S. v. Robinson*, 745.

§ 8i. Intersections and Through Streets.

A driver along a servient street is required, in compliance with G.S. 20-158, to bring his vehicle to a stop in obedience to a stop sign lawfully erected, and not to proceed into an intersection with the dominant highway until, in the exercise of due care, he can determine that he can do so with reasonable assurance of safety. *Badders v. Lassiter*, 413.

It is the duty of a motorist, when faced by a red light in a traffic control signal properly maintained by a municipality, to stop, and his failure to do so constitutes negligence as a matter of law. *Troxler v. Motor Lines*, 420.

A motorist who has stopped in obedience to a traffic control signal is under duty not only to refrain from putting his vehicle in motion until the green light faces him, but is also under duty not to make a right turn into the intersection until he determines, in the exercise of due care, that such movement can be made in safety. *Ibid.*

Where the traffic control signal shows a red light to vehicles along one street, it may be inferred that vehicles along the intersecting street are faced with the green light. *Ibid.*

The driver of a vehicle entering a highway from a filling station or private driveway is under duty to yield the right of way to all vehicles approaching

AUTOMOBILES—*Continued.*

on the highway, and in the discharge of this duty is required to look for vehicles approaching on the highway at a time when this precaution may be effective. *Gantt v. Hobson*, 426.

§ 8j. Sudden Emergencies.

Evidence that seven-year-old boy darted across highway into path of defendant's vehicle *held* to require application of doctrine of sudden emergency. *Barnes v. Caulbourne*, 721.

§ 9. Condition of and Defects in Vehicles.

Evidence *held* insufficient to show that explosion of gasoline tank truck was result of negligence in failing to maintain safety valves in proper condition. *Hopkins v. Comer*, 143.

The operator of a truck at nighttime on the public highways of the State is required to have burning on the rear of the vehicle a red light plainly visible under normal atmospheric conditions for a distance of five hundred feet to the rear, and other lights and reflectors required by G.S. 20-129 (d). *Gantt v. Hobson*, 426.

§ 12a. Speed in General.

The operator of a motor vehicle should not drive at a speed so slow as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or required by law. *Gantt v. Hobson*, 426.

§ 13. Passing Vehicle Traveling in Opposite Direction.

Evidence tending to show that a truck engaged in hauling asphalt was traveling along a one-hundred-foot strip where the highway had been excavated on one side for a width of three feet, leaving about 19 feet of hard surface for two-way traffic, that the truck was being driven 60 to 65 miles per hour, that the driver ran partly off on the shoulder of the road on his right, and in attempting to get back on the highway, lost control and struck plaintiff's car, which was traveling in the opposite direction, on plaintiff's right of the center of the highway, *is held* sufficient to be submitted to the jury on the issue of the truck driver's actionable negligence. *Harris v. Construction Co.*, 556.

§ 14. Passing Vehicle Traveling in Same Direction.

The failure of a motorist on the highway to give audible warning with his horn or other warning device before passing, or attempting to pass a vehicle traveling in the same direction is a violation of G.S. 20-149 (b) and constitutes negligence *per se*, and such warning must be given to the driver of the preceding vehicle in reasonable time to avoid injury which would probably result from a left turn. *Sheldon v. Childers*, 449.

Where plaintiff looks in rear view mirror some 350 feet before attempting to turn left into intersecting road, does not again look, and turns to left into defendant's vehicle as it had drawn alongside in attempting to pass, plaintiff is guilty of contributory negligence. *Gasperson v. Rice*, 660.

§ 16. Pedestrians.

After collision, car traveled several hundred feet and struck pedestrian in private driveway some distance from highway. *Held:* Even though negligence of driver of other car may have been sole proximate cause of collision, defendant's excessive speed may have been cause of his inability to stop within reasonable distance after collision, and constitute proximate cause of injury to pedestrians. *Aldridge v. Hasty*, 353.

AUTOMOBILES—*Continued.*

Proof of collision with pedestrian on highway is alone insufficient to warrant inference of actionable negligence. *Whitson v. Frances*, 733.

§ 17. Children on or Near Highway.

When a motorist observes or should observe children on, near or approaching a highway, he is under the duty to exercise greater vigilance and caution because of their immaturity and impulsive nature, which is the care an ordinarily prudent person would exercise when confronted with the dangers inherent in such circumstances. *Barnes v. Caulbourne*, 721.

§ 18a. Pleadings in Auto Accident Cases.

Allegations that defendant was driving recklessly, without specifying wherein the defendant was reckless, relate to conclusions of law not admitted by demurrer. *Troxler v. Motor Lines*, 420.

Allegations *held* to show that negligence of one defendant in turning right into intersection and striking rear of car of other defendant before it cleared intersection insulated any negligence on part of driver of car and her demurrer was properly sustained. *Ibid.*

Complaint *held* to allege negligence of demurring defendant which concurred with negligence of codefendant. *Gantt v. Hobson*, 426.

§ 18b. Negligence and Proximate Cause.

Evidence that defendant in attempting to enter a filling station on the left side of the highway, drove his vehicle across the highway to his left directly in the path of a car approaching from the opposite direction at a time and under circumstances which rendered a collision inevitable. G.S. 20-154, 20-140, and that the driver of the other car swerved to his left, sideswiping the right of defendant's car, deflecting the course of the other car so that it went outside the bounds of the highway on its left side and struck plaintiff, who was standing between two cars parked in a private driveway, *is held* to warrant the inference that plaintiff's injury could have been foreseen as the natural and proximate result of defendant's negligence. *Aldridge v. Hasty*, 353.

The evidence tended to show that while defendant was driving on his right side of the highway a car approached from the opposite direction, turned across the highway in front of defendant's lane of travel when defendant was only 20 to 25 feet away, that defendant swerved his vehicle to the left, hit the right side of the other vehicle in a sideswiping manner, went out of the bounds of the highway, and struck plaintiff who was standing in a private driveway on defendant's left of the highway. There was also evidence that defendant's vehicle was traveling at an excessive and unlawful speed, G.S. 20-141. *Held:* While the speed of defendant's car was not a proximate cause of the collision, since it was insulated by the unforeseeable and unlawful conduct of the operator of the other car, whether such excessive speed was the proximate cause of plaintiff's injury, in that it resulted in defendant's inability to control his vehicle after the collision or stop it before striking plaintiff, is a question for the jury. *Ibid.*

§ 18d. Concurring and Intervening Negligence.

Allegations *held* to show that negligence of driver entering intersection against red light and turning right was sole proximate cause of collision, insulating any negligence of driver of other vehicle. *Troxler v. Motor Lines*, 420.

In action by guest in car, allegations *held* concurring negligence of driver of car in traveling at speed at which he was unable to stop in radius of lights and

AUTOMOBILES—*Continued.*

of driver of truck in entering highway from filling station without proper lookout and in driving too slow on highway without lights, so that car hit its rear. *Gantt v. Hobson*, 426.

§ 18g (4). Actions for Negligence—Opinion Evidence.

It is competent for witnesses to testify from appearance that the truck which they saw involved in the accident was the same truck which they saw shortly thereafter at another place where it was identified as that of defendant. *Jyachosky v. Wensil*, 217.

While as a general rule, a person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile, where a motorist testifies he did not see the other car involved in the collision before the impact, his estimate of the speed of the other car is without probative value and is incompetent. *S. v. Roberson*, 745.

§ 18g (5). Actions for Negligence—Physical Facts.

Distance traveled by car after collision *held* to disclose that car was traveling at excessive speed. *Aldridge v. Hasty*, 353.

The physical facts at the scene of a collision may speak louder than the testimony of witnesses. *Sheldon v. Childers*, 449.

§ 18h (2). Nonsuit on Issue of Negligence.

Evidence of negligence in parking vehicle on highway at night without lights *held* for jury. *Bryant v. Watford*, 333.

Evidence that excessive speed prevented motorist, after collision, from stopping car in reasonable distance so that it struck pedestrian some distance from highway *held* for jury, even though negligence of driver of other car was sole proximate cause of collision. *Aldridge v. Hasty*, 353.

Evidence of driver's negligence in driving at excessive speed along highway under construction and running off road and then striking plaintiff's car on plaintiff's right of center of highway *held* for jury. *Harris v. Construction Co.*, 556.

Plaintiff's evidence tended to show the following facts and circumstances: The infant defendant was operating a truck on a public highway at night with knowledge that his right headlight was not burning. Plaintiff's intestate was walking on the highway headed in the opposite direction. The right front fender of the truck struck the intestate, apparently throwing his body up between the fender and the hood from which it fell or was thrown down a steep embankment, causing injuries from which he died. *Held:* The evidence was insufficient to be submitted to the jury on the issue of the actionable negligence of defendant driver, the position of intestate and the truck at the moment of impact, whether defendant driver could have seen him in time to have avoided the collision if he had been keeping a proper lookout and if his truck had been equipped with proper headlights, all being left in mere speculation and conjecture by the evidence. *Whitson v. Frances*, 733.

§ 18h (3). Nonsuit on Ground of Contributory Negligence.

Evidence tending to show that intestate drove his automobile from the yard of a rural filling station onto a highway directly in front of a bus, and that his car was struck before its rear wheels reached the hard surface of the highway, *is held* to show contributory negligence on the part of intestate, barring recovery as a matter of law. *Lassiter v. Coach Co.*, 142.

AUTOMOBILES—*Continued.*

Motorist *held* guilty of contributory negligence as matter of law in hitting mule on highway. *Johnson v. Heath*, 255.

Motorist *held* not guilty of contributory negligence as matter of law in hitting vehicle parked on highway without lights. *Bryant v. Watford*, 333.

Evidence *held* to disclose contributory negligence as matter of law on part of driver in starting across intersection with dominant highway. *Badders v. Lassiter*, 413.

Plaintiff's evidence *held* to show contributory negligence proximately causing rear end collision. *Sheldon v. Childers*, 449.

In this trial by the court under agreement of the parties, plaintiff's testimony to the effect that he looked in his rear-view mirror upon giving a left-turn signal some 350 feet before making the left turn, but did not look in the mirror again and did not see the tractor-trailer, which was following, at any time before collision, together with defendant's evidence that as the tractor-trailer came alongside plaintiff's vehicle in an attempt to pass, plaintiff cut left into the side of defendant's vehicle, with the point of impact being behind the tractor and at the front of the trailer, *is held* sufficient to support the trial court's conclusion that plaintiff was guilty of contributory negligence proximately causing his injury, and nonsuit was proper. *Gasperson v. Rice*, 660.

Defendant's disabled automobile was standing obliquely on his right of the highway with its left rear bumper some five or six inches over the center line. Plaintiff's own testimony was to the effect that he observed defendant's car some 500 feet ahead of him on the highway, with its headlights shining, but that he drove on and collided with the right side of the car, notwithstanding his wife was telling him that the car was on his side of the road, and although he could have stopped at any point along the highway before hitting the car. *Held:* Plaintiff's own testimony discloses contributory negligence barring recovery as a matter of law. *Moody v. Zimmerman*, 752.

§ 18i. Instructions in Auto Accident Cases.

Evidence that child ran across highway in path of defendant's vehicle *held* to support instruction on doctrine of sudden emergency. *Barnes v. Caulbourne*, 721.

In this action to recover for the death of a 7-year-old boy, fatally injured when struck by defendant's truck-trailer, no issue of contributory negligence was submitted to the jury and the court charged that the jury should answer the issue of negligence in the affirmative if it found by the greater weight of the evidence that negligence on the part of the defendant was a proximate cause of the fatal injury, and that the issue should be so answered even though the jury should also find that the acts of intestate constituted one of the proximate causes thereof. *Held:* The instruction is without prejudicial error. *Ibid.*

§ 23b. Liability of Owner for Permitting Incompetent to Drive.

The owner of a motor vehicle who entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver, is liable for such person's negligent operation of the vehicle upon the principle that the owner is negligent in entrusting its operation to such person. *Heath v. Kirkman*, 303.

Allegations relating to defendant's negligence in permitting incompetent to drive *held* proper, but allegations as to driver's nickname of "Wild Bill" and circumstances under which he got the nickname, unrelated to owner's knowledge of driver's reckless propensity, *held* incompetent. *Ibid.*

AUTOMOBILES—*Continued.*

Where plaintiff seeks to recover of one defendant solely upon the theory that such defendant had control of an automobile and permitted another to drive with knowledge that such other was an incompetent and reckless driver, the issue of *respondeat superior* does not arise upon the pleadings and evidence and should not be submitted to the jury. *Roberts v. Hill,* 373.

Where the owner of an automobile hires or lends it to another, knowing that such other is an incompetent and reckless driver and likely to cause injury to others in its use, the owner is liable for injuries caused by the borrower's negligence, not under the doctrine of imputed negligence, but on the ground of his personal negligence in entrusting the automobile to one he knows is apt to cause injury, and therefore whether the relationship of employer and employee exists between the owner and driver at the time the injuries are inflicted is irrelevant to this theory of liability. *Ibid.*

Where there is no evidence that the manager of a used car lot permitted an employee to drive one of the cars or had any knowledge of such employee's reputation as a reckless and incompetent driver, the defendant owner of the business cannot be held liable under the doctrine of imputed negligence. *Ibid.*

G.S. 20-71.1 does not raise presumption that incompetent driver was operating car with knowledge and permission of owner. *Ibid.*

§ 24a. Liability of Owner for Negligence of Agents or Employees in General.

Where recovery is sought solely on theory that owner's manager permitted incompetent employee to drive with knowledge of such employee's incompetence, recovery is based on negligence of manager in entrusting car to such incompetent or reckless driver and not on theory of *respondeat superior.* Therefore relationship of employer and employee does not arise in regard to liability for driver's negligence, and if manager was not guilty of negligence, no negligence could be imputed to owner. *Roberts v. Hill,* 373.

§ 24c. Liability of Owner for Negligent Driving of Agents or Employees—Scope of Employment or Authority.

An employer is liable where his employee causes injury by negligent operation of the employee's automobile while in use in the prosecution of his employer's business, when the employer knows, or should knew, that the employee is so using it, even though the employer has no right of control over the employee's personal car, nor responsibility for its condition, upkeep or operation. *Ellis v. Service Co.,* 453.

An employee is not engaged in the prosecution of his employer's business while operating his personal car to the place where he is to perform the duties of his employment, nor while leaving his place of employment to go home. *Ibid.*

§ 24½d. Competency of Evidence on Issue of Respondeat Superior.

It is competent for witnesses to testify from appearance that the truck which they saw at the scene of the accident was the same truck, identified as belonging to defendant employer, which they saw shortly thereafter at another place. *Jyachosky v. Wensil,* 217.

In an action seeking to hold the owner of a vehicle liable under the doctrine of *respondeat superior* it is competent for plaintiff to introduce in evidence the certificate of registration from the Motor Vehicles Department indicating that license for the vehicle was issued to the employer. *Ibid.*

AUTOMOBILES—*Continued.*

§ 24½e. Sufficiency of Evidence on Issue of Respondeat Superior.

Testimony of witnesses identifying the truck which they saw at the scene of the accident as the same truck identified as belonging to defendant employer is sufficient to take the case to the jury on that question, defendant employer's evidence in conflict therewith being for the jury to resolve. *Jyachosky v. Wensil,* 217.

G.S. 20-71.1 does not affect the burden of proof but merely provides that proof of ownership of a truck involved in an accident establishes *prima facie* that the truck was being operated by an employee and that at the time the employee was acting within the scope of his employment. Such *prima facie* showing is sufficient to take the issue of *respondeat superior* to the jury, but does not compel an affirmative finding thereon. *Ibid.*

G.S. 20-71.1 does not raise presumption that incompetent driver was operating car with knowledge and permission of owner. *Roberts v. Hill,* 373.

Evidence *held* insufficient to show that employee was using his personal car in the performance of the duties of his employment at time of accident. *Ellis v. Service Co.,* 453.

Evidence that the defendant driver, who owned his own truck, was operating it in highway construction work in company with trucks owned by the road contractor, that the contractor reserved the right to terminate defendant driver's services at any time they were unsatisfactory, and that the contractor's foreman was up and down the construction project at all times during working hours directing the work of all the drivers and other workers, *is held* sufficient to be submitted to the jury on the question of whether defendant driver was an employee of the road contractor and not an independent contractor. *Harris v. Construction Co.,* 556.

§ 24½f. Instructions on Issue of Respondeat Superior.

Instruction on issue of *respondeat superior held* without error under provisions of G.S. 20-71.1. *Jyachosky v. Wensil,* 217.

§ 28e. Homicide Prosecutions—Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to support verdict of guilty of manslaughter based upon culpable negligence in operation of automobile. *S. v. Bournais,* 311.

§ 28f. Homicide Prosecutions—Instructions.

In a prosecution for involuntary manslaughter, an instruction to the effect that defendant would be guilty if he killed a human being without intent in doing a lawful act "in an unlawful manner," rather than "in a culpably negligent manner," *held* not to constitute prejudicial error when in other portions of the charge the court painstakingly distinguishes between civil and criminal negligence, and instructs the jury that the unintentional violation of safety statutes not involving actual danger to life, limb, or property would not constitute culpable negligence unless such violation was reckless or in wanton disregard of the safety and rights of others. *S. v. Bournais,* 311.

§ 29b. Prosecutions for Reckless Driving.

In this prosecution under G.S. 20-140 there was no competent opinion evidence that defendant's car was traveling at excessive speed, and the physical facts at the scene of the collision *are held* insufficient, standing alone, to take the case to the jury on the charge of reckless driving, and defendant's motion to nonsuit should have been allowed. *S. v. Robinson,* 745; *S. v. Simmons,* 780.

AUTOMOBILES—*Continued.*

§ 30d. Prosecutions for Drunken Driving.

A warrant charging that defendant at a specified time unlawfully and willfully operated a motor vehicle upon a public road while under the influence of intoxicating liquor is sufficient to charge the offense proscribed by G.S. 20-138 without a reference in the warrant to any statute, and the fact that the warrant refers to an inapplicable statute will be treated as surplusage, and is insufficient ground for arrest of the judgment. *S. v. Smith*, 99.

Evidence that defendant ran his automobile into the left rear of another car while attempting to pass it on the public highway, with testimony of patrolman, who reached the scene of the accident in about 10 minutes after the accident occurred, that in his opinion defendant was intoxicated, that defendant was staggering, and that he had a strong odor of alcohol about him, *is held* sufficient to overrule nonsuit in a prosecution under G.S. 20-138. *Ibid.*

The evidence in this case *is held* sufficient to be submitted to the jury on the charge of defendant's guilt of driving an automobile on the public highway while under the influence of intoxicating liquor. *S. v. Bolling*, 141.

BAILMENT.

§ 1. Nature, Requisites and Kinds of Bailment.

Where the purchaser of an automobile returns it to the dealer for the five-hundred-mile checkup to which he is entitled under the contract of sale, such delivery constitutes a bailment for the mutual benefit of the bailor and the bailee. *Ins. Co. v. Motors*, 183.

§ 4. Care and Custody of Property.

A bailee for hire is not an insurer, but is under legal duty imposed by law, irrespective of the contract, to exercise due care to protect the subject of the bailment from loss, damage or destruction, and may be held liable for damages resulting from negligent failure to perform this duty. *Ins. Co. v. Motors*, 183.

§ 7. Actions for Conversion.

The bailor makes out a *prima facie* case of actionable negligence of a bailee for hire upon showing that he delivered the property in good condition to the bailee, that the bailee accepted it and thereafter had exclusive possession and control of the property, and failed to return it, or returned it in a damaged condition. *Ins. Co. v. Motors*, 183.

Plaintiff's evidence tended to show that the purchaser of an automobile delivered it to the dealer for the five-hundred-mile checkup, that the purchaser did not again see the car until the next day when it had been damaged by fire, although the cars on either side of it were not burned, and that in the interim the car was in the exclusive possession and control of the dealer. *Held:* Under the rule applicable to bailments, plaintiff made out a *prima facie* case sufficient to be submitted to the jury, notwithstanding the absence of any evidence of any facts or circumstances relating to the fire or tending to show any particular acts of negligence. *Ibid.*

BASTARDS.

§ 6. Prosecutions for Wilfull Failure to Support—Sufficiency of Evidence and Nonsuit.

Testimony to the effect that defendant admitted he was the father of prosecutrix' child, that though he gave prosecutrix' mother a small sum of money

BASTARDS—*Continued.*

for the child on one occasion, he had since refused to support it, that letters written by the Welfare Department relative to his responsibility for the child's support were mailed to him and not returned to the sender, and that he admitted having intercourse with prosecutrix on one occasion about eight months prior to the child's birth, *is held* sufficient to be submitted to the jury, notwithstanding defendant's testimony in defense that he was not the father of the child, that no demand had been made on him for support, that the money he had paid was not in discharge of any duty to support, and the introduction by him of a birth certificate stating the length of pregnancy so as to antedate the time he admitted having intercourse. *S. v. Wortham*, 132.

§ 12. Right to Custody and Control.

The mother of an illegitimate child is its natural guardian and has legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child. This rule is not absolute, and the custody of the child may be awarded to another when it clearly and manifestly appears that the best interest and welfare of the child demand it. *Wall v. Hardee*, 465.

It is necessary to support an order of the court awarding permanent custody of an illegitimate child to its nonresident mother that the court find that such permanent removal from the State would be for the best interest and welfare of the child. *Ibid.*

BILL OF DISCOVERY.

§ 1c. To Obtain Evidence.

After the pleadings have been filed, application for examination of the adverse party can be for no legitimate reason other than to obtain evidence to be used at the trial, and is available to the applicant as a matter of right. G.S. 1-568.11. *Aldridge v. Hasty*, 353.

After the pleadings have been filed, an application for examination of the adverse parties alleging that the parties to be examined are residents of a specified county and requesting that the examination be had at the courthouse of that county, discloses sufficient reason for the designation of the place for the hearing. G.S. 1-568.11 (b) (4). *Ibid.*

§ 6. Introduction of Examination at Trial.

Where order for examination of the adverse party after pleadings have been filed is issued on proper application, and notice of the examination is served on the adverse party, G.S. 1-568.14, and the adverse party appears in person and by counsel and participates in the examination, the deposition is admissible against him, subject to his right to except to the competency, relevancy, or materiality of the testimony. *Aldridge v. Hasty*, 353.

Since the amendment of G.S. 1-568.25 (a) and (b) by Chapter 885, Session Laws of 1953, the party introducing the deposition of a witness does not make the party examined his witness and is not bound by adverse statements made by the witness during his examination, and upon motion to nonsuit only so much of the pretrial testimony as tends to establish plaintiff's cause of action or explain other testimony offered in plaintiff's behalf is to be considered. *Ibid.*

BILLS AND NOTES.

§ 19½. Liabilities on Forged Endorsements of Checks.

This action was instituted by plaintiffs to recover for checks belonging to them which defendant cashed for the bookkeeper of the corporate plaintiff after the bookkeeper had forged endorsements of the payees. *Held:* Defendant's allegation that plaintiffs entrusted the checks to the bookkeeper, without more, fails to charge negligence on the part of plaintiffs proximately contributing to the cashing of the checks by defendant. *Britt Co. v. Drugs, Inc.*, 755.

This action was instituted by plaintiffs to recover for checks belonging to them which defendant cashed for the bookkeeper of the corporate plaintiff after the bookkeeper had forged endorsements of the payees. *Held:* Allegations that the bookkeeper had forged numerous other checks is insufficient to charge negligence on the part of plaintiffs when it is not alleged whether these other forgeries were committed before or after those sued on, wherein plaintiffs were negligent in supervising the bookkeeper, or that there was any causal connection between failure to detect the other forgeries and the losses sued on. Nor would testimony of the plaintiffs' witnesses, mainly that adduced on cross-examination, be sufficient to establish negligence in this respect on the part of plaintiffs. *Ibid.*

§ 29. Actions on Notes—Defenses.

An accommodation endorser alleged that the payee bank through its officer, who was also an agent for a life insurance company, agreed to procure the issuance of a term policy of life insurance on the maker, that interest on the note and the insurance premium were paid to the officer, that the policy was not issued, and that the maker died within the term specified. *Held:* The allegations are germane to defense of an action on the note by the payee bank, regardless of whether it is alleged that the premium was paid to the bank or to the insurance company, the basis of the defense being the bank's breach of its agreement to procure the issuance of the policy. *Bank v. Bryan*, 610.

Where, in an action on a note, defendant admits the execution of the note and pleads payment in full, the burden is upon him to prove this defense, and an instruction that the plaintiff had the burden of establishing by the greater weight of the evidence that defendant was indebted to him in some amount, and the amount of the indebtedness, must be held for reversible error. *White v. Logan*, 791.

BOUNDARIES.

§ 5d. Declarations.

In this action involving the location of a dividing line between the respective tracts of the parties, plaintiffs' witness testified that before dispute as to the dividing line, one of defendants' predecessors in title pointed out to the witness a line of marked trees as the true dividing line. The marked trees established the dividing line as contended for by plaintiffs. The trees pointed out were not referred to in the deeds. *Held:* Even though the testimony may not be competent as a declaration concerning a private boundary, it is competent as a declaration against interest made by a former owner of the land during the time of his ownership. *Newkirk v. Porter*, 296.

§ 6. Proceedings to Establish—Nature and Grounds.

Where, in an action to recover damages for trespass, defendants admit plaintiffs' title to the land embraced within the description in plaintiffs' deeds, but dispute the location of the dividing line between plaintiffs' land and the land

BOUNDARIES—*Continued.*

of defendants, plaintiffs are not required to prove title, but only that the disputed area lies within the boundaries of their tract. *Newkirk v. Porter*, 296.

The statutory direction that processioning proceedings be brought originally before the clerk is not jurisdictional, and the parties may agree that the cause be heard and determined in the first instance by the presiding judge. *Strickland v. Kornegay*, 758.

BROKERS.

§ 10. Right to Commissions Where Sale Is Consummated.

Plaintiff brokers' complaint *held* sufficient to state a cause of action to recover commissions on the theory of *quantum meruit* upon allegations that defendant owners listed their property for sale at a stipulated price net to them, with the brokers to receive as commissions any amount in excess of the stipulated price which they could obtain for the property, and that plaintiff brokers obtained a prospect willing to pay a sum in excess of the stipulated price, but that through no fault of their own plaintiffs were prevented from effecting the sale because the owners took negotiations into their own hands and sold to plaintiffs' prospect for the stipulated price. *Thompson v. Foster*, 315.

CARRIERS.

§ 3. Matters and Transactions Subject to Federal Regulation.

Interstate air transportation is regulated in accordance with the provisions of the Civil Aeronautics Act. *Crowell v. Air Lines*, 20.

§ 4. Rates and Tariffs.

An interstate Air Line is required to file with the Civil Aeronautics Board only such rules, regulations and practices as affect rates or services under such rates, 49 U.S.C., Sec. 483 (a), and a time limitation as to filing notice of claim and institution of action for negligent injury to a passenger relates to an act of the passenger and not to service of the carrier and is neither required nor authorized to be filed with the Board by the statute. *Crowell v. Air Lines*, 20.

Motor carriers of freight in intrastate commerce who exchange freight in the course of delivery are not only given authority but are required to establish joint rates, and may provide for the division of revenues derived from such shipments by contract, subject only to the limitation that the contract shall not unduly prefer or prejudice any of the participating carriers. *Utilities Com. v. Motor Lines*, 166.

The Utilities Commission is given authority to intervene and vacate a contract for division of revenue from interchanged freight between two intrastate motor carriers only upon its finding after hearing that the contractual agreement between the carriers for the division of revenue for such shipments is, or will be unjust, unreasonable and inequitable, or unduly preferential or prejudicial as between the contracting carriers, and when an order is entered by the Commission without such jurisdictional finding, the cause must be remanded. *Ibid.*

§ 7. Control and Regulation—Facilities and Terminals.

Railroads are *quasi*-public corporations which must operate under the public policy of the State to encourage competition among them for the public good and convenience, and one railroad company will not be allowed to preclude competition by another in a particular area by arbitrarily refusing such other

CARRIERS—*Continued.*

reasonable use of its right of way and trackage. G.S. 60-37; G.S. 60-60. *R. R. v. R. R.*, 495.

§ 8. Carriage of Goods—Unloading Facilities.

A franchise motor carrier of goods by contract in intrastate commerce, operating as both initial and delivering carrier, owes the duty to the employees of the consignee to exercise reasonable care to furnish a vehicle in reasonably safe condition so that the employees of the consignee can unload the trailer with reasonable safety, and the duty to make reasonable and timely inspection of the vehicle to ascertain whether it is reasonably safe for unloading, and to repair or give warning of any dangerous condition in the trailer discoverable by such inspection. *Honeycutt v. Bryan*, 238.

Evidence *held* sufficient for jury on issue of negligence of motor carrier in failing to use due care to provide vehicle reasonably safe for unloading and in failing to warn of danger. *Ibid.*

§ 21c. Liabilities to Passengers in Boarding or Alighting.

Evidence *held* sufficient for jury on issue of air carrier's liability for failure to exercise due care to provide safe passageway for passengers in going to board plane; carrier *held* not entitled to indemnity from municipality for such liability under terms of lease of port. *Crowell v. Air Lines*, 20.

A statement printed on the ticket folder that the carrier had set forth in its tariffs notice of time limits for filing claim and institution of suit for personal injury will not bar a passenger's action instituted within the limitation of G.S. 1-52 (5) when it appears that the carrier had actual notice of the injury at the time it occurred, that the tariffs were filed only with the Civil Aeronautics Board, and that the passenger, though a habitual traveler by air, had never read on any ticket sold her such limitation, it being necessary that such limitation be distinctly declared and deliberately accepted in order to be effective. *Ibid.*

COMPROMISE AND SETTLEMENT.

§ 1. Nature, Requisites and Validity of Agreements.

A completed compromise and settlement fairly made between persons legally competent to contract and having the authority to do so with respect to the subject matter of the compromise and supported by sufficient consideration, operates as a merger of, and bars all right to recover on, the claim or right of action included therein. *Jenkins v. Fields*, 776.

Answer *held* to allege settlement under suspended judgment in criminal prosecution in satisfaction of claim for damages arising out of collision. *Ibid.*

CONSPIRACY.

§ 6. Sufficiency of Evidence and Nonsuit.

An agreement between two or more persons is an essential element of a conspiracy, and such agreement must be proven directly or by evidence of facts from which the agreement may be legally inferred and not such as raise a mere suspicion. *S. v. Phillips*, 516.

The association between a husband and wife, living in the marital state, at the time the husband obtained money by false pretense from a third person, has no probative force in establishing a conspiracy between them to commit the offense. As to whether one spouse may be guilty of conspiracy with the other spouse, *quaere?* *Ibid.*

CONSPIRACY—*Continued.*

The mere subsequent possession by a wife of a portion of the money obtained by her husband from a third person by false pretense has no probative force in establishing a prior agreement between the husband and wife to commit the crime, or even to charge her with guilty knowledge of how the proceeds were obtained. *Ibid.*

The State's evidence tended to show that defendant husband obtained money by false pretense from a third person under the guise of preventing a purported criminal prosecution of such third person by the Board of Public Welfare for aiding and obtaining unwarranted old age assistance benefits. *Held:* A statement by defendant wife to such third person, after the alleged false pretense had been practiced, that if such third person deposited his money outside the city, the Board wouldn't know he had it, does not tend to show that the wife conspired with the husband to commit the offense of false pretense. *Ibid.*

CONSTITUTIONAL LAW.

§ 12. Police Power—Regulation of Trades and Professions.

By virtue of its police power a state is authorized to establish qualifications for admission to practice law in its jurisdiction. *Baker v. Varser*, 260.

§ 18. Equal Protection, Application and Enforcement of Laws.

The right to practice law in the State courts is not a privilege or immunity of a citizen within the meaning of the Fourteenth Amendment to the Federal Constitution, nor has applicant shown a violation of any rights guaranteed by the State Constitution, Article I, Sec. 17. *Baker v. Varser*, 260.

§ 20b. Due Process of Law in General.

The mere fact that a state court overrules its previous decision on a question of state law does not constitute a denial of due process under the Fourteenth Amendment to the Constitution of the United States. *Summrell v. Racing Asso.*, 614.

§ 25. Impairment of Obligations of Contract.

The Federal Constitutional protection of the obligations of contracts against state action is directed only against impairment by legislation and not by judgments of courts. *Summrell v. Racing Asso.*, 614.

A contract imposes no binding obligations if its validity is dependent upon the provisions of an unconstitutional statute. *Ibid.*

§ 32. Constitutional Guarantees of Persons Accused of Crime—Necessity for Indictment.

The Superior Court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the Superior Court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. *S. v. Hall*, 109.

§ 34a. Due Process in Prosecution of Criminal Actions in General.

Every person charged with crime has an absolute right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *S. v. Canipe*, 60.

CONSTITUTIONAL LAW—*Continued.*

§ 34c. Constitutional Guarantees of Persons Accused of Crime—Right to Confront Accusers.

The constitutional right of a person accused of crime to confront his accusers embraces the right of accused to have witnesses in court and to examine them in his behalf, and a fair opportunity to prepare and present his defense, and this constitutional right of confrontation must be afforded accused not only in form but also in substance. *S. v. Hackney,* 230.

§ 34d. Constitutional Guarantees of Persons Accused of Crime—Right to Counsel.

Circumstances *held* not such as to require court to appoint counsel for defendant in noncapital case. *S. v. Hackney,* 230.

CONTRACTS.

§ 1. Nature of and Right to Contract in General.

Persons *sui juris* may make any contract not contrary to law or public policy. *Clarke v. Butts,* 709. Right to contract is liberty and property right. *Childress v. Abeles,* 667. Law will not inquire into wisdom of contract in absence of fraud. *Roberson v. Williams,* 696.

§ 5. Consideration.

Execution of one contract may be consideration for another. *Childress v. Abeles,* 667.

§ 6. Definiteness.

The law does not favor the destruction of contracts on the ground of indefiniteness and uncertainty. *Childress v. Abeles,* 667.

An agreement by the seller to pay to plaintiff commissions at a fixed rate on all sales made under a contract with a certain purchaser will not be declared void for indefiniteness or uncertainty, even though the agreement be terminable at will. *Ibid.*

§ 7e. Contracts Against Public Policy—Contracts Limiting Liability for Negligence.

Contracts indemnifying one against his own negligence are strictly construed. *Crowell v. Air Lines,* 20.

§ 8. General Rules of Construction.

While punctuation is ineffective as against the plain meaning of the language used by the parties to a contract or other instrument in writing, still the rules of punctuation may be used to assist in determining the intent of the parties. *Stephens Co. v. Lisk,* 289.

The intention of the parties as expressed in the written agreement is controlling, and when such agreement is explicit, the court must so declare irrespective of what either party thought the effect of the contract to be. *Howland v. Stitzer,* 689.

§ 26. Interference With Contractual Rights by Third Person.

A contract executed by persons *sui juris* who have the legal right to contract may be vacated or annulled by a stranger thereto, even though the stranger be a State agency, only in the manner and method provided by law. *Utilities Com. v. Motor Lines,* 166.

CONTRACTS—*Continued.*

Party may be held liable for wrongfully inducing third party to breach contract with plaintiff even though contract be determinable at will of such third party. *Childress v. Abeles*, 667.

In an action against a third person for wrongfully inducing a party to a contract to breach same, malice is ordinarily material only upon the question of punitive damages. *Ibid.*

A person is justified in interfering in a contract between two other persons if he is in competition with one of them. *Ibid.*

But conflicting evidence on this issue is for jury. *Ibid.*

In an action for wrongfully inducing one of the parties to a contract to breach same, the fact that plaintiff may have a right of action on the contract against the other party to the agreement, is no defense. *Ibid.*

In this action against strangers to a contract for wrongfully inducing one of the parties to the agreement to breach same, defendants set up the defense that the contract was entered into in the State of Georgia and that under the laws of that State the contract was unenforceable because not in writing. *Held:* The defense of the statute of frauds, both under the laws of this State and the laws of the State of Georgia, is not available to defendants, who are strangers to the agreement. *Ibid.*

CONTROVERSY WITHOUT ACTION.

§ 4. Hearings and Judgment—Conclusiveness of Facts Agreed.

Where parties submit cause on agreed statement of facts, the cause must be determined on the facts agreed, and court may not hear evidence to find facts or grant rehearing for newly discovered evidence. *Edwards v. Raleigh*, 137.

CORPORATIONS.

§ 10. Stockholders—Attack of Corporate Acts or Transactions.

A corporation organized to construct and maintain common trackage for the incorporating railroads was under the control of one of the two railroads using such common facilities. Such corporation and the railroad having control thereof, through persons who acted for both, denied the other railroad company the right to construct a junction or turnout from the common trackage. *Held:* The law will not require a vain thing and, therefore, such other railroad company is not required to exhaust its rights as a stockholder before instituting action to establish its right to construct the turnout. *R. R. v. R. R.*, 495.

Where an incorporator's rights to use facilities held by the corporation for joint use of the incorporators depend upon the circumstances surrounding the incorporation, confirmed by usage and course of dealings between the parties over a period of years, and not upon its rights as a stockholder, *held*, such incorporator will not be required to exhaust its remedies as a stockholder before instituting an action to establish its right to use the common facilities. *Ibid.*

§ 16. Dividends.

The declaration of a cash dividend by a corporation creates a debt from the corporation to each of its stockholders who then hold such stock. *In re Estate of Bulis*, 529.

COUNTIES.

§ 24. Liability for Torts.

The doctrine that a county is not liable for the negligence of its officers and agents in the exercise of governmental functions obtains in this jurisdiction. *Hayes v. Billings*, 78.

A county acts in a purely governmental capacity in erecting and maintaining a jail, and in an action to recover for wrongful death allegedly resulting from the negligence of the county in this respect, demurrer is properly sustained. The exception to the general rule of nonliability in such instances in regard to municipalities is not extended to counties. *Ibid.*

COURTS.

§ 14. Conflict of Laws Between This and Other States.

Laws of state of decedent's residence and in which estate was administered control distribution, and its decree discharging administratrix cannot be attacked in our court. *Groome v. Leatherwood*, 573.

Party may not maintain action here challenging judgment of foreign probate court. *Ibid.*

§ 14½. Uniform Reciprocal Acts.

Proceedings under Uniform Reciprocal Enforcement of Support Act. *Mahan v. Read*, 641.

CRIMINAL LAW.

§ 14. Appeals to Superior Court from Inferior Courts.

Defendant was convicted in a recorder's court for possession of nontax-paid whiskey for the purpose of sale. On appeal, he was convicted in the Superior Court with having in his possession nontax-paid whiskey, and was found not guilty of possession of nontax-paid whiskey for the purpose of sale. *Held:* The judgment must be arrested, since defendant may not be prosecuted in the Superior Court on the original warrant except for an offense for which he was convicted in the inferior court. *S. v. Hall*, 109.

§ 14½. Certiorari from Inferior Court to Superior Court.

On *certiorari* from an inferior court, the Superior Court acts only as a court of review and is confined to the facts as they appear of record. *In re Stokley*, 658.

Certiorari, as a substitute for an appeal, must be applied for in apt time, ordinarily at the next term of the supervising court. In this case petition for *certiorari* filed some 11 years after sentence was not in apt time and should have been denied. *Ibid.*

§ 17c. Plea of Nolo Contendere.

Where defendant's attorney tenders a plea of *nolo contendere*, but the defendant in apt time disavows the plea and continues to protest his innocence throughout the proceeding, the defendant is not bound by the plea and is entitled to have his day in court before a jury, and judgment entered on the plea of *nolo contendere* will be vacated on appeal. *S. v. Barley*, 253.

§ 29a. Facts in Issue—Substantive and Collateral Evidence in General.

Testimony of a witness at the preliminary hearing, brought out on cross-examination after the witness has given contradictory testimony at the trial, *is held* competent solely for the purpose of impeaching the testimony of the

CRIMINAL LAW—*Continued.*

witness at the trial and may not be considered as substantive evidence of the facts at issue. *S. v. Cope*, 244.

§ 29b. Evidence of Guilt of Other Offenses.

The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense, even though the other offense is of the same nature as the crime charged. *S. v. McClain*, 171; *S. v. Myers*, 462.

Evidence disclosing the commission by the accused of a crime other than the one charged is admissible when the two crimes are parts of the same transaction, and by reason thereof are so connected in point of time or circumstance that one cannot be fully shown without proving the other. *S. v. McClain*, 171.

Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. *Ibid.*

Where guilty knowledge is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, even though the evidence reveals the commission of another offense by the accused. *Ibid.; S. v. Myers*, 462.

Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged. *S. v. McClain*, 171.

Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though it discloses the commission of another offense by the accused. *Ibid.*

Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. *Ibid.*

In prosecutions for crimes involving illicit sexual acts of a consensual character between the same parties, it is permissible for the State to introduce evidence of both prior and subsequent acts of like nature as corroborative or explanatory proof tending to show the mutual disposition of the participants to engage in the act and rendering it more probable that the act relied on for conviction occurred. *Ibid.*

In prosecutions for continuing offenses, evidence of other acts than that charged is generally admissible to corroborate or explain the evidence showing the act charged. *Ibid.*

Since evidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial, the general rule of exclusion should be strictly enforced in all cases where it is applicable. *Ibid.*

§ 32a. Competency of Circumstantial Evidence.

When the State relies on circumstantial evidence, all facts and circumstances forming a link in the chain of proof and which tend to prove the facts sought to be inferred as a reasonable and logical deduction are competent, but evidence of facts or circumstances which are equally consistent with the existence or nonexistence of the fact sought to be inferred is incompetent. *S. v. Stone*, 606.

CRIMINAL LAW—*Continued.*

§ 33. Confessions.

The extrajudicial statement of an accused is a confession if it admits defendant's guilt of the offense charged or even an essential part of the offense. *S. v. Hamer*, 85.

The extrajudicial confession of the accused in a criminal case is admissible if, and only if, it was in fact voluntarily made. *Ibid.*

As a general rule, a confession is presumed to be voluntary, and the burden is on the accused to show the contrary. *Ibid.*

Where an accused has made an involuntary confession, any subsequent confession is presumed to proceed from the same vitiating influence, and the burden is on the State to establish the voluntary character of the subsequent statement before it can be received in evidence. *Ibid.*

The State offered in evidence two confessions by defendant. Upon the *voir dire* the trial judge ruled that the first confession was involuntary because wrung from defendant by threat of delivering him to a mob. The testimony disclosed that the second confession was made some 12 or 18 hours later, that defendant was told that he did not have to make a statement and was warned that whatever he said would be used for or against him. Defendant himself corroborated these facts. *Held:* The evidence supports the finding of the trial court that the second statement was voluntarily made. *Ibid.*

Extrajudicial confession must be corroborated by other evidence to be sufficient for jury. *S. v. Cope*, 244.

§ 34e. Silence as Implied Admission of Guilt.

In order for testimony of hearsay statements to be competent as an implied admission of guilt on the part of defendant, it must not only appear that the statements were made in the presence of defendant, but also that the circumstances were such as to call for a denial on the part of defendant and that he had opportunity to do so. *S. v. Temple*, 738.

§ 42a. Character Evidence of Defendant.

Where defendant testifies in his own behalf, his evidence of good character is competent to be considered both as substantive evidence on the issue of guilt or innocence and also as affecting his credibility as a witness. *S. v. Wortham*, 132.

The State may not show directly or through the guise of cross-examination specific acts of misconduct to establish the bad character of the accused. *S. v. Phillips*, 516.

§ 42c. Cross-Examination of Defendant and Defense Witnesses.

In the cross-examination of the male defendant, the solicitor asked him numerous questions which assumed to be facts the unproved insinuations of defendant's guilt of a number of collateral offenses. *Held:* The cross-examination was improper. *S. v. Phillips*, 516.

If a prosecuting attorney wishes to vouch for the existence or the truth of a fact in the trial of a cause, he should retire from the case, have another appointed to prosecute, take the stand as any other witness, give competent evidence, and submit himself to cross-examination. *Ibid.*

Questions asked the male defendant on cross-examination to impeach him as to collateral matters which are so framed as to assert in advance the untruth of defendant's denials, *held* to violate the rule that the State is bound by the answer of the accused to such questions. *Ibid.*

CRIMINAL LAW—*Continued.*

It is improper for the solicitor to ask defendant on cross-examination questions insinuating that defendant's brother had been convicted of an offense. *Ibid.*

The solicitor on cross-examination of defense witnesses and the *feme* defendant asked numerous questions assuming to be facts the unproved insinuations of the male defendant's guilt of a number of collateral offenses, together with insinuations that the male defendant had aided his wife in despoiling a helpless orphan of her inheritance and that the male defendant's brother had been guilty of a collateral offense. *Held:* The cross-examination was improper. *Ibid.*

In cross-examining defendant and the witnesses for the defense, the solicitor may not, by insinuating questions or by other means, place before the jury incompetent and prejudicial matters not legally admissible in evidence. *Ibid.*

The solicitor may not, on cross-examination of defense witnesses, needlessly badger or humiliate them by impertinent or insulting questions which he knows, or should know, cannot possibly elicit any competent or relevant testimony, such as that the witness' brother-in-law was a chronic thief, etc. *Ibid.*

§ 42e. Impeaching Witness.

Testimony of a witness at the preliminary hearing, brought out on cross-examination after the witness has given contradictory testimony at the trial, *is held* competent solely for the purpose of impeaching the testimony of the witness at the trial and may not be considered as substantive evidence of the facts at issue. *S. v. Cope,* 244.

§ 42f. Exculpatory Statements or Testimony by State's Own Witnesses.

The State is not precluded from showing the facts to be otherwise than as stated in the declarations of a defendant, even though the State itself introduces testimony of such declarations, but when the State offers no evidence *contra,* it presents such declarations as worthy of belief. *S. v. Tolbert,* 445.

When the State introduces testimony of an exculpatory statement made by defendant it presents such statement as worthy of belief, and while the State is not precluded from showing the facts to be otherwise, defendant is entitled to whatever advantage the statement affords, even to an acquittal when the statement is wholly exculpatory and there is no evidence tending to show the facts to be otherwise. *S. v. Simmons,* 780.

§ 43. Evidence Obtained Without Search Warrant.

Where defendant upon the trial objects to the admission of evidence obtained without a search warrant, and the court upon the *voir dire* finds upon conflicting evidence that defendant consented to the search of his premises by the officers without a warrant, the finding of the court, supported by evidence, is conclusive, and the evidence obtained by the search is competent. *S. v. Moore,* 749.

§ 44. Time of Trial and Continuance.

Trial upon an indictment charging an offense less than a capital felony may be had at the term the bill of indictment is returned. *S. v. Hackney,* 230.

When a request for a continuance in a criminal prosecution is based on the right of the accused guaranteed by the Fourteenth Amendment to the Federal Constitution and Article I, Secs. 11 and 17 of the State Constitution, the question is one of law and not of discretion, and the decision of the lower court is reviewable. *Ibid.*

CRIMINAL LAW—*Continued.*

Evidence *held* to support conclusion that denial of continuance did not abrogate right of confrontation. *Ibid.*

§ 48. Motions for New Trial for Misconduct of or Affecting Jury.

In this prosecution for rape one witness volunteered information to the effect that defendant was an escaped convict, and another witness made a statement to like effect in response to an indefinite question of the solicitor which did not foreshadow such response. Neither statement disclosed the nature of the offense for which the defendant was serving the sentence. In each instance the trial court immediately and emphatically withdrew the evidence from the consideration of the jurors and instructed them to disregard it. *Held:* The testimony was not admitted by the court and the incidents were rendered harmless by the prompt action of the trial judge. *S. v. Hamer,* 85.

§ 50d. Expression of Opinion on Facts by Court During Progress of Trial.
(In instructions, see hereunder § 53f.)

The judge is forbidden to convey to the jury in any way at any stage of the trial his opinion on the facts involved in the case, and the trial begins within the purview of this rule when the prospective jurors are called to be examined touching their fitness to serve on the trial jury. G.S. 1-180. *S. v. Canipe,* 60.

Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not the motive of the judge. *Ibid.*

Where the court, in interrogating prospective jurors in regard to their scruples against capital punishment, refers to several celebrated cases and asks them, in the presence of those immediately thereafter impaneled to try the case, whether they would not render a verdict calling for the death sentence in such cases, defendant must be awarded a new trial notwithstanding that the court thereafter cautions them that he did not mean to compare the case at issue with the other cases. *Ibid.*

G.S. 1-180 proscribes an expression of opinion by the court upon the evidence not only in the charge but at any time during the course of the trial. *S. v. Smith,* 99.

While the trial court may propound competent questions to a witness in order to clarify his testimony or to bring out some fact that has been overlooked, the court may not cross-examine a witness or ask a witness questions for the purpose of impeaching him or casting doubt upon his testimony, and a new trial is awarded in this case for impeaching questions asked by the court. *Ibid.*

In this case a new trial is awarded for interrogations of a witness by the court which went beyond a mere effort to clarify the witness' testimony and amounted to an expression of opinion on the facts by the court. *S. v. McRae,* 334.

§ 50f. Argument of Solicitor.

Where the remarks of counsel are improper in themselves, or are not warranted by the evidence, and are calculated to mislead or prejudice the jury, it is the duty of the court to correct same upon objection, and, even in the absence of objection, it is proper for the court to correct gross abuse *ex mero motu. S. v. Smith,* 631.

Ordinarily the court, upon objection, may correct improper argument of the solicitor in his charge, but if the impropriety be gross it is the duty of the court to interfere at once. *Ibid.*

CRIMINAL LAW—*Continued.*

Impropriety in solicitor's remarks *held* not cured by court, and new trial is awarded on appeal even in absence of exception before verdict. *Ibid.*

§ 51. Province of Court and Jury in General.

It is the duty of the judge alone to decide the legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case. *S. v. Canipe*, 60.

It is the task of the jury alone to determine the facts of the case from the evidence adduced. *Ibid.*

While the probative weight of legal proof is for the jury, the sufficiency of proof in law is for the court. *S. v. Simmons*, 780.

§ 52a (1). Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit under G.S. 15-173, the evidence is to be taken in the light most favorable to the State. *S. v. Simmons*, 780.

§ 52a (2). Nonsuit—Sufficiency of Evidence in General.

An extrajudicial confession must be corroborated by other evidence which at least establishes the *corpus delicti* in order to be sufficient to sustain conviction of a felony. This is particularly true in prosecutions for sexual offenses. *S. v. Cope*, 244.

The introduction by the State of testimony of exculpatory declarations made by the defendant does not warrant nonsuit when the State introduces substantive evidence in contradiction of such declarations, but when the State offers no evidence in contradiction of the wholly exculpatory declarations or statements of defendant, the defendant is entitled to avail himself of such defense by demurrer to the evidence under G.S. 15-173. *S. v. Tolbert*, 445.

In order to be sufficient to be submitted to the jury, the State's evidence must tend to prove the fact at issue as a fairly logical and legitimate conclusion, and evidence which merely raises a suspicion or conjecture is insufficient to withstand motion to nonsuit. *S. v. Simmons*, 780.

When State introduces testimony of wholly exculpatory statement of defendant, and no evidence that facts were otherwise, nonsuit is proper. *Ibid.*

§ 52a (3). Sufficiency of Circumstantial Evidence to Be Submitted to Jury.

In order for circumstantial evidence to be sufficient to be submitted to the jury, the facts and circumstances adduced by the evidence must be of such nature and so connected or related as to point unerringly to defendant's guilt and exclude any other reasonable hypothesis. *S. v. Simmons*, 780.

§ 53f. Expression of Opinion on Evidence in Charge.

The mere fact that the court uses more words in the summation of the State's contentions than it does in the summation of the defendant's contentions does not in itself support an assertion that the court expressed an opinion on the evidence in violation of G.S. 1-180. *S. v. Stantliff*, 332.

§ 53i. Charge on Character Evidence of Defendant.

Where defendant testifies in his own behalf, his evidence of good character is competent to be considered both as substantive evidence on the issue of guilt or innocence and also as affecting his credibility as a witness, and an instruction which restricts such evidence to the question of credibility entitles him to a new trial. *S. v. Wortham*, 132.

CRIMINAL LAW—*Continued.*

§ 56. Arrest of Judgment.

If warrant charges offense in plain and explicit manner and contains sufficient matter to enable the court to proceed to judgment, motion in arrest of judgment on ground of defective warrant is properly denied. *S. v. Smith*, 99.

Fact that warrant refers to inapplicable statute not ground for arrest of judgment. *Ibid.*

Where on appeal to Superior Court defendant is convicted of offense not included in charge upon which he was convicted in inferior court, judgment must be arrested. *S. v. Hall*, 109.

Defects or irregularities in the drawing or organization of the grand jury may not be presented by motion in arrest of judgment. *S. v. Gales*, 319.

§ 62e. Concurrent and Consecutive Sentences.

A sentence to the common jail of a county upon conviction of one offense, and a subsequent sentence to the State Prison upon a conviction of another offense, in the absence of order in the judgment that the sentences should run concurrently, are consecutive and not concurrent sentences. *S. v. Bentley*, 112.

§ 62f. Suspended Judgments and Executions.

The term "good behavior" as used in an order suspending execution of a sentence means law-abiding, and a defendant does not breach such condition of suspension unless he is guilty of conduct constituting a violation of some criminal law of the State. *S. v. Millner*, 602.

The discretionary authority of the trial judge to order that a suspended sentence should be activated must be predicated upon a finding, based upon evidence of sufficient probative force to generate the conclusion in the minds of reasonable men, that the defendant had in fact breached a condition of the suspension, and in the absence of such proof, defendant is entitled to his discharge as a matter of right. *Ibid.*

The fact that a defendant has no occupation to the knowledge of the officers testifying is insufficient alone to support a finding that the defendant is a vagrant as the basis for an order executing a suspended sentence, especially when there is positive evidence that the defendant has a home and possesses ready cash. G.S. 14-336. *Ibid.*

Evidence that officers found glasses and fruit jars having an odor of whiskey in the kitchen of the defendant's house and a number of empty fruit jars in back of the house, that during a day a number of people would drive up to the house, knock on the door, and that defendant on some occasions would come to the door and speak to them and then the people would leave, without evidence that defendant passed any package to any of these visitors or that they passed money or any object to him, or that there was any disorder or disturbance, *is held* insufficient to support an order executing a suspended sentence on the ground that defendant had violated the law. *Ibid.*

The maximum period during which the execution of a sentence in a criminal case may be suspended upon conditions is 5 years, but ordinarily a suspension in excess of five years will be held void only as to that portion in excess of the statutory maximum, and the sentence may be ordered executed for condition broken at any time within the 5-year period. *S. v. McBride*, 619.

Where execution of sentence is suspended upon condition that the defendant be of good behavior and violate none of the laws of the State, the violation of a criminal law of another state is not a breach of the condition and cannot be made the basis for the execution of the sentence. *Ibid.*

CRIMINAL LAW—*Continued.*

The fact that an order directing the execution of a suspended sentence is held erroneous on appeal for want of proper finding of condition broken, does not prejudice the power of the court below to activate the sentence thereafter for violation of any valid condition, if such be found and properly adjudicated, during the period of suspension, but where there is nothing in the record to suggest that defendant had violated any of the conditions upon which his sentence was suspended, it will not be directed that he be held in custody for possible further inquiry, but it will be directed that he be immediately released. *Ibid.*

§ 67a. Supervisory and Appellate Jurisdiction of Supreme Court.

The defendant's assignments of error to the argument of the solicitor in a non-capital case cannot be sustained when not supported by exception taken before verdict, but upon the record in this case the Supreme Court, in the exercise of its supervisory power, takes cognizance *ex mero motu* to preserve defendant's constitutional right to a fair and impartial trial. *S. v. Smith*, 631.

This was an appeal by the State from judgment of the Superior Court upon a writ of *certiorari* issued some 11 years after the rendition of the judgment attacked. *Held:* Regardless of the State's right to appeal from the judgment of the Superior Court releasing defendant from custody, the Supreme Court, in the exercise of its supervisory power, holds *ex mero motu*, that after the lapse of such time the writ of *certiorari* was not available and that the writ was improvidently issued, and the cause is remanded to the inferior court. *In re Stokley*, 658.

§ 67b. Judgments Appealable. (In civil cases, see Appeal and Error § 2.)

On defendants' appeal from conviction in a recorder's court, they moved to quash the warrants on the ground that the recorder's court was established by local act in contravention of Article II, Sec. 29, of the State Constitution. The motion to quash was denied, and defendants appealed, although they had not been tried in the Superior Court. *Held:* The order was interlocutory and an appeal therefrom must be dismissed. *S. v. Baker*, 140.

§ 73a. Service of Case on Appeal.

The dropping of the appeal papers, suspended by a string, through the transom of the solicitor's office in such way as to cause them to be pushed behind the door and out of sight when the door was opened, so that the papers were not seen until after time for service of case on appeal had expired, is not a sufficient service. *S. v. Moore*, 792.

§ 78c. Necessity for and Form and Requisites of Objections and Exceptions.

Challenges to the admissibility of certain evidence and the sufficiency of the evidence to carry the case to the jury may not be raised initially in the Supreme Court, but must be presented by exceptions and assignments of error duly made in the lower court. *S. v. Ayscue*, 196.

An appeal itself is an exception to the judgment, but where the judgment is regular in form and is supported by the verdict, a sole challenge by appeal must fail. *Ibid.*

§ 78g. Exceptions to Argument of Solicitor.

Ordinarily exception to improper remarks of the solicitor during the argument must be taken before verdict. *S. v. Smith*, 631.

CRIMINAL LAW—*Continued.*

But in this case, Supreme Court takes cognizance thereof *ex mero motu* in exercise of supervisory jurisdiction. *Ibid.*

§ 78e (1). Objections and Exceptions to Charge.

An exception to the charge which does not point out any particular statements or omissions objected to is ineffective as a broadside exception. *S. v. Stantliff*, 332.

§ 78d (3). Objections and Exceptions to Evidence—Necessity for Motions to Strike.

A defendant waives objection to the unresponsive part of the answer of a witness by failing to make a specific motion to strike out that particular part. *S. v. Giles*, 319.

§ 79. Appeal—Briefs.

Exceptions not set out in the brief and in support of which no reason or argument is stated or authority cited, will be deemed abandoned. Rules of Practice in the Supreme Court, No. 28. *S. v. Stantliff*, 332.

§ 78g. Form and Requisites of Assignments of Error.

As a general rule only assignments of errors supported by exceptions duly and timely noted will be considered on appeal. *S. v. Taylor*, 117.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

Exceptions to the charge cannot be sustained when the charge construed contextually is without prejudicial error. *S. v. Taylor*, 117; *S. v. Bournais*, 311.

§ 81c (7). Harmless and Prejudicial Error in Course and Conduct of Trial.

Error committed by the court in inadvertently expressing an opinion on the facts is virtually impossible to cure, and certainly is not rendered harmless by a statement of the court that if any juror had the impression that the court had expressed such an opinion the court would release him from the jury. *S. v. Canipe*, 60.

Irrelevant statements of witnesses *held* to have been rendered harmless by action of trial judge. *S. v. Hamer*, 85.

Where the prosecuting attorney persists in asking on cross-examination of defendant and defense witnesses improper questions assuming defendant's guilt of a number of collateral offenses and of wrongdoing, all of which questions are objected to by defendant, *held*, such persistent interrogations by the solicitor in violation of the rules governing cross-examination are prejudicial and entitle defendant to a new trial notwithstanding the court's action in sustaining objection to some of the questions without comment, and its later instruction that the questions of the solicitor did not constitute evidence. *S. v. Phillips*, 516.

§ 89. Post Conviction Hearing Act.

Relief under the Post Conviction Hearing Act must be based upon some deprivation of a substantial constitutional right in the trial resulting in petitioner's conviction. *S. v. Hackney*, 230.

Held: Defendant failed to show deprivation of constitutional right necessary to relief under Post Conviction Hearing Act. *Ibid.*

DAMAGES.

§ 1a. Compensatory Damages in General.

Plaintiff is entitled to recover for negligent personal injury the present worth of all damages sustained in consequence of defendant's tort, embracing indemnity for loss of time, or loss from inability to perform ordinary labor, or capacity to earn money, which are the immediate and necessary consequences of his injury. *Owens v. Kelly*, 770.

§ 6. Aggravation and Mitigation of Damages.

A person who has been injured by the negligent act of another is entitled to recover all damages naturally and proximately resulting from the negligent act in suit, including, ordinarily, injuries resulting from delay in receiving proper medical treatment as well as injuries caused by unsuccessful medical treatment which tend to aggravate the damages for which the wrongdoer is responsible. *Heath v. Kirkman*, 303.

But allegations of false arrest and malicious prosecution of plaintiff after his injury, unrelated to delay in receiving medical treatment, *held* properly stricken on motion. *Ibid.*

§ 7. Punitive Damages.

Punitive damages for personal injury depend upon the circumstances under which the injury was inflicted, and occurrences subsequent to the injury can have no relevancy to punitive damages for the injury. *Heath v. Kirkman*, 303.

§ 11. Competency and Relevancy of Evidence on Issue of Damages.

In an action to recover damages for personal injury negligently inflicted, the age and occupation of plaintiff, the nature and extent of his employment, the amount of his income at the time, from either wages or salary, are competent to be considered by the jury on the issue of damages. *Owens v. Kelly*, 770.

Evidence of plaintiff's wages, subsequent to his injury, should be considered by the jury only for the purpose of estimating his loss of earning capacity in comparison with what he earned previous to the injury, and should be considered on the question of his impaired capacity to earn money rather than the wages he actually received. *Ibid.*

Where plaintiff and his wife were working as a team prior to the injury, but the wife is unable to work thereafter, the jury, in considering evidence of the husband's income prior to the injury, should not augment it by the amount the wife was earning, since her earnings are her sole and separate property. *Ibid.*

§ 13a. Instructions on Issue of Damages.

Insurer in an automobile collision policy elected to have the damaged car repaired. After initial delivery of the car to insured by the repairman, additional repairs were made. Instructions that the measure of damages would be the difference between the fair market value of the car immediately before it was damaged and its fair market value after it was repaired, *held* not prejudicial as excluding the additional repairs from the consideration of the jury, it appearing that in other portions of the charge the court called the jury's attention to the additional repairs and to the testimony as to the fair market value of the car after all the repairs had been made. *Pierce v. Ins. Co.*, 567.

DEATH.

(Particular acts of negligence, see Negligence, Automobiles, etc.)

§ 6. Actions for Wrongful Death.

In an action for wrongful death, allegations that plaintiff is the duly qualified and acting administrator of the estate of the deceased is sufficient without allegation that plaintiff brings the action in his representative capacity. *Midkiff v. Auto Racing*, 470.

DEEDS.

§ 5. Signing, Sealing and Delivery.

The date recited in a deed or other writing is at least *prima facie* evidence that the instrument was executed and delivered on such date. *Sandlin v. Weaver*, 703.

§ 11. Construction in General.

A deed must be construed to ascertain and effectuate the intention of the parties as gathered from the language of the entire instrument. *Stephens Co. v. Lisk*, 289.

Punctuation may be considered in ascertaining intent. *Ibid.*

Where plaintiffs' rights are dependent upon whether the deed and a contract executed by grantees should be construed together as parts of one transaction, and there is conflicting evidence as to whether the instruments were executed at the same time, the plaintiffs' contention will be taken as true for the purpose of determining defendants' motion to nonsuit. *Sandlin v. Weaver*, 703.

§ 16a. Covenants and Stipulations in General.

Where a deed contains a covenant on the part of the grantee for himself, his heirs and assigns, agreeing to pay a proportionate part of the cost of improvements which the grantor or its successors or assigns might make along the street abutting the property, *held:* The grantee is the covenantor and by accepting the deed binds himself and his assigns to the agreement as a covenant running with the land. Therefore the covenant is enforceable by the grantor against a subsequent purchaser of the land from such grantee. *Stephens Co. v. Lisk*, 289.

The deed in question contained a covenant binding the grantee and his heirs and assigns to pay *pro rata* part of street improvements "in the event the party of the first part, or its successors or assigns, owner or owners of a major portion of the lots in said block" should decide to grade, pave, or otherwise improve the abutting streets. *Held:* The intent of the parties, clarified by the punctuation, was that the grantor was authorized to make improvements without the consent of a majority of the owners of lots in said block, and the consent of the owners of a majority of the lots in said block was required only in the event the grantor's successors or assigns undertook to make the improvements. *Ibid.*

A grantee, by acceptance of a deed, becomes bound by the stipulations, recitals, conditions, and limitations therein contained, even though he has not signed the deed. *Story v. Walcott*, 622.

§ 16b. Restrictive Covenants.

In construing restrictive covenants in a deed, the meaning of each covenant must be determined from a consideration of and in relation to the other covenants in the instrument, giving each part its effect according to the natural meaning of its language. *Ingle v. Stubbins*, 382.

DEEDS—*Continued.*

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.*

Resubdivision of lots does not justify disregard of minimum setback lines as prescribed in restrictive covenant. *Ibid.*

It appeared that defendant purchased his lot with knowledge of the existence of restrictive covenants, that plaintiffs sought to restrain him from erecting a dwelling in alleged violation of the restrictions, but that the temporary order issued when only the foundations and subflooring had been completed was not renewed for plaintiffs' failure to give bond, and that pending the hearing on the merits, defendant completed the dwelling. *Held:* Upon determination that the dwelling violated restrictive covenants, plaintiffs are entitled to a mandatory injunction compelling defendant to remove the structure so that it conform to the covenants, and to prevent further construction of any building in violation of the covenants. *Ibid.*

Covenants restricting the free use of property are not favored, and the terms of such covenants will not be enlarged by construction beyond the plain and unmistakable meaning of the language employed. *Julian v. Lawton,* 436.

A covenant providing that no residence should be erected on the lot conveyed until the type and exterior lines of the structure had been approved by the developer, or an architect selected by him, creates a covenant personal to the developer which he may exercise in person or through the architect he selects, and therefore such covenant terminates upon the death of the developer and cannot be enforced by the executors and trustees of the developer, nor the owners of other lots in the development on the theory that it was a covenant intended for their benefit. *Ibid.*

Death of developer terminates agency of architect selected by him. *Ibid.*

§ 16d. Provisions for Repurchase by Grantor.

Where grantee contracts to convey to third person in violation of alleged agreement to give grantor first right to purchase, such third person is necessary party. *Story v. Walcott,* 622.

Where, contemporaneously with delivery of deed, the parties execute a contract giving the grantor the right to repurchase upon stipulated conditions, the two instruments will be construed together and the contract constitutes an option. *Sandlin v. Weaver,* 703.

DIVORCE AND ALIMONY.

§ 2a. Divorce on Ground of Separation.

Divorce on the grounds of two years' separation under G.S. 50-6 cannot be maintained when the separation is due to the insanity or mental incapacity of defendant spouse, the sole remedy in such instance being under G.S. 50-5 (6). *Lawson v. Bennett,* 52.

§ 5e. Pleadings in Cross-Actions.

While ordinarily a defendant wife may not attack a deed of separation by cross-action in her husband's suit for divorce, where the husband, in reply to

DIVORCE AND ALIMONY—*Continued.*

the wife's cross-action for subsistence pending the trial and subsequent thereto, sets up a deed of separation as a bar to the cross-action, the court may allow defendant to amend so as to allege that the deed of separation was invalid because of her mental incapacity. *Lawson v. Bennett*, 52.

§ 12. Alimony Pendente Lite.

The court may allow plaintiff possession of the home owned by the parties as tenants by the entireties in fixing alimony *pendente lite* under G.S. 50-16. *Sellars v. Sellars*, 475.

§ 15½. Merger of Deed of Separation in Divorce Decree.

Husband and wife executed a separation agreement, which provided for certain payments to the wife during her lifetime, and stipulated that its provisions should remain in full force and effect notwithstanding any subsequent judgment or decree obtained by either party in the state of their residence or any other state. Thereafter the wife obtained a decree of divorce in the State of New York, which decree contained a provision that the husband should provide for the support and maintenance of the wife in accordance with the separation agreement, which agreement "is incorporated in this judgment." *Held:* Under the laws of the State of New York the separation agreement was not merged in the divorce decree, but remains a valid and enforceable contract. *Howland v. Stitzer*, 689.

§ 19. Custody and Support of Children.

In awarding the custody of a minor child in a divorce action, the criterion is the best interest of the child, and all other factors, including the visitorial rights of the other parent and the common law preferential rights of the father, must be deferred or subordinated thereto. *Griffith v. Griffith*, 271.

If, upon a consideration of all relevant factors, the court determines that the mother is best fitted to give the child the home life, care and supervision that will be most conducive to its well being, the court should award the custody of the child to the mother, and should not hesitate to grant her subsequent application to remove the child to her out-of-state domicile, established upon her remarriage, upon finding that the best interest of the child will be served thereby, notwithstanding that this will preclude or make more difficult visitorial rights of the father, and notwithstanding that the father may be a fit and suitable person to have the custody of the child. *Ibid.*

Where the mother's application to remove the child in her custody from this State to her domicile in another state is denied upon misapprehension that such permission could not be granted except upon a finding that the father is an unsuitable person to have the custody of the child, the finding that the best interest of the child would be served by awarding its custody to the father will be set aside and the cause remanded to the end that the court may consider the evidence and find the facts in the light of correct legal principles. *Ibid.*

DOMICILE.

§ 1. Definition.

Whether the word "residence" is synonymous with "domicile" depends upon the nature of the subject matter as well as the context in which the word is used, and a person may have his residence in one state and his domicile in another. *Baker v. Varser*, 260.

EJECTMENT.

§ 17. Sufficiency of Evidence and Nonsuit.

In an action in ejectment, nonsuit is properly entered when plaintiffs fail to fit the description contained in the deeds on which they rely to the land claimed by them. *Skipper v. Yow*, 102.

ELECTIONS.

§ 1. Elections in General.

There is no inherent power in any governmental body to hold an election for any purpose, and an election held without affirmative constitutional or statutory authority is a nullity, no matter how fairly and honestly it may be conducted. *Tucker v. A.B.C. Board*, 177.

Provision of a municipal charter authorizing the mayor and governing body of the city to provide for election of city officers, as provided in another section (Chapter 716, Session Laws of 1947, Sec. 11), and "any other election authorized for city purposes," *is held* to authorize the governing body to call the election of city officers and such other elections for city purposes as are affirmatively authorized by statute, but does not authorize the governing body to call a primary municipal election without any statutory authorization. *Ibid.*

Statutory authority to a municipal governing body to call a quadrennial election for the election of city officers does not by implication authorize the governing body to call a primary election to select candidates to run in the municipal election. *Ibid.*

§ 9. Time of Holding Election.

The fact that a municipal primary election is held less than sixty days subsequent to a local option election does not invalidate the local option election, G.S. 18-124 (f), if the municipal primary election is held without constitutional or statutory authority and is, therefore, a legal nullity. *Tucker v. A.B.C. Board*, 177.

§ 24. Selection and Nomination of Candidates.

In the absence of a specific constitutional or legislative regulation on the subject, the law commits the nomination of candidates for political parties for public offices to party caucuses, party conventions, or such other unofficial procedures as party rules may establish. *Tucker v. A.B.C. Board*, 177.

ESTATES.

§ 9c. Allotment of Income Between Life Beneficiary and Remaindermen.

The testamentary trust in question provided that testator's widow receive the net income for life, and at her death the residue should be divided into trusts for the benefit of testator's sons. *Held:* The undistributed income of the trust which accumulated during the life of the widow belonged to her estate and not to the trusts created for the benefit of the remaindermen. *In re Estate of Bulis*, 539.

Where dividends are declared on stock held by a trust payable on dates which transpire before the death of the life beneficiary of the trust, such dividends belong to the estate of the life beneficiary. *Ibid.*

ESTOPPEL.

§ 3. Estoppel by Record.

Where a county board of education submits to the jurisdiction of the Superior Court by excepting to and appealing from the decision of the arbitrator in proceedings under G.S. 115-160, the county board of education will not be heard on further appeal to the Supreme Court to challenge the findings of the Superior Court on the ground that there was no *bona fide* disagreement between the board of education and the board of county commissioners and that the county commissioners arbitrarily reduced the budget prepared and presented to it. *Board of Education v. Comrs. of Onslow*, 118.

§ 5. Nature and Essentials of Equitable Estoppel in General.

Estoppel is based upon acts or conduct precluding a party from asserting a right. *Turnage Co. v. Morton*, 94.

§ 11a. Pleadings and Burden of Proof.

Estoppel is an affirmative defense which the purchaser must plead with certainty and particularity, and establish by the greater weight of the evidence. *Hall v. Odom*, 66; *Turnage Co. v. Morton*, 94.

EVIDENCE.

§ 5. Judicial Notice—Facts Within Common Knowledge.

The courts will take judicial notice as a fact within common knowledge that automobile manufacturers sell cars to ultimate purchasers solely through local authorized dealers. *Wetherington v. Motor Co.*, 90.

It is a matter of common knowledge that the firing of a cap pistol, or the explosion of a cap by such pistol, emits a spark, and that a spark will ignite gasoline fumes or vapors. *Hopkins v. Comer*, 143.

Judicial notice is not limited by the actual knowledge of any individual judge, but judges may refresh their memories, from standard works of reference, provided the matters are such as are a part of the common knowledge. *Ibid.*

§ 6. Presumptions.

Under the common law rule it is presumed that any person may have issue so long as he lives. *McPherson v. Bank*, 1.

In the absence of evidence of a will, it is presumed that a deceased person died intestate. *Skipper v. Yow*, 102.

§ 7a. Burden of Proof in General.

The burden of proof is a substantial right. *Owens v. Kelly*, 770; *White v. Logan*, 791.

§ 7e. Burden of Proof—Prima Facie Case and Burden of Going Forward With Evidence.

A *prima facie* case does not relieve plaintiff of the burden of proof nor create any presumption in his favor, but merely entitles him to have the issue submitted to the jury, and defendant, upon such showing by plaintiff, may elect to introduce no evidence, in which event he admits nothing but simply takes the risk of nonpersuasion, or he may offer evidence in explanation or exoneration. *Ins. Co. v. Motors*, 183.

The establishment of facts sufficient to give rise to a *prima facie* case merely takes the issue to the jury, and the credibility of defendant's evidence in explanation or rebuttal is also for their determination. *Jyachosky v. Wensil*, 217.

EVIDENCE—*Continued.*

§ 13. Privileged Communications—Attorney and Client.

Confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents. *Dobias v. White*, 680.

Only confidential communications between attorney and client are privileged, and if it appears by extraneous evidence or from the nature of the transaction or the communication that they were not regarded as confidential, or that they were made for the purpose of being conveyed by the attorney to others, they are not confidential and are not privileged. *Ibid.*

As a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese*. *Ibid.*

It being apparent in this case that the communications by plaintiff to his attorney were made for the very purpose of having the attorney relay the information to defendants, evidence thereof was competent, and the fact that the witness voluntarily incorporated in his answer other matters technically violative of the privileged communication rule will not affect this result when such other matters were collateral to the issue and could not have been prejudicial. *Ibid.*

§ 17. Rule That Party Is Bound by Testimony of Own Witness.

Party offering deposition taken under bill of discovery is not bound by adverse statements made by the witness during his examination. *Aldridge v. Hasty*, 353.

§ 29½. Competency of Pleadings in Evidence.

Plaintiff is not entitled to the introduction in evidence of allegations of the complaint which are denied by the answer, since such allegations are mere self-serving declarations. *Whitson v. Frances*, 733.

Plaintiff is entitled to introduce in evidence admissions in the answer of distinct and separate facts pertinent to the facts at issue as proof of the facts admitted without reference to the corresponding allegation of the complaint. *Ibid.*

Where an admission in the answer is categorical, but is more or less meaningless standing alone, plaintiff may offer such portion, and only such portion, of the corresponding allegation of the complaint as serves to explain or clarify the specific admission. *Ibid.*

§ 42d. Admissions by Agents or Other Representatives.

A casual, hasty or inconsiderate admission made by one of the attorneys for plaintiffs, which admission is in irreconcilable conflict with defendants' admission and the theory of plaintiffs' case, and which is repudiated in express terms by other counsel for plaintiff, is not binding on plaintiffs. *Newkirk v. Porter*, 296.

Testimony of statements made by the driver of a motor vehicle after the collision as to the defective condition of one of his headlights just prior to the accident, is admissible against him. *Whitson v. Frances*, 733.

§ 43a. Recitals and Declarations in General.

A recital or declaration in a deed is competent as evidence only against the parties and their privies and not in their favor, and may not be used against strangers unless such recitals fall within the ancient document rule, since as to strangers they are *res inter alios acta*. *Skipper v. Yow*, 102.

EVIDENCE—*Continued.*

§ 45. **Expert and Opinion Evidence in General.**

Ordinarily, a nonexpert is not competent to give his opinion on facts which are not within his personal knowledge, since the jury may be aided in forming an opinion from the facts only when additional light can be thrown on the question by a person of superior learning, knowledge or skill in the particular subject. *Hopkins v. Comer,* 143.

§ 51. **Competency and Qualifications of Expert Witnesses.**

A witness to be competent as an expert must be shown to be skilled or experienced in the business, profession or science to which the subject in question relates. *Hopkins v. Comer,* 143.

A physician, though an expert in his particular field, is not competent to testify as an expert as to the cause of an explosion of a gasoline tank truck, even though he studied chemistry in college. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

§ 15c. **Claims Against the Estate—Notes.**

Where the purchaser assumes an existing mortgaged indebtedness on the land and endorses the note secured thereby, and thereafter transfers the land to a third person who reconveys it to him and his wife so as to create an estate by the entireties, *held,* the creation of the estate by the entireties does not affect the liabilities on the note, nor does the acquisition of the property by the wife by survivorship release the husband's estate from liability for the debt. *Montsinger v. White,* 441.

§ 15d. **Claims Against Estate—For Personal Services.**

The rule that where a person renders services to another which are knowingly and voluntarily accepted, the law presumes that such services are given and received in anticipation of payment, is subject to the qualification that the circumstances must be such as to warrant the inference, with the burden of proof being on plaintiff, that at the time the services were rendered payment was intended on the one hand and expected on the other. *Twiford v. Waterfield,* 582.

Services performed by one member of a family for another within the unity of the family rule are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation. *Ibid.*

In this action to recover for personal services rendered intestate, charge *held* erroneous in failing to explain necessity for implied contract. *Ibid.*

§ 15e. **Claims Arising from Payment of Obligations of the Estate.**

Where the surviving wife pays notes upon which the husband alone was liable, which notes were secured by mortgage on lands theretofore held by entireties, she is subrogated to the rights of the mortgagee, but since the mortgagee could assert no claim against the estate of the husband until he had exhausted the security, the widow, as subrogee of the mortgagee, may not assert a general claim against the husband's estate for any amount in the absence of a contention that the property is worth less than the amount she paid to discharge the mortgage lien, the note not being paid for the benefit of the husband's estate, but to exonerate her own property from the lien. *Montsinger v. White,* 441.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 15h. Secured Claims.

The holder of a secured claim against an estate must first exhaust the security and apply the same on the debt before he may file a general claim against the estate for the balance due, if any, G.S. 28-105. *Montsinger v. White,* 441.

§ 26. Final Account and Settlement.

The discharge of an administratrix by the probate court having jurisdiction raises a presumption that the administratrix has complied with every prerequisite to a valid discharge. *Groome v. Leatherwood,* 573.

Ordinarily, a decree of a probate court having jurisdiction is not subject to collateral attack. *Ibid.*

§ 27. Jurisdiction and Proceedings for Accounting.

Plaintiff's father died in another State leaving real and personal property therein. Plaintiff alleged that defendant administratrix, acting under paper writings purporting to be the last will and testament of plaintiff's father, settled the estate and was discharged by the probate court of such state, but that plaintiff was born subsequent to the execution of said paper writings, and therefore, under the laws of such other state, was entitled to a part of the proceeds of the sale of the real estate and a part of the personal property of the estate. Plaintiff asked for an accounting by defendant administratrix. *Held:* The relief sought involves a challenge to the correctness of the official acts of the administratrix and the order of discharge of the probate court, and demurrer to the jurisdiction of our court was properly sustained. The allegations were insufficient to charge that the administratrix brought funds of the estate into this State and here wrongfully converted such funds to her own use so as to entitle plaintiff to an accounting in a court of equity on the grounds of a personal trust. *Groome v. Leatherwood,* 573.

FALSE PRETENSE.

§ 1. Nature and Elements of the Crime.

While the offense of false pretense ordinarily may not be predicated alone upon defendant's promise to do something, it may be based upon a false factual representation effective only by reason of being coupled with a false promise. *S. v. Phillips,* 516.

§ 2. Prosecution and Punishment.

Evidence tending to show that defendant falsely represented to a certain person that a criminal prosecution against him was imminent, and that defendant falsely promised such person that defendant could prevent the criminal prosecution and would do so if such person furnished him a sum to be paid the public official concerned, plus another sum as a fee to defendant for his services, and that in reliance upon the false representation and false assurance such other person paid defendant these sums, which defendant converted to his own use, is sufficient to be submitted to the jury on a charge of obtaining money by false pretense. *S. v. Phillips,* 516.

FRAUD.

§ 1. Deception Constituting Fraud in General.

Fraud is a material representation relating to a past or existing fact, which is false, made with knowledge of its falsity or in reckless disregard of the

FRAUD—*Continued.*

truth, with intention that the other party should act thereon, and which is reasonably relied and acted upon by the other party to his damage. *Lamm v. Crumpler*, 35.

Fraud is not defined lest the craft of men should find ways of circumventing or escaping a rule or definition, but generally fraud embraces all acts, omissions, or concealments involving a breach of legal or equitable duty resulting in damage, or the taking of undue or unconscientious advantage of another. *Roberson v. Williams*, 696.

§ 3. **Past or Subsisting Fact.**

A misrepresentation as to promissor's intent which is made for the purpose of inducing the other party to act or refrain from acting in reliance thereon will support an action for fraud even though it be promissory in nature, since the state of a person's mind at a particular time is as much a fact as any other fact. *Lamm v. Crumpler*, 35.

§ 4. **Knowledge and Intent to Deceive.**

It is not required that defendant have actual knowledge of the falsity of the representations made by him if he makes such representations with reckless indifference as to their truth or falsity and with intent that the other party should rely upon them. *Roberson v. Williams*, 696.

§ 5. **Deception and Reliance on Misrepresentation.**

The failure of plaintiff to make inquiry which would have disclosed the falsity of defendant's representations will not preclude plaintiff from maintaining an action for fraud in those instances in which there is nothing which would have put a reasonably prudent man upon inquiry. The law does not require a prudent man to deal with everyone as a rascal. *Roberson v. Williams*, 696.

§ 9. **Pleadings in Actions for Fraud.**

Plaintiff alleged that he was the last and highest bidder at a judicial sale, that he was induced to join in the commissioner's deed conveying the property to defendants by representations that defendants needed a part of said land to obtain approval by the Federal Housing Administration of a housing project, that defendants promised to reconvey to plaintiff that part of the land not needed for this purpose as soon as the amount of land needed could be ascertained, when in fact defendants at the time of making the representations knew the small amount of the land necessary for their housing project, and that defendants thereafter failed and refused to reconvey to plaintiff the part of the land not needed. *Held:* The complaint is sufficient to state a cause of action for fraud. *Lamm v. Crumpler*, 35.

Allegations to the effect that defendant had been in active and exclusive control of the books and records of a certain partnership, and that the other partner during his lifetime, and plaintiff trustees after his death, relied upon defendant's statements as the basis of settlements, and that plaintiffs thereafter purchased defendant's interest in the partnership, with further averment that an accounting would disclose that defendant owed plaintiffs a large sum of money, *is held* insufficient to state a cause of action against defendant for fraud in the sale of his interest in the partnership, it not being alleged that plaintiffs were induced to purchase the assets in reliance of any representation made to them by defendant. *Belch v. Perry*, 764.

FRAUD—*Continued.*

§ 12. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to be submitted to jury in action for fraud inducing plaintiff to sign timber deed. *Roberson v. Williams*, 696.

FRAUDS, STATUTE OF.

§ 1. Purpose and Operation in General.

The defense of the statute of frauds is personal to the parties to a contract, and is not available to strangers to the agreement. *Childress v. Abeles*, 667.

The Statute of Frauds has no application to a fully executed or consummated contract, but may be invoked only to prevent the enforcement of executory contracts. *Dobias v. White*, 680.

A written contract to devise realty in consideration of personal services to be rendered, which agreement is signed by the person to be charged, does not come within the ban of the statute of frauds. *Clark v. Clark*, 709.

GAMES AND EXHIBITIONS.

§ 3. Liability for Injury to Patrons.

Evidence *held* to show contributory negligence on part of golfer in stepping into hole for water hose connection. *Farfour v. Golf Club*, 159.

§ 4. Liability for Injury to Participants.

Allegations to the effect that plaintiff's intestate was a competitor in a stock car automobile race, that the racetrack was under the control of the defendants, who, acting in concert, were conducting the race, and that they started the race with the track in an unsafe condition as a result of one or more "dead" cars being left thereon after the trial runs immediately before the race, without the knowledge of the competitors, but with defendants being chargeable with notice thereof, and that intestate was fatally injured when his car collided with a "dead" car upon the track, *is held* sufficient to state a cause of action against defendants on the theory of concurrent negligence. *Midkiff v. Auto Racing*, 470.

GAS.

§ 2. Installation and Servicing of Gas Heaters.

Allegations to the effect that a liquefied petroleum gas company installed gas heating equipment at a motor court and supplied gas for the heaters, and that plaintiff's intestate, while a guest at the motor court, was killed by monoxide poisoning, without allegation that such installation was improperly or defectively made or that the material was defective or faulty, or that the appliances installed were defective or unsuited for their intended use, or allegations of contractual duty to repair, *held* insufficient to charge the gas company with the duty to inspect the equipment and heaters and keep them in proper repair, or to state a cause of action for negligence. *Caldwell v. Morrison*, 324.

Allegations to the effect that defendant liquefied petroleum gas company installed in a motor court room a heater of such capacity and supplied it with gas at such pressure that it was capable of exhausting the oxygen in the room to the extent that the occupant thereof might suffer carbon monoxide poisoning, and that plaintiff's intestate while a guest in the room died as a result of carbon monoxide poisoning, *held* insufficient to allege that the heater was unsuitable for use in the room where it was installed, or that defendant gas com-

GAS—*Continued.*

pany supplied the heater with gas at an improper pressure, so as to allege actionable negligence in these respects. *Ibid.*

GRAND JURY.

§ 2. Selection and Terms.

A Public-Local law providing for rotating grand juries in a designated county and repealing a part of a former law on the subject (Chapter 465 Public-Local Laws 1935; Chapter 104 Public Laws 1923), was in force on the effective date of the General Statutes, but through inadvertence was overlooked and the repealed statute was incorporated in the General Statutes (G.S. 9-25). *Held:* The Public-Local law remains in effect. G.S. 164-7. *S. v. Gales*, 319.

HABEAS CORPUS.

§ 3. To Obtain Custody of Minor Child.

The resident judge of the district has jurisdiction to hear a special proceeding under G.S. 50-13, brought and heard after notice to all parties. *Wall v. Hardee*, 465.

G.S. 17-39 provides a proceeding in the nature of *habeas corpus* by which a controversy respecting the custody of minor children may be determined between husband and wife, living in a state of separation without divorce, and the statute is available to the parent with whom the children then reside, it being immaterial whether the respondent or petitioner has custody at the time. *In re McCormick*, 468.

HIGHWAYS.

§ 4a. Highways Under Construction—Signs and Warnings.

Plaintiff's own evidence disclosed that he saw barricades and signs warning motorists that the highway was under construction, and that the excavation of a three-foot strip of highway along one side was plainly visible. The remaining portion of the hard surface was sufficiently wide for two vehicles to meet and pass. *Held:* The evidence is insufficient to support the inference that the contractor's asserted negligence in failing to post a watchman along the excavation and in failing to exercise due care in providing adequate signs, signals and warnings along the approach of the construction project, was a contributing cause of plaintiff's collision with another vehicle traveling in the opposite direction. *Harris v. Construction Co.*, 556.

HOMICIDE.

§ 17. Relevancy and Competency of Evidence.

Testimony to the effect that defendant had intentionally assaulted the deceased, inflicting personal injuries, on an occasion antedating the fatal assault, *held* competent as bearing on intent, malice, motive, premeditation, and deliberation on the part of defendant. *S. v. Gales*, 319.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence in this case *held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree. *S. v. Gales*, 319.

Testimony of statements of defendant to the effect that he had fist fight with deceased and left him standing in woods, with evidence that deceased died from blows on the head with blunt instrument, *held* insufficient to sustain con-

HOMICIDE—*Continued.*

viction of manslaughter, since whether defendant after fist fight assaulted deceased with blunt instrument is left in conjecture. *S. v. Tolbert*, 445.

§ 27e. Instructions on Question of Manslaughter.

In a prosecution for involuntary manslaughter, an instruction to the effect that defendant would be guilty if he killed a human being without intent in doing a lawful act "in an unlawful manner," rather than "in a culpably negligent manner," *held* not to constitute prejudicial error when in other portions of the charge the court painstakingly distinguishes between civil and criminal negligence, and instructs the jury that the unintentional violation of safety statutes not involving actual danger to life, limb, or property would not constitute culpable negligence unless such violation was reckless or in wanton disregard of the safety and rights of others. *S. v. Bournais*, 311.

HUSBAND AND WIFE.

§ 6. Wife's Separate Estate.

Earnings of wife are her sole and separate property. *Owens v. Kelly*, 770.

§ 10. Actions Against Third Persons for Negligent Injury.

In the wife's action to recover for personal injuries, the admission of evidence as to hospital bills paid by the husband cannot be prejudicial when the husband would be estopped to recover these items of damage in a separate action. *Jyachosky v. Wensil*, 217.

§ 12d. Deeds of Separation—Validity and Attack.

The mere fact that at the time of the execution of the deed of separation the wife was mentally incompetent does not support a judgment declaring that the deed of separation is void, since in such circumstances the contract is voidable and should not be annulled unless the husband is unable to show that he was ignorant of the wife's incapacity and had no notice thereof sufficient to put a reasonably prudent person upon inquiry, paid a fair and full consideration, took no unfair advantage of the wife, and that the wife has not restored or is unable to restore the consideration or make adequate compensation therefor. *Lawson v. Bennett*, 52.

Deed of separation *held* not merged in subsequent divorce decree. *Howland v. Stitzer*, 689.

§ 13a (3). Husband as Agent for Wife.

Where wife asserts that husband was her agent in part of negotiations beneficial to her, she may not deny his agency in the premises to avoid the burdens. *Dobias v. White*, 680.

§ 14½. Estates by Entireties—Liabilities on Mortgage Notes.

Where the purchaser assumes an existing mortgaged indebtedness on the land and endorses the note secured thereby, and thereafter transfers the land to a third person who reconveys it to him and his wife so as to create an estate by the entireties, *held*, the creation of the estate by the entireties does not affect the liabilities on the note, nor does the acquisition of the property by the wife by survivorship release the husband's estate from liability for the debt. *Montsinger v. White*, 441.

Where the surviving wife pays notes upon which the husband alone was liable, which notes were secured by mortgage on lands theretofore held by

HUSBAND AND WIFE—*Continued.*

entireties, she is subrogated to the rights of the mortgagee, but since the mortgagee could assert no claim against the estate of the husband until he had exhausted the security, the widow, as subrogee of the mortgagee, may not assert a general claim against the husband's estate for any amount in the absence of a contention that the property is worth less than the amount she paid to discharge the mortgage lien, the note not being paid for the benefit of the husband's estate, but to exonerate her own property from the lien. *Ibid.*

The surviving wife who pays mortgaged notes on lands theretofore held by them by entireties, is subrogated to the rights of the mortgagee, and is entitled to all the rights and remedies which were available to the mortgagee, but acquires no right or claim beyond those available to him. *Ibid.*

INCEST.

§ 2. Prosecutions.

Evidence in this case *held* sufficient to overrule nonsuit and sustain conviction of assault with intent to commit rape on a female child under the age of 12 years and of incest. *S. v. Stone,* 606.

Defendant was charged with carnal knowledge of a female child under the age of 12 years, with carnal knowledge of a female child over the age of 12 and under the age of 16, and with incest. *Held:* The finding of prophylactic rubbers on the person of defendant when he was arrested some seven months after the last act of intercourse took place according to the evidence, and some three and one-half years after the prosecuting witness became 12 years of age, does not tend to prove defendant's guilt of the offenses charged, and the admission of such evidence over defendant's objection constitutes reversible error. *Ibid.*

INDICTMENT.

§ 12. Motions to Quash—Time of Making Motion.

Motion to quash the indictment as a matter of right on the ground of defect or irregularity in the drawing or organization of the grand jury must be made before arraignment and plea; such motion made after plea is addressed to the discretion of the court; after the petit jury is sworn and impaneled, the court has no discretionary power to entertain such motion. *S. v. Gales,* 319.

INDICTMENT AND WARRANT.

§ 1. Proceedings in General.

A preliminary hearing is not an essential prerequisite to the finding of an indictment in this State. *S. v. Hackney,* 230.

§ 9. Charge of Crime.

A warrant will not be quashed or a judgment arrested on the ground that such warrant is defective, if it charges the offense in a plain, intelligible and explicit manner and contains sufficient matter to enable the court to proceed to judgment. *S. v. Smith,* 99.

If a warrant is sufficient to inform the defendant of the charge against him and to enable him to prepare his defense, reference therein to the specific section of the General Statutes upon which the charge is laid, is not necessary to its validity. *Ibid.*

INFANTS.

§ 1. Protection and Supervision of Courts of Person and Property of Infants.

When it appears in an action for the interpretation or reformation of a trust instrument that the judgment below affects the interest of possible unborn children of trustor, the Supreme Court, in the exercise of its supervisory powers, will protect *ex mero motu* the interest of the persons *in posse*. *McPherson v. Bank*, 1.

§ 12. Actions Against Infants and Persons in Posse—Representation and Guardians ad Litem.

Infants and persons *in posse* may be represented by virtual representation only if parties to cause have common interest. *McPherson v. Bank*, 1. Persons *in posse* not having virtual representation cannot be represented by guardian *ad litem* except as provided by statute. *Ibid.*

G.S. 41-11.1 does not apply to actions adjudicating the interests of persons *in posse* under trust instrument. *Ibid.*

Failure to show service of process on some of the interested parties and failure to show appointment of guardian *ad litem* for those parties under disability are not fatal defects warranting quashal of the proceeding. *In re Will of Wood*, 134.

INJUNCTIONS.

§ 1b. Mandatory Injunctions.

While a mandatory injunction ordinarily will not issue as a preliminary order, it is the proper remedy in apposite cases to compel compliance with a judgment in the nature of an execution against a private person. *Ingle v. Stubbins*, 382.

Where defendant deliberately violates restrictive covenants, mandatory injunction will lie to compel modification of building to comply with restrictions. *Ibid.*

§ 2. Inadequacy of Legal Remedy.

If a carrier has a legal right to construct and use a turnout or junction from trackage used by it jointly with another carrier and owned by a separate corporation, and such turnout or junction is the only feasible way for it to serve industries located in the area, equity will grant injunctive relief to preserve such right as being necessary to afford an adequate and complete remedy. *R. R. v. R. R.*, 495.

INSANE PERSONS.

§ 12. Contracts of Insane Persons.

Mental incapacity renders contract voidable but not void. *Lawson v. Bennett*, 52.

INSURANCE.

§ 25½. Fire Insurance—False and Fraudulent Claims.

In presenting a false claim and proofs in support of such claim for payment of loss or other benefits upon a contract of fire insurance, a defendant must have acted willfully and knowingly in order to be guilty under the statute. *S. v. Fraylon*, 365.

The existence of unreported liens or other insurance upon the property is a civil matter governed by G.S. 58-178, 58-180, but does not tend to show criminal intent in connection with the filing of proofs of claim. *Ibid.*

INSURANCE—*Continued.*

The procuring of overinsurance is not a crime, though it may be a civil wrong under certain circumstances. *Ibid.*

Evidence *held* insufficient to show that defendant willfully and knowingly presented fraudulent claim and proofs in support thereof. *Ibid.*

§ 26½. Contracts and Agreements to Procure Life Insurance.

Where, upon valid consideration, a person agrees with another, who has an insurable interest in the life of a third person, to procure the issuance of a term policy on the life of such third person, and fails to procure the issuance of the policy, recovery may be had, upon the death within the period specified of the person sought to be insured, for breach of the contract to procure the issuance of the policy or for negligent default in failing to perform the duty imposed by such contract. The principle of liability for breach of agreement to procure property insurance applies also to life insurance. *Bank v. Bryan*, 610.

§ 43b. Auto Liability—Vehicles Covered.

Under the Motor Vehicle Safety and Financial Responsibility Act of 1947, where an insurance company issues, in accordance with the application, an owner's policy of liability insurance upon an assigned risk covering only one of the two vehicles owned by insured, the insurer is not liable for a loss established by judgment against the insured for damages caused during insured's operation of the other vehicle owned by him. G.S. 20-276; G.S. 20-252 (a); G.S. 20-252 (b). This result is not affected by the failure of the Department of Motor Vehicles to cancel the registration of the automobile involved in the accident. *Graham v. Ins. Co.*, 458.

§ 43½. Auto Insurance—Collision and Upset.

Where the insurer in an automobile collision policy elects to repair the damaged automobile, insurer, under the provisions of the contract, is bound to repair the automobile and restore it to its former condition, and its authorization to the repairman to return the car to insured upon delivery by insured of a release, constitutes at least a tacit representation that the repairs had been properly made. *Pierce v. Ins. Co.*, 567.

Insured may rescind release for misrepresentations that damage to car covered by policy had been repaired. *Ibid.*

Insurer in an automobile collision policy elected to have the damaged car repaired. After notification by insurer that the car was ready for delivery, insured's agent delivered a release to the repairman, was then shown the car in a darkened room, and requested permission to try the car out before accepting delivery, which request was refused. *Held:* Under the evidence adduced in this case, the delivery of the release before request of permission to try out the car does not preclude the submission of the issue as to whether the release was obtained by fraudulent misrepresentations that the car had been properly repaired. *Ibid.*

Insurer in an automobile collision policy elected to have the damaged car repaired. After the execution and delivery to the repairman of a release, and after insured had taken possession of the car and ascertained that the repairs had not satisfactorily been made, insurer's agent authorized the return of the car for reinspection and further repairs, if necessary. *Held:* Insurer waived the release, and insured could maintain an action against insurer for breach of the insurance contract upon evidence that the car had not properly been repaired and tendered to him within a reasonable time. *Ibid.*

INTOXICATING LIQUOR.

§ 2. **Construction and Operation of Control Statutes.**

Municipal primary election *held* void for want of authority of governing body to call same, and therefore beer election within six months thereof was valid. *Tucker v. A.B.C. Board*, 177.

§ 9a. **Prosecutions—Indictment and Warrant.**

The offense of possessing alcoholic beverages on which taxes have not been paid and the offense of possessing intoxicating liquor for the purpose of sale are separate misdemeanors of equal dignity created by separate statutory provisions, and neither includes the other as a lesser offense, and a defendant may not be convicted of possessing intoxicating liquor upon which taxes have not been paid under a warrant charging possession of intoxicating liquor for the purpose of sale even though the warrant specifies that the liquor was "non-taxpaid." *S. v. Hall*, 109.

JUDGES.

§ 2b. **Emergency Judges.**

Where a cause comes on to be heard at a term of court presided over by an emergency judge duly commissioned, and the parties agree that the court should find the facts and render judgment thereon out of term and out of the county, judgment so rendered is within the jurisdiction of the emergency judge, since the judge, having acquired jurisdiction in term, had power to sign the judgment out of term and out of the county by consent of the parties. *Strickland v. Kornegay*, 758.

JUDGMENTS.

§ 25. **Attack of Judgments—Procedure.**

Ordinarily, a decree of a probate court having jurisdiction is not subject to collateral attack. *Groome v. Leatherwood*, 573.

§ 27c. **Attack and Setting Aside for Error of Law.**

Where there is a defective statement of a good cause of action, judgment dismissing the action is erroneous, but after term the sole procedure to correct the error of law is by appeal. *Mills v. Richardson*, 187.

§ 29. **Parties Concluded.**

A judgment is not binding upon persons *in posse* who do not come under the doctrine of virtual representation and are not therefore before the court. *McPherson v. Bank*, 1.

A judgment is binding only on parties and those in privity. *Taylor v. Honeycutt*, 105.

§ 32. **Operation of Judgment as Bar to Subsequent Action in General.**

Judgment adjudicating title under a State grant and conveyances from the State Board of Education to a large tract of land *held* not to bar a subsequent suit involving title under conveyance from the State Board of Education to a small portion of the land involved in the former case, in view of new facts alleged in the pleadings and developed at the trial, and an intervening Act of the General Assembly (Ch. 966, Session Laws of 1953) validating titles conveyed by the State Board of Education. *Parmele v. Eaton*, 539.

§ 33a. **Judgments as Bar to Subsequent Action—Judgments of Nonsuit.**

A judgment of nonsuit will not support a plea of *res adjudicata* in a subsequent action between the same parties upon substantially different allegations and evidence. *Newkirk v. Porter*, 296.

JURY.

§ 4. Examination of Prospective Jurors.

Interrogations of prospective jurors by trial court *held* to amount to expression of opinion by court on facts, entitling appellant to new trial. *S. v. Canipe*, 60.

LANDLORD AND TENANT.

§ 1. The Relationship.

A contract under which the owner of land furnishes a house and the land and one-half of the fertilizer, and the other party furnishes the labor for cultivating the crops and one-half of the fertilizer, with provision for division of the crops, creates the relationship between the parties of landlord and tenant and not that of master and servant. *Moss v. Hicks*, 788.

§ 11. Liability of Landlord for Negligent Injury to Tenant from Disrepair.

The landlord in an agricultural tenancy is not liable for injury suffered by the tenant when the steps of the house furnished the tenant collapse by reason of disrepair, even though the condition of the steps had theretofore been brought to the landlord's attention and he had agreed to repair same. *Moss v. Hicks*, 788.

§ 16. Expiration of Term in Accordance With Lease.

Upon the expiration of a lease for a term of years without request for renewal by lessees in the manner provided in the lease, lessors have the right to treat their lessees as trespassers and may bring an action for their eviction without notice. *Duke v. Davenport*, 652.

§ 18. Renewals, Extensions and Holding Over.

Where, upon the expiration of a lease for a term of years without request by lessees for renewal in the manner provided in the lease, the lessees hold over and continue to pay the rent monthly in the amount stipulated in the lease, which payment is accepted by lessors, the tenancy is presumed to be one from year to year. *Duke v. Davenport*, 652.

The presumption of a tenancy from year to year arising upon the holding over by lessees after the expiration of the lease for a term of years without request for renewal in the manner provided in the lease, is a rebuttable presumption. But in the present case the trial court found that neither lessors nor lessees had any understanding as to the future occupancy after the termination of the lease, and such finding negatives any agreement or understanding that might rebut the presumption. *Ibid.*

Where tenants for years hold over after the expiration of the lease without request for renewal by written notice 30 days prior to the expiration of the term in accordance with the lease, and lessors thereafter accept monthly rent in the amount stipulated in the lease, the character of the tenancy becomes fixed as that of a tenancy from year to year, and lessees cannot exercise the option for renewal by giving written notice subsequent to the termination of the period of the lease. *Ibid.*

§ 33. Liabilities for Negligent Injury to Third Persons.

Plaintiff alleged that she was injured by the falling of a sign erected over a sidewalk by lessees. Defendant lessees alleged that plaintiff was injured by the falling of an awning erected by lessor prior to their occupancy, and sought to have lessor joined as a party defendant for the purpose of contribution. *Held:* Defendants may not set up an entirely different state of facts which invoke

LANDLORD AND TENANT—*Continued.*

principles of law which have no relation to the subject matter of the action as stated in plaintiff's complaint, and thus litigate in plaintiff's action differences between themselves and lessor. *Hobbs v. Goodman*, 192.

Where plaintiff sues to recover for injuries sustained when a sign erected over a sidewalk by lessees fell and struck her, lessees are not entitled to joinder of lessor as a party defendant on the principle of primary and secondary liability, since upon the cause as set out in the complaint, lessees' active negligence created the situation which caused the injury, and therefore lessees are primarily liable. *Ibid.*

LARCENY.

§ 5. Presumptions and Burden of Proof.

Possession of stolen goods raises no presumption of guilt of larceny if time intervening after theft is too long. *S. v. Matheay*, 433.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that an automobile was stolen from where it was parked in front of the owner's house, that some 82 days thereafter defendant was apprehended driving an automobile of the same make and color and the same motor registration number, but with license plates that had been issued for a different vehicle, *is held* sufficient to be submitted to the jury in a prosecution for larceny. *S. v. Matheay*, 433.

LIBEL AND SLANDER.

§ 7c. Absolute Privilege.

Statements in pleadings or other papers filed in a judicial proceeding are absolutely privileged unless they are not relevant or pertinent to the subject matter, which presents a question of law to be determined on the basis of whether they are so palpably irrelevant and improper that no reasonable man could doubt that they could not become a proper subject of inquiry in the action or proceeding. *Scott v. Veneer Co.*, 73.

§ 10. Pleadings.

In this action for libel it appeared on the face of the complaint that the words constituting the basis of the action were contained in pleadings and papers filed by defendant in a duly constituted civil action, and that they were relevant to that action. *Held:* The complaint sets forth a statement of a defective cause of action and defendant's demurrer was properly sustained, since upon the face of the complaint the alleged libelous words were absolutely privileged, and were not actionable. *Scott v. Veneer Co.*, 73.

In an action for libel, the complaint ought to state the libel in the original language. *Ibid.*

LIMITATION OF ACTIONS.

§ 5b. Accrual of Right of Action—Fraud and Ignorance of Cause of Action.

This action to recover for alleged malpractice in the diagnosis and treatment of plaintiff's broken ankle was instituted some eleven years after the treatment. Plaintiff alleged that defendant concealed his own negligence and prevented plaintiff from securing other medical attention before further complications developed, but plaintiff's evidence was to the effect that she talked to defendant after the treatment from time to time across the years and complained of the

LIMITATION OF ACTIONS—*Continued.*

condition of her ankle. *Held:* There is no evidence of fraudulent concealment such as to toll the statute of limitations, and judgment of nonsuit upon the plea of the three year statute, properly pleaded, is without error. *Connor v. Schenck*, 794.

§ 6d. Accrual of Cause of Action—Contracts to Convey.

A cause of action for breach of written contract to convey certain lands to plaintiff for life, if she should survive the obligor, arises upon the prior death of the obligor without devising the property in accordance with the agreement, and not upon the obligor's execution of deed to third persons subsequent to the execution and registration of the contract to devise. *Clark v. Butts*, 709.

§ 9. Accrual of Right of Action—Fiduciaries.

If a trustee devises the trust property in fee simple free from and contradictory to the terms of the trust, such devise is a repudiation or disavowal of the trust, and starts the running of the Statute of Limitations against the *cestui* who has actual knowledge thereof and constructive notice thereof by the probate of the will. *Sandlin v. Weaver*, 703.

§ 11. Institution of Action—Amendments.

In action for wrongful death, amendment to bring the cause within the Federal Employers' Liability Act did not constitute new action, and action having been originally brought within time was not barred. *Graham v. R. R.*, 338.

In action against individual, amendment substituting corporate defendant constitutes new action as to corporation, and when action is then barred by applicable statute properly pleaded, action must be dismissed. *McLean v. Matheny*, 785.

MASTER AND SERVANT.

§ 4a. Distinction Between Employee and Independent Contractor.

The right to control the workman with respect to the manner and method of doing the work, regardless of whether such right is exercised or not, as distinguished from the mere right to require certain results, is usually determinative of whether the relationship between the parties is that of employer and employee, or independent contractor. *Harris v. Construction Co.*, 556.

§ 4b. Distinction Between Employee and Tenant.

A contract under which the owner of land furnishes a house and the land and one-half of the fertilizer, and the other party furnishes the labor for cultivating the crops and one-half of the fertilizer, with provision for division of the crops, creates the relationship between the parties of landlord and tenant and not that of master and servant. *Moss v. Hicks*, 788.

§ 25a. Construction and Operation of Federal Employers' Liability Act.

In an action under the Federal Employers' Liability Act matters of procedure, including the judge's charge, are governed by rules of the state court. *Miller v. R. R.*, 617.

§ 25b. Exclusiveness of Remedy Under Federal Employers' Liability Act.

Where, in an action for wrongful death it appears that deceased was an employee of the defendant railroad company and was fatally injured while engaged in the discharge of his duties in interstate commerce, plaintiff's sole remedy is under the Federal Employers' Liability Act. *Graham v. R. R.*, 338.

MASTER AND SERVANT—*Continued.*

An action by an employee of a common carrier to recover for injuries received in the course of his duties in interstate commerce is governed by the Federal Employers' Liability Act. *Miller v. R. R.*, 617.

§ 26. Federal Employers' Liability Act—Negligence of Employer.

In order to recover under the Federal Employers' Liability Act, plaintiff must prove that defendant was negligent and that such negligence was the proximate cause, in whole or in part, of intestate's death. *Graham v. R. R.*, 338.

Evidence of defendant's negligence in dispatching unscheduled freight onto track on which repairman on motorcar had been given clearance *held* for jury under Federal Employers' Liability Act. *Ibid.*

Contributory negligence of employee *held* not to insulate defendant's negligence as a matter of law. *Ibid.*

§ 27. Federal Employers' Liability Act—Assumption of Risks.

The effect of the 1939 amendment to the Federal Employers' Liability Act (45 U.S.C.A. 54) is to obliterate from the law every vestige of the doctrine of assumption of risk, and decisions prior to the amendment must be considered in relation to the rule as to assumption of risk then embodied in the law. *Graham v. R. R.*, 338.

§ 28. Federal Employers' Liability Act—Contributory Negligence of Employee.

Under the Federal Employers' Liability Act, contributory negligence of the fatally injured employee does not bar recovery, but effects a diminution of recovery by the proportion of the damages attributable to the employee's contributory negligence. *Graham v. R. R.*, 338.

The evidence disclosed that the intestate, with another, was dispatched on a motorcar along the northbound track to repair a signal, that the repairmen were given an hour's clearance on the northbound track, with no information in regard to clearance on the southbound track. The signal was repaired and the repairmen had time to return on the northbound track within the hour's clearance. *Held:* The failure of the repairmen to use a nearby railroad telephone for further report as to the clearance on the northbound track before attempting to return on that track, was not contributory negligence as a matter of law, but was properly submitted to the jury upon that issue. *Ibid.*

Held: Under the circumstances intestate was not guilty of contributory negligence as a matter of law in returning southward on the northbound track, but the evidence was properly submitted to the jury upon the question. *Ibid.*

Failure of employee to have abandoned rail motor car in face of on-coming train *held* not contributory negligence as matter of law upon evidence in this case. *Ibid.*

§ 29. Limitations Under Federal Employers' Liability Act.

Plaintiff alleged a cause of action for wrongful death. The evidence disclosed that plaintiff's intestate was an employee of a railroad company and was fatally injured in the discharge of his duties in interstate commerce. More than three years after the death, amendment was allowed to bring the cause within the purview of the Federal Employers' Liability Act. *Held:* Whether the amendment introduced a new cause of action then barred by the Federal statute must be determined by the Federal law, and under the Federal decisions the facts constituting the asserted negligence being the same, the amendment does not introduce a new cause of action. *Graham v. R. R.*, 338.

MASTER AND SERVANT—*Continued.*

§ 30a. Federal Employers' Liability Act—Instructions.

In this action under the Federal Employers' Liability Act, the failure of the court in several instances to charge that the amount of the recovery should be diminished by the proportion of the damages attributable to the deceased employee's contributory negligence, *is held* prejudicial. *Graham v. R. R.*, 338.

§ 37. Nature and Construction of Compensation Act in General.

The North Carolina Workmen's Compensation Act is an industrial injury act, and not an accident and health insurance act, and must be so construed by the courts. *Lewter v. Enterprises, Inc.*, 399.

While the Workmen's Compensation Act is to be liberally construed to the end that its benefits should not be denied by narrow and strict interpretation, the rule of liberal construction does not warrant the reading into the act meanings alien to its plain and unmistakable words or justify judicial legislation converting the act beyond the legislative intent into an accident and health insurance act. *Hatchett v. Hitchcock Corp.*, 591.

§ 40a. Compensation Act—Injuries Compensable in General.

In order to be compensable, an injury must arise out of and in the course of claimant's employment. *Poteete v. Pyrophyllite Co.*, 561.

In order to recover for the death of an employee under the Workmen's Compensation Act, plaintiff must show that death resulted from an injury by accident which arose out of and in the course of deceased's employment by defendant, and that it did not result from a disease in any form unless such a disease resulted naturally and unavoidably from the accident. G.S. 97-2 (f) and (j). *Lewter v. Enterprises, Inc.*, 399.

§ 40c. Compensation Act—Whether Accident "Arises Out of Employment."

The term "arising out of" within the meaning of the Compensation Act imports that the injury must arise out of the work or service the employee is to perform and be a risk incidental thereto, so that the employment be a contributing cause of the injury. *Lewter v. Enterprises, Inc.*, 399; *Poteete v. Pyrophyllite Co.*, 561.

The evidence tended to show that claimant, a foreman, frequently returned to the employer's plant after his regular working hours, to see how the work was going and to help correct any difficulties he found, that on the day in question claimant returned to the plant twice after his working hours for the purpose of seeing a co-employee to collect a personal debt, that on the second visit he found a rock chute, which was attended by the co-employee, choked up, and that, before speaking about the debt, he helped the co-employee for something over 20 minutes in the hard work of unchoking the chute. The evidence further tended to show that after the chute was unchoked, claimant walked over and sat on a wall to rest and wait until the co-employee had a lull in his work in order to speak to him about the debt, and that claimant, while waiting, lost consciousness and fell off the wall to his injury. *Held:* The evidence is insufficient to sustain a finding that plaintiff's injury arose out of and in the course of his employment, since from the evidence it cannot be held that the accident resulted from risk incidental to the employment. *Poteete v. Pyrophyllite Co.*, 561.

Evidence tending to show that an employee, while carrying a heavy board in the course of his employment, slipped and fell, wrenching his back, together with expert testimony that the employee had a permanent partial disability of

MASTER AND SERVANT—*Continued.*

a general nature resulting from the injury to his back, *is held* sufficient to support the Commission's finding that the employee had suffered injury to his back from an accident which arose out of and in the course of his employment. *Harris v. Contracting Co.*, 715.

§ 40d. Whether Accident "Arises in the Course of Employment."

The term "in the course of" as used in the Compensation Act refers to the time, place and circumstances under which the accident occurs. *Lewter v. Enterprises, Inc.*, 399.

§ 40f. Compensation Act—Diseases.

Ordinarily, heart disease does not result from an injury by accident arising out of or in the course of employment unless it results from an unusual or extraordinary exertion incident to the employment, nor is it an occupational disease compensable under the Workmen's Compensation Act. *Lewter v. Enterprises, Inc.*, 399.

Death of ticket seller at theatre from cerebral hemorrhage following fire in theatre *held* not compensable. *Ibid.*

The evidence before the Industrial Commission *is held* sufficient to support the finding of the Industrial Commission that plaintiff's intestate, after the termination of his employment with one employer because of silicosis in the third degree, was employed by another employer for more than thirty working days, or parts thereof, within seven consecutive calendar months, and that he was last exposed to the hazards of the disease while in the employment of the second employer within the rule of liability under G.S. 97-57. *Willingham v. Rock & Sand Co.*, 281.

§ 40g. Compensation Act—Hernia.

The findings of fact of the Industrial Commission *held* sufficient to support an award of compensation for hernia. *Beaver v. Paint Co.*, 328.

§ 43. Compensation Act—Notice and Filing of Claim.

Where the Industrial Commission, upon the hearing of a claim for compensation, joins another employer as an additional party defendant, notwithstanding that no notice or claim had been filed against such employer, *held:* The employer by appearing at the time and place of the hearing and stipulating that it was subject to the Compensation Act and joining in the hearing on the merits, makes a general appearance and submits itself to the jurisdiction of the Commission. *Willingham v. Rock & Sand Co.*, 281.

§ 45. Compensation Act—As Bar to Common Law Action.

Where the evidence discloses that the infant plaintiff was one of five or more employees in a business owned by two of defendants and conducted by the third defendant as general manager, and that he was injured in the performance of the duties of his employment, nonsuit is proper, since the evidence discloses that the cause is within the exclusive jurisdiction of the Industrial Commission, notwithstanding that the infant plaintiff may have been hired contrary to law. *McNair v. Ward*, 330.

§ 52. Hearings and Findings of Commission.

While the employer's report of an accident to the Industrial Commission does not constitute a claim for compensation, a statement therein as to the employee's average weekly wage is competent upon the hearing after the filing of claim. *Harris v. Contracting Co.*, 715.

MASTER AND SERVANT—*Continued.*

§ 53b (1). Amount of Recovery for Injury.

Under facts of this case employer was not prejudiced by finding of average weekly wage in amount fixed by contract at time of injury. *Harris v. Contracting Co.*, 715.

And statement in report of employer as to employee's wage is competent. *Ibid.*

§ 53b (3). Amount of Recovery—Medical Treatment.

No recovery may be had for services as practical nurse when Commission does not authorize or order such services prior to their rendition. *Hatchett v. Hitchcock Corp.*, 591.

§ 53c. Change of Condition and Review of Award by Industrial Commission.

Where the Industrial Commission finds upon supporting evidence that plaintiff had suffered permanent partial disability, and awards compensation therefor, the Commission has no jurisdiction to retain the cause for 300 weeks from the date of injury to make adjustments for future fluctuations in claimants ability to work and earn wages during that period, except in unusual circumstances, since the parties have the right under G.S. 97-47 to apply to the Commission for review of the award upon changed conditions on request filed within the time prescribed by the statute. *Harris v. Contracting Co.*, 715.

§ 55d. Appeals from Industrial Commission and Review in Superior Court.

Where counsel for both parties sign an agreed statement of facts and submit same to the hearing commissioner, the cause must be determined on the facts agreed, and denial of motion before the full commission that movants be allowed to introduce newly discovered evidence is proper. On appeal, it is error for the Superior Court to remand the cause to the Industrial Commission for the reception of the newly discovered evidence. *Edwards v. Raleigh*, 137.

Objections and exceptions to the signing and to the rendition of the judgment and award of the Industrial Commission do not support an assignment of error that the award was erroneous because no claim was filed against appellant as required by G.S. 97-58, and the exceptions are insufficient to present to the Superior Court the sufficiency of the evidence to support the findings of the Industrial Commission, or any one of them, but presents the sole question whether the facts found by the Commission support the decision and award. *Willingham v. Rock & Sand Co.*, 281.

In reviewing an assignment of error to the findings of fact of the Industrial Commission, the courts will review the evidence to determine as a matter of law whether there is competent evidence tending to support the findings, in which event the findings are conclusive. *Lewter v. Enterprises, Inc.*, 399.

Where there is an exception to a finding embracing a mixed question of fact and law, the finding of fact is conclusive if supported by evidence, leaving the question of law alone for review. *Ibid.*

Whether an accident arose out of the employment is a mixed question of law and fact. *Potcete v. Pyrophyllite Co.*, 561.

On appeal from the Industrial Commission, the Superior Court deleted an erroneous conclusion of the Commission that it should retain the cause for 300 weeks, but otherwise affirmed the findings of fact of the Commission and its award thereon, without adding to, modifying, or changing any of the findings. *Held:* The action of the Superior Court in deleting, *ex mero motu*, the errone-

MASTER AND SERVANT—*Continued.*

ous conclusion of law appearing on the face of the record does not support the contention that it exceeded its jurisdiction by modifying the award. *Harris v. Contracting Co.*, 715.

§ 57. Unemployment Compensation—Employers Subject to Contributions.

In order for an employer operating less than 20 weeks within a calendar year to be liable for unemployment compensation contributions under the provisions of G.S. 96-8 (f) (2), it is required that such new business not only buy the physical assets of a covered employer, but also that the new business succeed in some real sense to the organization, trade or business, or some part thereof, of the covered employer, ordinarily as a going concern, so that there be some continuity in the business or some part thereof of the former employing unit. *Employment Security Com. v. Skyland Crafts, Inc.*, 727.

Findings *held* insufficient to support conclusion that operations of new corporation were continuation of business of old corporation. *Ibid.*

§ 62. Appeals from Employment Security Commission.

An appeal lies from the Employment Security Commission to the Superior Court only after the Employment Security Commission has been given opportunity to pass upon exceptions filed to its original findings of fact and decision. G.S. 96-4 (m). *Employment Security Com. v. Skyland Crafts, Inc.*, 727.

MORTGAGES.

§ 27. Payment and Satisfaction.

Defendants set up a verbal agreement under which defendants were to convey certain lands to plaintiffs in satisfaction of notes secured by a mortgage executed by defendants to plaintiffs. *Held:* If, pursuant to this agreement, defendants execute and deliver deed to the agent of plaintiffs, and the deed is accepted by plaintiffs' agent, the contract of accord and satisfaction is fully executed, and the debt is paid and satisfied in full *eo instante* the deed is delivered and accepted, entitling defendants to the surrender of the notes and the cancellation of the mortgage, but if the person to whom deed is delivered is a mere intermediary, the accord is executory and plaintiffs may plead the statute of frauds in bar. *Dobias v. White*, 680.

§ 30a. Right to Foreclose and Defenses.

Upon the satisfaction of a debt secured by a mortgage, the trustee is divested of authority to foreclose the instrument, and his deed executed pursuant to later foreclosure conveys nothing. *Dobias v. White*, 680.

MUNICIPAL CORPORATIONS.

§ 7a. Exercise of Governmental Powers in General.

This action was instituted to enjoin a municipality from destroying certain apartment buildings belonging to the city and situate on land leased by it. The complaint alleged that the apartments are of solid construction, are not injurious to life, health, or morals, do not constitute a slum condition or a fire hazard, violated no zoning regulations, and that the city council had been offered substantial consideration for the buildings, but had refused to negotiate or consider the sale or any disposition of the property other than its destruction. *Held:* The facts alleged are sufficient predicate for plaintiffs' assertion that the order of the city council to destroy the apartments constituted an

MUNICIPAL CORPORATIONS—*Continued.*

arbitrary abuse of discretion, and it was error for the court to sustain the municipality's motion for judgment on the pleadings. *Burton v. Reidsville*, 577.

§ 8c. Municipal Airports.

Stipulation in a lease concerning a municipal airport that the municipality should keep the airport facilities in good repair does not excuse a lessee air line from its duty to provide passengers with a reasonably safe passageway to its planes, and such provision will not support an air line's claim for indemnity against the city for injury to a passenger caused by a fall when the passenger's heel was caught by a worn and loose threshold board while she was on her way to board a plane. *Crowell v. Air Lines*, 20.

Where the lease of a municipal airport requires the city to keep the facilities in repair, but expressly provides that the lessee air line should indemnify and save the city harmless from any liability arising from the negligence of the air line or its agents and employees, *held*, the air line may not assert the defense of primary and secondary liability for an injury resulting to a passenger from a fall over a loose and worn threshold board while the passenger was on her way to board a plane, since the duty to provide a reasonably safe passageway for its passenger rests upon the carrier, and therefore the injury resulted from negligence of the carrier in failing to perform this duty. *Ibid.*

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

Negligence is the failure to exercise proper care in the performance of some legal duty which defendant owes the injured party under the circumstances in which they are placed. *Boone v. R. R.*, 152.

Where the circumstances in which a person is placed are such that a man of ordinary sense using his faculties will recognize that his failure to use ordinary care and skill in his own conduct with regard to those circumstances will cause danger of injury to the person or property of another, such person is under duty to use ordinary care and skill to avoid such danger. *Honeycutt v. Bryan*, 238.

He who puts a thing in charge of another which he knows, or in the exercise of ordinary prudence should know, to be dangerous, or to possess characteristics which, in the ordinary course of events, are likely to produce injury. owes a duty to such person to give reasonable warning or notice of such danger. *Ibid.*

Negligence is the failure to exercise ordinary care in performance of some legal duty which the defendant owes plaintiff under the circumstances in which they are placed. *Ibid.*

The elements of negligence are, first a legal duty, which varies according to the subject matter and the relationships, and second, the failure to exercise due care in the performance of such duty, which always means the care an ordinarily prudent person would exercise under the same or similar circumstances when charged with like duty. *Barnes v. Caulbourne*, 721

§ 3½. Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* does not apply to the explosion of the parked tank truck when more than one inference can be drawn from the evidence as to the cause of the explosion and the existence of negligent default is not the more reasonable probability, or when the cause of the accident is left in conjecture, or when the instrumentality is not under the exclusive control of the defendant. *Hopkins v. Comer*, 143.

NEGLIGENCE—*Continued.*

§ 4f. Condition and Use of Lands and Buildings—Liability to Invitees.

The owner of a building renting a floor thereof to a private hospital is under duty to exercise ordinary care to keep the restroom on the floor in a reasonably safe condition for the use of the doctors' patients, and to warn them of hidden perils or unsafe conditions in entering or leaving the restroom which are known to the lessor or ascertainable by it by reasonable inspection and supervision, but the lessor is not an insurer of the safety of such patients, and the mere fact that a patient falls in the restroom to her injury raises no inference of negligence. *Reese v. Piedmont, Inc.*, 391.

The owner of a building is under no duty to warn invitees of a danger which is obvious to any person of ordinary intelligence using his faculties in an ordinary manner. *Ibid.*

The construction of a floor in a restroom on two levels, with a step from one level to the other, is not negligence unless, because of the character, location, or surrounding conditions, a reasonably prudent person would not be likely to expect the step or see it. *Ibid.*

Evidence *held* insufficient to show negligence on part of lessor in maintenance of restroom. *Ibid.*

Invitee *held* guilty of contributory negligence as matter of law barring recovery for fall down elevator shaft. *Waldrup v. Carver*, 649.

§ 5. Proximate Cause in General.

In order to be actionable, negligence must be the proximate cause of injury, which is that cause which produces the injury in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that some injury or harm would probably result. *Boone v. R. R.*, 152.

§ 7. Intervening and Insulating Negligence.

Where the negligence of defendant continues up to the moment of injury, it cannot be insulated by the contributory negligence of plaintiff. *Graham v. R. R.*, 338.

§ 8. Primary and Secondary Liability.

The doctrine of primary and secondary liability is based upon a contract implied by law from the fact that a passively negligent tort-feasor has discharged an obligation for which the actively negligent tort-feasor was primarily liable. *Crowell v. Air Lines*, 20.

Where, upon cause of action as set out in complaint, defendant's negligence is primary, such defendant may not, upon allegation of different facts in cross-complaint, have codefendant joined on theory that negligence of codefendant was primary. *Hobbs v. Goodman*, 192.

§ 9. Proximate Cause—Foreseeability or Anticipation of Injury.

That the injury be foreseeable is an essential element of proximate cause. *Aldridge v. Hasty*, 353.

Foreseeability does not require that the particular injury should have been foreseeable. *Boone v. R. R.*, 152.

§ 9½. Anticipation of Negligence of Others.

A person is not under duty of anticipating negligence on the part of others. *Troxler v. Motor Lines*, 420.

NEGLIGENCE—*Continued.*

A person is not required to anticipate negligence on the part of others, but in the absense of anything which gives or should give notice to the contrary, may assume, and act on the assumption, that others will exercise ordinary care for their own safety. *Boone v. R. R.*, 152.

A party does not forfeit his right to assume that others will exercise ordinary care for their own safety because such party is not altogether free from negligence on his own part. *Ibid.*

§ 10. Last Clear Chance.

Doctrine of last clear chance does not apply when there is nothing to put plaintiff on notice that person in position of peril will not exercise normal faculties to move to place of safety. *Boone v. R. R.*, 152.

The doctrine of last clear chance, which presupposes both negligence and contributory negligence, relates to a person having charge of an instrumentality who can but fails to bring it under control and so avoid inflicting injury, and in this case the doctrine is inapplicable since the evidence disclosed defendant could not have avoided the injury after discovery of the peril. *Graham v. R. R.*, 338; *Collas v. Regan*, 472.

The last clear chance or discovered peril doctrine must be pleaded by a plaintiff in order to be available as a basis for recovery. *Collas v. Regan*, 472.

§ 10½. Assumption of Risk.

Assumption of risk is a matter of defense which must be pleaded. *Midkiff v. Auto Racing*, 470.

§ 11. Contributory Negligence in General.

Contributory negligence need not be the sole proximate cause of injury to bar recovery; it is sufficient for this purpose if it contribute to the injury as a proximate cause, or one of them. *Badders v. Lassiter*, 413; *Sheldon v. Childers*, 449; *Owens v. Kelly*, 770.

§ 16. Pleadings.

Allegations referring to defendant as "Wild Bill," and as to circumstances as to how he acquired nickname *held* properly stricken on motion. *Heath v. Kirkman*, 303.

Allegations of false arrest and malicious prosecution of plaintiff after his injury, not necessary to establish damages resulting from delay in obtaining medical treatment, *held* properly stricken as not germane to cause of action for negligence. *Ibid.*

Ordinarily, assumption of risk is a matter of defense which must be set up by answer rather than by demurrer. *Midkiff v. Auto Racing*, 470.

The doctrine of last clear chance must be pleaded by plaintiff in order to be available. *Collas v. Regan*, 472.

§ 17. Presumptions and Burden of Proof.

Negligence is not presumed from the mere fact of a fatal accident. *Hopkins v. Comer*, 143.

In an action to recover for negligent injury, the burden of proof is upon plaintiff to satisfy the jury by the greater weight of the evidence that the defendant was guilty of actionable negligence. *Owens v. Kelly*, 770.

The burden of proof upon the issue of contributory negligence is upon the defendant. *Ibid.*

NEGLIGENCE—*Continued.*

§ 19b (1). Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Evidence *held* insufficient to show that fatal injury from explosion of tank truck was proximate result of defendant's negligence. *Hopkins v. Comer*, 143.

§ 19b (4). Sufficiency of Circumstantial Evidence of Negligence to Overrule Nonsuit.

Circumstantial evidence of negligence must be submitted to the jury if the facts and circumstances establish actionable negligence as the more reasonable probability by logical inference, even though the possibility of accident may also arise on the evidence. *Whitson v. Frances*, 734.

Physical facts and circumstances are insufficient to be submitted to the jury on the issue of negligence if the inference of negligence therefrom rests on mere conjecture or surmise. *Ibid.*

§ 19b (5). Nonsuit for Variance.

Plaintiff instituted this action to recover for personal injury allegedly caused by the falling of plaster in defendant's theatre. The allegations were to the effect that the plaster fell because of seepage of water due to a leaking roof, but the evidence was to the effect that the water flowed from a restroom on the balcony level. *Held:* Nonsuit was properly entered for variance between the allegation and proof. *Messick v. Turnage*, 625.

§ 19c. Nonsuit for Contributory Negligence.

Where plaintiff's own evidence clearly establishes contributory negligence constituting a proximate cause of the injury in suit, nonsuit is proper. *Sheldon v. Childers*, 449.

Invitee *held* guilty of contributory negligence as matter of law barring recovery for fall down elevator shaft. *Waldrup v. Carver*, 649.

§ 20. Instructions in Actions for Negligence.

An instruction to the effect that plaintiff had the burden of proving defendant's negligence by the greater weight of the evidence in order to make out a *prima facie* case, and that on a *prima facie* case the jury could answer the first issue "Yes," must be held for prejudicial error. *Owens v. Kelly*, 770.

The court charged the jury to the effect that the burden was on defendant to satisfy the jury by the greater weight of the evidence that defendant was guilty of contributory negligence. The court then corrected the error, and charged that the burden was upon defendant to satisfy the jury that plaintiff was guilty of contributory negligence. Thereafter the court again charged that the burden was upon defendant to prove that defendant was negligent. *Held:* The charge was prejudicial and entitles defendant to a new trial. *Ibid.*

§ 23. Culpable or Criminal Negligence.

Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. *S. v. Roberson*, 745.

PARENT AND CHILD.

§ 18. Proceedings Under Uniform Reciprocal Enforcement of Support Act.

Under the provisions of the Uniform Reciprocal Enforcement of Support Act (Chapter 317, Session Laws 1951; G.S. Ch. 52A) the initiating state has no jurisdiction to make any determination affecting the substantive rights of the

PARENT AND CHILD—*Continued.*

parties, and therefore, a conclusion by our court that the duty of respondent to support the children in question had already been found to exist by a court of competent jurisdiction of the initiating state, is erroneous. *Mahan v. Read,* 641.

In a proceeding under the Uniform Reciprocal Enforcement of Support Act, the court of the initiating state, by approval of the petition and the certification of the documents, enables petitioner to submit herself to the jurisdiction of responding state without the necessity of personal presence or employment of counsel, and the responding state acquires jurisdiction of the respondent through service of summons and notice. *Ibid.*

Where, after filing petition under the Uniform Reciprocal Enforcement of Support Act, the obligee moves to another state and is a resident of such third state at the time of the hearing in this state, our court has no jurisdiction to make an award for transmittal to the initiating state for transmittal in turn to the petitioner in the third state, and judgment of nonsuit and dismissal should have been entered here upon motion. *Ibid.*

A proceeding by a wife under the Uniform Reciprocal Enforcement of Support Act to enforce payment of support for the minor children of the marriage should be dismissed upon motion in this State for defect of parties, since in such instance the children are the obligees and the suit must be brought in their name and behalf by a duly appointed next friend. This result is not affected by provision of the law of the initiating state that a petition under the act might be brought in behalf of a minor obligee without appointment of guardian or next friend, since the rights of the parties are determinable in the court having jurisdiction of respondent, and the cause here must be so constituted as to conform to our law. *Ibid.*

PARTIES.

§ 1. **Parties Plaintiff.**

While it is not necessary that all parties plaintiff have the identity of interest required by the common law, it is necessary under the code that the interests of parties plaintiff be consistent. *Burton v. Reidsville,* 577.

§ 3. **Necessary Parties Defendant.**

Grantor alleged that stipulation in deed required grantee, if he desired to sell, first to offer land to grantor, and that grantee had breached the agreement by contracting to sell to third person. *Held:* Upon grantor's demand for specific performance, such third person is necessary party. *Story v. Walcott,* 622.

§ 9. **Defect of Parties and Objection.**

Where there is a fatal defect of parties plaintiff, of which the court will take notice *ex mero motu,* the action must be dismissed. *Mahan v. Read,* 641.

§ 10b. **Joinder of Additional Parties Plaintiff.**

Interveners must ordinarily come into the case as it exists, and when they expressly deny all material allegations of the complaint and attempt to assert claims wholly antagonistic to those asserted by original plaintiffs, such interveners, even if properly joined as additional parties, may not be made additional parties plaintiff. *Burton v. Reidsville,* 577.

PARTIES—*Continued.*

§ 12. Deletion of Parties.

Where the complaint makes no allegations against one of the parties named in the captions of the summons and complaint as a defendant, the name of such party is mere surplusage and should be stricken. *Roberts v. Hill*, 373.

PARTNERSHIP.

§ 7. Actions Against Partnership.

An action against one partner upon allegations that the partnership was indebted to plaintiffs in a large amount in connection with sale by plaintiffs of their interest in the partnership, cannot be maintained when the other partner is not made a party. *Belch v. Perry*, 764.

PAYMENT.

§ 9. Burden of Proving Payment.

The plea of payment is an affirmative defense and the general rule is that the burden of showing payment must be assumed by the party interposing it. *White v. Logan*, 791.

PERJURY.

§ 1. Nature and Essentials of Offense.

Perjury is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn as to some matter material to the issue or point in question. *S. v. Sailor*, 113.

§ 4. Subornation of Perjury.

Subornation of perjury consists in procuring another to commit the crime of perjury, and in a prosecution for subornation the State must prove the guilt of the suborned person of the offense of perjury as well as defendant's guilt of procuring him to commit the crime. *S. v. Sailor*, 113.

§ 7. Sufficiency of Evidence and Nonsuit.

In a prosecution for perjury the falsity of the oath must be established by the testimony of two witnesses or by one witness and corroborating circumstances. *S. v. Sailor*, 113.

Where in a prosecution for subornation of perjury there is evidence that the suborned person made conflicting statements under oath in separate trials, but there is no evidence tending to show which of the statements was false, the evidence is insufficient to convict defendant of subornation of perjury in regard to one of such statements. *Ibid.*

PLEADINGS.

§ 2. Joinder of Causes.

Plaintiff may unite in the complaint causes of action, legal or equitable, or both, which arise out of the same transaction, or transactions connected with the same subject of action. *Belch v. Perry*, 764.

If two or more causes are joined in the complaint, each must be separately stated, but allegations germane to issue of damages will not be held violative of this rule even though they refer to matters upon which separate causes of action might be predicated, if no separate recovery is demanded. *Heath v. Kirkman*, 303.

PLEADINGS—*Continued.*

§ 3a. Complaint—Statement of Cause of Action in General.

A complaint may be fatally defective in failing to state a cause of action either because of a want of averment of some essential element of the cause of action, which *constitutes a defective statement of a good cause of action*; or it may be defective by reason of a positive averment of some fact or combination of facts which affirmatively discloses that plaintiff's supposed grievance is not actionable, which constitutes a statement of a defective cause of action. *Scott v. Veneer Co.*, 73.

Allegations which set forth matters foreign and immaterial to the controversy are considered irrelevant; whereas, excessive fullness of detail or the repetition of facts are treated as being redundant. *Daniel v. Gardner,* 249.

The function of a pleading is not the narration of the evidence, but rather the statement of substantive, ultimate facts upon which the right to relief is founded. *Ibid.*

A complaint must contain a plain and concise statement of the facts constituting the cause of action. *Belch v. Perry*, 764.

§ 15. Office and Effect of Demurrer.

An action based on agreement to suppress bidding at a public sale was terminated by demurrer on the ground that the contract was unenforceable as *contra bonos mores.* In a subsequent action, the complaint alleged another agreement respecting the same property, but made no reference to the former action. *Held:* Upon demurrer in the second action, whether the complaint therein set up a new contract which was not tainted with the unlawful agreement alleged in the first, is not presented, since extraneous matters *dehors* a pleading may not be considered on demurrer. *Lamm v. Crumpler*, 35.

Upon demurrer a pleading will be liberally construed in favor of the pleader, giving him every reasonable intendment in his favor, and the pleading will not be overthrown unless it is fatally defective. *Ibid.; Boone v. R. R.*, 152; *Thompson v. Foster*, 315; *Troxler v. Motor Lines*, 420; *Gantt v. Hobson*, 426; *Midkiff v. Auto Racing*, 470; *Childress v. Abeles*, 667; *Belch v. Perry*, 764.

The office of a demurrer is to test the sufficiency of the pleading assailed for fatal defect appearing on its face, admitting for the purpose of the demurrer the truth of every fact alleged therein and all reasonable inferences of fact to be deduced therefrom. *Scott v. Veneer Co.*, 73.

A demurrer admits the facts alleged in the pleading and relevant inferences of fact deducible therefrom, but does not admit legal inferences or conclusions of law. *Boone v. R. R.*, 152; *Troxler v. Motor Lines*, 420; *Gantt v. Hobson*, 426.

The office of a demurrer to a pleading and the office of a demurrer to the evidence are different in purpose and result, and an adjudication of the sufficiency of the allegations upon demurrer to the complaint does not foreclose or circumscribe the consideration of the evidence adduced in support of the allegations. *Gantt v. Hobson*, 426.

§ 16. Time of Demurrer and Waiver.

Failure of a pleading to state a cause of action, or want of jurisdiction over the subject matter of the action, is not waived by pleading to the merits, but objection on these grounds may be made at any stage of the case. *Jenkins v. Fields*, 776.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

Where the allegations of the complaint disclose that the individual plaintiffs acted solely in a representative capacity for their respective corporations, and

the complaint prays no relief for them in their individual capacities, they are unnecessary parties and their joinder cannot warrant dismissal of the action upon demurrer. *Wetherington v. Motor Co.*, 90.

In determining whether a complaint is demurrable as stating a cause of action for breach of two separate contracts not affecting all the parties, the complaint must be considered as a whole, giving due weight to each and every allegation which tends to limit or qualify one of the contracts or disclose that the action is predicated upon the breach of a single agreement. *Ibid.*

In this action to recover for personal injuries resulting from negligence, plaintiff alleged, in addition to the facts relied on as constituting the action for negligence, facts tending to show false arrest and malicious prosecution as bearing on the issue of damages, but demanded no separate recovery therefor, *Held:* The complaint states but a single cause of action and the intimations of additional causes of action will be treated as mere embellishments and not germane to the cause of action stated, and therefore demurrer for misjoinder of causes is properly overruled. *Heath v. Kirkman*, 303.

A cause of action against defendant for breach of an alleged agreement by him that he would not engage in business in competition with plaintiffs after he had sold his interest in a partnership to plaintiffs, is improperly joined with a cause of action by plaintiffs for defendant's fraud in inducing them to purchase his interest in the partnership, and a cause of action by plaintiff trustees for an accounting of the partnership business, and to recover from another partnership funds alleged to be due by reason of plaintiffs' sale of the assets of such other partnership. *Belch v. Perry*, 764.

§ 19c. Demurrer for Failure of Complaint to State Cause of Action.

In this action for libel it appeared on the face of the complaint that the words constituting the basis of the action were contained in pleadings and papers filed by defendant in a duly constituted civil action, and that they were relevant to that action. *Held:* The complaint sets forth a statement of a defective cause of action and defendant's demurrer was properly sustained, since upon the face of the complaint the alleged libelous words were absolutely privileged, and were not actionable. *Scott v. Veneer Co.*, 73.

Where there is a defective statement of a good cause of action, the complaint is subject to amendment and the cause should not be dismissed until after the time for obtaining leave to amend has expired, G.S. 1-131; but where there is a statement of a defective cause of action, final judgment dismissing the action is proper. *Mills v. Richardson*, 187.

Upon demurrer of the additional defendants to the cross-action of the original defendants, the original defendants may not maintain that plaintiff might amend so as to state a cause of action against the additional defendants as joint tort-feasors, but the demurrer must be determined upon the cause as alleged by plaintiff. *Hobbs v. Goodman*, 192.

Where the allegations of the complaint are sufficient to establish plaintiff's legal right to the relief sought upon one theory of legal liability, a demurrer *ore tenus* will not be allowed because such facts may be insufficient predicate for relief upon a different theory of legal liability. *R. R. v. R. R.*, 495.

§ 20. Demurrer to New Matter in Answer.

Plaintiff may test sufficiency of new matter to allege defense by demurring thereto, but demurrer should be overruled if the new matter alleges any fact or combination of facts entitling defendant to relief. *Jenkins v. Fields*, 776.

PLEADINGS—*Continued.*

§ 22b. Amendment by Permission of Trial Court.

A defective statement of a good cause of action may be cured by amendment; a statement of a defective cause of action may not. *Scott v. Veneer Co.*, 73.

Judgment was entered sustaining demurrer and dismissing the cause of action, and plaintiff appealed. At a subsequent term the court allowed plaintiff's motion to set aside the judgment of dismissal as being contrary to G.S. 1-131 and allowed plaintiff's request to withdraw the appeal and file an amended complaint. *Held:* After expiration of the term the court was without authority to reinstate the action and allow amendment of the complaint, the action having been dismissed by a final judgment. *Mills v. Richardson*, 187.

Where the complaint alleges damages for wrongful death but the evidence shows that the deceased was an employee of a railroad company and was fatally injured while engaged in the discharge of his duties in interstate commerce, the court has power to allow plaintiff to amend so as to allege that the parties were engaged in interstate commerce and that plaintiff was the sole dependent of the deceased, so as to bring the action within the Federal Employers' Liability Act. *Graham v. R. R.*, 338.

G.S. 1-167 relates to amendment out of term and in the absence of a judge, and does not limit the authority of the presiding judge to allow an amendment under G.S. 1-163 at term after the cause is calendared for trial and without notice to the adverse party. *Dobias v. White*, 680.

While the court may permit amendment to process and pleadings to cure a misnomer where the proper party is before the court, the joinder of a corporation not named in the process or pleading as an additional party defendant, or the substitution of the corporation in lieu of the purported partnership without the corporation's consent, either expressed or by its entering a general appearance, constitutes a new action as to the corporation, instituted as of the date of service on it, and when the cause against it is then barred by the applicable statute of limitations duly pleaded, the action against it is properly dismissed. *McLean v. Matheny*, 785.

§ 24. Variance Between Allegation and Proof.

A plaintiff can recover only on the case made by his pleadings. *Collas v. Regan*, 472.

A plaintiff must make out his case *secundum allegata*. *Barnes v. Caulbourne*, 721.

Proof without allegation is as unavailing as allegation without proof. *Messick v. Turnage*, 625; *Dobias v. White*, 680.

§ 28. Judgment on the Pleadings.

A motion for judgment on the pleadings is in effect a challenge to the sufficiency of the pleading, admitting the truth of all its well-pleaded facts and the untruth of movant's own allegations in so far as they are controverted thereby, and the motion should be denied if the pleading challenged is good in any respect or to any extent. *Burton v. Reidsville*, 577.

Complaint *held* to allege abuse of discretion by city officials, and it was error to allow municipality's motion for judgment on the pleadings. *Ibid.*

Denial of motion is not appealable. *Howland v. Stitzer*, 689.

§ 30. Motions to Strike—Discretionary or Legal Right.

A motion to strike made before answer, demurrer, or extension of time to plead, is made as a matter of right rather than of grace, G.S. 1-153. *Daniel v. Gardner*, 249.

PLEADINGS—*Continued.*

§ 31. Motions to Strike—Grounds and Right to the Relief.

On motion to strike, the test of relevancy is the right of the pleader to present in evidence on the trial the facts to which the allegations relate, and nothing should remain in a pleading over objection which is not competent to be shown in evidence. *Daniel v. Gardner*, 249.

Allegations which are clearly evidential, irrelevant, or repetitious and probative have no place in stating a cause of action and should be stricken on motion aptly made. *Ibid.*

In this civil action to recover damages for assault and battery, allegations as to the peaceful and gentlemanly character of plaintiff and that defendant had been involved in many criminal cases charging him with violation of the liquor laws and engaging in assaults with deadly weapons, and as to the wild and drunken conduct of defendant previous to the occasion in suit, should have been stricken on motion aptly made. *Ibid.*

In this action to recover for negligent injury, allegations referring to the defendant driver of the vehicle by the nickname of "Wild Bill" and allegations by way of explanation as to how the driver acquired the nickname, unrelated to any allegations that defendant employers had knowledge that the driver customarily operated vehicles in a negligent manner and that they knowingly permitted him to operate the vehicle in question on the occasion referred to, were properly stricken upon motion. *Heath v. Kirkman*, 303.

Where plaintiff alleges liability under the doctrine of *respondeat superior*, and also alleges liability on the principle that defendant employers were negligent in permitting a person to drive their vehicle who was known by them to be an incompetent and reckless driver, the allegations as to the known recklessness of the driver are relevant if the allegations relating to *respondeat superior* are denied, and such allegations will not be stricken upon motion prior to the filing of an answer, since upon such motion the court will not attempt to chart the course of the trial. *Ibid.*

In an action to recover for negligent injury, allegations tending to show circumstances in respect to where the injured plaintiff was, and in respect to his physical condition from the time of his injury until the time he received proper medical treatment, may be competent for the purpose of establishing damages resulting from delay in receiving proper medical attention, but allegations tending to establish false arrest or malicious prosecution instigated by defendants, resulting in plaintiff being taken to jail after injury, should be stricken on motion as irrelevant to the cause of action for negligent injury. *Ibid.*

Punitive damages for personal injury depend upon the circumstances under which the injury was inflicted and not upon occurrences subsequent thereto, and therefore allegations relating to false arrest and malicious prosecution subsequent to the infliction of the injury cannot be germane to the issue of punitive damages. *Ibid.*

A motion to strike an allegation from a pleading for irrelevancy admits, for the purposes of the motion, the truth of all facts well pleaded in the allegation, and any inferences fairly deducible from them. But it does not admit the conclusions of the pleader. *Bank v. Bryan*, 610.

Allegations of evidential rather than ultimate or issuable facts, and of contentions of law, should be stricken on motion aptly made. Such determination is without prejudice to rulings upon the trial as to the competency of the evidence and upon the questions of law. *Magic Co. v. R. R.*, 626.

PLEADINGS—*Continued.*

Where allegations of answer set up valid defense, motion to strike is properly denied. *Howland v. Stitzer*, 689; *Bank v. Bryan*, 610.

Plaintiff may test the sufficiency of new matter alleged in the answer to constitute a defense or bar either by demurrer or motion to strike. *Jenkins v. Fields*, 776.

A demurrer and motion to strike allegations of the answer on the ground that they fail to state a defense or bar should not be granted if they state any fact, or combination of facts, which, if true, entitle defendants to some relief. *Ibid.*

PRINCIPAL AND AGENT.

§ 4. Termination of Relationship—Death.

Death of principal terminates agency. *Julian v. Lawton*, 436.

§ 7d. Authority of Agent—Ratification by and Estoppel of Principal.

Where the wife claims the benefits of negotiations conducted by her husband on the theory that he was her agent therein, she may not disavow his agency in the premises to avoid the burdens. *Dobias v. White*, 680.

PRINCIPAL AND SURETY.

§ 6. Bonds for Private Construction.

The surety on a contractor's bond is not entitled to a credit for the sum required to be retained by the owner during the progress of the work when it appears from the surety's own pleadings and evidence that final payment to the contractor, including the percentage retained, had been made under the contract and that the claim arose after final acceptance of the work and related to defects which were undiscoverable when the work was approved by the FHA inspector, and which under the terms of the contract were not waived by final acceptance and payment for the work in full. *Edgewood Knoll Apts. v. Braswell*, 760.

PROCESS.

§ 13. Dismissal for Defective Process.

Failure to show service of process on some of the interested parties and failure to show appointment of guardian *ad litem* for those parties under disability are not fatal defects warranting quashal of the proceeding. *In re Will of Wood*, 134.

§ 14. Amendment of Process.

While the court may permit amendment to process and pleadings to cure a misnomer where the proper party is before the court, the joinder of a corporation not named in the process or pleading as an additional party defendant, or the substitution of the corporation in lieu of the purported partnership without the corporation's consent, either expressed or by its entering a general appearance, constitutes a new action as to the corporation, instituted as of the date of service on it, and when the cause against it is then barred by the applicable statute of limitations duly pleaded, the action against it is properly dismissed. *McLean v. Matheny*, 785.

PROSTITUTION.

§ 2. Prosecutions.

In this prosecution for prostitution and occupying a building for the purpose of prostitution, G.S. 14-204, the State introduced evidence that defendant engaged in illicit intercourse with prosecuting witness for hire at certain places, and was permitted to introduce evidence over defendant's objection that some hours after the last assignation, defendant surreptitiously invaded the hotel room of the prosecuting witness in another building and took from it by larceny a sum of money. *Held:* The introduction of evidence tending to show defendant's guilt of larceny constitutes prejudicial error entitling her to a new trial. *S. v. McClain*, 171.

PUBLIC OFFICERS.

§ 9. Attack of Validity of Official Acts.

Complaint *held* sufficient to allege abuse of discretion in action of city officials in ordering destruction of apartment house on land leased by it. *Burton v. Reidsville*, 577.

QUASI-CONTRACTS.

§ 1. Nature, Elements and Essentials.

There can be no implied contract where there is an express contract between the parties in reference to the matter. *Crowell v. Air Lines*, 20.

RAILROADS.

§ 5. Injuries to Persons on or Near Tracks.

The engineer of a train is entitled to assume, and act on the assumption even until the very moment of impact, that trespassers or licensees on the track will use their faculties for their own protection and leave the track in time to avoid injury in the absence of anything which gives or should give him notice that such trespassers or licensees are not in possession of their strength or faculties or are unable to extricate themselves from their dangerous position. *Boone v. R. R.*, 152.

A trespasser or licensee on the track is under duty to look as well as listen for the approach of a train, and the fact that a train traveling in one direction creates so much noise that a trespasser or licensee on the other track cannot hear a train approaching from the opposite direction does not place the duty upon the engineer of that train to anticipate that the trespasser or licensee will negligently fail to look and step off the track in time to avoid injury, in the absence of anything which gives or should give notice to the contrary. *Ibid.*

The doctrine of last clear chance does not apply to a trespasser or licensee struck upon the tracks of a railroad when there is nothing to put the engineer upon notice that such trespasser or licensee is not in the apparent possession of his faculties. *Ibid.*

A railroad company owes the duty of ordinary care to avoid injury to persons on highways or private premises near its tracks by objects thrown, projecting or falling from trains. *Ibid.*

Railroad company *held* not liable to person near track struck by body hurled through the air by impact with engine. *Ibid.*

The duty of an engineer to keep a proper lookout is germane only when the doctrine of last clear chance is applicable. *Ibid.*

RAILROADS—*Continued.*

§ 14. Facilities in General.

Railroads have authority under general statutes to provide turnouts, sidings, and switches to serve industrial plants along or near their main lines. *R. R. v. R. R.*, 495.

In the absence of express statutory or charter authorization, the power to construct a railroad includes authority to construct such spur, industrial, switching, and other auxiliary tracks as may be necessary to serve the public needs along or near the main line. *Ibid.*

§ 16. Trackage and Facilities Jointly Used.

Railroad has authority to construct spurs; railroad companies forming corporation to provide common trackage *held* entitled to equal use of such trackage regardless of action by holding corporation; to this end plaintiff railroad *held* entitled to construct and use junction or turn-out from common trackage. *R. R. v. R. R.*, 495.

RAPE.

§ 10. Relevancy and Competency of Evidence.

Defendant was charged with carnal knowledge of a female child under the age of 12 years, with carnal knowledge of a female child over the age of 12 and under the age of 16, and with incest. *Held:* The finding of prophylactic rubbers on the person of defendant when he was arrested some seven months after the last act of intercourse took place according to the evidence, and some three and one-half years after the prosecuting witness became 12 years of age, does not tend to prove defendant's guilt of the offenses charged, and the admission of such evidence over defendant's objection constitutes reversible error. *S. v. Stone*, 606.

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence in this case *held* sufficient to overrule nonsuit and sustain conviction of assault with intent to commit rape on a female child under the age of 12 years and of incest. *S. v. Stone*, 606.

§ 13. Verdict and Judgment.

Where defendant is convicted of an assault with intent to commit rape, his further conviction of an assault on a female will be treated as surplusage as included in the graver offense. *S. v. Stone*, 606.

RECEIVERS.

§ 12b (1). Claims of Third Persons Against Assets.

Receiver *held* not entitled to account receivable for goods sold by insolvent when account had been assigned and paid for by assignee at time goods were sold. *In re Mfg. Co.*, 586.

Merchandise was delivered to the purchaser with copies of the invoice, one of which was stamped with notice that the account had been assigned to a named factor. The factor paid the seller for the account. The goods were refused by the purchaser on the ground that they were defective, and returned to the seller. Upon receivership of the seller, the receiver sold the same goods to the original purchaser at a reduced price. *Held:* Under the provisions of G.S. 44-84 the purchase money received from the sale of the goods by the receiver was impressed with a trust in favor of the assignee, and the assignee may assert his claim therefor as against the receiver. *Ibid.*

RECEIVING STOLEN GOODS.

§ 1a. Elements and Essentials of the Offense.

The offense proscribed by G.S. 14-71 is the receiving with felonious intent the goods or property of another knowing at the time that the same had been feloniously stolen or taken away. If the property was not stolen or taken from the owner in violation of statute, as where the original taking was without felonious intent or was not against the owner's will or consent, the receiver is not guilty of receiving stolen property. *S. v. Collins*, 128.

§ 5. Competency and Relevancy of Evidence.

In a prosecution for receiving stolen goods with knowledge that they had been stolen, evidence tending to show that defendant on a previous occasion had accepted stolen merchandise from the same parties under such circumstances that defendant must have known that the merchandise had been stolen, is competent upon the question of defendant's guilty knowledge upon the occasion specified in the indictment. *S. v. Myers*, 462.

§ 6. Sufficiency of Evidence and Nonsuit.

Defendant was charged with larceny and receiving. The State failed to prove her guilt of larceny of the goods, and while items of clothing which defendant possessed were identified as having come from two stores, or were of the brand and make carried by them respectively, there was no direct evidence that these items had been feloniously stolen from the stores, and the question was left in mere speculation or conjecture. *Held:* Defendant's motion for nonsuit should have been allowed. *S. v. Collins*, 128.

Evidence of defendant's guilt of receiving stolen goods with knowledge that they had been stolen, *held* amply sufficient to overrule defendant's motion for nonsuit. *S. v. Myers*, 462.

REGISTRATION.

§ 3. Priorities.

A contract to devise realty in consideration of services to be rendered, which contract is proven, probated, and registered in conformity with statute, G.S. 47-12, 47-17, 47-18, and 47-37, takes precedence over a subsequently executed deed to third persons. *Clark v. Butts*, 709.

SCHOOLS.

§ 9f. Controversy in Respect to Budget.

Where the board of education and board of county commissioners are unable to agree on the amounts set up in the school budget, and the procedure prescribed by G.S. 115-160 is invoked, the findings of the Superior Court on appeal from the decision of the clerk of the Superior Court acting as arbitrator, are conclusive unless arbitrary or in abuse of statutory duty. *Board of Education v. Comrs. of Onslow*, 118.

Where, on appeal to the Superior Court under the procedure prescribed under G.S. 115-160, the Superior Court makes findings of the amounts necessary for certain items of the capital outlay budget and the current expense budget in sums less than that requested by the county board of education, but there is no showing of present necessity for the amounts budgeted as compared with the amounts allowed, *held:* The record fails to show that the findings of the Superior Court are arbitrary and, therefore, such findings are conclusive, the estimates of the board of education not being determinative. *Ibid.*

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant.

Where officers are lawfully on the premises of defendant, and defendant consents to a search of the premises by them, such consent dispenses with the necessity of a search warrant, and evidence obtained by such search is competent. *S. v. Moore*, 749.

SETOFFS.

§ 2. Statutory Setoffs.

Setoff operates as payment only when there are reciprocal demands, and may be invoked only where there is mutuality of parties and of demands. *In re Mfg. Co.*, 586.

Notice of assignment of account *held* sufficient under the statute, defeating debtor's right of setoff. *Ibid.*

SHERIFFS.

§ 6a. Liability of Sheriffs for Torts.

Allegations to the effect that defendant sheriff took custody of a mental incompetent for the purpose of putting him in place of safety, but did not lock the incompetent in a room or cell, but permitted him to roam at large in the upstairs hallway of the jail, under circumstances from which injury should have been anticipated, resulting in the incompetent's falling down a fifteen foot well or open space to his death, *is held* sufficient to state a cause of action against the sheriff for negligence. *Hayes v. Billings*, 78.

SOLICITORS.

§ 3. Duties and Authority.

Prosecuting attorneys owe the duty to the State, the accused whom they prosecute, and the cause of justice they serve, to observe the rules of practice created by law to give those tried for crime the safeguards of a fair trial. *S. v. Phillips*, 516.

STATE.

§ 2b. State Lands—Conveyance.

The State Board of Education was given sole authority by the statute now codified as G.S. 146-94 to sell and convey all vacant, unentered marsh and swamp lands of the State, provided such lands are not covered by navigable waters and the quantity in any one marsh or swamp exceeds two thousand acres, and a conveyance by the State Board of Education of such marsh lands (G.S. 146-4) subsequent to the effective date of the statute conveys title. *Parmele v. Eaton*, 539.

Evidence to the effect that the *locus in quo* conveyed to plaintiff's predecessors in title by the State Board of Education subsequent to the effective date of the statute codified as G.S. 146-94, was marshland of more than two thousand acres in area, covered with marsh grass and not navigable by any kind of commercial craft, even at high tide, *is held* to sustain the findings of fact of the trial court that the land in question was a part of a tract of marshland in excess of two thousand acres and that no part of the *locus* was covered by navigable waters. *Ibid.*

STATUTES.

§ 12. Repeal by Enactment or Deletion from Code.

Where a section of the Code is not brought forward in the General Statutes and does not come within the exceptions and limitations set forth in Chapter 164

STATUTES—*Continued.*

of the General Statutes, such section of the Code is repealed and cannot be revived. *Baker v. Varser*, 260.

A Public-Local law providing for rotating grand juries in a designated county and repealing a part of a former law on the subject (Chapter 465 Public-Local Laws 1935; Chapter 104 Public Laws 1923), was in force on the effective date of the General Statutes, but through inadvertence was overlooked and the repealed statute was incorporated in the General Statutes (G.S. 9-25). *Held:* The Public-Local law remains in effect. G.S. 164-7. *S. v. Gales*, 319.

SUBROGATION.

§ 2. Operation and Effect.

The surviving wife who pays mortgaged notes on lands theretofore held by them by entireties, is subrogated to the rights of the mortgagee, and is entitled to all the rights and remedies which were available to the mortgagee, but acquires no right or claim beyond those available to him. *Montsinger v. White*, 441.

TORTS.

§ 1. Nature and Essentials in General.

A malicious motive makes a bad act worse, but it cannot make that wrong which, in its own essence, is lawful. *Childress v. Abeles*, 667.

§ 6. Joinder of Additional Parties for Contribution.

One defendant is not entitled to have another joined for contribution when complaint states no cause against such other, but liability is predicated upon allegations of different cause of action by original defendant in cross-complaint. *Hobbs v. Goodman*, 192.

TRESPASS TO TRY TITLE.

§ 3. Actions.

Where defendants fail to show that the grantee in the original deed in their chain of title ever conveyed the land to them or to any of the defendants' predecessors in title, or that they acquired the land by inheritance from such grantee, there is a *hiatus*, and the evidence is insufficient to support a finding to the effect that defendants had established title by *mesne* conveyances from the original grantee. *Lindsay v. Carswell*, 45.

Where defendants admit plaintiffs' title to the lands embraced in plaintiffs' deeds, but dispute the location of the dividing line between plaintiffs' land and the land of defendants, plaintiffs are not required to prove title, but only that the disputed area lies within the boundaries of their tract, and plaintiffs' evidence on this aspect *held* sufficient in this case. *Newkirk v. Porter*, 296.

TRIAL.

§ 1. Notice and Calendars.

Where judgment of nonsuit for failure of plaintiff to appear and prosecute his cause has been entered, but at a later term the judgment of nonsuit is set aside, the cause is properly subject to be calendared for trial, and when placed upon the calendar the cause is before the court and it has jurisdiction to hear and determine a motion therein. *Nelson v. Simpkins*, 406.

TRIAL—*Continued.*

§ 3. Nonsuit for Failure of Plaintiff to Appear.

Findings to the effect that in the hearing of a "clean-up" calendar, plaintiff's cause was nonsuited, without notice to plaintiff or his attorney, for failure of plaintiff to appear and prosecute his action, that plaintiff has a good cause of action, and that plaintiff himself was guilty of no negligence, *is held* sufficient to support the court's order reinstating the cause on the civil issue docket for trial upon the merits. *Nelson v. Simpkins*, 406.

§ 6. Order, Conduct and Course of Trial—Conduct and Acts of Court.

The judge is forbidden to convey to the jury in any way at any stage of the trial his opinion on the facts involved in the case, and the trial begins within the purview of this rule when the prospective jurors are called to be examined touching their fitness to serve on the trial jury. G.S. 1-180. *S. v. Canipe*, 60.

Whether the conduct or the language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not the motive of the judge. *Ibid.*

G.S. 1-180 proscribes an expression of opinion by the court upon the evidence not only in the charge but at any time during the course of the trial. *S. v. Smith*, 99.

While the trial court may propound competent questions to a witness in order to clarify his testimony or to bring out some fact that has been overlooked, the court may not cross-examine a witness or ask a witness questions for the purpose of impeaching him or casting doubt upon his testimony, and a new trial is awarded in this case for impeaching questions asked by the court. *Ibid.*

In this case a new trial is awarded for interrogations of a witness by the court which went beyond a mere effort to clarify the witness' testimony and amounted to an expression of opinion on the facts by the court. *S. v. McRae*, 334.

§ 15. Reception of Evidence—Necessity for Motions to Strike.

A defendant waives objection to the unresponsive part of the answer of a witness by failing to make a specific motion to strike out that particular part. *S. v. Gales*, 319.

§ 18. Province of Court and Jury in General.

It is the duty of the judge alone to decide the legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case. *S. v. Canipe*, 60.

It is the task of the jury alone to determine the facts of the case from the evidence adduced. *Ibid.*

Contradictions and discrepancies in the evidence are for the jury to resolve, largely on the basis of credibility of the witnesses. *Jyachosky v. Wensil*, 217.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff's evidence is to be considered in the light most favorable to him. *Pierce v. Ins. Co.*, 567.

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

On motion of nonsuit, defendant's evidence will be considered only in so far as it is favorable to plaintiff, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that of plaintiff. *Hopkins v. Comer*, 143.

TRIAL—*Continued.*

Upon motion to nonsuit, the Court must consider all the testimony, but in doing so must draw the conclusion most favorable to plaintiff and leave it for the jury to reconcile any inconsistent, conflicting, or contradictory testimony. *Aldridge v. Hasty*, 353.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

Cases cannot be submitted to a jury on speculations, guesses or conjectures. *Hopkins v. Comer*, 143.

§ 23f. Nonsuit for Variance.

Nonsuit is proper where there is fatal variance between allegation and proof. *Messick v. Turnage*, 625.

§ 25. Voluntary Nonsuit.

Nonsuit of plaintiff's cause of action upon defendant's motion effects a voluntary nonsuit on defendant's counterclaim. *Badders v. Lassiter*, 413.

§ 31b. Instructions—Statement of Law and Application of Evidence Thereto.

The failure to charge the law on the substantive features of the case arising upon the evidence is prejudicial error notwithstanding the absence of request for special instructions. *Barnes v. Caulbourne*, 721.

Even when the parties waive a recapitulation of the evidence, it is the duty of the court to state the evidence to the extent necessary to explain the application of the law to every substantial and essential feature of the case without a request for special instructions. G.S. 1-180. *Brannon v. Ellis*, 81.

It is not sufficient for the court to read a statute or to state the applicable law bearing on an issue in controversy, and leave the jury unaided to apply the law to the facts. *Ibid.*

Statement of the evidence solely in the form of contentions is insufficient to meet the requirements of G.S. 1-180. *Ibid.*

An erroneous view of the law or an incorrect application thereof in the court's charge to the jury must be held for prejudicial error, even though given in stating the contentions of the parties. *Harris v. Construction Co.*, 556.

The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe that the jury was misled or misinformed in respect thereto. *Barnes v. Caulbourne*, 721.

§ 31d. Instructions on Burden of Proof.

Instruction that plaintiff had burden of proof by greater weight of evidence in order to make out *prima facie* case, and that on *prima facie* case, jury could answer issue in affirmative, *held* erroneous. *Owens v. Kelly*, 770.

§ 31e. Instructions—Expression of Opinion on Evidence in Charge.

The fact that the court necessarily takes longer in stating the contentions of one of the parties than the other does not in itself constitute an expression of opinion by the court on the evidence. *Brannon v. Ellis*, 81; *S. v. Stantliff*, 332.

The crucial question in this case was whether the employer was negligent in failing to provide the employee with additional help to perform the task which the employee was assigned to do alone. *Held:* An instruction that if more than one person is required for the safe performance of a certain duty, "such as the

TRIAL—*Continued.*

one in question in this case," must be held for prejudicial error as an expression of opinion of the court that the job in question required more than one man for its safe performance. *Miller v. R. R.*, 617.

The fact that an expression of opinion by the trial court upon the evidence is an inadvertence renders such error nonetheless harmful. *Ibid.*

§ 31f. Instructions—Statement of Contentions.

The court is not required by law to state the contentions of the parties to the jury, but when he states the contentions of one party he must state the pertinent contentions of the adverse party with equal stress. This rule does not require that the statement of the respective contentions of the parties be of equal length. *Brannon v. Ellis*, 81.

§ 32. Requests for Instructions.

A party who aptly tenders written request for instructions on a point of law arising on the evidence is entitled to have the court give in substance the requested instructions as law coming from the court. The giving of the instructions merely as a contention of the party is not sufficient. *Aldridge v. Hasty*, 353.

When the charge is in substantial compliance with the requirements of G.S. 1-180, a party desiring further elaboration or explanation must tender specific prayers for instructions. *Barnes v. Caulbourne*, 721.

§ 37. Issues—Conformity to Pleadings and Evidence.

Where recovery is sought solely on theory that owner was negligent in permitting incompetent to drive, submission of issue of *respondeat superior* is error. *Roberts v. Hill*, 373.

§ 38. Tender of Issues.

Where the issues submitted are sufficient to support the judgment disposing of the whole case, the refusal of the court to submit issues tendered will not be held for error. *Crowell v. Air Lines*, 20.

§ 44. Impeaching Verdict—Quotient Verdict.

Even though the amount of the verdict may prompt the surmise that it was a quotient verdict, this alone is insufficient to compel the conclusion, as a matter of law, that it was in fact a quotient verdict. *Collins v. Highway Com.*, 627.

A verdict cannot be impeached because of an opinion of a juror on a matter irrelevant to the issue and not presented by either allegation or evidence. *Barnes v. Caulbourne*, 721.

§ 49. Motions to Set Aside Verdict and for New Trial on Ground Verdict Is Contrary to Weight of Evidence.

A motion to set aside the verdict on the ground that it is contrary to the greater weight of the evidence, as distinguished from a motion to set it aside for insufficiency of the evidence, is addressed to the court's discretion, and the court has the discretionary power to set the verdict aside on this ground to prevent injustice notwithstanding the evidence be sufficient to require the submission of the issue to the jury, and the court's determination of such motion is not reviewable. *Roberts v. Hill*, 373.

§ 51. Motions to Set Aside Verdict and for New Trial for Error of Law.

A motion to set aside the verdict on the ground of insufficient evidence presents a question of law identical with that presented by motion for involuntary

TRIAL—*Continued.*

nonsuit, which is whether the evidence is lacking in sufficient probative force to require its submission to a jury, and the court having denied motion to dismiss as in case of nonsuit, is without authority after verdict to set it aside for insufficiency of the evidence. *Roberts v. Hill*, 373.

The court may set aside the verdict as a matter of law for errors of law committed during the trial, in which case he should specify in his order the error of law which prompts his action. *Ibid.*

§ 55. **Trial by Court by Agreement—Findings and Judgment.** (Review of findings, see Appeal and Error.)

Where the parties waive a trial by jury and agree that the presiding judge find the facts under G.S. 1-184, the judgment will be reviewed in the light of the court's findings and not the facts alleged in the pleadings. *Turnage Co. v. Morton*, 94.

Where different inferences can be drawn from the evidence in a trial by the judge under agreement of the parties the ultimate issue is for the court. *Ibid.*

Where a jury trial is waived, the findings of fact of the trial court have the force and effect of a verdict by jury and are conclusive on appeal if there be competent evidence to support such findings. *Gasperson v. Rice*, 660.

TRUSTS.

§ 3a. **Written Trusts—Creation, Requisites and Validity.**

A grant of property to the trustee in an irrevocable trust with provision that upon the death of trustor's last surviving grandchild the trust should terminate and assets thereof should be distributed equally to the legitimate heirs of trustor's grandchildren is void by operation of the rule against perpetuities, it appearing that grandchildren of trustor might be born at any time during the next 50 years or more after the execution of the trust. *McPherson v. Bank*, 1.

The will in suit set up a trust with provision that the net income therefrom should be paid to testator's widow for life, with further provision that "it is my thought . . . that said net income shall be used for her benefit and for the benefit of" testator's sons, "according to their respective needs, and in the sound discretion of my said wife." *Held:* The recommendation as to using part of the income for the benefit of testator's sons was made exercisable by the widow as an individual and not as cotrustee, and the recommendation is precatory in nature and does not create a trust, spendthrift or otherwise, in favor of testator's sons. *In re Estate of Bulis*, 529.

§ 4c. **Actions to Establish Resulting Trust.**

While, ordinarily, a grantor may not engraft a parol trust upon his own deed, allegations to the effect that plaintiff was the last and highest bidder at a judicial sale, that defendants represented that they needed a part of the property for their housing development and would reconvey to plaintiff the part of the land not needed for this purpose as soon as the amount needed could be ascertained, that defendants, at the time, knew that only a small part of the land would be needed for the housing project, and induced plaintiff by reason of such false representations to join in the commissioner's deed to defendants merely as the most expeditious method of assigning this bid, and that thereafter defendants refused to reconvey to plaintiff that part of the land not needed for the housing development, *is held* sufficient to bring plaintiff's action within the exception to the general rule. *Lamm v. Crumpler*, 35.

TRUSTS—*Continued.*

§ 19b. Distribution of Income.

Where dividends are declared on stock held by a trust payable on dates which transpire before the death of the life beneficiary of the trust, such dividends belong to the estate of the life beneficiary. *In re Estate of Bulis*, 529.

The testamentary trust in question provided that testator's widow receive the net income for life, and at her death the residue should be divided into trusts for the benefit of testator's sons. *Held:* The undistributed income of the trust which accumulated during the life of the widow belonged to her estate and not to the trusts created for the benefit of the remaindermen. *Ibid.*

§ 19c. Advancements.

Trustor's widow, who was cotrustee and life beneficiary of the income from the trust, was given power at her pleasure and discretion to use part of the income for the benefit of testator's sons according to their respective needs. By later provision the trustees were authorized to use a part of the *corpus* if advisable for the maintenance of the widow or sons, or the education of the sons. The widow directed her cotrustee to advance one of the sons a stipulated sum to be charged to any funds which such son should be entitled from the testamentary trust, and the son agreed to repay said sum out of such funds. The sum paid such son was withdrawn from the accumulated income rather than the *corpus*. *Held:* The sum paid the son represented an advancement to him and should be charged to the trust fund established for his benefit as remainderman, and should be credited to the accumulated income account for payment to the executor of the widow. *In re Estate of Bulis*, 529.

§ 26. Modification of Trusts.

Trust may not be modified or reformed so as to exclude children of trustor *in posse;* such children may not be represented under doctrine of virtual representation. *McPherson v. Bank*, 1.

UTILITIES COMMISSION.

§ 2. Jurisdiction and Functions.

The Utilities Commission is a creature of the Legislature with only that authority which is vested in it by statute, which authority it may exercise only in accord with the standards prescribed by law. *Utilities Com. v. Motor Lines*, 166.

Authority of Commission to interfere with contractual division of revenue from interchanged freight. *Ibid.*

VENDOR AND PURCHASER.

§ 5a. Options.

Where a contract executed by grantees contemporaneously with the execution and delivery of the deed gives the grantors the right to repurchase upon the payment of a stipulated sum if grantees should elect to sell at any time in their lifetimes, with further provision that upon the death of the survivor grantee, the land should become the property of grantors upon the payment of a stipulated sum to the other heirs of grantees *is held* to constitute an option, giving grantors the unilateral right to purchase during the lifetime of grantees if they or the survivor should elect to sell, and the absolute right to purchase upon the death of the survivor grantee. *Sandling v. Weaver*, 703.

VENDOR AND PURCHASER—*Continued.*

A contract by which an owner of real property agrees with another person that the latter should have the privilege of buying the property at a specified price within a specified time, or within a reasonable time in the future, and which imposes no obligation to purchase upon the person to whom it is given, is an option, which confers a mere right to acquire the property by exercising the option, but conveys neither ownership nor any interest in the property itself. *Ibid.*

The fact that a contract describes the rights created thereunder as an option is not conclusive, but is a circumstance bearing upon the intent of the parties. *Ibid.*

Where an option does not specify the time within which the right to buy may be exercised, such right must be exercised within a reasonable time. *Ibid.*

Plaintiff grantors were given the absolute right to exercise their option to repurchase the land upon the death of the survivor grantee. *Held:* An attempt by plaintiffs to exercise the option more than 11 years after their rights became absolute is too late. *Ibid.*

§ 23. Actions for Specific Performance.

Plaintiff grantor instituted this suit for specific performance against his grantee, alleging that the deed contained a provision that if the grantee should desire to sell the land conveyed, she would first offer it to grantor, that grantee had entered into a contract to sell to a third person, and that grantor had offered to purchase the lands on the same terms and had tendered an amount equal to the consideration called for by that contract. *Held:* The ultimate question is whether the grantor in the deed or the third person in the contract to convey is entitled to specific performance, and therefore such third person is a necessary party to the action. *Story v. Walcott*, 622.

WAIVER.

§ 2. Acts Constituting Waiver.

Waiver is based upon an express or implied agreement. *Turnage Co. v. Morton*, 94.

Insurer in an automobile collision policy elected to have the damaged car repaired. After the execution and delivery to the repairman of a release, and after insured had taken possession of the car and ascertained that the repairs had not satisfactorily been made, insurer's agent authorized the return of the car for reinspection and further repairs, if necessary. *Held:* Insurer waived the release, and insured could maintain an action against insurer for breach of the insurance contract upon evidence that the car had not properly been repaired and tendered to him within a reasonable time. *Pierce v. Ins. Co.*, 567.

WAREHOUSEMEN.

§ 4. Liens and Claims of Third Persons. (Liability to holders of agricultural liens, see Agriculture.)

A warehouseman may not deny liability to a lienholder on the ground that his business is affected with a public interest, or that he was agent neither for the buyer nor the seller. *Turnage Co. v. Morton*, 94.

WATERS AND WATERCOURSES.

§ 11. Navigable Waters.

The test in this State for determining whether waters are navigable is not the ebb and flow of the tide, but whether the waters are suitable for the purpose of navigation by vessels or boats such as are employed in the ordinary course of water commerce, trade and travel, and are thus navigable in fact. *Parmele v. Eaton*, 539.

WILLS.

§ 4. Contracts to Devise.

A written contract to devise a life estate in described lands in consideration of personal services to be rendered is specifically enforceable in a court of equity by the declaration of a trust in favor of the party performing the personal services in accordance with the agreement and in reliance thereon. *Clark v. Clark*, 709.

Such contract signed by person to be charged does not come within statute of frauds, and when registered, takes precedence over subsequently executed deed or will. *Ibid.*

Evidence *held* sufficient for jury on the issue. *Ibid.*

§ 17½. Probate and Caveat Jurisdiction.

While the clerk has exclusive original jurisdiction for the probate of a will in common form even though the script is alleged to have been lost, since his jurisdiction to take proof of a will is not affected by its loss or destruction before probate; when answer is filed denying the averment that the script offered for probate is the last will and testament of the decedent, such denial raises the issue of *devisavit vel non*, conferring jurisdiction on the Superior Court in term to determine the entire matter in controversy, G.S. 1-273, G.S. 1-276. *In re Will of Wood*, 134.

§ 19. Pleadings in Caveat Proceedings.

Allegations to the effect that the decedent had testamentary capacity, had left a last will and testament which had been lost or destroyed by some person other than testator, and alleging the terms of the instrument, the existence of property passing under it, and formal requisites of execution, the known heirs and next of kin, and persons interested in the will, together with allegations that testator did not revoke or destroy the instrument, are sufficient to state a cause of action for the probate of the instrument in solemn form. *In re Will of Wood*, 134.

§ 31. General Rules of Construction.

Where the language of a will is ambiguous or doubtful, evidence is competent to show the circumstances surrounding the execution of the will, including the condition, nature and extent of testatrix' property, and her relation to her family and to the beneficiaries named in the will, so as nearly as possible to get testatrix' viewpoint at the time the will was executed, and even if the language of the will is not ambiguous or doubtful, the admission of such evidence may not be prejudicial. *Hubbard v. Wiggins*, 198.

The intention of testatrix as gathered from the general purpose of the will and the significance of the various expressions, enlarged or restricted according to their real intent, is the will, and a phrase will not be given its literal meaning if contrary to the intent as gathered from the language of the instrument considered as a whole. *Ibid.*

WILLS—*Continued.*

In an action to construe a will, the extent and character of the estate should be established when material as an aid in ascertaining the intent of the maker of the will. *Ibid.*

§ 32. Presumptions.

While ordinarily it will be presumed that a testator intended to dispose of property owned by him and did not intend to dispose of property over which he did not have power of testamentary disposition, such presumption of fact, like other presumptions of fact and technical rules of construction, as distinguished from rules of law, will not be permitted to overrule the evident intent of the testator, express or implied in the language of the instrument considered as a whole. *Hubbard v. Wiggins*, 198.

§ 33b. Rule in Shelley's Case.

A devise to testator's wife and daughter for life, with further provision that if the daughter "has no heirs" the land should go to testator's son, for life, and upon his death to his heirs, *is held* to convey only a life estate to the daughter, the rule in *Shelley's case* not being applicable, since it is apparent that the words "heirs" was used to mean children or issue of the daughter and was not used in its technical sense as importing a class of persons to take indefinitely in succession from generation to generation. *Taylor v. Honeycutt*, 105.

§ 33d. Trusts.

The will in suit set up a trust with provision that the net income therefrom should be paid to testator's widow for life, with further provision that "it is my thought . . . that said net income shall be used for her benefit and for the benefit of" testator's sons, "according to their respective needs, and in the sound discretion of my said wife." *Held:* The recommendation as to using part of the income for the benefit of testator's sons was made exercisable by the widow as an individual and not as cotrustee, and the recommendation is precatory in nature and does not create a trust, spendthrift or otherwise, in favor of testator's sons. *In re Estate of Bulis*, 529.

§ 33h. Rule Against Perpetuities.

If there is a possibility that a devise or grant of a future interest may not vest within 21 years plus the period of gestation after some life or lives in being at the time of the creation of the interest, the devise or grant is void by operation of the rule against perpetuities. *McPherson v. Bank*, 1.

§ 34e. Designation of Amount or Share.

Where the amount of property intended to be embraced in a bequest is ambiguous and doubtful under the language of the will, later directions in the instrument for the disposition of testatrix' property inconsistent with one of the possible interpretations of the prior bequest, even though such directions are ineffectual because of ambiguity or illegibility, are proper to be considered in ascertaining the amount of property testatrix intended to embrace within the prior bequest, since such later provisions throw light upon testatrix' intent in this regard. *Hubbard v. Wiggins*, 198.

Where amount of government bonds included in bequest is ambiguous, the amount must be ascertained in accordance with intent as gathered from entire instrument. *Ibid.*

WILLS—*Continued.*

§ 36. Specific Devises and Bequests.

Ordinarily, where a definite and certain devise or bequest is made and some part of the same property is disposed of in a later part of the will, the original devise or bequest is only reduced to the extent necessary to comply with the later provision in the will. *Hubbard v. Wiggins*, 198.

§ 39. Actions to Construe Wills.

The principle of virtual representation is in derogation of the general rule that a judicial decree does not bind persons not before the court, and the principle must be applied with great caution. *McPherson v. Bank*, 1.

The principle of virtual representation of persons *in posse* applies only when living persons who have a privity of estate, or a similar or common interest with the persons *in posse*, are before the court, and this fact should appear from the pleadings. *Ibid.*

G.S. 41-11.1 does not apply to actions to adjudicate interests of persons *in posse* under instrument. *Ibid.*

§ 44. Election by Beneficiaries.

The beneficiary and executor of a will by accepting real and personal property devised and bequeathed to him by the will is estopped from asserting any interest in lands which the testatrix devises to a third person. *Sandlin v. Weaver*, 703.

GENERAL STATUTES CONSTRUED.

G.S.

1-38. Evidence of adverse possession under color for seven years *held* sufficient for jury. *Newkirk v. Porter*, 296.

1-52 (5). When action against carrier is instituted within time allowed by statute, it will not be held barred by notice printed on ticket folder. *Crowell v. Air Lines*, 20.

1-68; 1-70. Interests of parties plaintiff must be consistent. *Burton v. Reidsville*, 577.

1-122. Complaint must contain plain and concise statement of facts constituting cause of action. *Belch v. Perry*, 764.

1-123. Plaintiff may unite causes of action which arise out of same transaction or transactions connected with same subject of action. *Belch v. Perry*, 764.

1-123; 1-127. If two or more causes are compounded in the complaint, and not separately stated, demurrer should be sustained. *Heath v. Kirkman*, 303.

1-131. Where there is defective statement of good cause of action, action should not be dismissed until after time for leave to amend. *Mills v. Richardson*, 187.

1-151. Upon demurrer, pleading will be liberally construed in favor of pleader. *Troxler v. Motor Lines*, 420; *Gantt v. Hobson*, 426; *Belch v. Perry*, 764.

1-153. Motion to strike before answer is matter of right. *Daniel v. Gardner*, 249.

1-163. Court may allow amendment to action for wrongful death so as to bring the action within the Federal Employers' Liability Act. *Graham v. R. R.*, 338.

1-167. Relates to amendment out of term and does not limit authority of presiding judge under G.S. 1-163. *Dobias v. White*, 680.

1-180. Rule forbidding court to express opinion on evidence during trial precludes such expression in interrogation of prospective jurors. *S. v. Canipe*, 60. Or at any time during course of trial. *S. v. Smith*, 99. Mere fact that more words are used in stating contentions of State than in stating contentions of defendant does not constitute expression of opinion on evidence. *S. v. Stantliff*, 332. Expression of opinion by trial court on evidence is prejudicial, notwithstanding it may have been inadvertence. *Miller v. R. R.*, 617. Even when parties waive recapitulation of evidence, it is duty of the court to state evidence to extent necessary to explain application of law to every substantial feature of case. *Brannon v. Ellis*, 81. Reading applicable statute or stating applicable law, without applying law to facts, is insufficient. *Brannon v. Ellis*, 81. Statement of evidence solely in form of contentions is insufficient. *Brannon v. Ellis*, 81. Charge is sufficient when, read contextually, it presents law of the case to jury, and party desiring elaboration on subordinate feature must request instruction. *Barnes v. Caulbourne*, 721.

1-184. Judgment will be reviewed in light of court's findings and not facts alleged in pleadings. *Turnage Co. v. Morton*, 94.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

1-240. Defendant may not allege matters in order to state cause in favor of plaintiff against other defendant for purpose of joinder of such other defendant for contribution. *Hobbs v. Goodman*, 192.

1-273; 1-276. Upon filing of answer denying that script offered for probate is last will and testament, issue of *devisavit vel non* is raised, conferring jurisdiction on Superior Court. *In re Will of Wood*, 134.

1-277. Appeal from order of Superior Court remanding cause to Industrial Commission is premature. *Edwards v. Raleigh*, 137. Order allowing withdrawal of appeal and filing of amended pleading, affects substantial right and is appealable. *Mills v. Richardson*, 188.

1-282. Assignments of error must be filed in trial court and certified with record. *S. v. Dew*, 595.

1-568.11; 1-568.14; 1-568.23. Examination after pleadings are filed is to obtain evidence; request that examination be had at courthouse of county of residence of parties is sufficient; party may object to relevancy and competency of deposition upon the trial. *Aldridge v. Hasty*, 353.

14-17. Evidence of defendant's guilt of murder in first degree *held* sufficient to be submitted to jury. *S. v. Gales*, 319.

14-43. Married woman must have been virtuous at time of the beginning of the acts leading to elopement. *S. v. Temple*, 738.

14-71. Evidence of guilt of receiving *held* sufficient. *S. v. Myers*, 462. If property was not stolen, defendant cannot be convicted of receiving. *S. v. Collins*, 128.

14-204. Evidence of defendant's guilt of robbery incompetent in prosecution for prostitution. *S. v. McClain*, 171.

14-210. In prosecution for subornation, State must prove guilt of suborned person of perjury and defendant's guilt of procuring him to commit the crime. *S. v. Sailor*, 113.

14-214. Evidence *held* insufficient to show that defendant willfully and knowingly presented fraudulent claim for insurance. *S. v. Fraylon*, 365.

14-335. Peace officer may not arrest without warrant for public drunkenness unless there is breach or threatened breach of peace. *S. v. Mobley*, 476.

14-336. Fact that officers have no knowledge of any occupation of defendant is alone insufficient to support finding that defendant is vagrant. *S. v. Millner*, 602.

15-27. Warrant not necessary when owner consents to search. *S. v. Moore*, 749.

15-39. Peace officer or private citizen may arrest without warrant for breach or threatened breach of the peace committed in his presence. *S. v. Mobley*, 476. Mere drunkenness is not such breach of peace. *Ibid.* Nuisance is not necessarily breach of peace. *Ibid.*

15-41. Peace officer may arrest without warrant when he has reasonable grounds for believing felony has been committed. *S. v. Mobley*, 476. Private citizen may arrest for felony committed in his presence. *Ibid.*

15-116. Right to move for modification or vacation of judgment absolute upon bond upon later surrender of defendant. *S. v. Dew*, 595.

15-153. Warrant will not be quashed if it charges offense in plain, intelligible manner and contains sufficient averment to enable court to proceed to judgment. *S. v. Smith*, 99.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

15-173. When State offers no evidence in contradiction of its testimony of wholly exculpatory statement of defendant, nonsuit is proper. *S. v. Tolbert*, 445. Upon motion to nonsuit, evidence must be taken in light most favorable to State. *S. v. Simmons*, 780.

15-180. Appeal from denial of motion to quash is premature. *S. v. Baker*, 140.

15-200. Maximum period of suspension is five years, but suspension for longer term is void only as to period in excess of five years. *S. v. McBride*, 619. Violation of laws of another state is not violation of terms of suspension. *Ibid.*

15-217. Failure to appoint counsel and refusal of motion for continuance *held* not to have deprived defendant of any constitutional right, and relief under Post Conviction Act is denied. *S. v. Hackett*, 230.

17-39. Statute is available regardless of which parent has custody. *In re McCormick*, 468.

18-124 (f). If municipal primary is void, it does not invalidate local option election within 60 days. *Tucker v. A.B.C. Board*, 177.

20-252 (a) (b). Insurer in policy on one car belonging to insured is not liable for loss occasioned while insured was driving another of his cars. *Graham v. Ins. Co.*, 458.

20-71.1. Merely provides that proof of ownership makes out *prima facie* case, but does not affect burden of proof. *Jyachosky v. Wensil*, 217. Does not raise presumption that incompetent driver was operating car with knowledge and permission of owner. *Roberts v. Hill*, 373.

20-129 (d). Truck must have red light on rear visible at nighttime for distance of five hundred feet. *Gantt v. Hobson*, 426.

20-138. Reference in warrant to inapplicable statute not fatal. *S. v. Smith*, 99.

20-140. Physical facts at scene *held* insufficient alone to establish guilt. *S. v. Roberson*, 745.

20-141. Inability to stop within radius of lights *held* not insulating negligence. *Gantt v. Hobson*, 426.

20-141 (h). Driver should not operate at speed so slow as to impede traffic. *Gantt v. Hobson*, 426.

20-149 (b). Warning by horn of intention to pass must be timely given and failure to do so constitutes negligence *per se*. *Sheldon v. Childers*, 449.

20-151 (a). Driver entering intersection from filling station must yield right of way to vehicles traveling on highway. *Gantt v. Hobson*, 426.

20-154. Driver may not start into intersection with dominant highway until he determines he can do so in safety. *Badders v. Lassiter*, 413. Motorist may not make right turn at intersection until he determines that such movement can be made in safety. *Troxler v. Motor Lines*, 420. Plaintiff *held* guilty of contributory negligence in turning left without seeing that movement could be made in safety. *Gasperson v. Rice*, 660.

20-158. Driver along servient highway must stop before entering intersection with dominant highway. *Badders v. Lassiter*, 413.

22-2. Has no application to fully executed contract. *Dobias v. White*, 680. Signature of party to be charged is sufficient. *Clark v. Butts*, 710.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

28-105. Wife paying note executed by husband alone on land later held by entireties may not recover against husband's estate. *Montsinger v. White*, 441.

41-11.1. Does not relate to actions adjudicating the interest taken by persons *in posse*. *McPherson v. Bank*, 1.

44-84. Where account is assigned and goods returned to seller for defects, assignee has lien on sale price of goods upon resale by seller, even as against receiver of seller. *In re Mfg. Co.*, 586.

47-12; 47-17; 47-37. Registered contract to devise in consideration of personal services to be rendered takes precedence over later deed. *Clark v. Butts*, 710.

50-6; 50-5 (6). Divorce on ground of separation cannot be obtained when separation is due to insanity of one of parties. *Lawson v. Bennett*, 52.

50-13. Resident judge has jurisdiction to hear proceedings under this section. *Wall v. Hardee*, 465.

50-16. Court may allow plaintiff possession of home owned by entireties in fixing alimony *pendente lite*. *Sellars v. Sellars*, 475.

52A. Proceeding under Uniform Reciprocal Enforcement of Support Act. *Mahan v. Read*, 641.

52-10. Wife's earnings are her separate property. *Owens v. Kelly*, 770.

60-37 (7); 60-60. Railroads have authority to provide turnout and sidings; one railroad will not be permitted to deny to another the right to construct turnout from joint trackage. *R. R. v. R. R.*, 495.

62-121.28. Authority of Utilities Commission to interfere with contractual division of revenue from interchange of freight. *Utilities Commission v. Motor Lines*, 166.

67-2; 113-104. Not presented on theory of trial in this case for trespass by hunting dogs. *Pegg v. Gray*, 548.

84-24. Board of Law Examiners has been entrusted with duty of examining applicants for license and promulgating regulations for admission to Bar. *Baker v. Varser*, 260.

96-8 (f) (2). Determination of whether new concern purchases substantially all assets of employer covered by the Employment Security Act. *Employment Security Com. v. Skyland Crafts*, 727.

97-2 (e). Under facts of this case, employer was not prejudiced by finding of average weekly wage in amount fixed by contract of employment at time of injury. *Harris v. Contracting Co.*, 715.

97-2 (f) (j). Evidence *held* not to show that cerebral hemorrhage resulted from injury incident to employment. *Lewter v. Enterprises*, 399.

97-3; 97-10; 97-2 (b). That infant had been hired contrary to law does not affect exclusive coverage of Workmen's Compensation Act. *McNair v. Ward*, 330.

97-25; 97-26; 97-80 (a). No recovery may be had for services of practical nurse when Commission does not authorize such services prior to their rendition. *Hatchett v. Hitchcock Corp.*, 591.

97-47. Since parties may ask review upon changed conditions, Commission may not retain jurisdiction upon its finding of partial, permanent disability. *Harris v. Contracting Co.*, 715.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

97-57. Evidence *held* to support finding of liability of last employer for disability for silicosis. *Willingham v. Rock & Sand Co.*, 281.

115-160. Determination of controversy over school budget. *Board of Education v. Comrs. of Onslow*, 118.

146-94. State Board of Education may convey marshlands. *Parmele v. Eaton*, 539.

164. Where section of Code is not brought forward and does not come within exceptions set forth in this chapter, such section is repealed. *Baker v. Varser* 260.

164-7. Where public-local statute repealing part of former law on subject was in force on effective date of General Statutes, but through inadvertence the repealed statute was brought forward in General Statutes, and the public-local law overlooked, the public-local law remains in effect. (G.S. 9-25.) *S. v. Gales*, 319.

SECTIONS OF CONSTITUTION OF NORTH CAROLINA CONSTRUED.

ART.

I, secs. 11, 17. Circumstances *held* not such as to require court to appoint counsel for defendant in noncapital case. *S. v. Hackney*, 230. Right to continuance. *Ibid.*

I, secs. 12, 13. Defendant may not be tried in Superior Court on original warrant except for offense for which he was convicted in inferior court. *S. v. Hall*, 109.

I, sec. 17. Right to practice law is neither privilege nor immunity. *Baker v. Varser*, 260.

II, sec. 29. Appeal from denial of motion to quash on ground that recorder's court was established by local act, *held* premature. *S. v. Baker*, 140.

IV, sec. 8. Supreme Court, in exercise of supervisory jurisdiction, may determine legal question even though appeal is premature. *Edwards v. Raleigh*, 137.

Supreme Court will take cognizance in exercise of supervisory jurisdiction that *certiorari* was issued too late. *In re Stokeley*, 658.

SECTIONS OF CONSTITUTION OF THE UNITED STATES CONSTRUED.

ART.

I, sec. 10. Contract imposes no binding obligation if it is based on unconstitutional statute. *Summrell v. Racing Asso.*, 614. Protection against impairment relates to legislative action and not court decision. *Ibid.*

XIVth Amendment. Fact that Court overrules previous decision is not denial of due process. *Summrell v. Racing Asso.*, 614.
Circumstances *held* not such as to require court to appoint counsel for defendant in noncapital case. *S. v. Hackney*, 230. Right to continuance. *Ibid.*